

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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Unedited

FRIDAY, APRIL 13, 2006

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The Commission convened in room 540 at 624
9th Street, N.W., Washington, D.C. at 9:30 a.m.,
GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairperson
JENNIFER C. BRACERAS, Commissioner (via telephone)
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
MICHAEL YAKI, Commissioner

STAFF PRESENT:

KENNETH L. MARCUS, Staff Director
CHRISTOPHER BYRNES, Attorney Advisor to the Office
of the Staff Director and Acting Deputy
General Counsel, OGC
DEBRA CARR, Associate Deputy Staff Director, OSD
RANITA CARTER
PAMELA A. DUNSTON, Chief, ASCD
BARBARA FONTANA
LATRICE FOSHEE
DEREK HORNE
MAHA JWEIDE
SOCK FOON MacDOUGALL
TINALOUISE MARTIN (via telephone)
EMMA MONROIG, Solicitor/Parliamentarian
BERNARD QUARTERMAN, JR.
EILEEN RUDERT
AONGAS ST. HILAIRE
KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELE YORKMAN

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COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
RICHARD SCHMELCHEL
KIMBERLY SCHULD

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Adjourn

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

(9:38 a.m.)

CHAIRMAN REYNOLDS: Good morning, everyone. The meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. And this meeting is being held at 624 9th Street, Northwest, room 540, Washington, D.C.

With the exception of Commissioner Braceras, all of the commissioners are physically present. Commissioner Braceras is participating by phone.

This morning we focus our attention on business and administrative issues at the Commission.

I. Approval of Agenda

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. I move that we approve the agenda. Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor please signify by saying aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

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1 CHAIRMAN REYNOLDS: Any abstentions?

2 (No response.)

3 CHAIRMAN REYNOLDS: The motion passes
4 unanimately.

5 **II. Approval of Minutes of March 9 Meeting**

6 CHAIRMAN REYNOLDS: The second item is the
7 approval of the minutes of May 9th of 2007. I move
8 that we approve those minutes. Is there a second?

9 COMMISSIONER KIRSANOW: Second.

10 CHAIRMAN REYNOLDS: Discussion?

11 (No response.)

12 CHAIRMAN REYNOLDS: All in favor please
13 say aye.

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

15 CHAIRMAN REYNOLDS: Any objections?

16 (No response.)

17 CHAIRMAN REYNOLDS: Any abstentions?

18 (No response.)

19 CHAIRMAN REYNOLDS: The motion passes
20 unanimately. Excuse me. I am in the process of
21 coming down with a cold. I may lose my voice before
22 it's all over.

23 **III. Announcements**

24 CHAIRMAN REYNOLDS: The announcements,
25 April 15th is the 60-year anniversary of Jackie

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1 Robinson's breaking Major League Baseball's color
2 barrier. He became the first black American Major
3 League Baseball player of the modern era in 1947.

4 He was a member of six World Series teams,
5 earned six consecutive all-star game nominations and
6 won several awards during his career. And he was
7 inducted into the baseball Hall of Fame in 1962.

8 In recognition of his accomplishments,
9 both on and off the field, Robinson posthumously
10 received a Congressional Gold Medal and the
11 Presidential Medal of Freedom.

12 On March 29th, the Tuskegee Airmen, a
13 group of black American pilots who flew with
14 distinction during World War II as the 332nd fighter
15 group of the U.S. Army Air Corps received --

16 COMMISSIONER MELENDEZ: The Red Tails.

17 CHAIRMAN REYNOLDS: -- received the
18 nation's highest civilian award, the Congressional
19 Gold Medal, for fighting to defend their country while
20 facing bigotry at home.

21 Although they were not allowed to practice
22 or fight with their white counterparts, the Tuskegee
23 Airmen distinguished themselves by escorting bomber
24 aircraft with unusual fuel losses during World War II.

25 Prior to the Tuskegee Airmen, no U.S. military pilots

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1 had ever been black Americans.

2 At this point we will hear from the Staff
3 Director. We will hear his report.

4 STAFF DIRECTOR MARCUS: I thank you, Mr.
5 Chairman, Madam Vice Chair, commissioners.

6 **IV. Staff Director**

7 STAFF DIRECTOR MARCUS: We do have a few
8 issues for this morning. First, on March 29th, 2007,
9 I testified before the U.S. House of Representatives
10 Committee on Appropriations Subcommittee on Commerce,
11 Justice, Science, and Related Agencies in support of
12 the agency's request for fiscal year 2008
13 congressional appropriations.

14 Chairman Mollohan, Ranking Member
15 Frelinghuysen and Member Ruppertsberger were present
16 during my testimony. The agency's budget request was
17 generally well-received. And both Chairman Mollohan
18 and Ranking Member Frelinghuysen praised Commission
19 leadership for the success of certain of its reforms.

20 There were a number of concerns or
21 questions that were expressed from the committee,
22 including, for instance, concerns that members had
23 about our process for external review of commission
24 reports, the timeliness of state advisory committee
25 rechartering, and Commissioner Melendez's criticisms

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1 regarding the briefing procedures or lack of briefing
2 procedures.

3 However, in general, I think the tone of
4 the congressmen's remarks were positive. They were
5 particularly impressed with our ability to get a clean
6 audit for last year. And they were also impressed
7 with the seriousness with which we have taken the most
8 recent GAO audit.

9 Just this week, the Commission entered
10 into an agreement with GSA to provide expanded
11 services to the Commission regarding budget and
12 finance. I've mentioned in the past that we were
13 working with GSA to execute this MOU. Under this
14 agreement, GSA will be providing a substantial number
15 of the services that were previously provided by our
16 Budget and Finance Division chief.

17 There are some tasks that we will still
18 need to do in-house that they cannot do, including,
19 for instance, doing reconciliation of some of their
20 work and doing some coordination that can only be done
21 on the premises here. But this will involve a
22 substantial undertaking by GSA to do the work
23 previously done by the Budget and Finance Division.
24 And I think it is an excellent way of ensuring that we
25 get high-quality work in budget and finance.

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1 Within the last week, the staff posted on
2 FedBizOps the statement of work for the audit. We are
3 getting ready once again to ensure a timely audit for
4 this fiscal year.

5 The statement of work is largely similar
6 to the one that we did last year with the exception
7 that the Commission is now able to indicate to
8 potential auditors that we did receive unqualified
9 opinions on all of our financial statements last year
10 and also that we now have an accounting system that is
11 finally fully compliant with the joint financial
12 management improvement plan based on our work with
13 GSA.

14 So we are hopeful that this will signal to
15 potential auditors that we are not only a fully
16 auditable agency but that the audit work can be
17 undertaken at a reasonable time and expense level.

18 This week, as directed by the Commission,
19 we held a roll-out of the campus anti-semitism public
20 education campaign. The launch of the Website is
21 scheduled for today, but we held a meeting with
22 interested groups from the higher education community
23 as well as from the Jewish community and civil rights
24 community about the work that we were doing to
25 communicate to college students about what their

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1 rights are and what remedies they have in the event
2 that they face anti-semitism.

3 We do have an example of the poster that
4 is being disseminated. The content had previously
5 been approved by the Commission with some changes.
6 The changes have now been approved. And it was I
7 think very successfully executed by GPO.

8 GPO was here for the roll-out, including
9 members of their creative team. In addition, we are
10 disseminating the hard copy card, which has
11 essentially the same image that you can see on the
12 easel and the same message. And the Web site will
13 roll out.

14 One of the creative features of the Web
15 site is the way in which it participates in our viral
16 campaign. As the commissioners may recall, a goal of
17 the Website is to inform students of what their rights
18 are but also to make sure that students around the
19 country know about our complaint line, what they can
20 do. So we use the poster, the flyer, and the
21 electronic card as a means of letting people know the
22 URL address of our new Website and also the phone
23 number and e-mail address for our complaint line.

24 An interesting feature of the Website is
25 that the electronic version of this card can now be

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1 e-mailed directly from the site. We had a number of
2 staff members who did a lot of great work, too many to
3 thank by name.

4 I would say Sock Foon MacDougall
5 coordinated the entire project, that Michele Yorkman
6 was able to do the Website in-house, juggling it with
7 all of our other work so that we did not incur
8 additional expenses for the electronic side. Margaret
9 Butler and Maha Jweide and others provided other sorts
10 of support. And we had a substantial team of other
11 people.

12 So this was I think successful. One
13 organization sent us a letter describing as momentous
14 our campaign.

15 VICE CHAIRPERSON THERNSTROM: Have there
16 been any hits so far on the Website? Do you know?

17 STAFF DIRECTOR MARCUS: The Website is
18 scheduled to be launched this morning --

19 VICE CHAIRPERSON THERNSTROM: Oh, this
20 morning? Okay.

21 STAFF DIRECTOR MARCUS: -- as part of this
22 meeting.

23 VICE CHAIRPERSON THERNSTROM: Right.

24 STAFF DIRECTOR MARCUS: We have completed
25 a proposed state advisory committee for the State of

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1 Michigan and the Commonwealth of Virginia, which has
2 been distributed to members. And I am pleased that
3 the potential members who have been identified have
4 both a very wide range of experience and a wide range
5 of expertise and community involvement.

6 I would like, if I may, to say a few more
7 words about it, particularly in light of
8 correspondence that we have just received from the
9 Hill. And I think that commissioners should have
10 received directly the correspondence from Chairman
11 Conyers and Chairman Nadler.

12 The recommendation for the Michigan
13 advisory committee includes a former chairman of the
14 U.S. Commission on Civil Rights, president of the
15 Michigan Asian Pacific American Bar Association, and
16 the American Indian affairs specialist for the
17 Michigan Department of Civil Rights, chairperson of
18 the Michigan Civil Rights Initiative, regional
19 director of the American Hour of Discrimination
20 Committee, the executive director of the American
21 Civil Liberties Union of Michigan, the pastor of the
22 Ypsilanti Bible Church, and the deputy director and
23 director of community affairs for Chairman Conyers.
24 So we have, just to name a few of them, some very
25 distinguished people among the recommended members.

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1 Similarly, the proposed members for the
2 Virginia state advisory committee include a former
3 staff director of the U.S. Commission on Civil Rights,
4 the former chief of staff of the Employment Division
5 --

6 COMMISSIONER YAKI: I am sorry. Excuse
7 me. But why are we going through this now if it's not
8 a discussion item yet? I think it's appropriate to
9 note the letter, but I don't think we need to go into
10 a debate about the merits of the different people
11 unless you want to start it right now.

12 VICE CHAIRPERSON THERNSTROM: Well, wait a
13 minute. We're not into a debate. We're simply
14 hearing what the list is.

15 COMMISSIONER YAKI: That list is already
16 an agenda item. So why are we doing it now?

17 VICE CHAIRPERSON THERNSTROM: I would like
18 to hear from the Staff Director. Usually when it is
19 an agenda item -- what is the down side of hearing the
20 list from the Staff Director as part of his report?

21 COMMISSIONER YAKI: Because it is already
22 on the agenda. And the list is part of the agenda.
23 So, therefore, we discuss it during that part of the
24 agenda. He is simply noting the fact that we got a
25 letter late yesterday from Chairman Conyers and

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1 Subcommittee Chairman Nadler. And I think that's
2 appropriate, but a defense of whatever it is is
3 something that is more appropriate for the agenda
4 item. And we're not at that place right now.

5 STAFF DIRECTOR MARCUS: I will be happy to
6 wrap it up. I have discussed this in prior meetings.

7 And when I have done this, I was not aware of any
8 concern.

9 I will simply say that there is a wide
10 variety of very impressive individuals who have been
11 recommended.

12 COMMISSIONER YAKI: Oh, yes.

13 STAFF DIRECTOR MARCUS: Those are my
14 comments. If there are any questions from the
15 members?

16 COMMISSIONER MELENDEZ: Commissioner
17 Melendez.

18 I just had a question about the
19 appropriation. I know that our budget was a big
20 concern. As you know, we were decreased down to \$8.8
21 million. And we had talked about trying to in some
22 way -- we recognize that the Staff Director cannot --
23 well, the Staff Director cannot advocate against the
24 word of such an employee for the federal government.

25 But I think that we had talked about

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1 trying to some way advocate for more funding for the
2 Commission because we are really under-funded. So we
3 had talked about if there is some way to mention that
4 maybe you cannot advocate for that, but at least
5 individual commissioners had concerns with the amount
6 of money that we are getting to adequately operate
7 here within the Commission.

8 So did we have that opportunity to
9 absolutely ask the people at the hearing that that is
10 a big issue?

11 STAFF DIRECTOR MARCUS: There was talk
12 about individual commissioners who might want to send
13 letters in their individual capacity. I am not aware
14 of any letters that were sent. And they certainly
15 weren't shared with me.

16 COMMISSIONER MELENDEZ: Okay. We can
17 still do that?

18 STAFF DIRECTOR MARCUS: If you are asking
19 whether commissioners legally can do that, I would say
20 that I have distributed the best legal advice that OGC
21 has. And I would simply say that I have nothing to
22 add on the legality of it.

23 Since the commissioner mentions the need
24 for more money, I suppose I should also add -- and
25 this is very significant -- that both the chairman and

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1 the ranking member noted fairly strongly their belief
2 that our agency needs more money than what is
3 requested.

4 They both in very strong terms
5 acknowledged the importance of the mission of the
6 agency. They indicated their belief that we have been
7 under-funded in prior years. And they expressed a
8 concern that we should receive more money than is
9 requested.

10 COMMISSIONER MELENDEZ: Just a couple of
11 updates. Could you also -- I note you did comment on
12 this, but we still have a statutory report for 2007
13 that we still have some deadline dates. What is our
14 status on that?

15 STAFF DIRECTOR MARCUS: We are woefully
16 behind. As the commissioner may recall, we have had a
17 lot of attrition in the Office of General Counsel in
18 the last year or so. And we have just put some people
19 back on. But we still are understaffed there.

20 We are at this point, I would say, more
21 than a month, probably more than six weeks or two
22 months behind on that. But the Office of General
23 Counsel is working very hard to put a draft together.

24 And I would expect to have a draft in a shape that I
25 can circulate, I'm hoping, between now and the next

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1 meeting.

2 Now, because we are trying to get it out
3 much sooner in the year than we have done in the past,
4 it will not look as polished, I don't think, or as
5 complete as prior drafts. There are still substantial
6 areas where the research is not yet completed.

7 This is, as the commissioner may recall, a
8 very data-intensive project. The research has been
9 very intensive and is required on a district by
10 district basis checking on court records and checking
11 on the status of proceedings where no one seems to
12 have checked on them for quite some time.

13 So we are behind. The draft will not be
14 polished or completed on time, but we will provide the
15 best that is available at some time over the course of
16 the next month.

17 VICE CHAIRPERSON THERNSTROM: Is there any
18 further discussion? I have obviously taken over.
19 Gerry had to step out. The Chairman had to step out.
20 Is there further discussion of the Staff Director's
21 report at this point?

22 COMMISSIONER MELENDEZ: Just one other
23 question. What is the status of our hiring here in
24 the office? You know, you had mentioned that. Could
25 you give us an update of who has been hired in the

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1 last six weeks or something like that?

2 STAFF DIRECTOR MARCUS: I'm sorry? The
3 people hired in the last six week?

4 COMMISSIONER MELENDEZ: Yes. Is there new
5 staff?

6 STAFF DIRECTOR MARCUS: Maybe someone
7 could remind me. I don't believe we have new staff
8 who have actually come on board in the last six weeks.

9 I do anticipate new staff will come on
10 board between now and the next meeting, whom I hope to
11 be able to introduce at that time. And they would
12 include a new attorney adviser in the Office of the
13 Staff Director to take over the work that Derek Horne
14 had been doing since he is moving into the regional
15 structure as well as a special assistant for the
16 Chairman has been previously approved.

17 We are working to identify a person who
18 can help on the procurement side, but that person will
19 not be an employee but, rather, would be part of a
20 contracting operation.

21 COMMISSIONER YAKI: Do we have a head of
22 OCRE yet?

23 STAFF DIRECTOR MARCUS: We do not have a
24 new head of OCRE, but we are fairly far along in the
25 process. I don't know whether we will have someone

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1 who is on board by the next meeting, but I certainly
2 hope to have one within the next few meetings.

3 It's a Senior Executive position. So the
4 procedures are a little bit more intensive.

5 COMMISSIONER MELENDEZ: Just a final
6 question. How is the staff morale here within the
7 Commission? I understand we have done some surveys to
8 try to get some feedback as to how everything is going
9 within the operations here.

10 STAFF DIRECTOR MARCUS: As with any
11 agency, that is a complicated question. And there are
12 at any given time people with higher and people with
13 lower.

14 I would say that over the last few years,
15 the morale at this agency has been lower than it
16 should be and lower than at other federal agencies.
17 And I don't believe that in the last two years we have
18 been able to significantly improve that. I think we
19 have improved it in some areas. And in other areas it
20 may actually have declined. And that is a concern.

21 Just over the last few years our budget in
22 relative terms has continued to decline. The number
23 of staff has significantly declined while the amount
24 of work has not. So I think that the workload has
25 been increasing. We have had less money than other

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1 agencies for bonuses, for training, and for travel.

2 So I would say in general our staff has
3 faced a lot of challenges over the last couple of
4 years and that that is an issue. At the same time, I
5 would say I have been impressed by a number of signs
6 of great commitment and passion by individual staff
7 members and some extraordinary work in certain areas
8 that has been done that shows unflagging enthusiasm by
9 at least some staff members in some area that I think
10 can be a source of pride.

11 COMMISSIONER MELENDEZ: Thank you. You
12 know, my point is that the budget even affects morale
13 to some extent because people do a lot more than they
14 normally would. So I just wanted to point that out.
15 So thank you.

16 STAFF DIRECTOR MARCUS: Thank you, sir.

17 VICE CHAIRPERSON THERNSTROM: Are there
18 any other questions or comments with respect to the
19 Staff Director's report?

20 COMMISSIONER YAKI: Yes. I have a
21 question. Do we have any idea of anticipated
22 personnel changes in the regions?

23 STAFF DIRECTOR MARCUS: Yes. We are
24 anticipating that we will have continued attrition.
25 And there are three retirement-eligible officials we

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1 anticipate will retire within the course of the next
2 month or so.

3 COMMISSIONER YAKI: And what rank are
4 these people?

5 STAFF DIRECTOR MARCUS: They are senior
6 people that include the regional director of our
7 Chicago office, the regional director of our Denver
8 office, and our analyst in Los Angeles.

9 COMMISSIONER YAKI: And there is no
10 regional director in L.A. right now as is, correct?

11 STAFF DIRECTOR MARCUS: That's correct.

12 COMMISSIONER YAKI: So with the retirement
13 of the analyst, that pretty much leaves no one in the
14 Western region?

15 STAFF DIRECTOR MARCUS: We will need to
16 backfill for the analyst to replace him. That's
17 correct.

18 COMMISSIONER MELENDEZ: Just a comment.
19 Can you give us a revised time line for the statutory
20 --

21 STAFF DIRECTOR MARCUS: I would happy to
22 provide it as soon as we can and certainly between now
23 and the next meeting.

24 COMMISSIONER MELENDEZ: Okay. And if
25 there are any surveys you want to send us on morale,

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1 that would be fine, too, if you could. I would like
2 to see those.

3 STAFF DIRECTOR MARCUS: Yes. There is a
4 survey. If I had not communicated it to the
5 commissioners, I certainly will.

6 COMMISSIONER MELENDEZ: Okay. Thank you.

7 VICE CHAIRPERSON THERNSTROM: Any other
8 comments on the staff director's report?

9 (No response.)

10 **V. Management and Operations**

11 **-2007 Calendar**

12 VICE CHAIRPERSON THERNSTROM: Otherwise
13 let us move on to the 2007 calendar. We need to
14 approve this calendar of meetings and briefings. Some
15 commissioners have requested that we amend it to --
16 I'm sorry, sir? Do you want to stop me in my tracks
17 here or no?

18 STAFF DIRECTOR MARCUS: Maybe if you could
19 give us just a moment?

20 VICE CHAIRPERSON THERNSTROM: Okay.

21 (Pause.)

22 VICE CHAIRPERSON THERNSTROM: Is there a
23 problem on discussing the calendar?

24 STAFF DIRECTOR MARCUS: No. I'm sorry.

25 VICE CHAIRPERSON THERNSTROM: Oh, okay.

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1 Anyway, do we have the calendar, the proposed
2 calendar, here? I do not have this.

3 COMMISSIONER YAKI: I didn't see it in my
4 packet either.

5 VICE CHAIRPERSON THERNSTROM: Yes. I do
6 not have it. I'm happy to continue, though the Chair
7 has just arrived back. Mr. Chairman, we're in the
8 middle of discussing this, beginning to discuss the
9 calendar.

10 Some commissioners have requested that we
11 amend the calendar to ensure that we have enough time
12 to handle pending issues at business meetings. And
13 the suggestion is that meetings would consist of
14 either business or briefings but not both unless we
15 have an unusual or pressing need to conduct business
16 during a month dedicated to a briefing.

17 And so I would like a motion to revise the
18 2007 business meeting briefing calendar in order to
19 cancel the business meeting previously scheduled for
20 the months of June, October, and November, move the
21 briefing scheduled for July to August.

22 Revising the calendar will enable us to
23 focus on the briefings scheduled for those months
24 under the revised calendar. The June briefing will
25 remain, "School Choice: The Blaine Amendments and

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1 .Anti-Catholicism."

2 There will now be an August briefing,
3 previously scheduled for July, which will be "Minority
4 Children in State Foster Care and Adoption."

5 The October briefing will remain
6 "Discrimination Against Native Americans in Border" --

7 CHAIRMAN REYNOLDS: Is there something
8 about being chair today that ruins your voice?

9 VICE CHAIRPERSON THERNSTROM: Yes. Well,
10 this Chair has got not a new disease but just a
11 lingering cough from an old sickness. So I'm not
12 lethal in any way.

13 PARTICIPANT: In that regard.

14 VICE CHAIRPERSON THERNSTROM: In that
15 regard. Yes. I hope I'm lethal in other regards.

16 And the November briefing will remain
17 "Minorities in Special Education." So we need a
18 motion on this to change it. And do people actually
19 need the list, which I do not have? Do people need to
20 stare at this calendar?

21 CHAIRMAN REYNOLDS: Does anyone need this
22 calendar?

23 VICE CHAIRPERSON THERNSTROM: None of us
24 have it.

25 STAFF DIRECTOR MARCUS: I sent a staff

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1 member to try to make copies.

2 VICE CHAIRPERSON THERNSTROM: Yes. It
3 would be helpful to have it right in front of us.

4 COMMISSIONER KIRSANOW: Maybe we should
5 move on to the next agenda item while we are waiting
6 for the --

7 PARTICIPANT: And while we are waiting for
8 the cough drops to take effect.

9 CHAIRMAN REYNOLDS: I will resume my
10 duties.

11 VICE CHAIRPERSON THERNSTROM: Yes. Please
12 do.

13 CHAIRMAN REYNOLDS: Okay. So we are going
14 to table this issue until we get copies of the
15 calendar. The next item up is -- yes, Commissioner
16 Braceras?

17 COMMISSIONER BRACERAS: Like the others, I
18 have the motion but not the calendar.

19 VICE CHAIRPERSON THERNSTROM: Could
20 somebody e-mail it to you?

21 STAFF DIRECTOR MARCUS: Perhaps we will
22 have someone fax it to you. Is that equally
23 acceptable?

24 COMMISSIONER BRACERAS: Unfortunately, no.

25 STAFF DIRECTOR MARCUS: I think Ms. Schuld

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1 is taking care of that.

2 COMMISSIONER YAKI: Clarification. So
3 under the proposed calendar, July and September would
4 now be business meetings?

5 VICE CHAIRPERSON THERNSTROM: We are
6 holding this until we get a calendar in front of us so
7 we can all intelligently discuss this.

8 **-Website Updates**

9 CHAIRMAN REYNOLDS: The next item up is
10 the Website updates. I move to authorize the Staff
11 Director to post the following documents on the
12 Commission's public Website.

13 The first item is the letter to Major
14 League Baseball commending it for hosting its first
15 ever civil rights game. The letter was signed by all
16 commissioners except Commissioner Melendez.

17 The second item to be posted would be the
18 letter sent to Major League Baseball signed by
19 Commissioners Yaki and Melendez expressing concern
20 over the participation of a team in the civil rights
21 game with a mascot representing Native Americans.

22 Three, the third item is the Staff
23 Director's March 29th testimony before the House
24 Appropriations Subcommittee for Commerce, Justice,
25 Science, and related agencies.

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1 And the fourth item is the Commission's
2 January 31st, 2007 letter to the House Appropriations
3 Committee on Commission reforms.

4 Is there a second?

5 VICE CHAIRPERSON THERNSTROM: I second it.

6 CHAIRMAN REYNOLDS: Discussion?

7 (No response.)

8 CHAIRMAN REYNOLDS: All in favor, please
9 signify by saying aye.

10 (Whereupon, there was a chorus of "Ayes.")

11 CHAIRMAN REYNOLDS: Any objections?

12 (No response.)

13 CHAIRMAN REYNOLDS: Any abstentions?

14 (No response.)

15 CHAIRMAN REYNOLDS: The motion passes
16 unanimously.

17 -2007 Calendar (Continued)

18 CHAIRMAN REYNOLDS: I guess we can jump
19 back now. Do we all have calendars in front of us
20 now?

21 VICE CHAIRPERSON THERNSTROM: Jennifer,
22 have you got a calendar?

23 COMMISSIONER BRACERAS: I am looking. No.

24 VICE CHAIRPERSON THERNSTROM: Well, I
25 don't think you are in disagreement with the basic

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1 thrust of this.

2 COMMISSIONER BRACERAS: No, of course not.

3 VICE CHAIRPERSON THERNSTROM: I think the
4 first question is, is anybody in disagreement with
5 separating briefings and business, if possible?

6 CHAIRMAN REYNOLDS: I assume that everyone
7 is in support of separating business meetings from
8 briefings, but I could be wrong. Does anyone have any
9 thoughts?

10 COMMISSIONER HERIOT: I guess for the
11 record, I am willing to do it, you know, to have a
12 full day's agenda. That's not a problem for me. I am
13 a worker today.

14 CHAIRMAN REYNOLDS: You are in the
15 minority.

16 (Laughter.)

17 CHAIRMAN REYNOLDS: You are in the
18 minority.

19 VICE CHAIRPERSON THERNSTROM: Well, Gerry,
20 let's talk about this for a second. She's in the
21 minority, I believe, because of concerns on the part
22 of the West Coast participants. Is that not correct?

23 CHAIRMAN REYNOLDS: Yes.

24 COMMISSIONER BRACERAS: Not exactly. I
25 mean, they are concerns of the West Coast

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1 participants. They are also concerns by, I believe,
2 Ashley and myself because of the need to get back to
3 our families.

4 CHAIRMAN REYNOLDS: Well, what we have to
5 do, though, is to balance our workload with our
6 personal lives. And sometimes we have to make
7 sacrifices on the personal side, as we all do.

8 COMMISSIONER BRACERAS: Gerry, I
9 understand that, but the reality is that both Ashley
10 and I have to leave by a certain time on Fridays. And
11 if the meetings go beyond that certain time, we will
12 rarely, if ever, be in attendance. That's the way it
13 is.

14 VICE CHAIRPERSON THERNSTROM: Jennifer,
15 what time do you have to leave on Fridays?

16 COMMISSIONER BRACERAS: Well, historically
17 I have always been on the 3:45 flight, preferably the
18 2:45, but I can make the 3:45 and make it work. Now,
19 you know, I'm only --

20 PARTICIPANT: I have that same schedule.
21 I take the train.

22 COMMISSIONER BRACERAS: So that's what we
23 have always done. And my proposal with briefings and
24 meetings was initially made because what we were
25 finding is that we were never getting the work of the

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1 Commission done because we had briefings and then
2 people like myself and folks on the West Coast
3 couldn't get out. So we were not getting the work
4 done. So we could go ahead and be here all day.

5 CHAIRMAN REYNOLDS: Commissioner Kirsanow?

6 COMMISSIONER KIRSANOW: I am in favor of
7 whatever the majority would like to do. I could stay
8 here as long as necessary or truncate the meetings,
9 but there was I think a second consideration. And
10 that is that if we had day-long meetings, that might
11 necessitate those who are on the West Coast to stay
12 over a night, which impacts our budget.

13 COMMISSIONER BRACERAS: That's right.

14 COMMISSIONER YAKI: Now, to add, the other
15 reason why this was a serendipitous change is that we
16 were informed that it made more budgetary sense to not
17 be running and logistical sense not to be running 9 to
18 ten briefings a year as is.

19 So, if I recall, how originally the
20 genesis of this came about was a mutually beneficial
21 convergence of the fact that briefings at 1:00 o'clock
22 meant that Commissioner Melendez and I were leaving
23 after about an hour and a half of testimony at the
24 most.

25 And at the same time budget constraints

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1 and the reality of time and personnel and the backlog
2 in our briefing reports date meant that we were
3 cutting back from a full schedule to about eight.

4 COMMISSIONER BRACERAS: That is right.
5 And I think there was a giant feeling that it was
6 important to produce quality reports, even if that
7 meant fewer reports, that we were going to exercise
8 quality over quantity.

9 CHAIRMAN REYNOLDS: I think that there are
10 good reasons to do this. I just want to say that
11 there will be some issue, some emerging issue, that
12 will come up that we will have to handle.

13 So there may be occasions where we deviate
14 from this. And I would assume that it would only be
15 under circumstances that are significant where we
16 would deviate.

17 COMMISSIONER KIRSANOW: I agree.

18 VICE CHAIRPERSON THERNSTROM: I have a
19 question. Oh, Pete, you do, too?

20 COMMISSIONER KIRSANOW: No.

21 VICE CHAIRPERSON THERNSTROM: If we look
22 back at the record of meetings, let's say, over the
23 last year, have there been months in which we could
24 have skipped the business section of the meeting
25 without any cost to the functioning of the agency?

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1 We're going to have quite a few months here in which
2 we do not have a discussion of business.

3 COMMISSIONER BRACERAS: My concern is not
4 that we are limiting the business portion of the
5 meetings to the months that we would be briefing so
6 much as it is that we make sure we satisfy ones like
7 this one, where we only do that and that when we have
8 to conduct business in the other months, those
9 discussions are much shorter and streamlined.

10 I never anticipated that we would have
11 months where we would probably never have to do any
12 business. The notion of having a separate business
13 meeting was to take off the items on our agenda
14 without having to worry that speakers were being made
15 to wait until we could have the full airing and not
16 let our business meeting be taken over by the
17 briefing.

18 COMMISSIONER YAKI: And to underscore
19 Commissioner Braceras' point, I think I can point to
20 more than several meetings at which due to the length
21 of the briefing or attendance or other matters that
22 intervened, we basically had to try and reschedule the
23 business portion of the meeting to a teleconference,
24 which is always problematic at best with all of our
25 very divergent schedules. And those I always find to

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1 be a poor substitute for the robust discussion that we
2 have in person at the Commission.

3 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

4 VICE CHAIRPERSON THERNSTROM: But,
5 Commissioner Yaki, that simply reinforces a concern of
6 mine, which is that if we simply eliminate -- and I
7 understand what Commissioner Braceras has said. Look,
8 this will not necessitate eliminating business
9 discussions. But I don't want to structure it such
10 that we are having months in which we do not discuss
11 business that is important and we end up in thee
12 teleconferences.

13 COMMISSIONER BRACERAS: We'll make sure we
14 deal with it, but we have months where we have months
15 where we have no briefings. For all the reasons that
16 --

17 VICE CHAIRPERSON THERNSTROM: Right. And
18 that is a slightly different point, it seems to me,
19 than the one that comes through on this calendar. The
20 one that comes through on this calendar, I mean, the
21 calendar suggests no business at the meetings at which
22 we are holding briefings. So I think it's important
23 not to --

24 COMMISSIONER BRACERAS: We did offer that
25 with the knowledge that we will try to do business to

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1 a minimum on --

2 CHAIRMAN REYNOLDS: Commissioner Melendez?

3 COMMISSIONER MELENDEZ: Yes. It always
4 seemed to me that the business meeting was scheduled
5 in the morning. I guess the question would be if you
6 scheduled all briefings in the morning -- and I always
7 wondered whether or not we were planning to
8 accommodate the people that were coming in to
9 participate in presentations at the briefing.

10 And it always seemed to me I always
11 wondered why we didn't have a business meeting at 1:00
12 and then go as much into it so people could get out of
13 here at 3:00 and if you didn't accomplish what was on
14 the agenda, then you would just table it to the next
15 business meeting. At least you would get two hours of
16 business meeting after lunch and take care of
17 briefings in the morning if you were going to -- that
18 would be the only scenario that I could see if you
19 were going to combine both of them. I would hate to
20 see a business meeting in the morning than to try to
21 go through afternoon briefing.

22 I just think that the briefing was more
23 important than the business meeting. So I don't know
24 if we ever thought about that.

25 CHAIRMAN REYNOLDS: If we are going to do

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1 a briefing and also handle some business, we can pick
2 some topics that are not controversial, that is not
3 going to soak up a lot of time. So that's a way where
4 we could get some business done while at the same
5 time, at least on the same day, have a briefing.

6 VICE CHAIRPERSON THERNSTROM: Provided we
7 can, in fact, postpone the controversial issues that
8 come up like the one that has come up today with the
9 letter.

10 STAFF DIRECTOR MARCUS: If I may just
11 briefly respond to Commissioner Melendez's question,
12 we did consider flipping it and having the briefings
13 in the morning and the business meetings in the
14 afternoon. And, in fact, we tried that for a few
15 times.

16 The concern that was expressed by some
17 commissioners is that they felt it wasn't working
18 because we would lose the quorum during the business
19 meeting, the business meeting would fail; whereas, the
20 briefing would not by our guidelines require a quorum.

21 So that was the reason we switched it around last
22 time.

23 COMMISSIONER MELENDEZ: So did we break
24 for lunch? Does that have a big impact into trying to
25 come back after 1:00 or something like that? If you

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1 just went straight through, would it --

2 STAFF DIRECTOR MARCUS: Well, we have had
3 times where we have broken for lunch. I'm not sure if
4 we have had times where we didn't break for lunch.

5 COMMISSIONER YAKI: There have been more
6 times than not that we haven't.

7 STAFF DIRECTOR MARCUS: There have been
8 more times where we haven't?

9 COMMISSIONER YAKI: Yes. I would say
10 break for lunch is the exception, rather than the
11 rule. But just I don't think we need to beat this
12 horse anymore. I would say this is an imperfect
13 compromise amongst the many items that we have.

14 I think that the Chairman's point about we
15 can schedule nominal type business that we have to get
16 out that we need to get housekeeping reports,
17 whatever, not controversial reports, but staff
18 director reports, whatever, during the days that we
19 have briefings.

20 But I do not want to see briefings
21 starting at 1:00 o'clock in the afternoon. It just
22 does not work for me. I need to get on the 5:30
23 flight. Everything else is usually all booked up.

24 And as we accrete more toward the spring
25 and summer months, if you go to Dulles at 3:00 o'clock

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1 in the afternoon, you're in for a nightmare of epic
2 proportions going through security. And I don't want
3 to leave early from these briefings because I find
4 them enjoyable and very thought-provoking and part of
5 why I enjoy being a commissioner, because it allows us
6 to take heed of the important issues of the day.

7 And to say, "Well, you know, we're going
8 to put them in the afternoon because we can lose
9 quorum because we might have to leave" I think is a
10 disservice to the folks on the West Coast.

11 VICE CHAIRPERSON THERNSTROM: Let me just
12 ask a question. So what we are talking about here is
13 both May and June being briefings? And we don't have
14 the next business, real business, discussion until
15 July 13th. Is that correct?

16 STAFF DIRECTOR MARCUS: That is correct.
17 And it is an anomaly. The basic rule seems to be that
18 we would alternate from month to month between
19 business meetings and briefings.

20 VICE CHAIRPERSON THERNSTROM: Well, it is
21 not true. September is business and then not until
22 December 3rd again.

23 STAFF DIRECTOR MARCUS: The reason for the
24 first anomaly that you mentioned is that --

25 PARTICIPANT: We voted on it.

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1 STAFF DIRECTOR MARCUS: -- it was a vote
2 last month to flip this month's meeting and next.

3 COMMISSIONER BRACERAS: Right. This month
4 was supposed to be the briefing.

5 STAFF DIRECTOR MARCUS: Right. So that
6 does create the unfortunate situation that there would
7 not be another business meeting until July.

8 VICE CHAIRPERSON THERNSTROM: Well, but we
9 have got the same thing between September and
10 December. Pete, I just don't see how we can go that
11 long without --

12 COMMISSIONER BRACERAS: Well, again, you
13 know, my suggestion is to do the briefings first.

14 VICE CHAIRPERSON THERNSTROM: We can't
15 afford to lose our quorum, however, for business
16 meetings.

17 CHAIRMAN REYNOLDS: Ken, for those months
18 where we have back-to-back briefings, I mean, looking
19 at what's in your "In" basket now, is it possible for
20 you to determine if we could take care of housekeeping
21 matters during those two months?

22 STAFF DIRECTOR MARCUS: It is difficult to
23 assess because we seldom have a month where it doesn't
24 appear to me that there is a lot going on that it
25 would be useful to get commissioner input.

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1 VICE CHAIRPERSON THERNSTROM: Yes,
2 exactly.

3 STAFF DIRECTOR MARCUS: If the question
4 is, if push comes to shove, can we do without
5 commissioner input for an extra 60 days, formal input,
6 I think we can try to do it. I don't see any of our
7 obligations that we would be disregarding if we did it
8 that way.

9 There would be state advisory committees
10 that staff would be ready to recharter but where the
11 charter would be delayed for 30 or 60 or 90 days
12 because we don't have a meeting. And there might be
13 occasional issues where input would be useful and we
14 can only get it informally.

15 COMMISSIONER BRACERAS: Why don't you just
16 do November and December?

17 STAFF DIRECTOR MARCUS: I don't see any
18 reason why. It might have been inadvertent that we
19 had them in this order. The "Minorities and Special
20 Education" had been voted for November 9, but there is
21 no reason that I can think of why they wouldn't be
22 switched.

23 COMMISSIONER BRACERAS: Well, just flip
24 them and then for the understanding that there may be

25 --

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1 CHAIRMAN REYNOLDS: Commissioner Heriot?

2 COMMISSIONER HERIOT: I am new here, but I
3 am a bit confused. I am feeling somewhat
4 uncomfortable with all of this. Civil rights issues
5 haven't gotten any less important, and we aren't being
6 paid any less money.

7 It seems to me that why don't we just
8 schedule telephone conferences, but why don't we then
9 start, you know, an hour earlier? We started at 9:30
10 today. If we started at 8:30, we could get more done.

11 Again, I am willing to be here as often as
12 is necessary to get the job done. And I'm not feeling
13 very comfortable with a notion of cutting back on any
14 kind of project.

15 CHAIRMAN REYNOLDS: Commissioner Heriot's
16 suggestions, some of them, have been considered; for
17 example, starting earlier. Some of us are willing to
18 do that. Some of us are not.

19 COMMISSIONER BRACERAS: Well, also on
20 cutting back, we are not trying to do. We are putting
21 quality over quantity. I know it is expensive, but
22 they were what we had before. And they were not based
23 on personal convenience but, rather, the reality that
24 we can only afford to do a certain number of things.

25 CHAIRMAN REYNOLDS: Well, I think that a

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1 significant driver in this conversation has to do with
2 schedules, people feeling that they need to be home,
3 people who believe that they need to be at the airport
4 by a certain time. And that is having its effect on
5 how we do business.

6 Vice Chair Thernstrom? Then Commissioner
7 Kirsanow.

8 VICE CHAIRPERSON THERNSTROM: Look, I take
9 very seriously what the Staff Director just said, that
10 a month rarely goes by in which there are not
11 important issues having to do with the functioning of
12 this agency that need to be discussed.

13 And I don't think that these telephone
14 conference calls from our experience with them in the
15 past are a substitute. They are an exercise in
16 frustration.

17 CHAIRMAN REYNOLDS: Well, they are less
18 effective.

19 VICE CHAIRPERSON THERNSTROM: They are
20 really less effective.

21 CHAIRMAN REYNOLDS: They are less
22 effective, but we still manage to get things done.
23 It's not the --

24 VICE CHAIRPERSON THERNSTROM: We do, but I
25 don't think that they answer the problem that we're

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1 creating here.

2 COMMISSIONER BRACERAS: If I may, I mean,
3 why do they not answer the problem?

4 VICE CHAIRPERSON THERNSTROM: Because
5 there is a world of difference between the conference
6 calls and meeting in --

7 COMMISSIONER BRACERAS: No, that is not my
8 question. Let me finish my question.

9 VICE CHAIRPERSON THERNSTROM: I'm sorry.

10 COMMISSIONER BRACERAS: Why does it not
11 answer the problem? Pass a motion where some months
12 there are business meetings and some months there are
13 briefings first, business meetings second.

14 VICE CHAIRPERSON THERNSTROM: If we can
15 keep the quorum for the business meetings. That was
16 the issue. I raised that question only because the
17 Staff Director raised that question of concern about
18 keeping a quorum for the business meeting when the
19 business meeting is not first thing.

20 COMMISSIONER BRACERAS: Well, right. And
21 that is going to happen sometimes. There is really no
22 other way.

23 CHAIRMAN REYNOLDS: Commissioner Kirsanow?
24 Then Commissioner Melendez.

25 COMMISSIONER KIRSANOW: I am not sure that

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1 the views being expressed are necessarily in conflict.

2 I think they are reconcilable.

3 I agree with Commissioner Heriot that, you
4 know, we need to get these things done. And I'm not
5 sure why we are focused on the tail end of the day.
6 Why not start at 8:00? Why not start at 7:30? Get
7 the business meetings done when we've got --

8 COMMISSIONER BRACERAS: The Vice Chair
9 doesn't want to.

10 COMMISSIONER KIRSANOW: Well, we have got
11 --

12 VICE CHAIRPERSON THERNSTROM: 7:30, no, I
13 don't.

14 COMMISSIONER KIRSANOW: -- to go when we
15 know we have a quorum and then start the briefing. I
16 don't want to rush the briefings so that we have
17 sufficient time to get to a business meeting.

18 I think the briefings are the guts of what
19 we do. And, frankly, I mean, it has worked to some
20 degree in the past, not perfectly, but my
21 understanding was before I got to the Commission, I
22 think, before anyone else here got onto the
23 Commission, the Commission had traditionally had
24 day-long meetings. And I have got to believe, with
25 all due respect to everybody here, -- and I am

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1 sensitive to everyone's schedule. I'm not making any
2 comments with respect to anybody's schedule, but I
3 have got to believe that those commissioners had
4 schedules that they tried to accommodate also.

5 So I am in favor of having this schedule
6 where we have got business meetings or days that are
7 devoted solely to business, but I don't think that we
8 can go more than a month without addressing some
9 business.

10 And I don't see why we can't front load
11 those situations. Everyone gets in on Thursday night
12 anyway or most often people get in on Thursday night,
13 maybe not all the time. And there may be occasions
14 when we have one or two commissioners who aren't
15 present. That's happened in the past. But we still
16 have a quorum. We can conduct the business.

17 I think we should endeavor to get as much
18 done as we can while we are here face to face.
19 Conference calls are a poor substitute.

20 COMMISSIONER YAKI: I agree.

21 CHAIRMAN REYNOLDS: Commissioner Yaki?

22 COMMISSIONER YAKI: Well, since we are now
23 in the realm of throwing everything out on the table,
24 I have always said on more than one occasion that I
25 did not see why if we had to have a situation where we

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1 needed to transact business and we had a rather
2 lengthy briefing, briefing schedule, with adequate
3 notice, we could break it up and have the business
4 portion Thursday afternoon.

5 COMMISSIONER BRACERAS: We did that
6 before. I thought that went very well.

7 COMMISSIONER YAKI: I mean, we are flying
8 out. We have to fly out Wednesday, rather than
9 Thursday, but I would rather do that than have to be
10 flying out on Saturday.

11 CHAIRMAN REYNOLDS: Okay. What does that
12 do to our budget.

13 VICE CHAIRPERSON THERNSTROM: Jennifer,
14 can you do that?

15 STAFF DIRECTOR MARCUS: It does cost money
16 to have people in for an extra night, but it's not
17 going to bust the budget.

18 CHAIRMAN REYNOLDS: All right. Any other
19 thoughts? Commissioner Heriot?

20 COMMISSIONER HERIOT: I teach a class
21 Wednesday night. I will in the future. I actually
22 teach it Thursday nights these days, but I took the
23 Red Eye this morning. But as long as it's late enough
24 in the afternoon, I can do that.

25 CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

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1 VICE CHAIRPERSON THERNSTROM: Well, the
2 one other thought in terms of this break for lunch, I
3 mean, if everybody leaves the building and goes to a
4 restaurant, it becomes a real break. If we brought in
5 food and had a continuous meeting, we would get a lot
6 more done.

7 COMMISSIONER YAKI: Was there a catering
8 budget request in the appropriations?

9 (Laughter.)

10 PARTICIPANT: We can all make this a brown
11 bag affair.

12 VICE CHAIRPERSON THERNSTROM: We can all
13 chip in, whatever, but I think if we're going to --

14 COMMISSIONER YAKI: The no-doughnut rule?

15 VICE CHAIRPERSON THERNSTROM: We need to
16 have a --

17 COMMISSIONER YAKI: We need some lobbyist
18 to hang around here.

19 VICE CHAIRPERSON THERNSTROM: There are
20 ways of getting more work done when we are here.

21 COMMISSIONER MELENDEZ: I guess the
22 question would be, how early can we start the briefing
23 that is acceptable to all of us? I mean, on Capitol
24 Hill, they have 8:00 o'clock maybe they're having
25 briefings because of their schedule.

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1 So I don't see why we can't start at 8:00,
2 run through lunch. I mean, if we had to pay for our
3 own sandwiches right after the briefing and have a
4 working meeting while we have somebody run down to the
5 deli, that might work also.

6 I think we are looking at a time frame
7 from something like 8:30 to 2:30 and trying to squeeze
8 both the briefing meeting and just a meeting into all
9 of that. I think it can all be done, but we have to
10 all agree to 8:30 to 2:30 and then work right through
11 lunch because I also have a commitment on Wednesday
12 nights that's very hard for me to -- that's why I
13 travel out here on Thursday. I have many meetings on
14 Wednesday evenings. That's difficult for me.

15 CHAIRMAN REYNOLDS: Okay. It sounds like
16 we have at least two competing ideas. One would be to
17 start on Thursday afternoon. The other would be to
18 start early, 8:30 to 2:30. Now, of those two options
19 --

20 COMMISSIONER TAYLOR: Mr. Chair? As to
21 that second option, let me add these two thoughts.
22 The first is that I don't think as a body we have
23 focused in the past on being as efficient as possible
24 with the use of our time. That just hasn't been one
25 of our goals. I think it should be. And that has

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1 caused part of the problem. And I think as a --

2 COMMISSIONER YAKI: This is government
3 mystery. I don't know what you are talking about.

4 COMMISSIONER TAYLOR: I was going to say
5 it's a governmental body. Unfortunately, if you just
6 create more time and don't focus on efficiency, you
7 tend to just fill in the time, rather than focusing on
8 efficiency.

9 COMMISSIONER YAKI: Private sector folks.

10 COMMISSIONER TAYLOR: And so for that
11 reason, I would --

12 VICE CHAIRPERSON THERNSTROM: This is a
13 shocking statement.

14 COMMISSIONER TAYLOR: I would be in
15 support of the second proposal, focusing on
16 Commissioner Melendez's suggestion that we start the
17 briefings early. We have business meetings one month.
18 We have a briefing the next month. We start the
19 briefing early in the morning. We are all prepared to
20 work through lunch for two and a half, three hours
21 after the briefings.

22 And I suspect if we do all of those things
23 and focus on being efficient and using our time
24 wisely, we will have plenty of time to accomplish our
25 work.

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1 CHAIRMAN REYNOLDS: I think that that
2 approach is sound in theory. The one thing, though,
3 that I want to point out in practice, I mean, when we
4 deal with controversial issues, it takes up a lot of
5 time. When we deal with noncontroversial issues, like
6 the calendar, it takes up a lot of time.

7 And we have not demonstrated much
8 restraint. We will discuss important issues to death.

9 And we will discuss issues that are not very
10 important. We can spend a lot of time on them.

11 So, in theory, I think we should try it, I
12 think, but okay. Well, she beat you.

13 COMMISSIONER HERIOT: I have just one
14 sentence to say, and that is that with issues as
15 controversial as some of those that we discussed, it
16 is important to be collegial and let everyone have
17 their say. And that interferes sometimes with
18 efficiency, but I would go with collegiality over
19 efficiency.

20 CHAIRMAN REYNOLDS: And to add to that,
21 because of -- well, when I started here, there was a
22 lot of -- well, in the past, there had been a lot of
23 bad blood. And so one of the things that we have done
24 is to ensure that everyone gets an opportunity to have
25 their say. We bend over backwards to ensure that

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1 people have an opportunity to have their say. And one
2 of the costs is meetings that tend to drag on.

3 Commissioner Yaki?

4 COMMISSIONER YAKI: I would just like to
5 end this conversation by saying there are good ideas,
6 let's just get this thing done with, give discretion
7 to you and the Staff Director as we go along to figure
8 out what the business is like for a particular month
9 and whether we need to do X or Y, communicate that
10 early enough to the commissioners, and move on.

11 CHAIRMAN REYNOLDS: Is everyone
12 comfortable with that approach?

13 VICE CHAIRPERSON THERNSTROM: Yes.

14 PARTICIPANT: Yes.

15 COMMISSIONER HERIOT: So we are reserving
16 the possibility of having Thursday meetings?

17 COMMISSIONER YAKI: Yes.

18 COMMISSIONER HERIOT: And early meetings?

19 CHAIRMAN REYNOLDS: Or early, or early,
20 and/or early.

21 VICE CHAIRPERSON THERNSTROM: Wait a
22 minute. How late on a Thursday so that Gail Heriot
23 can get here? How late on a Thursday could we start a
24 meeting? I don't want to start a meeting without
25 Gail.

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1 COMMISSIONER HERIOT: If worse comes to
2 worst, I could take the Red Eye on Wednesday.

3 VICE CHAIRPERSON THERNSTROM: No.

4 COMMISSIONER YAKI: I would say a 5:00 to
5 7:00 meeting is probably doable given that the
6 earliest flights from the East to the West Coast start
7 about 6:30-7:00 o'clock in the morning. They get in
8 about 3:00.

9 COMMISSIONER HERIOT: From San Diego, they
10 get in about like from 3:30.

11 COMMISSIONER YAKI: Yes. And then you
12 have to --

13 VICE CHAIRPERSON THERNSTROM: It's not
14 that late.

15 COMMISSIONER YAKI: -- rush hour. By the
16 time you get here, 5:00 o'clock would be --

17 COMMISSIONER TAYLOR: 5:00 o'clock?

18 COMMISSIONER YAKI: Yes.

19 COMMISSIONER HERIOT: I can meet at 5:00
20 o'clock. And, again, I can take the Red Eye. I think
21 that would be --

22 STAFF DIRECTOR MARCUS: The one point I
23 would add is that if the meetings go late, there is
24 some point at which there are additional fees that we
25 incur, both for overtime court reporting and also for

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1 those employees who are required to be paid overtime
2 at a certain hour. So that's just one thing we have
3 to balance in.

4 COMMISSIONER YAKI: Just keep that in
5 mind.

6 CHAIRMAN REYNOLDS: Yes. We will keep
7 that in mind when we make our decisions.

8 COMMISSIONER MELENDEZ: I just don't see
9 how I can get here any earlier. I mean, I took the
10 6:20 through San Francisco on United. I got here to
11 Dulles, I think it was -- I got to the hotel at 6:00
12 o'clock. So I'm just saying that's the earliest I --

13 COMMISSIONER YAKI: The one down side
14 about trying to do the Thursday is if there is any
15 weather delay on the West Coast or East Coast.

16 VICE CHAIRPERSON THERNSTROM: Yes. I
17 think that Thursday is --

18 COMMISSIONER YAKI: One time I was
19 supposed to do a conference call with you guys at
20 4:00, thinking my plane landed at 3:15. My plane
21 landed at 5:00 p.m.

22 VICE CHAIRPERSON THERNSTROM: Yes. I
23 think that Thursday is unrealistic. I really do. It
24 took me six and a half hours to get here yesterday
25 from Boston because --

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1 COMMISSIONER YAKI: That is because you
2 were bicycling.

3 (Laughter.)

4 VICE CHAIRPERSON THERNSTROM: Yes, I know.
5 The plane was bicycling.

6 CHAIRMAN REYNOLDS: Okay. We will go with
7 Commissioner Yaki's recommendation essentially. The
8 motion that is on the table right now is to vote for
9 the -- I am going to regret this. Did we resolve the
10 issue of whether we want to flip the November and
11 December?

12 VICE CHAIRPERSON THERNSTROM: No, we
13 didn't, but we should do that.

14 CHAIRMAN REYNOLDS: Okay. So is everybody
15 comfortable switching the order so that on the
16 November 9th --

17 COMMISSIONER YAKI: Remember, December 3
18 is a Monday.

19 CHAIRMAN REYNOLDS: I'm sorry?

20 COMMISSIONER YAKI: December 3 is a
21 Monday. Remember, we did that because Jennifer's and
22 Peter's term may expire at the end of that week. And
23 we wanted to do it before then so we could all do Auld
24 Lang Syne or Welcome Back or do a roast or just heave
25 them out the door.

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1 CHAIRMAN REYNOLDS: Okay.

2 COMMISSIONER YAKI: Okay. So I don't know
3 if that has a consequence for how we schedule --

4 CHAIRMAN REYNOLDS: We can still throw
5 them out the door if the briefing is moved to the 3rd.

6 COMMISSIONER YAKI: Yes. I have no
7 objection.

8 CHAIRMAN REYNOLDS: Okay. So we are going
9 to vote.

10 COMMISSIONER MELENDEZ: Mr. Chairman?

11 CHAIRMAN REYNOLDS: Mr. Melendez?

12 CHAIRMAN REYNOLDS: For August, do we have
13 a date yet or is that something we decide after?

14 CHAIRMAN REYNOLDS: No, we don't.

15 COMMISSIONER YAKI: Yes. How come we
16 don't have a date?

17 STAFF DIRECTOR MARCUS: We have not
18 previously had an agreement to have this briefing in
19 August.

20 COMMISSIONER YAKI: Usually we don't do
21 August.

22 STAFF DIRECTOR MARCUS: Usually we don't
23 do August. The idea of having an August briefing
24 would be a way of ensuring that we don't have
25 briefings --

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1 COMMISSIONER YAKI: It's so hot here in
2 August.

3 VICE CHAIRPERSON THERNSTROM: Oh, you
4 know, violins are playing over here.

5 CHAIRMAN REYNOLDS: We have air
6 conditioning. I think that we can handle it. Folks,
7 we need to bring this --

8 COMMISSIONER YAKI: The Bay area, man.
9 We've got --

10 CHAIRMAN REYNOLDS: We need to bring this
11 to a close. So let's vote on the --

12 COMMISSIONER YAKI: I move that we adopt
13 the proposed calendar as amended with the flip of the
14 November and December meetings with instructions to
15 the Chairman and the Staff Director as appropriate to
16 determine whether we need early starts on any of the
17 days that we have briefings.

18 CHAIRMAN REYNOLDS: Is there a second?

19 COMMISSIONER HERIOT: I am still confused.
20 How does this calendar differ from the calendar that
21 existed before?

22 CHAIRMAN REYNOLDS: Does anyone have the
23 original?

24 COMMISSIONER YAKI: Yes. The original --

25 STAFF DIRECTOR MARCUS: The second page of

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1 this document shows the existing briefing schedule.

2 COMMISSIONER HERIOT: Okay.

3 CHAIRMAN REYNOLDS: So we are changing
4 August --

5 COMMISSIONER HERIOT: I get it. Never
6 mind.

7 CHAIRMAN REYNOLDS: Okay. Let's take a
8 look at our calendars for August. Pick a date.

9 COMMISSIONER MELENDEZ: How about the
10 10th?

11 CHAIRMAN REYNOLDS: Okay. The 10th is on
12 the table. Does everyone have a calendar?

13 VICE CHAIRPERSON THERNSTROM: I'm looking
14 for mine. Hold on.

15 COMMISSIONER HERIOT: I'm okay. I can
16 remember my calendar for August.

17 VICE CHAIRPERSON THERNSTROM: She's lying
18 on a beach.

19 COMMISSIONER BRACERAS: I can only come
20 for the 24th in August or the 31st.

21 PARTICIPANT: The 31st?

22 COMMISSIONER BRACERAS: Oh, you're right.

23 CHAIRMAN REYNOLDS: So the 10th doesn't --

24 VICE CHAIRPERSON THERNSTROM: What dates
25 are we talking about?

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1 CHAIRMAN REYNOLDS: What about the 17th?

2 COMMISSIONER KIRSANOW: Twenty-fourth.

3 COMMISSIONER YAKI: Jennifer said she
4 can't do the 17th.

5 COMMISSIONER BRACERAS: I've got stuff
6 going on that day.

7 CHAIRMAN REYNOLDS: Okay. The 24th?

8 COMMISSIONER KIRSANOW: I can do the 24th.

9 COMMISSIONER HERIOT: Is the 10th out?

10 CHAIRMAN REYNOLDS: Yes.

11 COMMISSIONER YAKI: Is the 3rd out?

12 COMMISSIONER HERIOT: Then I can do any
13 date.

14 COMMISSIONER YAKI: Is the 3rd out?

15 COMMISSIONER KIRSANOW: No.

16 CHAIRMAN REYNOLDS: We didn't consider the
17 3rd.

18 COMMISSIONER YAKI: Why didn't we consider

19 --

20 COMMISSIONER BRACERAS: The 25th --

21 COMMISSIONER HERIOT: The 3rd is out for
22 me.

23 COMMISSIONER YAKI: Wait, wait, wait.

24 COMMISSIONER BRACERAS: I am basically
25 booked.

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1 VICE CHAIRPERSON THERNSTROM: Say that
2 again, Jennifer. I'm sorry.

3 COMMISSIONER YAKI: Jennifer, just
4 basically said, "I'm irrelevant in this discussion."

5 CHAIRMAN REYNOLDS: Okay, folks. We need
6 to end this.

7 COMMISSIONER MELENDEZ: September is the
8 21st for a meeting in September. So it would be about
9 a month.

10 COMMISSIONER KIRSANOW: Twenty-fourth.

11 COMMISSIONER MELENDEZ: Twenty-fourth?
12 That would work.

13 CHAIRMAN REYNOLDS: Okay. Twenty-fourth,
14 going once. Going twice. Gone. It's the 24th of
15 August. Please let's make that change.

16 VICE CHAIRPERSON THERNSTROM: There is
17 this horrible groaning over there.

18 CHAIRMAN REYNOLDS: Okay. So Commissioner
19 Yaki has made the motion. I second it. We have had
20 the discussion, I hope.

21 STAFF DIRECTOR MARCUS: May I just ask by
22 way of clarification whether Commissioner Yaki's
23 motion to give a certain amount of discretion to the
24 Chairman and the Staff Director would enable us to
25 schedule a business meeting on one of the days

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1 currently scheduled only for a briefing if it were
2 necessary to deal with --

3 COMMISSIONER YAKI: Yes, yes.

4 STAFF DIRECTOR MARCUS: Thank you.

5 CHAIRMAN REYNOLDS: Okay. All in favor
6 please signify by saying aye.

7 (Whereupon, there was a chorus of "Ayes.")

8 CHAIRMAN REYNOLDS: Any opposition?

9 (No response.)

10 CHAIRMAN REYNOLDS: Any abstentions?

11 (No response.)

12 CHAIRMAN REYNOLDS: The motion carries
13 unanimously.

14 Vice Chair Thernstrom, I did not know
15 where you left off. So where are we?

16 VICE CHAIRPERSON THERNSTROM: We are --

17 COMMISSIONER YAKI: Pretty much nowhere.

18 VICE CHAIRPERSON THERNSTROM: No. That's
19 not true. Hold on a second.

20 COMMISSIONER YAKI: We did the Website
21 updates.

22 VICE CHAIRPERSON THERNSTROM: Yes. We
23 have done the Website updates.

24 COMMISSIONER YAKI: We have not done the
25 launch of the Website.

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1 VICE CHAIRPERSON THERNSTROM: Procedures
2 for briefing reports.

3 CHAIRMAN REYNOLDS: Okay.

4 COMMISSIONER YAKI: Wouldn't we rather
5 launch the Website before we get into that.

6 CHAIRMAN REYNOLDS: Okay. So we did not
7 -- okay.

8 **-Anti-Semitism Public Education Campaign Web Pages**

9 CHAIRMAN REYNOLDS: On January 20th, 2006,
10 the Commission voted to have the Staff Director
11 produce public education campaign materials to
12 communicate with college students to educate them
13 about their rights and about the available remedies in
14 the event they face anti-semitic discrimination on
15 campus.

16 Staff worked with the GPO to develop a
17 poster and flyer, which the Commission unanimously
18 approved on July 28th, 2006. More importantly, staff
19 also developed a campus anti-semitism Website, which
20 will be situated within the Commission's general
21 Website at www.usccr.gov. The Commission approved the
22 new Website on March 9th, 2007, agreeing that the
23 Website should be launched during this meeting.

24 This campaign has already received a great
25 deal of favorable attention as well as support from

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1 countless organizations within both the higher
2 education community and the Jewish community.
3 Yesterday, for example, one national higher education
4 association praised this campaign as momentous.

5 We are pleased to launch the Website this
6 morning. The particulars, Michele, please press the
7 button launching this. Drum roll, please. Very good.

8 STAFF DIRECTOR MARCUS: And we are live.

9 (Applause.)

10 CHAIRMAN REYNOLDS: Once again I would
11 like to thank the staff for its excellent work in
12 putting together the materials and the Website.

13 VICE CHAIRPERSON THERNSTROM: We all thank
14 the staff.

15 CHAIRMAN REYNOLDS: Okay.

16 CHAIRMAN REYNOLDS: If I am correct, we
17 are up to procedures for briefing reports.

18 VICE CHAIRPERSON THERNSTROM: Yes.

19 -Procedures for Briefing Reports

20 CHAIRMAN REYNOLDS: I would like to move
21 -- well, the working group spent quite a bit of time
22 coming up with various proposals. We did not reach a
23 consensus in terms of what the procedure should be.

24 I am going to move to amend our policies
25 on national projects to provide these procedures for

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1 all briefings. All briefings will be subject to the
2 requirement of a concept paper, a defame and degrade
3 review, commissioner review of the initial draft of
4 the report, external review of the report, and final
5 revision of the report.

6 Editorial review and legal sufficiency
7 will be provided when they are appropriate and on a
8 case-by-case basis at the discretion of the Staff
9 Director. Affected agency review will be used when
10 there is another agency that is affected by our report
11 to the same extent as other national office reports.

12 Also under this motion, once a briefing
13 report with findings and recommendations is submitted
14 for a vote, the vote would be conducted in a
15 bifurcated fashion. Commissioners would first vote to
16 approve part A of the report, what Commissioner
17 Braceras has called the clearinghouse portion of the
18 report, containing the executive summary, a
19 description of the topic and summary of the
20 proceedings as well as Commission's questions.

21 Commissioners would then vote on part B of
22 the report. This vote would consist of an
23 item-by-item vote on each finding and each
24 recommendation. Those votes receiving a majority vote
25 would be included in the report with a vote tally and

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1/ a sentence explaining any opposition vote for that
2 item.

3 The ability of commissioners to provide
4 concurring or dissenting statements would not be
5 affected by this policy.

6 Is there a second?

7 COMMISSIONER YAKI: Point of order.

8 CHAIRMAN REYNOLDS: Yes?

9 COMMISSIONER YAKI: I don't have a copy of
10 that motion in my binder. Was that sent later?

11 CHAIRMAN REYNOLDS: This is on the fly.
12 This is something that after looking at all of the
13 motions that came down, I am putting this one on the
14 table since we didn't have a consensus.

15 COMMISSIONER YAKI: Can we get copies of
16 that so I could read it more carefully --

17 CHAIRMAN REYNOLDS: Sure, sure.

18 COMMISSIONER YAKI: -- before offering
19 even comment on it?

20 STAFF DIRECTOR MARCUS: It will take a few
21 minutes to get copies made.

22 CHAIRMAN REYNOLDS: Okay.

23 COMMISSIONER YAKI: I would just ask as a
24 point of courtesy that whenever we have new motions on
25 items, that they be distributed prior to the meeting,

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1 if possible, at the day of, or anything that basically
2 is sent Thursday on, I would appreciate it if it were
3 available in hard copy at each commissioner's place,
4 desk on Friday mornings because it is very difficult
5 to get to a printer when you're in a hotel.

6 CHAIRMAN REYNOLDS: No. I think that that
7 is a -- well, as a rule, we generally distribute
8 motions ahead of time, but yesterday sitting down and
9 looking at what we had, I decided to put this on the
10 table to jump-start the conversation.

11 But you are right. It would be best if we
12 and to the extent possible provide hard copies to all
13 the commissioners.

14 VICE CHAIRPERSON THERNSTROM: Yes. I
15 mean, this is very difficult to deal with as simply in
16 oral form here.

17 CHAIRMAN REYNOLDS: Yes. We are going to
18 table this and move to strategic planning.

19 **-Strategic Planning**

20 CHAIRMAN REYNOLDS: The draft strategic
21 plan was approved by the commissioners and was sent to
22 the Office of Management and Budget. The comments
23 made by OMB are included in the draft and appear in
24 the gray boxes to the right of the text of the report.

25 The most important change was to

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1 strengthen and clarify the measures to hold the agency
2 accountable for results before submitting the
3 strategic plan to the appropriate congressional
4 committees.

5 The additional changes by OMB, comments,
6 must be approved by the commissioners. At our last
7 meeting, the commissioners agreed to table the motion
8 until today.

9 I would like to move that the Commission
10 adopt the proposed preliminary draft strategic plan
11 distributed to the commissioners on March 1st of 2007
12 subject to one change. Instead of requiring a
13 50-state SAC report by 2010, we will require a
14 multi-SAC report based on as many SACs as we have been
15 able to charter by that time.

16 Please note that approval of this motion
17 does not constitute approval of the final strategic
18 plan as the draft strategic plan remains preliminary
19 and must be further vetted by OMB and Congress.

20 Is there a second?

21 COMMISSIONER KIRSANOW: Second.

22 CHAIRMAN REYNOLDS: Discussion?

23 COMMISSIONER MELENDEZ: Mr. Chairman,
24 Commissioner Melendez.

25 I had asked a number of questions to the

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1 Staff Director on the strategic plan. And he did
2 answer me on many of those questions, but basically
3 some of the questions I asked were whether or not some
4 of the I don't know whether you call them goals within
5 the strategic plan were actually realistic, you know.

6 And I think his answer to many of the
7 questions I asked was that they're ambitious. So
8 whether that means the same thing, you know, but I'm
9 just saying that as it stands now, I don't really
10 support. I think that it still needs some work on
11 this plan.

12 That's just my opinion. So I just wanted
13 to say that.

14 CHAIRMAN REYNOLDS: Your opinion is
15 important. And I guess I would respond, in part, by
16 saying that this is still preliminary. And there
17 still will be opportunities to improve it.

18 COMMISSIONER MELENDEZ: Right. Just
19 another comment because we have a new commissioner.
20 Also, I don't know if she has had an opportunity to
21 actually go through the plan herself because I
22 remember when I came on this Commission, there were
23 some issues that I had just come on as a new
24 commissioner. And I asked for some like table of the
25 month so that I had an opportunity to kind of go

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1 through it. And they gave me two weeks on -- I forgot
2 what that issue was but the same situation as facing
3 us here with a new commissioner.

4 So I think everybody should have an
5 opportunity. I know everybody is busy, but I am not
6 sure if everybody has totally gone through my
7 questions that I had with the Staff Director on this
8 plan and also maybe have some yourself. I'm just
9 laying that out there.

10 So I just want you to consider that in
11 this motion because this is really a step forward
12 where we're going here with the Commission and has to
13 do with budgeting issues that make it either realistic
14 to attain whatever is in this plan.

15 And I just see our budget going kind of
16 the opposite direction as to what our ambitious vision
17 is here. So I just think that all of the
18 commissioners have to kind of take that into account
19 as they vote on this.

20 And if you do need more time, I would
21 suggest you consider that in your motion. Thank you.

22 CHAIRMAN REYNOLDS: Other comments?

23 (No response.)

24 CHAIRMAN REYNOLDS: Okay. Did we have a
25 second?

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1 COMMISSIONER KIRSANOW: Yes.

2 CHAIRMAN REYNOLDS: Okay. Are we ready to
3 vote? All in favor please signify by saying aye. .

4 (Whereupon, there was a chorus of "Ayes.")

5 CHAIRMAN REYNOLDS: Any opposition?

6 COMMISSIONER MELENDEZ: Opposed.

7 CHAIRMAN REYNOLDS: Any abstentions?

8 (Whereupon, there was a show of hands.)

9 CHAIRMAN REYNOLDS: Okay. Please let the
10 record reflect that Commissioner Yaki abstained from
11 the vote, Commissioner Melendez voted against the
12 motion, and the remaining commissioners voted in favor
13 of it. So the motion carries.

14 COMMISSIONER YAKI: Do you want to break?

15 VICE CHAIRPERSON THERNSTROM: He says
16 hopefully.

17 CHAIRMAN REYNOLDS: Yes. Let's take a
18 five-minute break.

19 (Whereupon, the foregoing matter went off
20 the record at 10:54 a.m. and went back on the record
21 at 11:07 a.m.)

22 CHAIRMAN REYNOLDS: On the record. Okay.
23 Everyone should have in front of them a copy of the
24 motion. Jennifer, are you there?

25 COMMISSIONER BRACERAS: I'm here.

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1 CHAIRMAN REYNOLDS: Very good and,
2 Jennifer, did you receive the email?

3 COMMISSIONER BRACERAS: No, I guess not.

4 CHAIRMAN REYNOLDS: Okay. You guess not.

5 COMMISSIONER BRACERAS: I received the --

6 CHAIRMAN REYNOLDS: Okay. The motion,
7 well, we're at the discussion point. Comments?
8 Concerns? Commissioner Heriot.

9 COMMISSIONER HERIOT: I just have a
10 question in that I'm not familiar some of the jargon
11 here. When you refer to an external review of the
12 report, who is the external reviewer?

13 CHAIRMAN REYNOLDS: Staff Director. Well,
14 that's not the answer. Please respond to Commissioner
15 Heriot.

16 STAFF DIRECTOR MARCUS: The Commission
17 adopted a procedure within the last few months under
18 which we have new objectivity criteria for Commission
19 reports including briefing reports as well as other
20 reports. Under those procedures, the Staff Director
21 is required to make certain certifications about
22 objectivity procedural issues such as the balance of
23 speakers. After the Staff Director makes those
24 certifications, the certification is then reviewed by
25 an outside reviewer who may be either a member of the

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1 State Advisory Committee or an outside paid consultant
2 selected by the Staff Director.

3 COMMISSIONER HERIOT: Okay. So this is at
4 the Staff Director's discretion.

5 STAFF DIRECTOR MARCUS: That's correct.

6 COMMISSIONER: And it's not substantive.

7 STAFF DIRECTOR MARCUS: People have -- I
8 find difficult sometimes the distinction between what
9 is called "substantive" and what's called
10 "procedural." It does not deal with whether the
11 content of the report is good or bad or problematic.
12 It goes to whether the determinations of whether
13 certain procedures have been applied to ensure the
14 objectivity of the report.

15 COMMISSIONER HERIOT: Such as?

16 STAFF DIRECTOR MARCUS: Such as a
17 numerical balance of varying and opposing points of
18 view.

19 CHAIRMAN REYNOLDS: Okay. Commissioner
20 Kirsanow, did you have a comment or a question?

21 COMMISSIONER KIRSANOW: What would be the
22 effective date of this if it passed?

23 CHAIRMAN REYNOLDS: I would assume it
24 would be today since we have --

25 COMMISSIONER KIRSANOW: Let me be more

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1 specific. Any briefing reports that are in the
2 pipeline, would it apply to this or would it only
3 apply prospectively to briefing that occur hence
4 forth.

5 STAFF DIRECTOR MARCUS: This is a very
6 good and difficult question and probably one that we
7 should try in a more formalized way to bring. It has
8 been my understanding that all of the recent prior
9 decisions on procedure in the iterations of AI 1-6 and
10 the motions apply to those activities that take place
11 after the date of the approval. Now that's a little
12 bit more complicated than it sounds in that some of
13 the procedures relate to what happens at the briefing
14 itself. So it applies to all of the briefings that
15 take place afterwards. Some of them apply to the
16 national planning for the briefing which takes place
17 two years in advance.

18 COMMISSIONER KIRSANOW: I'm sorry for
19 interrupting, Mr. Staff Director. The one thing that
20 I see has not been done or may not have been done,
21 I'm not sure, for some of them, it may have been, in
22 terms of this motion for any ending briefings, that is
23 briefings we've already had and that are waiting the
24 production of a report, is the motion of the concept
25 paper. I don't recall getting concept papers on

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1 briefings that we've had already. Maybe I -- I know
2 we've gotten one from statutory report. I think we
3 got something, an explanation, of what we're doing
4 with respect to, for example, No Child Left Behind.
5 But I'm not sure the notion of concept paper -- that
6 the notion of a concept paper was applied to any of
7 the other briefings we've done.

8 STAFF DIRECTOR MARCUS: I believe external
9 review has not yet occurred because it is a procedure
10 that was developed I believe in January. So it
11 applies to reports of briefings that took place since
12 January. We've not yet had a vote on the report of
13 any briefing that took place since January. Concept
14 papers though have been done so far as I recall for
15 all or substantially all of the briefings we've had so
16 far. Some of them were developed in connection with
17 the annual planning. So it would be for the planning
18 meeting.

19 COMMISSIONER KIRSANOW: Okay.

20 CHAIRMAN REYNOLDS: Vice Chairperson
21 Thernstrom.

22 VICE CHAIRPERSON THERNSTROM: I'm back to
23 the extent of the questions. So the Staff Director
24 said he had a line between -- Sorry about that.
25 (Microphone.) I'm back to the question of the general

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1 review of the report. The Staff Director said the
2 line between procedural and substantive review is a
3 little blurred now and then he talked about making
4 sure that the report met the standard of objectivity.

5 Well, does that apply to the findings and
6 recommendations?

7 STAFF DIRECTOR MARCUS: The external
8 reviewer would not address the findings and
9 recommendations per se. He would only address whether
10 certain procedural requirements have been met. I
11 should say that this motion as the Chairman read it
12 would not affect in any way the use of external review
13 for briefing reports because the Commission has
14 already voted a couple of months ago to use external
15 review for all national products including briefing
16 reports. So this is one of the few things where we've
17 already clearly said we're going to be doing it.

18 VICE CHAIRPERSON THERNSTROM: Right. But
19 I understand it that external review, if we agree to
20 have findings and recommendations on briefing reports,
21 that external review does not apply to the findings
22 and recommendations and I just want to make sure that,
23 I just want this to be on the record, we're not going
24 to cut some kind of objectivity test for findings and
25 recommendations.

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1 CHAIRMAN REYNOLDS: Commissioner Melendez
2 and the Commissioner Taylor.

3 COMMISSIONER MELENDEZ: My concern, at
4 least in that part of the whole process, is it almost
5 sounded to me like an external reviewer would actually
6 have some checkout box. He would look to see if
7 certain components were actually done. So it almost
8 sounded to me like he may not even read some standard
9 portion of the report. He may just look at a list and
10 say, "That's in here. This is in here. That's in
11 there." So to me that kind of seemed like that's our
12 external review and if it's different, then you need
13 to tell me that it's something more than some checkoff
14 box that just goes down and checks that certain things
15 are in there as opposed to maybe given some opinion as
16 to whether or not the whole report means something
17 other than just a checkoff box.

18 STAFF DIRECTOR MARCUS: Again, this motion
19 does not affect in any the external review. That's
20 something that was already decided by vote at least a
21 couple of months ago and it's memorialized in AI 1-6
22 in the associated appendix and it does essentially
23 involve completing a checkoff box. It does not entail
24 the reviewer developing a separate opinion about
25 findings and recommendations or anything else.

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1 CHAIRMAN REYNOLDS: Commissioner Heriot.

2 COMMISSIONER HERIOT: I'm just seeking
3 further clarification on this external review.
4 Suppose an external reviewer has that checklist and
5 decides that the procedures were not followed but the
6 Commission disagrees. What happens then?

7 CHAIRMAN REYNOLDS: We have not had to
8 wrestle with that.

9 COMMISSIONER HERIOT: Don't we want to
10 know what happens?

11 PARTICIPANT: Yes, we do want to know.

12 STAFF DIRECTOR MARCUS: The checkoff box
13 has to be completed before the materials can be
14 forwarded to the Commission. But I'm not aware of
15 anything that constrains the Commission from making
16 its own ultimate determinations.

17 COMMISSIONER HERIOT: So we never see the
18 report until the external reviewer has.

19 STAFF DIRECTOR MARCUS: You will have seen
20 at least one draft previously.

21 COMMISSIONER HERIOT: What would be the
22 procedure if you received an external review that said
23 this was not complied with and the Staff Director
24 disagrees preliminarily and believes that it has been
25 complied with. Let's start with that possibility.

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1 Then what happens next?

2 STAFF DIRECTOR MARCUS: I think we would
3 have to -- I would have to take this back and report
4 to you either at the next meeting or in the interim.

5 CHAIRMAN REYNOLDS: Right.

6 COMMISSIONER HERIOT: That's important in
7 terms of what the procedure is here because one day
8 that's going to happen. It's best not for it to be an
9 explosive situation when it happens. It's best if we
10 know what the procedure is right off the bat
11 especially if we've already gotten this in our AI 1-6.
12 We need to know what it means. So we need a policy
13 on that.

14 CHAIRMAN REYNOLDS: Okay. Commissioner
15 Kirsanow and then Commissioner Melendez.

16 COMMISSIONER KIRSANOW: Yes. First, I
17 concur with Commissioner Heriot on that. It strikes
18 me though that simply in terms of raw delegation of
19 powers we would be the ultimate arbiter of that.

20 CHAIRMAN REYNOLDS: Right.

21 COMMISSIONER KIRSANOW: And we would
22 probably have to vote on it.

23 CHAIRMAN REYNOLDS: Yes.

24 COMMISSIONER KIRSANOW: And determine
25 whether or not we're going to go forward. But it's a

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1 good thing to memorialize that so that we're acting
2 consistent with what we've already designated as our
3 procedure. The question I have is in going through
4 this, unless I'm missing something, how does this
5 fundamentally differ from the procedure used in our
6 statutory report. Other than in paragraph two, I
7 really don't know that there are many differences
8 between the way we handle briefing reports and
9 statutory reports and not that that's a good or bad
10 thing. I just want to know how it does differ.

11 STAFF DIRECTOR MARCUS: The statutory
12 report also has at least one or two other
13 requirements, for instance, the requirement of the
14 discovery plan and I believe there's also a discovery
15 of the outline that also has to be done and an
16 opportunity for the Commissioners to see it. The
17 statutory plan has -- Let me see.

18 COMMISSIONER KIRSANOW: That's correct.
19 My recollection is it comes back to the Commissioners
20 for our input also.

21 STAFF DIRECTOR MARCUS: That's right.

22 COMMISSIONER KIRSANOW: Yes, because we
23 don't have that stuff in here.

24 STAFF DIRECTOR MARCUS: That's right and
25 I'm not sure where you're calling the second

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1 paragraph, but with the statutory report, the
2 editorial review, legal (Background noise) review, are
3 part of the process. It's not --

4 COMMISSIONER KIRSANOW: Right. It's
5 discretionary.

6 STAFF DIRECTOR MARCUS: That's right.

7 CHAIRMAN REYNOLDS: Commissioner Melendez.

8 COMMISSIONER MELENDEZ: Yes. Just I think
9 this whole process really has to do with having a
10 quality report that comes out of this whole process
11 where I looked at this here where it says "Editorial"
12 about the seventh line down, "Editorial review and
13 legal sufficiency review will be provided when they
14 are appropriate on a case-by-case basis at the
15 discretion of the Staff Director." And really I have
16 a problem with that because in my opinion an AI 1-6
17 has been changed in February. So the question would
18 be what were we operating on before February 6 and
19 what was the reason we changed it to that point and
20 have we been operating on what was changed in February
21 when we changed AI 1-2. So AI 1-6 seems to be kind of
22 like shooting from your hip where you change it. But
23 we really have to understand the reasons for it
24 because even what we're talking about here would
25 change AI 1-6 again.

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1 So it sounds to me like AI 1-6 is a
2 discretion of us in some way putting some policies in
3 place. In my opinion, I think what you want to do is
4 take out discretion from a Staff Director to make
5 those calls. I think the process have to be something
6 where we're following some process with limited
7 discretion.

8 Otherwise, we're always going to
9 questioning the Staff Director as the authority that
10 we give him to make the discretion of himself. So I
11 think just a statement in here is what I'm trying to
12 make to ensure that we have a policy that takes a lot
13 of discretion out. That's just my opinion as to
14 what's written here if we're trying to come up with a
15 policy that's pretty much set in stone, not totally.
16 Nothing's really set in stone, but I'm just saying
17 that maybe we need to go back to the reasons of the
18 change of AI 1-6 back in February and what did we
19 accomplish with that and if this is something that
20 will constantly be changing AI 1-6 as we change it
21 again in October. I don't know. So that's my
22 question on this whole process.

23 CHAIRMAN REYNOLDS: Mr. Staff Director,
24 why is it that some of these items are mandatory while
25 others are discretionary?

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1 STAFF DIRECTOR MARCUS: I think that the
2 distinction between editorial review and legal
3 sufficiency on the one hand and some of the others is
4 that editorial review can take a substantial amount of
5 resources and the balance of whether it's justified to
6 a report will depend on a lot of factors like the
7 availability of resources and the complexity of the
8 document, perhaps whether there are findings and
9 recommendations, whether there's a substantial amount
10 of staff work or analysis or whether there isn't a
11 substantial amount of analysis.

12 The way we've been doing editorial review
13 boards requires three staff members to take usually a
14 significant amount of time, at least a few days, and
15 put aside all of their work to focus on this. So the
16 question is to what extent do we want staff members to
17 be working on new projects or to be spending
18 additional time on review of old ones.

19 Legal sufficiency review is important for
20 some documents. For instance, it's important for
21 documents that have either legal citations or legal
22 claims or there might be some sort of legal problem.
23 But there are other sorts of documents where it's easy
24 to say that there aren't either legal citations or
25 legal issues, but that sending it to OGC might take

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1 awhile for them to go through and putting aside other
2 work that they're working on.

3 COMMISSIONER MELENDEZ: Okay. Just
4 another comment. You know, an editorial review, it
5 almost sounded to me like we were doing nothing more
6 than a spell check on it, whatever that means. So I
7 think every one of these that has editorial review
8 really has to tell the Commission exactly what does
9 that mean and are we actually following that so that
10 it's more in-depth than spell check. I don't fully
11 understand what that components means as far as these
12 other things, the legal sufficiency, and I've always
13 been not real clear as to exactly what we were saying
14 as far as those various things I mentioned because
15 we're talking about quality here and I think they are
16 all components of quality.

17 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

18 VICE CHAIRPERSON THERNSTROM: I think what
19 Commissioner Melendez is saying and it really does
20 open the door to another debate here is what he would
21 like to see in the way of editorial review is a review
22 of the substance of the points in the briefing so that
23 he would define editorial in a very board way and
24 please correct me if I'm wrong on this.

25 I mean as it is we're having a lot of

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1 trouble getting these briefing reports out. We have a
2 balanced panel of experts who come and we honestly
3 report what they have to say and then go on. In my
4 view, it's essential to go on for findings and
5 recommendations. I do not think that an editorial
6 review in any sense that encompasses substance is
7 appropriate here.

8 COMMISSIONER MELENDEZ: Right. My point
9 was that we had talked about when people come and give
10 their testimony we basically when we were talking
11 about whether or not we should approve without
12 findings and recommendations we would just say what
13 they said. Let Congress or the President make up his
14 mind as to what was said by all these people who had
15 testified. Then we got into the issue of if you go
16 beyond that and even our staff here under the Staff
17 Director started to insert their own opinions on what
18 those people have said. The question is who do you
19 actually believe when we're inserting our own opinions
20 because many times it's who is whose side and who is
21 actually believing who when we have two people
22 advocating for a certain position, two people against
23 and then we have our staff basically inserting their
24 opinions. They might line up with somebody I don't
25 agree with. So at some point --

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1 VICE CHAIRPERSON THERNSTROM: Wait a
2 minute. At what point are they inserting their
3 opinions?

4 COMMISSIONER MELENDEZ: I thought we were
5 --

6 VICE CHAIRPERSON THERNSTROM: Before the
7 findings and recommendations?

8 COMMISSIONER MELENDEZ: Well, I think that
9 was actually happening in my opinion.

10 STAFF DIRECTOR MARCUS: I'm not aware of
11 it.

12 VICE CHAIRPERSON THERNSTROM: I mean when
13 and what part of the briefing is it happening? Not in
14 this --

15 COMMISSIONER MELENDEZ: For example, when
16 we did the Native Hawaiians that's the reason that the
17 whole thing got thrown out without findings and
18 recommendations because the people that testified in
19 my opinion, there was a lot of insertion if you want
20 in those findings and recommendations.

21 VICE CHAIRPERSON THERNSTROM: Okay. So
22 you're concerned about the findings and
23 recommendations. This is not a comment on anything
24 that comes prior to the findings and recommendations.

25 COMMISSIONER MELENDEZ: I still am not

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1 clear as to this whole process as we're talking about
2 it and we're almost ready to make a motion to approve
3 this paper here which I still have tremendous
4 questions on and I think, our working group, part of
5 the problem is we never could connect to actually
6 fully meet adequacy. I think we cancelled about three
7 or four calls because people couldn't make the call
8 and a lot of this, like you said, was done on
9 conference calls where a couple of us were there. A
10 couple of us were not. So I'm saying we adequately
11 have actually gotten to the bottom of all these many
12 issues I've talked about. That's my opinion and here
13 we're ready to vote on this.

14 VICE CHAIRPERSON THERNSTROM: Wait a
15 minute. This has -- There are two separate issues
16 here. One is the question of findings and
17 recommendations in these briefing reports and the
18 other is the report prior to the list of findings and
19 recommendations. Are you concerned about the
20 editorial review and its meaning with respect to any
21 part of these reports other than the findings and
22 recommendations?

23 COMMISSIONER MELENDEZ: Again, I'm not
24 sure exactly like I said whether or not editorial
25 review actually met some checkoff list that actually

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1 didn't even work. A person hadn't even read the
2 report. So the only point I'm making, I'm not real
3 comfortable with this whole -- the many issues that
4 are on this paper here.

5 So I could raise a number of questions on
6 this. I'm sure others will also. But I'm just saying
7 if we're ready to vote on this, I'm not real
8 comfortable with it.

9 CHAIRMAN REYNOLDS: Commissioner Yaki and
10 then Commissioner Kirsanow.

11 COMMISSIONER YAKI: Just to pick on
12 Commissioner Melendez's point and in response to
13 Commissioner Thernstrom, I think that quite frankly it
14 goes to both. I have chosen because it gets to be, I
15 think, ticky-tacky at some point, but other points
16 I've been rather disturbed to see what was cobbled out
17 of my questions and answers to panelists in some of
18 these reports. Whether something is in quotations or
19 not or something is characterized a certain way, to me
20 in the end I'm willing not to get too much into it
21 because it then starts getting into a wholesale
22 relearning. But to the extent that there's editorial
23 review of that, I think that would be very useful.

24 I also think that editorial review goes to
25 the question of whether or not, and I think this goes

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1 to Commissioner Melendez's second point, there is
2 substantial evidence in the record before us to
3 substantiate some of the findings at the very least in
4 these reports and I think that Native Hawaiian is a
5 good example of that. But I also think that there are
6 other examples as well including in the report that
7 we're going to be discussing today where I find it
8 very difficult to accept the notion that anyone who
9 was doing editorial review and all of us write. All
10 of us do writings and we all know that we get
11 questioned by our editors whether or not a statement
12 that we make that is sweeping as the need to be
13 substantiated by a bibliography or other sorts of
14 things rather than simply our own take of what we
15 believe the state of literature to be and I believe an
16 editorial review can and should go toward that. But
17 there are bigger issues involved here and we're just
18 doing this in chunks. So I'm going to reserve the
19 rest of my remarks for later.

20 VICE CHAIRPERSON THERNSTROM: I would just
21 like him to clarify something he said before he goes
22 on.

23 COMMISSIONER YAKI: I'm sorry.

24 CHAIRMAN REYNOLDS: Vice Chairperson
25 Thernstrom would like you to clarify a statement you

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1 made.

2 VICE CHAIRPERSON THERNSTROM: Yes. Has
3 there been an occasion, I'm speaking again not to the
4 question of finding some recommendations, but you
5 complained about, for instance, on occasion, the
6 summary of your own remarks, your own questions posed.

7 I don't remember an occasion on which, but maybe you
8 do, I haven't had the opportunity to correct the
9 characterization of what I said at the briefing.

10 COMMISSIONER YAKI: It kind of gets to be
11 completely honest, Commissioner Thernstrom, to the
12 point where if I know that I'm going to basically be
13 trashing on the report anyway, what's the point of
14 adding in three or four more lines to make a point
15 that I thought I was making clear a little more clear
16 or a little bit less editorialized.

17 VICE CHAIRPERSON THERNSTROM: Wait a
18 minute. That's your choice not to have your voice
19 properly represented in the body of the briefing
20 report. It seems to me that this is for the record as
21 it were for the ages and it seems to me that it's in
22 your interest to have your voice properly reflected
23 and I don't see what that has to do with applying some
24 recommendations and questions. It's completely
25 separate question and our procedures do allow you to

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1 collect your own voice.

2 COMMISSIONER YAKI: That may be. On the
3 other hand, if we want to start going down this road,
4 to me paragraph two of this motion does nothing more
5 than ratify the status quo that many of us were
6 attempting to change. By providing a case-by-case
7 discretion for all briefing reports, the Staff
8 Director is basically, I believe, the status quo as it
9 sits right now.

10 CHAIRMAN REYNOLDS: But that's not what it
11 says. Certain issues in certain areas the Staff
12 Director has discretion. In other areas, the Staff
13 Director does not.

14 COMMISSIONER YAKI: It says, "Editorial
15 review and legal sufficiency will be provided when
16 they are appropriate on a case-by-case basis at the
17 discretion of the Staff Director." What about that
18 sentence am I not understanding?

19 CHAIRMAN REYNOLDS: Prior to that, we also
20 talk about a concept paper, defame and degrade, and
21 the fact that the Commissioners will receive an
22 initial draft. There will be an external review of
23 the report and a final revision of the report. None
24 of those items are discretionary.

25 COMMISSIONER YAKI: With all due respect,

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1 Mr. Chair, it's like putting spackle on a leaking hole
2 as far as I'm concerned. Fine. We have been doing
3 concept papers as the Staff Director pointed out.
4 Defame and Degrade, I think we have been doing as the
5 Staff Director has pointed out on a number of
6 occasions especially with regard to a report where we
7 had something corrected, even though if we had done
8 defame and degrade. We do have initial review of the
9 initial draft and we do review the final revision, of
10 course.

11 What I am talking about is that it goes to
12 what I call the unknown data that comes into these
13 reports and that is the stuff that appears in the
14 findings and recommendations which is why I think
15 editorial review is necessary there as well. It's not
16 just about objectivity. It's also about the academic
17 scholarship involved in those findings. So they're
18 not just simply taken out of thin air based upon
19 extraneous research or points and information that was
20 not before us in the record of these briefings and
21 which is why quite frankly I have had the most trouble
22 with briefing reports to begin with.

23 When we have four people testify, two on
24 one side, two on another, it stands to reason to me
25 that you are not going to be getting everything that

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1 you would need to move onto the next level which is
2 now we're going to take a position. That to me is
3 something that I might have done at the Board of
4 Supervisors in San Francisco. But let me tell you.
5 That is not what I would want to see done at the
6 United States Commission on Civil Rights which is far
7 greater mandate, far greater responsibility, far
8 greater impact, than whether or not we approve zoning
9 for someone's backyard expansion. This is not that
10 kind of a thing.

11 When we have again just two people on
12 either side talking about that, talking about an
13 issue, I don't understand how we can possibly find
14 that there is clear and preponderant evidence or
15 testimony on one side or the other. The reason we're
16 talking about this is because there are going to -- I
17 admit.

18 There are going to be occasions when if we
19 did an issue on campus racism which I think actually
20 we should expand now this to campus racism in general
21 given what's going on in the world today and I don't
22 think that any of us here would have a panel in which
23 there would be two white supremacists and any of us
24 would agree with their point of view. But those
25 exceptions, I think, proving the rule when you have a

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1 situation like we did in the report that we'll be
2 talking about later today. I think that this kind of
3 editorial and legal editorial review is not just --
4 should be at the discretion of the Staff Director. I
5 believe that at some point the Commission should be
6 able to direct that it be mandatory.

7 VICE CHAIRPERSON THERNSTROM: But I was
8 trying to separate the findings and recommendations
9 question from the rest of it because I think we need
10 to talk about that separately. You are merging the
11 two.

12 CHAIRMAN REYNOLDS: Vice Chairperson
13 Thernstrom, Commissioner Kirsanow is next up in the
14 queue.

15 VICE CHAIRPERSON THERNSTROM: I'm sorry.

16 COMMISSIONER KIRSANOW: Many of the issues
17 raised by Commissioners Melendez and Yaki are
18 obviously important issues, but I think that this
19 procedure contemplates those issues. We do have a
20 mechanism to address these matters such as the ability
21 to file a dissent, the ability to review these things,
22 and also these is the first time we will have a vote
23 on each discrete item which that vote (Microphone
24 noise) further someone who is a third party can look
25 at it and decided for himself whether or not this is

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1 the position, the unanimous position, or if it's a
2 mixed position, divided up positions.

3 In terms of editorial review, my
4 understanding of editorial review would be simply
5 that. It's a rote process that doesn't get into the
6 substance of the findings and recommendations. I
7 think that's what our charge is and I think there's
8 nothing in this that detracts from that.

9 In fact, when we had briefings in the
10 past, this is an improvement insofar as even to the
11 extent there are no changes in certain aspects of the
12 procedure, at least it's in writing. So we can make
13 reference to it and we have a check on ourselves,
14 whereas in the past, we haven't had that and in the
15 past, you would have reports that were wildly
16 untethered to the testimony that was received or any
17 of the documents we received.

18 Commissioner Yaki was making the point
19 when we have a balanced panel, there's really a great
20 difficulty entailed in coming up with findings and
21 recommendations. But simply because the panel is
22 balanced doesn't mean that the evidence adduced is
23 balanced. A good example would be K through 12
24 education that we had in July of last year when we had
25 a balanced panel, but all of the evidence with the

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1 exception of maybe one or two discrete reports to
2 which they referred seemed to suggest proposition A as
3 opposed to proposition B.

4 And I think that to the extent that
5 there's an disagreement that that's what all the
6 evidence suggests, there is an ability to file a
7 dissent. There's an ability for us to have a review
8 as Commissioners and talk about it. We, I think, have
9 been collegial in that respect. Again, I hate
10 referring to the past, but the fact is that's our
11 starting point and in the past there was no ability
12 for commissioners to have any input. We would simply
13 get this thing. It would be a complete product and
14 then we would vote on it. Whereas here we could look
15 at it and say, "Wait a minute. This doesn't have any
16 connection to what was adduced at the hearing and may
17 be amended as a result." But I think there are some
18 safeguards. Is it a perfect procedure? I'm agnostic
19 about it, but I think this is something that I could
20 lend my support to.

21 CHAIRMAN REYNOLDS: Commissioner Heriot.

22 COMMISSIONER HERIOT: I just want to
23 clarify here. I assumed that it would be in order for
24 a commissioner to make a motion to amend a report.

25 CHAIRMAN REYNOLDS: That is correct.

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1 COMMISSIONER HERIOT: Even at the final
2 stages.

3 CHAIRMAN REYNOLDS: That is correct.

4 VICE CHAIRPERSON THERNSTROM: Yes.

5 COMMISSIONER HERIOT: And that it would be
6 in order for the Commission to vote to require the
7 Staff Director to conduct a legal sufficiency review.

8 CHAIRMAN REYNOLDS: That is correct.

9 COMMISSIONER HERIOT: If they think it's
10 appropriate. Okay.

11 CHAIRMAN REYNOLDS: Commissioner Melendez.

12 COMMISSIONER MELENDEZ: Again, I want to
13 understand the process because I would ask the Staff
14 Director to give us an example of what we call an
15 editorial review process and in the process we'd
16 determine how the reviewer is chosen. That would seem
17 to me if we're would saying the 'A-1 process is
18 important we could read that or is it something where
19 he would say, "Chris Burns, I want you to read this."

20 So I'm talking about what process is it that tells
21 certain people are the reviewers and all those
22 different things and then how are their concerns
23 reported into this document. So I'm not sure exactly
24 what this process is.

25 Maybe the Staff Director can tell us how

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1 does the review process actually work, how does he
2 choose the so-called panel and are they the same
3 people or different people? Are we shooting from the
4 hip or is it something that's really laid out that
5 certain people are on this panel? I don't totally
6 understand how that works right now.

7 STAFF DIRECTOR MARCUS: I would be happy
8 to. I construe the term "editorial review" as being
9 harmonized with editorial review board as the term is
10 used in AI 1-6 and elsewhere in the AIs. So we do
11 spell out at least some aspects of what's done in
12 editorial review.

13 It is a process for a panel of usually
14 three members of the staff to review a document
15 usually with the focus on a few things in mind such as
16 the balance of the document, the support for
17 propositions in the document as well as what would
18 normally think of as editorial issues more narrowly
19 construed which is to say the quality of the writing
20 as well as the quality of the analysis.

21 I typically like to have both continuity
22 and change on the panels. I like to have a rotation
23 of members of the panels. I do like to have one
24 person see as many of these as possible so that I can
25 get an assessment of how does this stack up especially

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1 if we're talking about regional products as well. How
2 did this stack up with comments on the one we got last
3 month or the one we got the month before? But I also
4 like to have people from different offices and people
5 who were not involved in the preparation of the
6 underlying document. Typically, I try to have at
7 least one person who is from a headquarters office
8 other than the Office of the Staff Director and when
9 possible, I will get one person from the regional
10 office and I'll try to vary it up depending upon the
11 work load of different offices and the needs that we
12 have and I like to try and get different skill sets
13 involved. I might like to have an attorney on it but
14 not necessarily three attorneys. If possible, I like
15 to have at least one other social scientist or analyst
16 and I try to get different office perspectives on the
17 document. And that's true whether it's the editorial
18 review board for a regional document or an editorial
19 review board for a national document.

20 COMMISSIONER MELENDEZ: Okay. Just one
21 other question. How does the editorial review and all
22 the staff that you have working on that play into the
23 findings? Is that the basis for the findings that
24 have come out say in the affirmative action in law
25 schools which we'll be talking about later today? Is

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1 that the basis where all that comes from?

2 STAFF DIRECTOR MARCUS: You know, to the
3 best of my knowledge, I have not made changes in the
4 editorial review board process as opposed to what
5 we've done before, although I haven't spoken with the
6 prior staff director about it. The custom and
7 practice has been not to include findings and
8 recommendations in the editorial review process.

9 Typically, they were not included there
10 because the notion was that that's not editorial.
11 That's more of a policy issue. They have been
12 included more recently in a couple of editorial review
13 boards, but it's not required and it wasn't usually
14 the way it was done in the past.

15 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

16 VICE CHAIRPERSON THERNSTROM: Commissioner
17 Yaki, I have to say that, I can't resist saying that,
18 when you said if we have a balanced panel who, let's
19 say, it's an issue that lends itself to this kind of
20 polarization, two on one side, two on the other side
21 and then you look at the findings and recommendations
22 and you said, "Gee. It was a balanced panel, but the
23 findings and recommendations, particularly the
24 recommendations, probably don't seem to reflect that
25 two and two balance." My reaction is fine. Let's

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1 have more imbalanced panels and then there will be
2 findings and recommendations which will flow clearly
3 from what has been before us, presented to us, and I
4 don't think that that's what you want. Look, we have
5 balanced panels and, you know, we start to think
6 ourselves. That seems to me our job.

7 COMMISSIONER YAKI: And there's a
8 difference between thinking for ourselves and -- Well,
9 let me put it as kindly as I can. My concern about
10 the briefing reports and where we were headed, the
11 direction that we were headed in in conversations with
12 Commissioner Braceras and Taylor and Melendez on
13 briefing reports is my concern that we deviated from
14 the original concept of what briefings were supposed
15 to be. They were supposed to be briefings. They were
16 not supposed to become briefing reports. It was
17 supposed to be a way of hearing an issue, listening to
18 what's going on and then in terms of thinking for
19 ourselves, Commissioner Thernstrom, I thought that it
20 would be appropriate for us to ask further questions,
21 to develop that four people in two hours could not
22 possibly begin to develop with us. It would be
23 explore additional lines of inquiry, of research, or
24 whatever that would lend itself to a more credible
25 product in the end.

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1 What we are doing here and what you call
2 thinking for ourselves to me does nothing more than
3 create a procedural fig leaf for the imposition of
4 certain views as a result of these reports. If that's
5 where they are going, I mean, I certainly don't have
6 the votes on this commission to deal with that. But
7 I'm just telling you that in the spirit of compromise
8 and seeking to broker some harmony on this issue, a
9 topic that has not been addressed but one that was
10 addressed seriously by Commissioners Braceras, Taylor,
11 Melendez and myself came up in the context of two
12 things, one that there was this discord on the
13 Commission over the fact that at least two of us here
14 believe that it was not the original intent of
15 briefing reports to then proceed off on policy at full
16 speed based on two hours of testimony, No. 1.

17 But No. 2 and more importantly, was the
18 fact that in so doing, we created a fairly substantial
19 backlog of work for our own staff for our own product
20 to the point where it was starting to become stale.
21 Omaha is becoming stale. In terms of the developments
22 going on in Omaha today, it was a great hearing
23 envisioned by the Chair to go there and to send and
24 offer our view point and our and our moral authority
25 there. It helped galvanize a lot of people into

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1 coming forth and putting out points of view. And then
2 every month I get an email from someone saying is the
3 report ready and life is just moving on there.

4 So the compromise that we started talking
5 about was to have something along the lines of two or
6 three full-blown briefing reports. That would be my
7 concession to go ahead, put out what you want to put
8 out. I can't stop it. But at the same time, let's
9 also not forget the fact that there are some issues
10 where a briefing is just a briefing and we can talk
11 about it and we can ask about more questions. We can
12 look for certain lines of inquiry and move on and that
13 has the added impact of reducing the backlog on the
14 staff from attempting to justify and defend what goes
15 on in these findings and recommendations that we're
16 going to fighting about for two hours later on today.

17 That's where we were going and I was quite willing to
18 make that kind of compromise. I don't see that here
19 today and so you can understand my dissatisfaction
20 with the result and why -- I'll just stop talking
21 about it and why don't we just vote it through since
22 I'm not going to prevail on it.

23 COMMISSIONER BRACERAS: Can I be heard?

24 CHAIRMAN REYNOLDS: Yes. Commissioner
25 Braceras.

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1 COMMISSIONER BRACERAS: (Speaking from
2 unmiked location.)

3 CHAIRMAN REYNOLDS: Commissioner BRACERAS,
4 Jennifer, can you go closer to the microphone on your
5 phone?

6 COMMISSIONER BRACERAS: Yes. Can you hear
7 me now?

8 CHAIRMAN REYNOLDS: Yes.

9 COMMISSIONER BRACERAS: Hello?

10 CHAIRMAN REYNOLDS: That's better.

11 COMMISSIONER BRACERAS: All right. The
12 first is as I said from the beginning that there are
13 two sets of issues here. One involves front end
14 procedures and has to do with what happens at the staff
15 level. The other has to do with back end procedures
16 and how we as commissioners procedurally handle these
17 reports.

18 So one possibility is to go on to aspects.
19 The other part is that although we have something
20 today that doesn't end for today on this and I think
21 that the working group can continue to tinker with
22 these policies and fine-tune them. I think if I'm not
23 mistaken the rationale for bringing these policies and
24 procedures forward for a vote today is so that we can
25 move forward with the reports that are becoming stale,

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1 obviously a work in progress for dealing with them
2 until such time that we can come up with something
3 better.

4 We should always strive for something
5 better and I'm willing to continue to do that. But I
6 do think it's critical that we get some procedures in
7 place today so that we can review the reports better
8 on the table and that will be coming to the table in
9 the next two months. That I guess goes to, I think,
10 it was Commissioner Kirsanow said, as to whether what
11 we're approving is prospective or retrospective. I
12 would argue that with at least with respect to the
13 back-end procedures and how Commissioners vote on and
14 profit from anything we vote on today will be tied to
15 any subsequent vote we take under 4 CFR before, today
16 or in the future until we come up with something
17 different. That's all I have to say about that.

18 CHAIRMAN REYNOLDS: Okay. Are there other
19 questions? Commissioner Taylor.

20 COMMISSIONER TAYLOR: Very quick comments.
21 First is that this is not, I think, the final word on
22 this. I think we should continue to work even after
23 this vote today. I think it's important though to
24 vote on this today to move the reports in the pipeline
25 at some point. The ones in the pipeline really worry

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1 me and we're holding ourselves back.

2 But the larger issue to Commissioner
3 Yaki's point of the issue of briefings evolving is
4 that when the briefings were first raised the thought
5 was that frankly there would be a lot of briefings
6 every year. And I want to point out to everyone if we
7 look at our calendar we've adopted, we have four
8 listed and I think we've had two more that are not
9 listed. We have actually reduced the number of
10 briefings that we intend to hold throughout the year
11 and I think that in large measure addresses the point
12 raised by Commissioner Yaki and even his suggested
13 compromise of two to three is not a far cry from the
14 six briefings we're going to end up with in reality.

15 I think we've had two lines that have been
16 getting closer and closer and I think they are very
17 close now and I think that marginal difference is not
18 a reason to hold back the reports in the pipeline
19 today. But I think even that marginal difference can
20 be reconciled over the next two months with a little
21 bit of work. So we should do both, I think,

22 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

23 VICE CHAIRPERSON THERNSTROM: I agree we
24 should bring this to a vote and I also agree that this
25 is not the final word. I would say however that there

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1 remain on the table very important disagreements that
2 I don't think are going to get papered over with
3 further discussion.

4 CHAIRMAN REYNOLDS: Commissioner Melendez.

5 COMMISSIONER MELENDEZ: Just going back to
6 where we started discussing this whole process, I
7 don't know when it was, the issue actually was whether
8 or not it sounded to me like AI 1-6 applied to all
9 reports, statutory, all the different reports we had.

10 At the time, we were going to ask a question as far
11 as formal hearings, you know, that would be where we
12 can subpoena witnesses basically and maybe there's
13 more process and procedures on recommendations and
14 findings in hearings. So I wasn't even sure whether
15 or not this Commission was supposed to doing briefings
16 that led up to hearings, maybe we're the eyes and
17 ears, and when important issues in this country come
18 in the form of a briefing, we sure knew it wasn't
19 coming from the SACs. I mean I never really heard
20 what was going on there that really trickled into the
21 Commission here. So it seemed to me with all the
22 different briefings that we were holding some of those
23 would actually be so important that they'd actually
24 end up being a hearing. I'm not sure whether that's
25 part of the process or not.

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1 But at the very beginning, the question
2 was should AI 1-6 be for all reports. It sounded
3 logical to me. But then at some point, we started to
4 change. At some point in February and all these
5 different reasons, it sounds like we wanted to become
6 more discretionary in not having this legal
7 sufficiency and editorial review and all that stuff.
8 We wanted to kind of give them more discretion. To
9 me, it sounded like we should just maintain that all
10 reports coming out of the Commission are quality, that
11 we should applied the same AI 1-6 standards to
12 everything. I think that's where we kind of went off
13 on some watered-down process with discretion in it
14 within the Staff Director doing some of this.

15 That's my issue here and not only that.
16 In the GAO Report of 2006, it sounded like he was
17 actually looking at those very things that we're
18 talking about today. So in my opinion, if we make
19 this motion here today, we haven't really increased
20 quality. Actually, we've decreased the quality of the
21 reports that are going to come out of this Commission.

22 So that's the reason I would oppose this. I just
23 think that there's a lot more work we have to do to
24 come to some agreement. Thank you.

25 CHAIRMAN REYNOLDS: The work will continue

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1 and ask for AI 1-6 applied to whole briefing. At
2 least one Commissioner has taken the position that
3 that rule applies to all reports, but other
4 Commissioners have taken a different position. For
5 example, I don't believe, that AI 1-6 when that rule
6 was put into place, that there was an intent to have
7 it apply to briefing reports. There was no discussion
8 at that time. Well, at the time that it was put into
9 place, the discussion centered around our national
10 reports. It was some months later when we decided to
11 do briefings. Well, the briefings, the decision to do
12 briefings came after the decision to apply the
13 standards that are in AI 1-6. So I just want to be
14 clear that there is a disagreement as to whether we
15 intended AI 1-6 to apply to both briefings and
16 national reports.

17 COMMISSIONER BRACERAS: Can we call the
18 question?

19 VICE CHAIRPERSON THERNSTROM: Yes.

20 CHAIRMAN REYNOLDS: All in favor please
21 signify by saying aye.

22 (Chorus of ayes.)

23 CHAIRMAN REYNOLDS: In all in opposition.

24 (Two opposed.)

25 COMMISSIONER YAKI: No.

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1 COMMISSIONER MELENDEZ: Opposed.

2 CHAIRMAN REYNOLDS: Please let the record
3 reflect that Commissioners Yaki and Melendez opposed
4 the motion. The remaining Commissioners support it.
5 The motion carries.

6 VI. PROGRAM PLANNING - AFFIRMATIVE ACTION IN LAW

7 SCHOOLS BRIEFING REPORT

8 CHAIRMAN REYNOLDS: The next item on the
9 agenda is the Affirmative Action in Law School
10 Briefing Report. Consideration of this report was
11 postponed until the new procedures for briefing
12 reports were approved. That this has now been
13 resolved, may I have a motion that the Commission
14 approve for publication along with any concurring and
15 dissenting statements submitted by any Commissioner by
16 March 23 -- I'm sorry. Hold on. How much time do
17 folks -- How much time will folks need to review?
18 Will two weeks suffice?

19 VICE CHAIRPERSON THERNSTROM: No.

20 CHAIRMAN REYNOLDS: Okay. A month?

21 COMMISSIONER BRACERAS: To review what?

22 CHAIRMAN REYNOLDS: To review the report.

23 COMMISSIONER BRACERAS: Which report are
24 you talking about?

25 CHAIRMAN REYNOLDS: The Affirmative Action

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1 in Law Schools Briefing Report.

2 COMMISSIONER BRACERAS: Haven't we
3 reviewed that for a month?

4 STAFF DIRECTOR MARCUS: I think the
5 question is if anyone wants to write a concurring or
6 dissenting opinion that hasn't yet been completed, how
7 much additional time they will need.

8 CHAIRMAN REYNOLDS: That's right.

9 COMMISSIONER BRACERAS: Okay. Thank you.

10 CHAIRMAN REYNOLDS: Will 30 days do?

11 VICE CHAIRPERSON THERNSTROM: Yes.

12 COMMISSIONER YAKI: No.

13 VICE CHAIRPERSON THERNSTROM: Wait a
14 minute. How much time do you -- Do you want a year?

15 COMMISSIONER BRACERAS: -- probably three
16 or four.

17 COMMISSIONER YAKI: I'm sorry. Perhaps
18 the fact that as a partner in a law firm, I have other
19 responsibilities as well.

20 VICE CHAIRPERSON THERNSTROM: I'm sorry.

21 COMMISSIONER YAKI: This is a very heavy
22 month for me.

23 VICE CHAIRPERSON THERNSTROM: Yes. I'm
24 sorry. I apologize, Commissioner Yaki.

25 COMMISSIONER YAKI: I have patients that

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1 are going berserk right now. I've been basically -- I
2 email back and forth to my office and I'm on travel
3 half this month devoted toward these case.

4 VICE CHAIRPERSON THERNSTROM: I'm sorry.
5 I apologize for that. I do. It was uncalled for.

6 CHAIRMAN REYNOLDS: Okay. Commissioner
7 Yaki.

8 COMMISSIONER YAKI: I would like 45 days.

9 CHAIRMAN REYNOLDS: Any objections to 45
10 days?

11 (No response.)

12 CHAIRMAN REYNOLDS: Okay. All right. So
13 the dissents and conferring statements will be
14 submitted 30 days from today.

15 COMMISSIONER YAKI: Forty-five.

16 CHAIRMAN REYNOLDS: I'm sorry. Forty-five
17 days from today. Part A of the Affirmative Action in
18 Law Schools Briefing -- I'm sorry. This draft
19 reflects Commissioner and panelists' input on the
20 briefing the Commission held on June 16, 2006 on
21 Affirmative Action in American Law Schools.

22 Part A as distributed in draft form to
23 Commissions on April 5, 2007 contains an executive
24 summary with a brief overview of the issue and an
25 explanation of why the Commission chose to conduct

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1 this briefing. A summary of the proceedings
2 consisting of synopses of the panelists' oral
3 statements during the briefing and a synopsis of the
4 question and answer sessions and finally copies of the
5 panelists' written statements.

6 Under this motion if a majority of the
7 Commissions votes to adopt Part A of the briefing
8 report the Commission will then open discussion on
9 Part B. Is there a second?

10 VICE CHAIRPERSON THERNSTROM: Second.

11 CHAIRMAN REYNOLDS: Discussion.

12 COMMISSIONER YAKI: Point of order. In
13 terms of the new procedures that we adopted today, I'd
14 like to know whether or not what effected agency
15 review was conducted with regard to this report.

16 CHAIRMAN REYNOLDS: May I amend your --
17 Offer a friendly amendment and ask whether this report
18 conforms to the procedures that we just adopted.

19 COMMISSIONER YAKI: That can be it, but I
20 was just asking about effected agency reviews since
21 our findings and recommendations make mention of
22 various agencies.

23 STAFF DIRECTOR MARCUS: I know that
24 Commissioner Melendez previously asked that question
25 and I responded to all of the Commissioners and my

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1 recollection is that the answer on this one is that
2 there was no agency that was deem to require a review.
3 So it did not go to any agency for that.

4 COMMISSIONER YAKI: What determines -- I
5 don't mean to beat a dead horse, but what determines
6 whether or not an agency is entitled to review or not
7 because it says there's another agency affected by the
8 report. Here we're talking about the National
9 Academy. We're talking about Congress. I just wanted
10 to know whether or not -- And by implication through
11 this, the Department of Education, I'm just wondering
12 if they had been consulted as part of this as well.

13 STAFF DIRECTOR MARCUS: In general the
14 question is whether the work of other agencies is
15 assessed or described or analyzed or criticized in any
16 way with which they would need to comment on or
17 correct and that was considered not to be the case for
18 this document.

19 COMMISSIONER YAKI: It wasn't?

20 STAFF DIRECTOR MARCUS: That's correct.

21 COMMISSIONER YAKI: Not withstanding the
22 fact that these standards dealt with the Department of
23 Education in terms of Standard 211 and -- I'm just
24 curious. The answer is no?

25 STAFF DIRECTOR MARCUS: The answer is no.

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1 COMMISSIONER YAKI: Okay.

2 CHAIRMAN REYNOLDS: Other questions?

3 Comments?

4 VICE CHAIRPERSON THERNSTROM: Call the
5 question.

6 COMMISSIONER KIRSANOW: No, we're going to
7 go on the findings recommendations that we're going to
8 vote on each one one at a time, right?

9 CHAIRMAN REYNOLDS: No, first we have to
10 vote on Part A before we get to Part B.

11 COMMISSIONER KIRSANOW: Okay.

12 CHAIRMAN REYNOLDS: All in favor, please
13 signify by saying aye.

14 (Chorus of ayes.)

15 CHAIRMAN REYNOLDS: Objections? Opposed?

16 (One opposed.)

17 CHAIRMAN REYNOLDS: Abstentions?

18 COMMISSIONER MELENDEZ: I abstain.

19 CHAIRMAN REYNOLDS: Please let the record
20 reflect that Commissioner Yaki opposes the motion.
21 Commissioner Melendez abstains and the remaining
22 Commissioners voted in the affirmative.

23 COMMISSIONER YAKI: I'll change my vote to
24 abstain.

25 CHAIRMAN REYNOLDS: Okay. Please let the

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1 record reflect that both Commissioners Melendez and
2 Yaki abstain from the vote. The remaining
3 Commissioners vote in favor. The motion carries.

4 Okay. Since the Commission has adopted
5 Part A of the briefing report, we will address Part B.

6 Part B as distributed in draft form to Commissioners
7 on April 5, 2007 contains the Commission's findings
8 and recommendations. Under this motion, the
9 Commission will vote individually on each finding and
10 recommendation.

11 The first finding reads as follows:
12 "Richard Sander, November 2004, Article, Systematic
13 Analysis of Affirmative Action in American Law Schools
14 in the *Stanford Law Review*, attributed disparities
15 between white and African American law students in
16 grades, graduation and bar passage rate to an academic
17 mismatch. Specifically, Professor Sander concluded
18 that large racial preferences employed by law schools
19 in admissions had demonstratively counterproductive
20 effects on their intended beneficiaries, that is, many
21 African American law school applicants are admitted to
22 law schools for which they are not academically
23 qualified." Is there a second?

24 VICE CHAIRPERSON THERNSTROM: Second.

25 CHAIRMAN REYNOLDS: Discussion.

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1 (No response.)

2 CHAIRMAN REYNOLDS: Okay. I'll call the
3 question. All in favor?

4 (Chorus of ayes.)

5 CHAIRMAN REYNOLDS: All in opposition?

6 COMMISSIONER MELENDEZ: Aye.

7 COMMISSIONER YAKI: Aye.

8 CHAIRMAN REYNOLDS: Let the record reflect
9 that Commissioners Melendez and Yaki oppose the
10 motion. The remaining Commissioners vote in favor.
11 The motion carries.

12 COMMISSIONER BRACERAS: Just a point of
13 information. Is that going to be specifically
14 indicated under finding, how many votes for and how
15 many against?

16 CHAIRMAN REYNOLDS: Yes. I believe that
17 our new rule requires that.

18 VICE CHAIRPERSON THERNSTROM: Yes, with
19 the identification of.

20 COMMISSIONER BRACERAS: Yes.

21 CHAIRMAN REYNOLDS: Of the Commissioners
22 who --

23 VICE CHAIRPERSON THERNSTROM: Yes.

24 CHAIRMAN REYNOLDS: Okay. I move -- The
25 second finding is "both Sander's supporters and

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1 critics have agreed that there are significant
2 disparities between white and African American law
3 students in terms of grades, graduation and bar
4 passage rates. However, others disagree with Sander's
5 assertion that academic mismatch is the culprit. Data
6 that would enable researchers to further evaluate the
7 strength of the academic mismatch theory is not
8 available." Discussion. Commissioner Yaki.

9 COMMISSIONER YAKI: Yes, I move to amend
10 this one to state that "both Sander's supporters and
11 critics have agreed that there are strikingly
12 significant disparities between white and African
13 American law students in terms of grades, graduation
14 and bar passage rates. The vast majority of the
15 literature disputes Sander's statistical and
16 scientific conclusions and do not agree with Sander's
17 assertion that academic mismatch is the culprit."
18 That's how I would amend it.

19 CHAIRMAN REYNOLDS: Okay. Vice Chair
20 Thernstrom.

21 VICE CHAIRPERSON THERNSTROM: I can't go
22 along with that. First --

23 COMMISSIONER YAKI: Of course, you can't.

24 VICE CHAIRPERSON THERNSTROM: Yes. First
25 place, if there aren't significant disparities, then

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1 why is this even an issue?

2 COMMISSIONER YAKI: Exactly.

3 VICE CHAIRPERSON THERNSTROM: I mean if
4 there are trivial disparities we shouldn't even be
5 talking about the question. And, no, I can't possibly
6 sign on to the notion that to some suggestion that
7 Sander's work lacks --

8 COMMISSIONER HERIOT: We don't have second
9 yet. So there's no --

10 COMMISSIONER MELENDEZ: Yes, we need a
11 second to amend it.

12 VICE CHAIRPERSON THERNSTROM: I'm sorry.

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

15 COMMISSIONER BRACERAS: Yes, second.

16 CHAIRMAN REYNOLDS: All right. Vice Chair
17 Thernstrom, have you completed your thought?

18 VICE CHAIRPERSON THERNSTROM: The second
19 thought was simply that the second part of
20 Commissioner Yaki's amendment suggests that Sander's
21 work lacks integrity and that there is some kind of at
22 least widespread consensus on that. I can't sign onto
23 that either.

24 CHAIRMAN REYNOLDS: Additional comments?
25 Commissioners Yaki.

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1 COMMISSIONER YAKI: Let me just defend my
2 characterization. At the hearing, we heard Professor
3 Sander discuss his methodology and then discuss his
4 reformulated methodology. He did not really indicate
5 that there were others who had taken the same
6 methodology and reached the same conclusion.

7 To the contrary, we heard a number of
8 different reports, not just from Professor Lempert,
9 but Professor Ayres and Professor Brooks, and other
10 professors at UCLA, as I said, in the *Stanford Law*
11 *Review* article. There were too many responses that
12 they could even publish to the original Sander
13 finding. There are still problems, quantitatively and
14 with the Sander second revised proposal. And that to
15 me was pretty clear and continues to be pretty clear
16 that Dr. Sander, Professor Sander, pretty much stands
17 alone.

18 Whether he's right or not you may choose
19 to believe he's right, Commissioner Thernstrom. But
20 certainly from an objective point of view, the vast
21 amount of research out there today refutes what Sander
22 is saying and I don't see why it should not be put in
23 there. Certainly the idea that the supporters and
24 critics are evenly matched is quite -- The inference
25 is completely wrong and I think that that should be

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1 highlighted in there.

2 CHAIRMAN REYNOLDS: Commissioner Yaki, it
3 seems to me that there is a dispute over the
4 methodological approach. But the issue that's on the
5 table here is whether there are significant
6 disparities in terms of grades, graduation and bar
7 passage.

8 COMMISSIONER YAKI: But part of --

9 CHAIRMAN REYNOLDS: Hear me out.

10 COMMISSIONER YAKI: Okay.

11 CHAIRMAN REYNOLDS: And these facts I
12 don't believe are in dispute.

13 COMMISSIONER YAKI: I would say that if
14 you read the testimony of Professor Lembert, he indeed
15 takes issue with the fact that the disparities are as
16 great A.S. Sander says. They attack the control group
17 and when you have a control group that is wrong,
18 you're going to get result that are wrong and whether
19 you agree or disagree with that, the fact is that
20 there is disagreement on whether or not the
21 disparities are significant or not especially with
22 regard to some of the factors that are put forth in
23 this. I'm just trying to be factual and correct in
24 this particular characterization of Sander's research
25 and the criticisms of it and I think that you will

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1 find people who will say that you will get different
2 disparities depending on the different datasets you
3 get. Some may be significant. Some may not be and
4 Lempert had charts that show that the disparity in
5 some instances was not as great as Sander would assert
6 it to be.

7 COMMISSIONER BRACERAS: Excuse me. I'm
8 sorry. I just wanted to tell you all that I'm going
9 to step away from the phone for a moment or two. I
10 will be back. But I'll just tell you now it's going
11 to be the questions that I'm not participating in from
12 now until the time I get back. But I need to --

13 VICE CHAIRPERSON THERNSTROM: And you
14 don't have any immediate comment on this.

15 COMMISSIONER BRACERAS: I have not
16 immediate comment. I just wanted the record to
17 reflect that I'm standing away and I'll let you know
18 when I'm back.

19 CHAIRMAN REYNOLDS: Okay. Thank you.
20 Commissioner Kirsanow.

21 COMMISSIONER KIRSANOW: I don't want to
22 belabor the point. I think that there was
23 considerable evidence adduced at the hearing with
24 respect to the characterization of the three sentences
25 that are contained in this Finding No. 2.

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1 I think if memory serves correctly,
2 Professor Lemberg was talking in terms of certain
3 grades, not even grades because some of these
4 institutions don't even have grades by which you can
5 measure. But to the extent there are grades, there
6 are disparities in those grades and they're
7 significant. There is the testimony that we deduced
8 and I think Lemberg even agreed with this is that on a
9 1,000 point scale there's about 135 point difference
10 between blacks and whites in terms of their academic
11 performance.

12 There is significance difference in terms
13 of -- and this was not disputed either that
14 approximately 50 percent of all black students in law
15 schools cluster in the bottom 10 percent of the law
16 school classes which would actually make the bottom 10
17 percent virtually all black. I consider that to be a
18 significant disparity, maybe a deplorable disparity,
19 maybe a -- I don't know what other adjective we can
20 use.

21 And bar passage rates, I don't think there
22 was any dispute there, although he did -- maybe it
23 would be cabined in terms of bar passage rates in
24 terms of certain states. California, we didn't have a
25 bar passage rate for, but for the states that we have

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1 bar passage rates, blacks were six times as likely to
2 fail. That's astonishing. That's not just
3 significant. That's astonishing. Six times as likely
4 to fail and I think all the other witnesses concurred
5 with that including Professor Bernstein from George
6 Mason. So I would agree with the first one --

7 COMMISSIONER YAKI: He is on your side
8 though.

9 COMMISSIONER KIRSANOW: And that's why you
10 disagree with him. We are talking about the testimony
11 that was adduced.

12 And in terms of the second sentence,
13 "others disagree with Sander's assertions" suggests
14 that there are multiple people that disagree with one
15 person. It's not as if we're trying to suggest that
16 the proposition is evenly matched. Others disagree
17 with him, but we had Sander in front of us and he's
18 the one in front of us that had conducted a full-scale
19 study. Professor Lemberg did not. And they both
20 agreed that we need more research on this. I think
21 everybody concludes that this is preliminary research
22 and I know Professor Sander is seeking to conduct more
23 comprehensive research including bar passage rates
24 from the State of California.

25 CHAIRMAN REYNOLDS: Commissioner Taylor.

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1 COMMISSIONER TAYLOR: As to the first
2 sentence, I think from my recollection of the evidence
3 at least and the material from my perspective
4 indicated that the disparities were significant and
5 indeed -- As to the second sentence, others disagree
6 could be read to imply a balance of views and I think
7 at this point, I think it's accurate to say that a
8 vast majority of literatures is again saying this on
9 the mismatch issue. And the third point, that is that
10 everyone agrees you need more research on the mismatch
11 issues specifically is a valid statement. So that
12 reason I think we should keep "significant." I don't
13 mind changing the second sentence to indicate that at
14 this point Sander is not in the majority and indeed
15 there is not a balanced argument in that regard and
16 that they both agree that you need more evidence to
17 determine who's right. That was my recollection of
18 the evidence.

19 CHAIRMAN REYNOLDS: . Okay. Let's call the
20 question.

21 VICE CHAIRPERSON THERNSTROM: Can I --

22 CHAIRMAN REYNOLDS: Commissioner
23 Thernstrom.

24 VICE CHAIRPERSON THERNSTROM: Yes.

25 CHAIRMAN REYNOLDS: That's quite nice.

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1 VICE CHAIRPERSON THERNSTROM: Thank you,
2 dear. I'm scribbling here. I'm drawing. I actually
3 have a problem with the last sentence stated that
4 there will be researchers to further evaluate the
5 strength of the academic mismatch there is not widely
6 available -- I don't know what "widely" means, but I
7 mean it is available and Professor Sander continues to
8 work on it, not as well as other people though. There
9 are a lot of people working on it.

10 COMMISSIONER KIRSANOW: It may not be
11 readily available because he's having significant
12 difficulty.

13 VICE CHAIRPERSON THERNSTROM: All right.
14 Readily-available. That he is not --

15 COMMISSIONER KIRSANOW: -- drawing that
16 information out because --

17 VICE CHAIRPERSON THERNSTROM: But nobody
18 is at the end of the road in terms of exploring this
19 issue.

20 COMMISSIONER KIRSANOW: I don't disagree
21 with you. He's saying that he's having a difficult
22 time and others have had a difficult time teasing out
23 the information because it's being kept more closely
24 than the secrets to the Manhattan Project.

25 VICE CHAIRPERSON THERNSTROM: And I really

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1 don't care in the Academy which I have no respect for
2 in general what the balance of agreement is on
3 Sander's assertions, but that seems to me simply
4 saying others disagree. Okay. That is accurate.
5 Others disagree. I don't care what the numbers are.

6 CHAIRMAN REYNOLDS: Okay.

7 VICE CHAIRPERSON THERNSTROM: I would like
8 it to remain as is. In other words, I would like us
9 to vote on this as the motion was.

10 COMMISSIONER KIRSANOW: There is been an
11 amendment we had to vote on, Commissioner Yaki's
12 amendment first and then we will vote on this one.

13 CHAIRMAN REYNOLDS: Okay. All in favor of
14 Commissioner Yaki's amendment, please signify by
15 saying aye.

16 COMMISSIONER YAKI: Aye.

17 COMMISSIONER MELENDEZ: Aye.

18 CHAIRMAN REYNOLDS: All in opposition?

19 (Chorus of nays.)

20 CHAIRMAN REYNOLDS: Okay. Please let the
21 record reflect that Commissioners Melendez and Yaki
22 voted in the affirmative. The remaining Commissioners
23 voted against. The motion does not carry.

24 Next up we're going to vote on the
25 original motion. All in favor please signify by

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1 saying aye.

2 (Chorus of ayes.)

3 CHAIRMAN REYNOLDS: All in opposition?

4 COMMISSIONER YAKI: No.

5 COMMISSIONER MELENDEZ: No.

6 CHAIRMAN REYNOLDS: Okay. Please let the
7 record reflect that Commissioners Yaki and Melendez
8 voted in the negative. The remaining Commissioners
9 voted in the affirmative. The motion carries.

10 Okay. I move that we adopt the Finding
11 No. 3 which reads: "Minority lost students may better
12 gauge their likelihood of academic success at a given
13 law school and future career prospects if law schools
14 and the entities responsible for granting admission to
15 the bar publicly disclose the extent to which they use
16 race and admissions data on academic performance, bar
17 passage rates, graduation rates, student loan default
18 rate and grade point averages disaggregated by rates.

19 Is there a second?

20 COMMISSIONER KIRSANOW: Second.

21 CHAIRMAN REYNOLDS: Discussion.
22 Commissioner Yaki.

23 COMMISSIONER YAKI: Why don't we just put
24 on every law school sign, every law school, a warning
25 for minority students "Don't come here. You're likely

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1 to fail." This is an amazing endorsement, a stereo-
2 type threat and I can't endorse it.

3 CHAIRMAN REYNOLDS: Okay. I -- Jump right
4 in, Commissioner Heriot.

5 COMMISSIONER HERIOT: I'm thinking about
6 maybe a motion to amend this. Is it really the data
7 that we want desegregated by race or desegregated by
8 academic credentials? A student of any particular
9 race shouldn't want to know how the people of my race
10 did. They should want to know how do people of my
11 academic credentials do because that's what matters
12 and the notion that we should look at this by race I
13 think is a big mistake. This is an issue of academic
14 credentials.

15 COMMISSIONER KIRSANOW: I would agree with
16 that and I'd also strike the first word in this,
17 minority. I think all students may better gauge how
18 they would perform and the problem is I think
19 Professor Bernstein read maybe an apocryphal email
20 from the student from Colorado Law School who happened
21 to be a minority student self-identified and thought
22 that this was a bait and switch where she was
23 encouraged and lured to go to this place with the
24 promise that she was going to graduate and everything
25 and have a fine academic career and fine legal career

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1 and found out that in fact had she known what
2 individuals with her grade point average and LSAT
3 scores, how they fare in law school, she would have
4 found some other place to go to rather than spend all
5 the money going to Colorado State or Colorado Law
6 School. But I would suggest, I would amend the
7 friendly amendment to strike "Minority law students"
8 and just put "law students."

9 COMMISSIONER HERIOT: Yes.

10 VICE CHAIRPERSON THERNSTROM: Commissioner
11 Heriot, do you also want to strike then "the extent to
12 which racial preferences are used"?

13 COMMISSIONER HERIOT: I don't know about
14 that.

15 COMMISSIONER KIRSANOW: I happen to think
16 personally since I'm an amendment to the friendly
17 amendment I would keep that in.

18 VICE CHAIRPERSON THERNSTROM: Yes.

19 COMMISSIONER KIRSANOW: Or possibly
20 segregate to the subcategory 3(a). But nonetheless
21 that is pertinent.

22 VICE CHAIRPERSON THERNSTROM: Right.

23 COMMISSIONER KIRSANOW: What we did have
24 was testimony that referenced a study and I believe it
25 was by the Center for Equal Opportunity.

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1 VICE CHAIRPERSON THERNSTROM: It was.

2 COMMISSIONER KIRSANOW: It showed the
3 greater the preference the greater the likelihood of -
4 - I'm sorry. Maybe we shouldn't have quoted somebody
5 else, but the fact of the matter is if somebody else
6 has another study let him put it forth and that
7 studied showed the greater the preference the more
8 likely the student is to flunk out and I think it is
9 the job of this Commissioner to alert minorities to
10 these kinds of difficulties. This is not a good thing
11 for minorities that are being sold the Santa Claus
12 version of what it's like to go to college and law
13 school and then they flunk out or do poorly and that
14 just breeds resentment.

15 But more importantly is those individuals
16 who celebrate the number of people who are in school
17 have failed to graduate I would suggest are not acting
18 necessarily in the best interest of minorities. I
19 would rather think that it's more likely to yield a
20 better society where we're celebrating the number of
21 those who graduate and become productive members of
22 society. Garbage input, garbage output.

23 CHAIRMAN REYNOLDS: Commissioner Yaki, you
24 have a question.

25 COMMISSIONER YAKI: No. Just a heavy

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1 sigh.

2 COMMISSIONER HERIOT: Let's make this more
3 of an official motion.

4 VICE CHAIRPERSON THERNSTROM: Yes.

5 COMMISSIONER HERIOT: I move that this be
6 amended to read No. 3 "Law students may better gauge
7 their likelihood of academic success at a given law
8 school and future career prospects if law schools and
9 the entities responsible for granting admission to the
10 bar publicly disclose the extent to which they use
11 race and admission and data on academic performance,
12 bar passage rates, graduation rates, student loan
13 default rates and grade point averages disaggregated
14 by academic credentials."

15 COMMISSIONER KIRSANOW: Second.

16 VICE CHAIRPERSON THERNSTROM: Good. Like
17 it.

18 CHAIRMAN REYNOLDS: Commissioner Melendez.

19 COMMISSIONER MELENDEZ: I don't know that
20 distributing this kind of information could result in
21 misuse that actually harms minorities. I'm just
22 saying that you'd better sure that that's not going to
23 happen and I think that even the Staff Director may,
24 this question may have been raised by your staff
25 people as far as it gets to be a legal thing and I'm

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1 not sure what you're feeling on this component here.
2 I just feel uncomfortable with distributing
3 information like that that has a potential to harm
4 minority students and I think you have to really think
5 that out as to could that be possible.

6 COMMISSIONER KIRSANOW: I'm just -- Just
7 as a question to --

8 COMMISSIONER BRACERAS: I'm back.

9 COMMISSIONER KIRSANOW: How does this harm
10 the minority students?

11 COMMISSIONER MELENDEZ: I'm not sure.

12 COMMISSIONER KIRSANOW: Are you referring
13 to personally identifying?

14 COMMISSIONER MELENDEZ: And who we give
15 that information to, I guess, would be the question.

16 VICE CHAIRPERSON THERNSTROM: It seems to
17 me the thrust here is to help minority students and
18 other students, not only minority. That was why this
19 was amended who are entering law school with
20 credentials that are way below average. Those are the
21 average student.

22 CHAIRMAN REYNOLDS: So in effect this is a
23 form of consumer protection. Potential law students
24 would have additional information on which to base
25 their decision.

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1 COMMISSIONER YAKI: Then why have the
2 criteria and if they use race and admissions then?

3 CHAIRMAN REYNOLDS: That would shed some
4 light and provide some transparency as to what schools
5 are actually doing. I think it would be helpful for
6 researchers. I think that as a public policy matter
7 if you're going to do it well and you think that
8 there's value to it then there should be no reason to
9 hide the extent to which racial preferences are used
10 in the omissions process.

11 COMMISSIONER YAKI: I think you're just
12 making ensure that they're targets for ward Connolly
13 and I object to that.

14 CHAIRMAN REYNOLDS: This is not going to
15 prevent Ward Connolly -- This does not provide Ward
16 Connolly with any additional abilities to move forward
17 with an initiative. He's doing it in the absence of
18 this data.

19 COMMISSIONER KIRSANOW: Mr. Chairman.
20 There is a technical reason to provide this kind of
21 information going beyond a policy reason. One is that
22 there are a number of individuals who are apply to a
23 law school with sterling credentials thinking that
24 with these credentials they're going to get admitted,
25 at least, based on the objective criteria set forth in

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1 the various publications that say what the admissions
2 rates are. However, they then come to find out that
3 they've been rejected and don't know the reasons
4 therefore.

5 A little bit further data reveals that
6 sometimes they are rejected because someone with less
7 sterling credentials gets admitted because there is a
8 racial preference in place. Those individuals have
9 spent time and energy and money applying to those
10 places when they probably could have devoted their
11 attention to applying to another school that doesn't
12 have this regime in place.

13 COMMISSIONER YAKI: So you just want to
14 make sure that their resentment is based on fact. Is
15 that what you're trying to do?

16 COMMISSIONER KIRSANOW: No, it's consumer
17 protection.

18 COMMISSIONER YAKI: That's just
19 ridiculous.

20 COMMISSIONER KIRSANOW: Right now -- It's
21 curious. It's very curious that law schools as I say
22 protect like the secrets to the Manhattan Project what
23 the degree of preference is. The reason --

24 COMMISSIONER YAKI: That's because there
25 are people out there like others not in this room who

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1 are going to sue them and that's in a half second.

2 COMMISSIONER KIRSANOW: There are people
3 who are concerned about their protection. There are
4 people who are concerned about black and Hispanic law
5 students who are being sold a pig in a poke saying,
6 "Come on in here. Spend your money here and whether
7 you graduate..."

8 COMMISSIONER YAKI: That's not the data
9 that -- about African Americans in Michigan.

10 COMMISSIONER KIRSANOW: And whether or not
11 you graduate is a wholly different proposition.

12 CHAIRMAN REYNOLDS: Gentlemen. Let's --

13 COMMISSIONER KIRSANOW: It's very similar
14 to the schools that invite black athletes in and say
15 "Come on here. Play for us" and then don't graduate
16 them. "We love your presence here as mascots and
17 everybody else, but whether or not you graduate,
18 that's your problem, not ours."

19 CHAIRMAN REYNOLDS: Commissioner Heriot.

20 COMMISSIONER HERIOT: I may be able to put
21 Commissioner Yaki's mind at rest a bit. Ward
22 Connolly's initiatives, of course, only apply to
23 public universities. As a result, he has access to
24 this information through FOIA requests anyway. The
25 reason for this finding is not for Ward Connolly or

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1 anyone else who might wish to pursue a public
2 initiative but rather for individual applicants.

3 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

4 VICE CHAIRPERSON THERNSTROM: I mean I
5 hate to play social scientist here and intellectual
6 and scholar, but, you know --

7 COMMISSIONER YAKI: But you can't help
8 myself.

9 VICE CHAIRPERSON THERNSTROM: I can't help
10 myself and the more information that a reliable source
11 that I have to think about very hard problems and
12 these are tough problems, the better off we all are so
13 that we're not just trading accusations and
14 suppositions and frankly junk that is ideologically
15 driven. So I just -- More information is better than
16 less information.

17 COMMISSIONER KIRSANOW: If racial
18 preferences are such a good thing, why don't college
19 comp it? Why don't they say we give you a ten percent
20 preference? We give you a 50 percent preference? Why
21 are they hiding it?

22 VICE CHAIRPERSON THERNSTROM: Absolutely.
23 And we're -- because we believe in it. Absolutely.
24 There's an argument for them.

25 CHAIRMAN REYNOLDS: Okay. Let's vote.

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1 All in favor, please say aye.

2 (Chorus of ayes.)

3 CHAIRMAN REYNOLDS: As amended.

4 COMMISSIONER BRACERAS: Aye. I'm back.

5 COMMISSIONER KIRSANOW: Did she hear the
6 amendment by the way?

7 CHAIRMAN REYNOLDS: Commissioner Braceras,
8 the motion was amended.

9 COMMISSIONER BRACERAS: Could you read it
10 to me please?

11 CHAIRMAN REYNOLDS: Commissioner Heriot,
12 would you mind?.

13 COMMISSIONER HERIOT: Okay. Commissioner
14 Braceras, this is for No. 3. Under the motion, it
15 would read, "Law students may better gauge their
16 likelihood of academic success at a given law school
17 and future career prospects if law schools and the
18 entities responsible for granting admission to the bar
19 publicly disclosed the extent to which they use race
20 and admissions and data on academic performance, bar
21 passage rates, graduation rates, student loan default
22 rates and grade point averages disaggregated by
23 academic credentials."

24 COMMISSIONER BRACERAS: Okay. Great. I
25 still vote aye. Thank you very much.

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1 CHAIRMAN REYNOLDS: Okay. All in
2 opposition?

3 COMMISSIONER YAKI: Absolutely.

4 COMMISSIONER MELENDEZ: Aye.

5 CHAIRMAN REYNOLDS: Please let the record
6 reflect that Commissioners Yaki and Melendez voted
7 against the finding and the remaining Commissioners
8 voted against the finding as amended by Commissioner
9 Heriot. Okay. One of those days. The remaining
10 Commissioners voted to support the motion. So the
11 motion carries.

12 COMMISSIONER HERIOT: Clarification. Was
13 that -- It was my motion, I know. But are we treating
14 that, though as a vote on the actual finding or is that
15 just a motion to substitute and now do we have to vote
16 again on the finding?

17 COMMISSIONER YAKI: No, it's a supremacy
18 motion. So it carries as is. And the underlying
19 motion, there's no need for a vote.

20 COMMISSIONER HERIOT: Okay.

21 CHAIRMAN REYNOLDS: Okay. I move that the
22 following finding be adopted. It reads as follows:
23 "The impact of racial preferences in law school
24 admissions is an important matter of public policy and
25 particularly the public would benefit from further

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1 social science research on such preference's impact on
2 African American and other minority law students.
3 Admitting students into law school for which they
4 might not academically be prepared could harm their
5 academic performance and hinder their ability to
6 obtain and secure gainful employment in the legal
7 profession. Law school entails significant
8 investments of time and financial resource and law
9 students often take out extensive Federal and private
10 loans to finance their education. Racial preferences
11 that contribute to any academic mismatch might
12 therefore also contribute to income and wealth
13 disparities between whites and African Americans." Is
14 there a second?

15 VICE CHAIRPERSON THERNSTROM: I second it.

16 CHAIRMAN REYNOLDS: Discussion. Yes.
17 Commissioner Yaki.

18 COMMISSIONER YAKI: Yes, I'm just
19 wondering why we don't have as a finding the fact that
20 there are many studies that would indicate that the
21 number of African American lawyers would decrease
22 under the Sander's model utilizing his mismatch theory
23 and correction model.

24 CHAIRMAN REYNOLDS: Well -- I'm sorry.
25 I'm just --

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1 COMMISSIONER YAKI: You have Katherine
2 Barnes. You have Ayres and Brooks and you have Lempert
3 all stating that the elimination of these items would
4 actually result in a decrease in the number of African
5 Americans who would be entering the bar.

6 CHAIRMAN REYNOLDS: Vice Chair Thernstrom.

7 VICE CHAIRPERSON THERNSTROM: I believe
8 that what the research finds is a cascading effect
9 such that students who are preferentially admitted
10 today to schools where they are mismatched with the
11 average law student at those schools are going to go
12 to a school that say one tier lower that the only
13 students who will be out of the profession entirely
14 are those at the very bottom who cannot drop down
15 another tier. But those students are not passing the
16 bar exam.

17 CHAIRMAN REYNOLDS: Chairman Heriot, do
18 you have a question?

19 COMMISSIONER YAKI: But we're not making
20 those distinctions. We're not talking about the
21 subtleties of these studies. We're not talking about
22 the fact that there's contrary evidence that would say
23 that students at the top tier law schools do well and
24 do have good bar passage rates. We're not talking
25 about that and instead we're simply creating this

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1 incredible stereotype threat of guess what. You're
2 not going to make it in law school and you're not
3 going to make it in life and I just can't subscribe to
4 that.

5 VICE CHAIRPERSON THERNSTROM: Actually,
6 they don't do well at the top law schools, but in any
7 case, I'm sorry.

8 COMMISSIONER HERIOT: All finding of Fact
9 No. 4 says is this might be so.

10 COMMISSIONER KIRSANOW: That's right.

11 COMMISSIONER HERIOT: And so it's not
12 really --

13 COMMISSIONER YAKI: But it doesn't give
14 the contrary point of view.

15 COMMISSIONER KIRSANOW: But it says who
16 would benefit from further social science research.

17 COMMISSIONER YAKI: But there is already
18 existing a contrary point of view. Rather than simply
19 would benefit from further research, there is already
20 an existing contrary point of view.

21 COMMISSIONER HERIOT: But that's already
22 in No. 2.

23 COMMISSIONER YAKI: Professor Lempert
24 talked about it.

25 COMMISSIONER HERIOT: That's in No. 2.

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1 COMMISSIONER YAKI: No. It simply says
2 there's disagreement, not that in the actual
3 conclusions of 4 that there is actual disagreement on
4 what those conclusions actually are. Two is just
5 blather. Four is specific and four has specific
6 reputations by Lempert, Brooks, Ayres, Barnes, etc.

7 COMMISSIONER KIRSANOW: But these aren't
8 conclusions in four. No. 2 is --

9 COMMISSIONER YAKI: They are findings.

10 COMMISSIONER HERIOT: They are finding
11 that it's possible.

12 COMMISSIONER KIRSANOW: Right.

13 COMMISSIONER YAKI: But we're not talking
14 about the other side at all.

15 COMMISSIONER KIRSANOW: No. 2 acknowledges
16 a disagreement --

17 COMMISSIONER YAKI: No. 2 acknowledges
18 nothing.

19 COMMISSIONER KIRSANOW: No. 2 acknowledges
20 --

21 COMMISSIONER YAKI: No. 2 just
22 acknowledges that maybe there's a --

23 (Both speaking at once.)

24 COMMISSIONER KIRSANOW: But it says right
25 here others disagree.

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1 COMMISSIONER YAKI: -- maybe there are
2 people who disagree.

3 COMMISSIONER KIRSANOW: It says others
4 disagree.

5 COMMISSIONER KIRSANOW: Commissioner --

6 COMMISSIONER YAKI: It doesn't say
7 anything about what the disagreement is.

8 COMMISSIONER KIRSANOW: -- further
9 research on the disagreement.

10 CHAIRMAN REYNOLDS: Gentlemen. Keep it
11 civil.

12 COMMISSIONER YAKI: We're civil. We're
13 just talking loud. Four does not state what the
14 disagreement is with regard to these particular
15 findings and the contrary conclusions driven by other
16 researchers who have taken Sander's data.

17 CHAIRMAN REYNOLDS: Are you suggesting
18 that we don't have the ability to make distinctions
19 and judge the -- to essentially choose amongst
20 competing arguments?

21 VICE CHAIRPERSON THERNSTROM: And put it
22 all in terms of "might contribute."

23 COMMISSIONER KIRSANOW: But you have a
24 predicate in No. 2 that says we have a disagreement.
25 No. 4 says we need further research to tease that out

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1 and find out who's right and who's wrong.

2 COMMISSIONER HERIOT: And that's an
3 important issue. If it might be true, it's important
4 enough to study.

5 COMMISSIONER YAKI: But it posits that
6 there is this thing to study and if you read Lempert
7 and Ayres and Brooks, they're not entirely as
8 conclusive on what their definition of academic
9 mismatch is as what Sander defines academic mismatch.
10 So because of that, you're essentially putting the
11 cart before the horse. That's why -- Forget it. Just
12 vote on it. I'm going to lose on it anyway. What the
13 hell do I care.

14 COMMISSIONER KIRSANOW: Mr. Chair, I do
15 have a question on -- Just to throw out. Not that I
16 would necessarily disagree with this, but something
17 for consideration. The last sentence "Racial
18 preferences that contribute to any academic mismatch
19 might therefore also contribute to income and wealth
20 disparities between whites and African Americans." It
21 may make some logical sense, but that seems to be a
22 little bit of a leap from where the rest of where No.
23 4 is. I'm just throwing that out. I don't
24 necessarily disagree with it, but it does give me a
25 little pause.

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1 CHAIRMAN REYNOLDS: Okay.

2 VICE CHAIRPERSON THERNSTROM: I don't have
3 a problem with it.

4 COMMISSIONER YAKI: Okay. Of course not.

5 CHAIRMAN REYNOLDS: All right. Let's call
6 the vote unless there are other questions or comments.
7 All in favor please say aye.

8 (Chorus of ayes.)

9 CHAIRMAN REYNOLDS: All in opposition?

10 COMMISSIONER YAKI: No.

11 COMMISSIONER MELENDEZ: No.

12 COMMISSIONER BRACERAS: I'm sorry. I'm
13 back.

14 COMMISSIONER YAKI: Is there a seven
15 second delay after Peter and my latest exchange,
16 Jennifer?

17 CHAIRMAN REYNOLDS: Let the record reflect
18 that Commissioners Melendez and Yaki voted against the
19 motion and the remaining Commissioners voted to
20 support the motion. The motion carries.

21 I move that Finding No. 5 be adopted.
22 Finding No. 5 reads as follows: "Despite research
23 questioning the impact and extent of racial
24 preferences in law school admissions, the American Bar
25 Association adopted Standard 211 in August of 2006.

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1 Under Standard 211, law schools seeking accreditation
2 from the American Bar Association must demonstrate by
3 concrete action a commitment to having a student body
4 that is diverse with respect to race among other
5 aspects of diversity." Is there a second?

6 VICE CHAIRPERSON THERNSTROM: Second.

7 CHAIRMAN REYNOLDS: Discussion.

8 COMMISSIONER YAKI: Why do we have the
9 first sentence in there?

10 VICE CHAIRPERSON THERNSTROM: I don't know
11 why we don't start with simply "The American Bar
12 Association adopted Standard 211..."

13 COMMISSIONER KIRSANOW: I agree. I would
14 excise the first clause.

15 VICE CHAIRPERSON THERNSTROM: Yes.

16 CHAIRMAN REYNOLDS: The first sentence?

17 VICE CHAIRPERSON THERNSTROM: No, in the
18 first sentence.

19 COMMISSIONER KIRSANOW: Beginning with --
20 It would start "The American Bar Association adopted
21 Standard 211 in August 2006."

22 VICE CHAIRPERSON THERNSTROM: Right.

23 COMMISSIONER KIRSANOW: And then go on
24 from there.

25 CHAIRMAN REYNOLDS: Commissioner Taylor.

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1 COMMISSIONER TAYLOR: I would agree with
2 that. Just a question. I just don't recall the
3 evidence on this point. Did the American Bar
4 Association discuss the issues of bar passage rates,
5 graduation rates, student loan default rates, grade
6 point averages, disaggregated by academic credentials
7 with regard to race?

8 VICE CHAIRPERSON THERNSTROM: No.

9 CHAIRMAN REYNOLDS: I don't believe so.

10 COMMISSIONER TAYLOR: So they passed this
11 new standard without answering those questions or at
12 least knowing --

13 VICE CHAIRPERSON THERNSTROM: Correct.

14 COMMISSIONER TAYLOR: Then I think we
15 should -- I thought the point of the first phrase in
16 that clause was to demonstrate that they were doing
17 something in the face of all of these questions. So
18 in my mind, an appropriate addition would be the ABA
19 passed this in the absence of knowing X. That's the
20 important point.

21 COMMISSIONER KIRSANOW: That's right and I
22 think we specifically asked Professor Smith who was
23 the ABA representative maybe not everything that
24 you're asking. But I know I asked at least one
25 question related to that and he answered back as I

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1 recall, you might want to look at the record, was they
2 hadn't looked at that.

3 VICE CHAIRPERSON THERNSTROM: The first
4 clause does not --

5 COMMISSIONER TAYLOR: Right. It doesn't
6 do that.

7 VICE CHAIRPERSON THERNSTROM: It doesn't
8 do that.

9 COMMISSIONER TAYLOR: Right.

10 VICE CHAIRPERSON THERNSTROM: So would you
11 like to formulate --

12 COMMISSIONER TAYLOR: I won't. I tell you
13 what. Let's just strike the first clause and keep it.

14 I'm going to write something on my own I think. I
15 can't come up with it right now.

16 VICE CHAIRPERSON THERNSTROM: Fine.

17 COMMISSIONER TAYLOR: But on that point,
18 I'll just write something.

19 VICE CHAIRPERSON THERNSTROM: I would like
20 to call the question.

21 CHAIRMAN REYNOLDS: All right. All in
22 favor signify by saying aye.

23 VICE CHAIRPERSON THERNSTROM: Of the
24 amended. As amended.

25 CHAIRMAN REYNOLDS: Yes.

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1 VICE CHAIRPERSON THERNSTROM: Yes.

2 (Chorus of ayes.)

3 CHAIRMAN REYNOLDS: Any objections?

4 (No response.)

5 CHAIRMAN REYNOLDS: Any abstentions?

6 COMMISSIONER YAKI: Aye.

7 CHAIRMAN REYNOLDS: Let the record reflect
8 that Commissioners Yaki and Melendez abstain. The
9 remaining Commissioners voted to support the motion as
10 amended.

11 COMMISSIONER MELENDEZ: I vote no.

12 CHAIRMAN REYNOLDS: I'm sorry. Okay. Let
13 the record reflect that Commissioner Yaki abstained.
14 Commission Melendez voted against the motion. The
15 remaining Commissioners voted in support the motion as
16 amended. The amended motion is approved.

17 Okay. I move that Finding 6 be adopted
18 and Finding 6 reads as follows: "The American Bar
19 Association also enacted official interpretations to
20 help guide law schools in these demonstrations of
21 concrete action. Interpretation 211-2 permits law
22 schools consistent with the U.S. Supreme Court's
23 decision in Grutter v Bollinger' to use race and
24 ethnicity in their admissions process to promote equal
25 opportunity and diversity. Interpretation 211-3

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1 states that "the determination of the law school
2 satisfaction of these obligations is based on the
3 totality of the law schools actions and the results
4 achieved." Given these interpretations, it's
5 difficult to see who law schools could satisfy their
6 obligations under Standard 211 without the use of
7 racial preferences. To this extent some have argued
8 that the standard strongly although implicitly
9 encourages the use of racial preferences in
10 admissions." Is there a second?

11 VICE CHAIRPERSON THERNSTROM: Second.

12 CHAIRMAN REYNOLDS: Any discussion?
13 Commissioner Heriot.

14 COMMISSIONER HERIOT: I actually have a
15 minor point that applies not just to six but
16 unfortunately to five which we've already done here.
17 The American Bar Association itself is not the
18 accrediting agency. It's the American Bar
19 Association's Council on Legal Education and Admission
20 to the Bar or something like that and what happened in
21 August of 2006 was that the ABA House of Delegates
22 didn't ratify rather than adopt the standard.

23 COMMISSIONER YAKI: It's the Council on
24 Section of Legal Education Admissions to the Bar.

25 COMMISSIONER HERIOT: We might want to

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1 amend five and six to refer to the Council and leave
2 out the date because I think it's the Council that
3 does the adopting and the House of Delegates that
4 simply ratified. Because what happens is if the House
5 of Delegates fails to ratify, the Council then doesn't
6 have to accept that. They can then repromulgate it
7 and the second time it takes even without the ABA's
8 intervention and that has to do with any trust law
9 settlement that goes back a couple of years with the
10 Department of Justice. If we want to get it right, we
11 might as well get it right.

12 VICE CHAIRPERSON THERNSTROM: Yes. Let's
13 have a motion to amend both of those.

14 COMMISSIONER HERIOT: Yes. I move that
15 both five and six be changed to substitute the words
16 "American Bar Association's Council..."

17 COMMISSIONER YAKI: "On Legal Education
18 and Admission to the Bar."

19 COMMISSIONER HERIOT: "Adopted Standard
20 211" and leave out the date "in August of 2006." Just
21 put "in 2006." Strike the word "August."

22 COMMISSIONER KIRSANOW: Second.

23 COMMISSIONER YAKI: Actually, they called
24 it the Section. They don't call it the Council.

25 COMMISSIONER HERIOT: Section. And same

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1 for No. 6.

2 COMMISSIONER KIRSANOW: Second.

3 CHAIRMAN REYNOLDS: Okay. All in favor
4 of --

5 COMMISSIONER HERIOT: And the same for No.
6 7.

7 COMMISSIONER KIRSANOW: Second.

8 CHAIRMAN REYNOLDS: Okay. Why don't we
9 take some time and --

10 VICE CHAIRPERSON THERNSTROM: We don't
11 need time.

12 COMMISSIONER HERIOT: That's just
13 separate. We can split on this. It's a separate
14 issue. It's noncontroversial.

15 VICE CHAIRPERSON THERNSTROM: Yes.

16 CHAIRMAN REYNOLDS: All right. All in
17 favor of the motion to -- Is that --

18 COMMISSIONER YAKI: Jennifer's baby is
19 kind of going through these changes right now.

20 (Off the record comments.)

21 CHAIRMAN REYNOLDS: Okay. All in favor
22 to adopt the motion as articulated by Commissioner
23 Heriot please signify by saying aye.

24 (Chorus of ayes.)

25 CHAIRMAN REYNOLDS: Any objections?

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1 (No response.)

2 CHAIRMAN REYNOLDS: And abstentions?

3 (No response.)

4 CHAIRMAN REYNOLDS: The motion carries
5 unanimously.

6 VICE CHAIRPERSON THERNSTROM: And it
7 affects five, six and seven.

8 CHAIRMAN REYNOLDS: So that gets us back
9 to six. We've had the discussion. Is that right?

10 COMMISSIONER YAKI: No.

11 CHAIRMAN REYNOLDS: Okay. The floor is
12 open. Any questions?

13 COMMISSIONER MELENDEZ: No. I'm not even
14 going to go there.

15 COMMISSIONER KIRSANOW: Call the question.

16 CHAIRMAN REYNOLDS: You have a question?

17 COMMISSIONER KIRSANOW: No. I call the
18 question.

19 VICE CHAIRPERSON THERNSTROM: Call the
20 question, yes.

21 CHAIRMAN REYNOLDS: All in favor please
22 signify by saying aye.

23 (Chorus of ayes.)

24 CHAIRMAN REYNOLDS: All in opposition?

25 COMMISSIONER MELENDEZ: No.

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1 CHAIRMAN REYNOLDS: Let the record reflect
2 that Commissioners Yaki and Melendez voted against the
3 motion. The remaining Commissioners voted in favor of
4 the motion. The motion carries.

5 Finding No. 7. I move that we adopt
6 Finding No. 7 and Finding No. 7 reads as follows:
7 "The American Bar Association..." The amendment that
8 we made before would that be applicable here?

9 COMMISSIONER HERIOT: Yes, we applied it
10 here.

11 CHAIRMAN REYNOLDS: Okay. Please give me
12 the name of this. "The American Bar Association..."

13 COMMISSIONER YAKI: Section on Legal
14 Education and Admissions to the Bar.

15 COMMISSIONER HERIOT: It's Council of the
16 Section on Legal Education and Admissions to the Bar.

17 COMMISSIONER YAKI: Pardon? Yes, the
18 Council of the Section.

19 COMMISSIONER HERIOT: Yes.

20 COMMISSIONER YAKI: It's bizarre.

21 COMMISSIONER HERIOT: They like lots of
22 words at the ABA.

23 VICE CHAIRPERSON THERNSTROM: The problem
24 with lawyers in general.

25 COMMISSIONER YAKI: I would not begin to

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1 debate that.

2 CHAIRMAN REYNOLDS: And that's on Legal
3 Education to the --

4 COMMISSIONER YAKI: On Legal Education and
5 Admissions to the Bar.

6 VICE CHAIRPERSON THERNSTROM: They get
7 paid by the word.

8 COMMISSIONER TAYLOR: Amen.

9 CHAIRMAN REYNOLDS: Finding 7 reads as
10 follows: "The American Bar Association Council on the
11 Section on Legal Education and Admissions to the Bar
12 rounded Standard 211 and the Supreme Court's 2003
13 decision in Grutter v Bollinger, the Supreme Court's
14 deference to the University of Michigan Law School's
15 judgement that racial diversity was essential to its
16 educational mission, was predicated on the 'Expansive
17 Freedom's Speech and Thought associated with the
18 University environment' which give higher
19 institutional institutions 'a special niche in our
20 Constitutional tradition.' The Court recognized the
21 traditional judicial deference to the right of
22 colleges and universities to select those students who
23 will contribute the most to the robust exchange of
24 ideas of a means to achieve a goal that is of
25 paramount importance to the fulfillment of its mission

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1 and understands the American Bar Association Council
2 of the Section on Legal Education and Admission to the
3 Bar displaces the judgement of individual law schools
4 to decide the importance of diversity and substitutes
5 its own." Is there a second?

6 COMMISSIONER KIRSANOW: Second.

7 CHAIRMAN REYNOLDS: Discussion.

8 COMMISSIONER MELENDEZ: Yes. Is that last
9 sentence that you read where "it displaces the
10 judgement of individual law schools to decide the
11 importance of diversity and to substitute its own" is
12 that actually true? I just want to know.

13 COMMISSIONER KIRSANOW: Professor
14 Bernstein testified to that effect. That would be a
15 legal judgement, one with which I concur. I suspect
16 that Michael doesn't. But to the extent that Standard
17 211 kind of subsumes New Hampshire v Sweaze, it does
18 displace it because Grutter only applied to education
19 institutions of higher learning such as colleges and
20 said we're going to do because we grant great autonomy
21 to these educational institutions pursuant to New
22 Hampshire v Sweaze.

23 In doing that, taking 211, it takes away
24 the discretion that Grutter presupposes that these
25 institutions are going to exercise it. An institution

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1 can decide it's not a part of their educational
2 mission to have diversity. It's not -- whatever that
3 school may be. Another may say it is a part of their
4 educational mission. That's part of the discretion
5 subsumed in New Hampshire v Sweaze. This takes that
6 away and says you must do that.

7 CHAIRMAN REYNOLDS: Commissioner Yaki.

8 COMMISSIONER YAKI: I was just going to
9 sigh heavily continually. But with regard to six and
10 seven, we're distorting what the testimony was by Dean
11 Smith at the hearing. The standard itself has
12 admissions as only one criteria by which the ABA will
13 measure "concrete actions." It is not -- And if you
14 read 211 which I just did and it talks -- Here. The
15 interpretation of 211-3 "The determination of law
16 school satisfaction of such obligations is based on
17 the totality of the law school's actions and the
18 results achieved. The commitment to providing full
19 educational opportunities for members of under-
20 represented groups typically includes a special
21 concern for determining the potential of these
22 applicants through the admissions process, special
23 recruitment efforts, programs of the system meeting
24 the academic and financial needs of many of these
25 students and that creates a more favorable environment

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1 for students from under-represented groups." Dean
2 Smith talked about those in his testimony. This
3 obsessive focus in six and seven, I think, distorts
4 his testimony and is why I'm going to be voting
5 against them.

6 COMMISSIONER TAYLOR: Question. I
7 actually had the same question as Commissioner
8 Melendez and I was taken halfway home by your
9 explanation but not all the way there, this reason.
10 As I saw the argument being framed, you were right in
11 the sense that it took the discretion out but only
12 with respect to one of many criteria that were
13 required to use so that the law school could not say
14 that is not part of our mission and therefore for
15 purposes of our comprehensive review remove that
16 particular aspect of review. Law schools could no
17 longer do that. So in that respect, it does displace
18 the law school's judgement but not totally because it
19 is one of many factors they consider. That's how I
20 had it framed in my mind.

21 COMMISSIONER KIRSANOW: Right. It's one
22 of many factors in terms of Grutter but not in terms
23 of meeting the accreditation standard here. In
24 Grutter, the University of Michigan Law School program
25 supposedly, admissions program, met Constitutional

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1 muster because race was only one factor among many in
2 a holistic review. It was flexible plus factor not
3 applied in a mechanical way. This applies it in a
4 mechanical way and therefore displaces the discretion
5 that you were just talking about.

6 COMMISSIONER YAKI: How? It's just one of
7 a number of factors. It doesn't say it have to be --

8 COMMISSIONER KIRSANOW: Now if you listen
9 to not just Dean Smith's testimony and he didn't
10 dispute this. The uncontroverted testimony of
11 Professor Bernstein was when he talked to a number of
12 other law school deans is no, this is how we do it
13 because the ABA calls you up and says what's going on
14 here and everyone knows if you don't meet these
15 numbers, out the door you go. So that testimony was
16 uncontroverted.

17 CHAIRMAN REYNOLDS: Additional questions?

18 COMMISSIONER YAKI: That's because no one
19 could question who he had called and he had no
20 evidence of anyone who he had called and told about
21 it. So how can you dispute that with which comes from
22 there?

23 COMMISSIONER KIRSANOW: He was sitting
24 right next to me.

25 COMMISSIONER YAKI: And that for me is the

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1 flaw of these briefings in general and why in a
2 truncated proceeding where I'm looking at my watch
3 because it's getting close to the time I have to get
4 out the door and maybe I could have and should have
5 picked up on it. I don't know or maybe I was just
6 ignoring all the blather coming out of his mouth. I
7 don't know.

8 COMMISSIONER KIRSANOW: You could have
9 controverted him if you had wished.

10 COMMISSIONER YAKI: I will in my dissent.

11 CHAIRMAN REYNOLDS: Okay. Commissioner
12 Heriot.

13 COMMISSIONER HERIOT: The school marm in
14 me insists we correct the lack of a comma after the
15 word "environment" and before the word "which."

16 COMMISSIONER KIRSANOW: And it should come
17 after the quotation marks.

18 VICE CHAIRPERSON THERNSTROM: No. Before
19 the quotation marks.

20 COMMISSIONER YAKI: Before the quotation
21 marks.

22 COMMISSIONER HERIOT: It's before the
23 quotation marks.

24 COMMISSIONER KIRSANOW: Is it? I'm not a
25 school marm.

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1 VICE CHAIRPERSON THERNSTROM: I'm a school
2 marm, too. Before the quotation marks.

3 CHAIRMAN REYNOLDS: Okay. So we will not,
4 I assume, need to vote on this.

5 COMMISSIONER HERIOT: I hope we don't have
6 to vote.

7 CHAIRMAN REYNOLDS: Yes. If there are no
8 other questions, comments or discussion we can vote.
9 All in favor, please signify by saying aye.

10 (Chorus of ayes.)

11 CHAIRMAN REYNOLDS: All opposed?

12 COMMISSIONER KIRSANOW: Jennifer?

13 COMMISSIONER BRACERAS: Aye.

14 CHAIRMAN REYNOLDS: All in opposition?

15 COMMISSIONER MELENDEZ: No.

16 COMMISSIONER YAKI: No.

17 CHAIRMAN REYNOLDS: Let the record reflect
18 that Commissioners Yaki and Melendez voted against the
19 motion. The remaining Commissioners voted in favor of
20 the motion. The motion carries.

21 VICE CHAIRPERSON THERNSTROM: I have a
22 small stylistic recommendation on these. I guess it's
23 five, six and seven that we don't each time say the
24 American Bar Association Council of the Section on
25 Legal Education and Admissions to the Bar but simply

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1 the first --

2 CHAIRMAN REYNOLDS: Just say ABA.

3 VICE CHAIRPERSON THERNSTROM: The first
4 time put in parens, ABA Council or something like that
5 so we don't have this cumbersome language with each
6 one of these.

7 CHAIRMAN REYNOLDS: Okay. So we are up to
8 No. 8.

9 COMMISSIONER HERIOT: Eight?

10 VICE CHAIRPERSON THERNSTROM: Yes.

11 COMMISSIONER HERIOT: There is no eight.

12 COMMISSIONER YAKI: There is no eight.

13 VICE CHAIRPERSON THERNSTROM: Now we're
14 starting on the recommendations.

15 CHAIRMAN REYNOLDS: That's right. Okay.
16 I move that we adopt the following recommendation
17 which reads as follows: "The National Academy of
18 Sciences or another appropriate grant-making entity
19 should fund independent research on the impact of
20 racial preferences on racial disparities in law school
21 academic performance, bar passage rates, graduation
22 rates, student loan default rates and future income.
23 State bar associations should cooperate with this
24 research." Is there a second?

25 COMMISSIONER KIRSANOW: Second.

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1 CHAIRMAN REYNOLDS: Discussion.

2 COMMISSIONER YAKI: I recommend we do not.

3 VICE CHAIRPERSON THERNSTROM: I'm sorry.

4 What are you recommending?

5 COMMISSIONER YAKI: That we do not.

6 COMMISSIONER HERIOT: Call the question.

7 CHAIRMAN REYNOLDS: Okay. That was
8 concise. Thank you. All in favor, please signify by
9 saying aye.

10 (Chorus of ayes.)

11 COMMISSIONER YAKI: Garbage in, garbage
12 out. No.

13 COMMISSIONER HERIOT: Did you take nays on
14 that?

15 CHAIRMAN REYNOLDS: I was deciding whether
16 to have some fun, but no. All in opposition?

17 COMMISSIONER MELENDEZ: No.

18 COMMISSIONER YAKI: No.

19 CHAIRMAN REYNOLDS: And Jennifer?

20 COMMISSIONER BRACERAS: I did aye.

21 CHAIRMAN REYNOLDS: Let the record reflect
22 that Commissioners Yaki and Melendez voted against the
23 motion. The remaining Commissioners voted in favor of
24 the motion.. The motion carries.

25 I move that we adopt Recommendation 2

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1 which reads as follows: "Law schools should
2 voluntarily provide disclosure to the public and at
3 the very least to potential applicants on student
4 academic performance, attrition, graduation, bar
5 passage rates, student load default rates and future
6 income disaggregated by race and ethnicity."

7 COMMISSIONER KIRSANOW: Friendly
8 amendment. I would change "race and ethnicity" to
9 "academic credentials."

10 VICE CHAIRPERSON THERNSTROM: Yes, I agree
11 with that.

12 COMMISSIONER HERIOT: Yes. Okay.

13 CHAIRMAN REYNOLDS: All in favor of the
14 amendment please say aye.

15 (Chorus of ayes.)

16 CHAIRMAN REYNOLDS: Any in opposition?

17 (No response.)

18 CHAIRMAN REYNOLDS: Any abstentions?

19 COMMISSIONER YAKI: To the amendment
20 itself?

21 CHAIRMAN REYNOLDS: Yes.

22 COMMISSIONER YAKI: Or to the main motion?

23 CHAIRMAN REYNOLDS: To the amendment.

24 VICE CHAIRPERSON THERNSTROM: I have a
25 question about it.

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1 COMMISSIONER YAKI: Abstain.

2 VICE CHAIRPERSON THERNSTROM: Is it
3 possible in changing it to "academic credentials" that
4 that phrase could open the door to definitional gains
5 as to what academic credentials are?

6 COMMISSIONER HERIOT: But so can race and
7 ethnicity.

8 VICE CHAIRPERSON THERNSTROM: Well, it
9 could mean some kind of holistic blah, blah, blah that
10 has very little to do with LSAT scores, very little to
11 do with college grade point averages, etc.

12 COMMISSIONER YAKI: You just gave the
13 argument against Sander. So there we go.

14 VICE CHAIRPERSON THERNSTROM: No, I have
15 not given the argument against Sander. I've given the
16 argument for typing this up slightly.

17 COMMISSIONER HERIOT: We could have a
18 definition.

19 COMMISSIONER KIRSANOW: Yes.

20 COMMISSIONER HERIOT: Within the meaning
21 of these findings of facts and recommendations.
22 Academic credentials mean high GPA --

23 VICE CHAIRPERSON THERNSTROM: I think that
24 is necessary.

25 COMMISSIONER HERIOT: -- and LSAT.

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1 CHAIRMAN REYNOLDS: Okay. May I have a
2 motion to this effect?

3 COMMISSIONER KIRSANOW: "Academic
4 credentials" as used herein shall be defined as
5 college grade point average, cumulative grade point
6 average and LSAT scores.

7 VICE CHAIRPERSON THERNSTROM: Thank you.

8 COMMISSIONER HERIOT: Where do we want to
9 put that?

10 COMMISSIONER KIRSANOW: Right at the end.

11 VICE CHAIRPERSON THERNSTROM: Right at the
12 end.

13 COMMISSIONER HERIOT: At the very end of
14 the recommendation.

15 COMMISSIONER KIRSANOW: Yes, because I
16 think that may be the only place where it's used.

17 COMMISSIONER YAKI: Don't you want to say
18 the school that they went to as well? Doesn't it have
19 an impact on GPA?

20 VICE CHAIRPERSON THERNSTROM: Pardon me?

21 COMMISSIONER KIRSANOW: I'm sorry.

22 COMMISSIONER YAKI: Nothing. I'm just
23 trying to help you.

24 COMMISSIONER KIRSANOW: We appreciate your
25 help.

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1 VICE CHAIRPERSON THERNSTROM: But I know
2 it was a brilliant suggestion.

3 COMMISSIONER KIRSANOW: What's the
4 suggestion?

5 COMMISSIONER YAKI: Isn't part of the data
6 that they looked at is also the tiered school from
7 which they graduated from in the first place?

8 COMMISSIONER HERIOT: I don't know how to
9 come up with the data for that. You can't generate
10 that as easily.

11 CHAIRMAN REYNOLDS: So the first vote will
12 be on the definition of --

13 VICE CHAIRPERSON THERNSTROM: Adding the
14 definition. One sentence which adds the definition of
15 academic credentials.

16 CHAIRMAN REYNOLDS: Okay.

17 COMMISSIONER TAYLOR: Let me put a word of
18 caution on the table. I hesitate to try to craft the
19 definition as we sit here today. I fear we're going
20 to miss something that could really be important and I
21 would be inclined not to put a definition in.

22 COMMISSIONER KIRSANOW: At all?

23 COMMISSIONER TAYLOR: Yes, I like just
24 academic credentials. I'm fearful sitting here that
25 we're going to --

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1 VICE CHAIRPERSON THERNSTROM: Let me tell
2 you schools go to town with vague phrases like that.

3 COMMISSIONER TAYLOR: Sure. But I would
4 just like to put more thought into a definition.

5 COMMISSIONER HERIOT: These aren't binding
6 anyway and it can be changed if you do define it in
7 that they have to use a band and the band could be
8 larger or smaller.

9 CHAIRMAN REYNOLDS: Okay. where are we
10 folks?

11 VICE CHAIRPERSON THERNSTROM: I would like
12 to vote on the motion as amended with the definition
13 and we can revisit it later.

14 COMMISSIONER TAYLOR: Okay. It seems like
15 when I start putting definitions in on the fly I get
16 nervous.

17 VICE CHAIRPERSON THERNSTROM: This is not
18 really --

19 COMMISSIONER KIRSANOW: You make a good
20 point but I think that we can revisit it.

21 VICE CHAIRPERSON THERNSTROM: We can
22 revisit it. It's not --

23 COMMISSIONER KIRSANOW: We're not crafting
24 legislation.

25 COMMISSIONER BRACERAS: When are we going

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1 to revisit it if it's going --

2 VICE CHAIRPERSON THERNSTROM: This is not
3 a fancy definition. We're simply saying that we
4 regard the word "academic" as referring to cumulative
5 GPAs and LSATs.

6 COMMISSIONER BRACERAS: That's fine with
7 me, but as long as we know --

8 VICE CHAIRPERSON THERNSTROM: And it
9 doesn't refer to the sob story you can give to the law
10 school about why you're really qualified even though
11 your LSAT scores are terrible and --

12 COMMISSIONER BRACERAS: But let's just be
13 clear that the language we vote on is the language
14 that will be public.

15 CHAIRMAN REYNOLDS: Okay folks.

16 COMMISSIONER YAKI: No. I'm sorry.

17 CHAIRMAN REYNOLDS: That was just a
18 reflex.

19 COMMISSIONER YAKI: That's right.

20 (Laughter.)

21 CHAIRMAN REYNOLDS: Okay. We're voting on
22 Recommendation 2 as amended. All in favor, please
23 signify by saying aye.

24 (Chorus of ayes.)

25 CHAIRMAN REYNOLDS: All in opposition?

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1 COMMISSIONER MELENDEZ: No.

2 COMMISSIONER YAKI: No.

3 COMMISSIONER TAYLOR: I'm going to
4 abstain.

5 CHAIRMAN REYNOLDS: Okay. Let the record
6 reflect that Commissioner Taylor abstained, that
7 Commissioners Yaki and Melendez voted against the
8 motion. The remaining Commissioners voted in favor.
9 The motion carries.

10 Okay. I move that we adopt Recommendation
11 3 which reads as follows: "Congress should enact
12 legislation requiring law schools receiving Federal
13 financial assistance..."

14 COMMISSIONER KIRSANOW: I'm not sure we
15 actually voted on the whole notion.

16 COMMISSIONER HERIOT: Did we vote two up
17 or down?

18 COMMISSIONER YAKI: That was the vote. We
19 already did --

20 COMMISSIONER KIRSANOW: I thought we were
21 voting on the amendment dealing with --

22 COMMISSIONER YAKI: No.

23 CHAIRMAN REYNOLDS: Wait.

24 COMMISSIONER KIRSANOW: -- the amendment
25 dealing with the addition of the definition.

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1 COMMISSIONER HERIOT: Yes. We added --

2 CHAIRMAN REYNOLDS: Okay. I thought what
3 I read into the record that -- I did mush it all
4 together.

5 COMMISSIONER KIRSANOW: You did?

6 COMMISSIONER YAKI: I thought he did.

7 COMMISSIONER HERIOT: I thought it was two
8 separate because I haven't written down anything that
9 suggests that we've voted on two yet.

10 CHAIRMAN REYNOLDS: Okay. If that's the
11 case.

12 COMMISSIONER HERIOT: At worse, it would
13 be just duplicating. Better that than skipping.

14 CHAIRMAN REYNOLDS: Okay. Here is the
15 recommendation that we're voting on. It reads as
16 follows: "Law schools should voluntarily provide
17 disclosure" --

18 (Off the record discussion.)

19 CHAIRMAN REYNOLDS: "Law schools should
20 voluntarily provide disclosure to the public and at
21 the very least to potential applicants on student
22 academic performance, attrition, graduation rates, bar
23 passage rates, student loan default rates and future
24 income disaggregated by academic credentials which is
25 defined as cumulative GPA and LSAT scores."

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1 COMMISSIONER HERIOT: I thought we defined
2 it in nine because if you define it only in two, then
3 you have to go back to three of the findings and
4 define it there as well. I thought we added the
5 definition of academic credentials as nine.

6 CHAIRMAN REYNOLDS: Okay.

7 COMMISSIONER YAKI: What?

8 CHAIRMAN REYNOLDS: What do you mean by --
9 You mean have it as a separate sentence?

10 COMMISSIONER HERIOT: Yes. You need it to
11 be separate from two because we want it to be
12 applicable to three on findings as well.

13 COMMISSIONER YAKI: What?

14 CHAIRMAN REYNOLDS: So if I understand
15 you, this should be a standalone. The definition
16 should standalone so that it applies to all --

17 COMMISSIONER KIRSANOW: Right.

18 COMMISSIONER YAKI: Why don't you just put
19 it in three instead and not worry about another No. 9
20 and then it will refer by inference back to No. 3?

21 COMMISSIONER HERIOT: I thought we just
22 did it that way and since that --

23 COMMISSIONER YAKI: No. Three in the
24 first one, not three in the second. You talk about
25 academic credentials in two.

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1 COMMISSIONER HERIOT: Three and two.

2 COMMISSIONER YAKI: Whatever. I'm just
3 trying to make it simpler.

4 CHAIRMAN REYNOLDS: Okay folks.

5 COMMISSIONER YAKI: If you put it up in
6 the findings thing, then it will refer downward rather
7 than to having put it in the back and refer upwards.

8 VICE CHAIRPERSON THERNSTROM: I agree with
9 that. A point of agreement. Let everybody note.

10 COMMISSIONER YAKI: I'm not going to vote
11 for it though.

12 CHAIRMAN REYNOLDS: But we do appreciate
13 your note. Okay. Where is the first time that phrase
14 is used?

15 COMMISSIONER HERIOT: I think it's
16 Findings 3.

17 CHAIRMAN REYNOLDS: Three, Findings,
18 disaggregate. Okay. So we're going to go back and
19 vote again.

20 COMMISSIONER KIRSANOW: I move to amend
21 Finding No. 3 to add at the very end "academic
22 credentials" as used in these findings and
23 recommendations "as defined as cumulative college
24 grade point average and LSAT scores."

25 CHAIRMAN REYNOLDS: Is there a second?

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1 VICE CHAIRPERSON THERNSTROM: Second.

2 CHAIRMAN REYNOLDS: Discussion.

3 (No response.)

4 CHAIRMAN REYNOLDS: All in favor, please
5 signify by saying aye.

6 (Chorus of ayes.)

7 CHAIRMAN REYNOLDS: Any in opposition?

8 COMMISSIONER MELENDEZ: No.

9 COMMISSIONER YAKI: No.

10 CHAIRMAN REYNOLDS: Jennifer?

11 COMMISSIONER BRACERAS: I said aye.

12 CHAIRMAN REYNOLDS: Okay. The motion
13 passes unanimously. So now we're back to --

14 COMMISSIONER KIRSANOW: Three.

15 CHAIRMAN REYNOLDS: We have finished with
16 Recommendation 2. Is that correct?

17 COMMISSIONER KIRSANOW: Yes.

18 CHAIRMAN REYNOLDS: Okay.

19 VICE CHAIRPERSON THERNSTROM: Yes. We're
20 on Recommendation 3.

21 CHAIRMAN REYNOLDS: Okay. I move that we
22 approve Recommendation 3 and Recommendation 3 reads as
23 follows: "Congress should enact legislation requiring
24 law schools receiving Federal financial assistance to
25 disclose to the public detailed data on the extent to

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1 which they take race into account in making admissions
2 decisions. These details should include: (1) whether
3 they take race, color or national origin into account;
4 (2) the race, color and national origin groups for
5 which membership is considered a plus or a minus
6 factor; (3) a description of how group membership is
7 considered including the weight accorded to such
8 membership; (4) whether targets, goals or quotas are
9 used; (5) a statement explaining a group membership is
10 given particular weight and its relationship to the
11 diversity rationale; (6) a description of the
12 consideration given to using race neutral alternatives
13 to achieve those goals; (7) how frequently the need to
14 give weight to group membership is reassessed; (8)
15 what nonracial factors are considered in the
16 admissions process; and (9) an analysis of any
17 correlation between membership in a favored group to
18 placement in remediation program, graduation rates and
19 student loan default rates." Is there a second?

20 COMMISSIONER KIRSANOW: I would move to
21 amend Subpart 9 to say "an analysis of any correlation
22 between academic credentials to placement in
23 remediation program, graduation rates and student loan
24 default rates."

25 COMMISSIONER HERIOT: Second.

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1 VICE CHAIRPERSON THERNSTROM: Yes.

2 CHAIRMAN REYNOLDS: Commissioner Yaki.

3 COMMISSIONER YAKI: Are we in discussion?
4 Are we in the discussion phase now?

5 CHAIRMAN REYNOLDS: Yes.

6 COMMISSIONER YAKI: Two points, one a
7 point of procedure. This is, I believe, take almost
8 verbatim from legislation by Representative Peter King
9 of New York, a legislation which --

10 COMMISSIONER KIRSANOW: Steven King of
11 Iowa.

12 COMMISSIONER YAKI: Or whatever. One of
13 those guys.

14 (Laughter.)

15 COMMISSIONER YAKI: Whichever it is, they
16 lost 337 to 77 in Congress, No. 1. No. 2, aside from
17 a very brief oblique mention of it in the Sander
18 testimony, again this is something that comes from
19 outside sources, that given the fact that it's already
20 been, had hearings and such, it would have been
21 instructive to have known what the hearings about this
22 legislation said rather than simply repeating it as if
23 it had never existed before when in fact it has. And
24 finally, I would just say that the chances of this
25 happening in this Congress are slim to none and slim

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1 is leaving town.

2 CHAIRMAN REYNOLDS: Other comments?

3 Questions?

4 COMMISSIONER YAKI: This is a garbage
5 recommendation.

6 VICE CHAIRPERSON THERNSTROM: Wait a
7 minute. That has been your mantra, should we call it.

8 COMMISSIONER YAKI: I wonder why.

9 VICE CHAIRPERSON THERNSTROM: Yes.

10 CHAIRMAN REYNOLDS: Okay folks. All in
11 favor of the recommendation as amended, please signify
12 by saying aye.

13 (Chorus of ayes.)

14 CHAIRMAN REYNOLDS: Is anyone opposed to
15 the motion?

16 COMMISSIONER YAKI: Yeah.

17 CHAIRMAN REYNOLDS: And, Jennifer, that
18 was an aye.

19 COMMISSIONER BRACERAS: Yes, it was.

20 CHAIRMAN REYNOLDS: Please let the record
21 reflect that Commissioners Yaki and Melendez voted
22 against the recommendation and that the remaining
23 Commissioners voted in support, in favor of the
24 recommendation. So the recommendation is adopted.

25 The next recommendation is Recommendation

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1 4. I move that it be approved. It reads as follows:
2 "As an interim measure, the American Bar Association
3 should pursuant to its accreditation authority require
4 law schools to disclose the details recommended in
5 Recommendation 2." Is there a second?

6 COMMISSIONER KIRSANOW: Second.

7 CHAIRMAN REYNOLDS: Discussion.

8 (No response.)

9 CHAIRMAN REYNOLDS: All in favor, please
10 signify by saying aye.

11 (Chorus of ayes.)

12 CHAIRMAN REYNOLDS: Does anyone oppose the
13 recommendation?

14 COMMISSIONER YAKI: Yep.

15 COMMISSIONER MELENDEZ: No.

16 CHAIRMAN REYNOLDS: Let the record reflect
17 that Commissioners Melendez and Yaki voted against the
18 recommendation. The remaining Commissioners voted in
19 favor of it. The recommendation is approved.

20 Next up we have Recommendation 5. "Should
21 states require the authorities responsible for
22 granting admission to the bar and their jurisdiction
23 to disclose bar passage rates disaggregated by
24 academic credentials." Is there a second?

25 COMMISSIONER KIRSANOW: Second.

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1 CHAIRMAN REYNOLDS: Discussion.

2 (No response.)

3 CHAIRMAN REYNOLDS: All in favor, please
4 signify by saying aye.

5 (Chorus of ayes.)

6 CHAIRMAN REYNOLDS: Commissioner Yaki, do
7 you oppose or abstain from this vote?

8 COMMISSIONER YAKI: Do I have a choice?

9 CHAIRMAN REYNOLDS: Sure you have choices.

10 COMMISSIONER YAKI: The answer is I
11 oppose.

12 CHAIRMAN REYNOLDS: Okay. Let the record
13 reflect that Commissioner Melendez did not vote. He
14 stepped out of the room. Commissioner Yaki voted
15 against the recommendation.

16 COMMISSIONER YAKI: I move to keep the
17 roll open until Commissioner Melendez returns.

18 CHAIRMAN REYNOLDS: Okay.

19 COMMISSIONER KIRSANOW: Second.

20 CHAIRMAN REYNOLDS: I assume that there
21 will be no objectives.

22 VICE CHAIRPERSON THERNSTROM: No
23 objections to that. Is there going to be a surprise?

24 COMMISSIONER YAKI: No, I wanted to do it
25 on the record.

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1 VICE CHAIRPERSON THERNSTROM: I know but I
2 suspect we could put it on the record right now.

3 COMMISSIONER YAKI: No, you can't vote for
4 somebody else. That just can't be done.

5 VICE CHAIRPERSON THERNSTROM: I'm not
6 serious, Michael.

7 COMMISSIONER KIRSANOW: Do you have his
8 proxy?

9 VICE CHAIRPERSON THERNSTROM: He gave me
10 his proxy. Right. All right. Let's go onto
11 Recommendation --

12 COMMISSIONER YAKI: Maybe we should go
13 back to Florida and have another hearing.

14 CHAIRMAN REYNOLDS: Okay. So --

15 COMMISSIONER YAKI: Obviously, No. 6 needs
16 a big correction because we're not dealing with the
17 Americans with Disabilities Act provision but Section
18 211. Section 212 is the Americans with Disabilities
19 Act provision of the state bar standard.

20 CHAIRMAN REYNOLDS: Good catch.

21 COMMISSIONER YAKI: And that should be
22 changed for seven and eight as well.

23 COMMISSIONER KIRSANOW: Yes.

24 COMMISSIONER YAKI: So I will move that
25 Section 212 be amended to read Section 211 in

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1 Recommendations 6, 7 and 8.

2 CHAIRMAN REYNOLDS: Is there a second?

3 VICE CHAIRPERSON THERNSTROM: Second.

4 COMMISSIONER KIRSANOW: That's not
5 noncontroversial. I think we can do that.

6 COMMISSIONER YAKI: I know he's so
7 uncomfortable seconding my motion.

8 CHAIRMAN REYNOLDS: Okay. We will fix it.
9 (Commissioner Melendez enters.)

10 COMMISSIONER YAKI: We kept the roll open
11 for you on No. 5.

12 CHAIRMAN REYNOLDS: Commissioner Melendez,
13 we assumed you would support it.

14 COMMISSIONER MELENDEZ: No.

15 CHAIRMAN REYNOLDS: Okay. Let the record
16 reflect that Commissioner Melendez along with
17 Commissioner Yaki voted against it. The remaining
18 Commissioners voted for it. The recommendation is
19 approved.

20 Onto Recommendation 6, I move that we
21 adopt it. It reads as follows: "The ABA should
22 revise the recently adopted Standard 211 to delete any
23 requirement that law schools seeking accreditation
24 demonstrate a commitment to diversity. The standard
25 should instead be revised to permit law schools the

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1 freedom to determine whether diversity is essential to
2 their academic mission consistent with Grutter v
3 Bollinger. Accordingly, the ABA should appeal
4 Interpretation 211-2 so as to most clearly preserve
5 law schools academic freedom in the accreditation
6 process." Is there a second?

7 COMMISSIONER KIRSANOW: I would move a
8 small amendment, stylistic more than anything, to
9 delete "any" in the first sentence. It says, "The ABA
10 should revise the recently adopted Standard 211 to
11 delete any..." I would change that to "the
12 requirement." There is only one requirement in that
13 standard.

14 VICE CHAIRPERSON THERNSTROM: Yes, I agree
15 with that and also "The standard should be revised to
16 permit law schools, consistent with Grutter v
17 Bollinger, the freedom to determine whether..." It's
18 a little bit confusing to have that consistent with
19 Grutter v Bollinger at the very end.

20 COMMISSIONER KIRSANOW: I agree.

21 CHAIRMAN REYNOLDS: Any other comments?

22 COMMISSIONER MELENDEZ: I would just
23 comment that this side deletes requirements that
24 schools demonstrate a commitment to diversity then
25 basically.

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1 CHAIRMAN REYNOLDS: That's correct and
2 that it be left up to the schools whether they --

3 COMMISSIONER YAKI: Can discriminate or
4 not.

5 COMMISSIONER KIRSANOW: Well, they're all
6 discriminating right now.

7 COMMISSIONER YAKI: I'm sure they are.

8 CHAIRMAN REYNOLDS: Okay folks. All in
9 favor of the recommendation as amended, signify by
10 saying aye.

11 (Chorus of ayes.)

12 CHAIRMAN REYNOLDS: All in opposition?

13 COMMISSIONER MELENDEZ: No.

14 COMMISSIONER YAKI: No.

15 CHAIRMAN REYNOLDS: Any abstentions?

16 (No response.)

17 CHAIRMAN REYNOLDS: Let the record reflect
18 that Commissioners Yaki and Melendez voted against the
19 recommendation. The remaining Commissioners voted to
20 adopt it. Recommendation 6 is adopted.

21 Okay. I move that we adopt Recommendation
22 No. 7 which reads as follows: "The ABA should revise
23 Interpretation 211-3 to make it clear that the
24 organization will not judge a law school's commitment
25 to diversity by the results achieved." Is there a

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1 second? Pretty please.

2 COMMISSIONER HERIOT: Second.

3 CHAIRMAN REYNOLDS: Thank you.
4 Discussion.

5 COMMISSIONER YAKI: Yes. I just wanted to
6 say for six, seven and eight it's a very sad, sad day
7 when diversity is a four letter word at this
8 Commission.

9 COMMISSIONER KIRSANOW: It's a sad day
10 when discrimination seems to supplant equal protection
11 at this Commission.

12 COMMISSIONER YAKI: Then maybe you should
13 -- Never mind.

14 COMMISSIONER HERIOT: But I would like to
15 point out that seven does not do that anyway.

16 COMMISSIONER KIRSANOW: That's right.

17 CHAIRMAN REYNOLDS: Okay folks. Let's
18 withdraw the six shooters and we'll continue to work
19 through these.

20 (Off the record comments.)

21 CHAIRMAN REYNOLDS: Commissioner Melendez.

22 COMMISSIONER MELENDEZ: I just think that
23 the ABA's recommendation already is good enough.

24 CHAIRMAN REYNOLDS: Okay. Other comments?
25 Questions?

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1 COMMISSIONER KIRSANOW: The other comment
2 I have is that I understand this recommendation based
3 on the manner in which 211 is drafted. But 211 in and
4 of itself is somewhat vague and I think this
5 replicates the vagueness.

6 VICE CHAIRPERSON THERNSTROM: I agree with
7 this.

8 COMMISSIONER BRACERAS: I see your point.

9 COMMISSIONER KIRSANOW: I don't know that
10 I would vote for this and I'm not sure how this
11 actually much lends to our recommendations.

12 VICE CHAIRPERSON THERNSTROM: I agree with
13 this. We don't need this.

14 COMMISSIONER TAYLOR: In fact, both 7 and
15 8.

16 CHAIRMAN REYNOLDS: Any other comments?

17 VICE CHAIRPERSON THERNSTROM: All right.
18 I'm going to vote against it. I agree with this and
19 people looking at this just aren't going to know what
20 it means.

21 CHAIRMAN REYNOLDS: Let's finish the
22 discussion before we start voting.

23 COMMISSIONER HERIOT: Yes. Maybe we need
24 to clarify a little bit for me here. I don't quite
25 understand that.

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1 COMMISSIONER KIRSANOW: The way for me,
2 the way this reads can be susceptible of a number of
3 interpretations with which I may or may not agree and
4 I have a little bit of a background as we all do
5 having heard the testimony. I'm not so sure how this
6 would be interpreted by the broader public or by any
7 our stakeholders.

8 For example, it says that "it should be
9 revised to make it clear that the organization will
10 not judge a law school's commitment to diversity by
11 the results achieved." I'm not so sure what "results
12 achieved" means. Standing along, I understand based
13 on the evidence that we receive what it means, but I'm
14 not sure without more elaboration what this actually
15 means. So I'm a little hesitant to vote for it.

16 VICE CHAIRPERSON THERNSTROM: We need to
17 beef it up if we're going to --

18 COMMISSIONER KIRSANOW: I don't know that
19 this adds that much to our report.

20 VICE CHAIRPERSON THERNSTROM: Right. I
21 agree.

22 COMMISSIONER YAKI: Just strike it.

23 COMMISSIONER KIRSANOW: That's what I
24 would do.

25 CHAIRMAN REYNOLDS: Other comments?

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1 (No response.)

2 COMMISSIONER HERIOT: Is that a motion to
3 strike then?

4 COMMISSIONER KIRSANOW: Yes, I would move
5 to strike.

6 COMMISSIONER YAKI: I'll vote for that.

7 CHAIRMAN REYNOLDS: I mean we just vote
8 and if it doesn't get the majority, then it's done.

9 COMMISSIONER YAKI: Yes. That will make a
10 vote for yes.

11 CHAIRMAN REYNOLDS: Okay. All in favor of
12 Recommendation No. 7 please signify by saying aye.

13 (No response.)

14 CHAIRMAN REYNOLDS: All in opposition?

15 (Chorus of nos.)

16 CHAIRMAN REYNOLDS: Any abstentions?

17 (No response.)

18 COMMISSIONER YAKI: You could have made it
19 a motion to strike and I could have gone on the record
20 as voting with you.

21 COMMISSIONER KIRSANOW: You are voting
22 with me.

23 COMMISSIONER YAKI: It's not the same
24 thing. I mean an affirmative vote versus a no vote.

25 CHAIRMAN REYNOLDS: Commissioner Heriot,

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1 was that an abstention?

2 COMMISSIONER HERIOT: I abstain. I still
3 haven't figured this out.

4 COMMISSIONER TAYLOR: Correct.

5 CHAIRMAN REYNOLDS: Okay. Let the record
6 reflect that Commissioners Heriot, Taylor and Reynolds
7 abstain.

8 VICE CHAIRPERSON THERNSTROM: Do you know
9 what? I'm changing mine to an abstention also since I
10 can't that out. The reason is I can't figure that
11 out.

12 COMMISSIONER YAKI: You can't give me one
13 victory, Abigail. Is that it?

14 (Laughter.)

15 VICE CHAIRPERSON THERNSTROM: You got the
16 victory. We've struck it.

17 CHAIRMAN REYNOLDS: Okay. Let the record
18 reflect that Commissioners Heriot, Taylor, Thernstrom
19 and Reynolds abstained. The remaining Commissioners
20 voted against the recommendation. I'm sorry.
21 Jennifer, am I correct in assuming that you voted
22 against it?

23 COMMISSIONER BRACERAS: I did. I was just
24 thinking about Commissioner Thernstrom's comments.
25 Yes, I'll keep my vote against it.

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1 CHAIRMAN REYNOLDS: So this constitutes a
2 victory for Commissioners Yaki and Melendez. That was
3 a joke, folks.

4 (Laughter.)

5 CHAIRMAN REYNOLDS: Okay. Recommendation
6 8.

7 VICE CHAIRPERSON THERNSTROM: Got to work
8 on your sense of humor, Jerry.

9 CHAIRMAN REYNOLDS: I'm not going to quit
10 my day job.

11 Recommendation 8, I move that we approve
12 it. It reads as follows: "The ABA should revise
13 Interpretation 211-1 to make it clear that the
14 Constitutional and statutory provisions at the
15 Federal, state and local levels remain binding, legal
16 obligations for all law schools even if they conflict
17 or appear to conflict with Standard 211 and its
18 official interpretations." Is there a second?

19 VICE CHAIRPERSON THERNSTROM: Second.

20 CHAIRMAN REYNOLDS: Discussion.

21 COMMISSIONER KIRSANOW: I just had a
22 question and maybe staff knows this. My recollection
23 is that subsequent to the, was it the July meeting,
24 I'm sorry, June meeting, that there was an amendment
25 to 211 to make that clear or maybe it was Stephen

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1 Smith who testified that there was going to be a
2 clarification. Does anybody know?

3 STAFF DIRECTOR MARCUS: My understanding
4 also is that there was an amendment which deleted
5 language which many said created an explicit conflict.

6 COMMISSIONER KIRSANOW: Right.

7 COMMISSIONER HERIOT: I thought, maybe I'm
8 wrong, but I thought that this second sentence in
9 Interpretation 211-1 was the modification. "A law
10 school that is subject to such Constitutional or
11 statutory provisions would have to demonstrate the
12 commitment required by Standard 211 by means other
13 than those prohibited by the applicable Constitutional
14 or statutory provisions." That was the addition.

15 COMMISSIONER BRACERAS: I think
16 Commissioner Heriot is correct on that one.

17 COMMISSIONER KIRSANOW: So the question is
18 does that clarify it sufficiently.

19 CHAIRMAN REYNOLDS: Folks.

20 COMMISSIONER YAKI: Not my fight.

21 VICE CHAIRPERSON THERNSTROM: Commissioner
22 Heriot, do you think that we need this at this point?

23 COMMISSIONER BRACERAS: I think we need to
24 do something about it because certainly the ABA did
25 attempt to say initially that law schools broke the

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1 law and how they may have changed that under pressure.

2 So I think we nevertheless want to be very clear that
3 legal obligations come before accrediting obligations.

4 So I think it was my suggestion that we maintain a
5 reference to that and it may not be clear and it may
6 be -- but I just want to be clear that it's more
7 important for law schools to comply with the law than
8 it is for them to comply with the ABA.

9 VICE CHAIRPERSON THERNSTROM: Do we lose
10 anything by including this in our list of findings?
11 We don't even if it's duplicative.

12 COMMISSIONER KIRSANOW: I don't have a
13 problem with it as written. I just had a question as
14 to whether or not that clarification had been made.

15 VICE CHAIRPERSON THERNSTROM: Right.

16 COMMISSIONER KIRSANOW: And if this, in
17 fact, if we already have reference to that
18 clarification my only question was does that satisfy
19 us. I'm not sure.

20 VICE CHAIRPERSON THERNSTROM: I know. I'm
21 just asking since we don't have an answer to that
22 question whether we need it.

23 COMMISSIONER BRACERAS: I have a
24 suggestion. How about taking out the first part that
25 says "ABA should revise" and just simply state "Law

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1 schools should be clear that Constitutional and
2 statutory provisions" blah, blah, blah.

3 VICE CHAIRPERSON THERNSTROM: That's fine.

4 COMMISSIONER BRACERAS: We're not asking
5 them to do anything. We're simply reminding the law
6 schools of where their primary obligations lie.

7 VICE CHAIRPERSON THERNSTROM: Right, and
8 then strike "for all law schools." Put "Law schools
9 should be clear at the outset." Strike "for all law
10 schools."

11 COMMISSIONER BRACERAS: That's right.

12 CHAIRMAN REYNOLDS: Commissioner Melendez.

13 COMMISSIONER MELENDEZ: No, I didn't have
14 a comment.

15 CHAIRMAN REYNOLDS: All right.

16 VICE CHAIRPERSON THERNSTROM: And then it
17 should read "even if these obligations conflict."

18 COMMISSIONER BRACERAS: Right. "Or
19 appears to," right?

20 VICE CHAIRPERSON THERNSTROM: Right.

21 COMMISSIONER BRACERAS: -- right now.
22 "Even if they conflict or appear to conflict."

23 VICE CHAIRPERSON THERNSTROM: Right.

24 COMMISSIONER BRACERAS: "Standard 211 and
25 its interpretation." So in other words, "Standard 211

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1 and its official interpretation" can say what they
2 want. I don't want any ABA bureaucratic on the sly
3 telling people, "You never really..."-- valid
4 initiative that the people voted for. So whether it
5 appears to them or somebody else tells they're not at
6 the point because they have to comply the law first.

7 VICE CHAIRPERSON THERNSTROM: Right. I'm
8 in agreement with this.

9 CHAIRMAN REYNOLDS: Okay. All in favor of
10 this recommendation as amended, please signify by
11 saying aye.

12 (Chorus of ayes.)

13 COMMISSIONER KIRSANOW: I would move to
14 hold open the record so that Commissioner Yaki can
15 register his vote on this.

16 VICE CHAIRPERSON THERNSTROM: That's fine.
17 In the meantime while we're doing that --

18 CHAIRMAN REYNOLDS: One thing.
19 Commissioner Melendez, do you vote for this or against
20 it or abstain?

21 COMMISSIONER MELENDEZ: Which number is
22 this?

23 COMMISSIONER KIRSANOW: No. 8

24 COMMISSIONER MELENDEZ: I'm opposed.

25 CHAIRMAN REYNOLDS: Okay.

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1 VICE CHAIRPERSON THERNSTROM: I hate to do
2 this but I do want to go back for one minute to
3 Finding 2. I am still very bothered by the last
4 sentence "is not widely available." You know, I just
5 don't know why we have that in there as if don't
6 bother folks to pursue this topic.

7 COMMISSIONER KIRSANOW: "Readily
8 available"?

9 VICE CHAIRPERSON THERNSTROM: Why do we
10 need that sentence?

11 COMMISSIONER YAKI: Are we still talking
12 about this?

13 VICE CHAIRPERSON THERNSTROM: No, I know.

14 COMMISSIONER KIRSANOW: How do you vote on
15 No. 8?

16 CHAIRMAN REYNOLDS: You don't need to
17 know. Just say no.

18 COMMISSIONER YAKI: No. 8? Could you
19 reread that? No.

20 COMMISSIONER HERIOT: You're aware of the
21 new phrasing of it.

22 COMMISSIONER YAKI: It doesn't matter.

23 COMMISSIONER HERIOT: Okay.

24 COMMISSIONER KIRSANOW: Commissioner Yaki
25 will be given \$1 million bonus.

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1 CHAIRMAN REYNOLDS: Okay. The suggestion,
2 are you comfortable?

3 VICE CHAIRPERSON THERNSTROM: I'm
4 suggesting we cut the last sentence on Finding 2. I'm
5 uncomfortable with the notion, with any notion, that
6 further research is less than feasible.

7 COMMISSIONER HERIOT: It just says
8 "further evaluate." So all the data that's out there
9 is out there.

10 CHAIRMAN REYNOLDS: This would be in
11 addition to the body of information that's out --

12 COMMISSIONER HERIOT: It's almost
13 redundant. The data that's not there yet is not there
14 yet.

15 VICE CHAIRPERSON THERNSTROM: Is that the
16 way it's going to be read? The fact is we have a
17 bunch of scholars working on this question. They're
18 trying to get the data. Sander himself is trying to
19 get more data.

20 COMMISSIONER HERIOT: Yes, but in that
21 respect, the data isn't widely available. But with
22 regard to that research, it's true.

23 VICE CHAIRPERSON THERNSTROM: This seems
24 to suggest we can't answer crucial questions and will
25 not be able to.

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1 CHAIRMAN REYNOLDS: My sense is -- Well,
2 the impression that I have is, Commissioner
3 Thernstrom, I think you're reading a lot into it.

4 VICE CHAIRPERSON THERNSTROM: Okay. All
5 right. Fine. I'll drop it.

6 CHAIRMAN REYNOLDS: Where are we, folks?

7 VICE CHAIRPERSON THERNSTROM: We're at the
8 State Advisory Committee. I have one other remark to
9 make before we go onto this. This is too cumbersome a
10 process. Surely, there is some way of doing this --

11 COMMISSIONER KIRSANOW: Poll votes.

12 VICE CHAIRPERSON THERNSTROM: Whatever.

13 COMMISSIONER BRACERAS: I have to disagree
14 with you. I think this is precisely the type of
15 stuff, the good discussion, that we never had under
16 Mary Frances Berry that is good for us to have in open
17 forum and I think some of the changes that were made
18 today, some of them substantive and some of them nit-
19 picky, all make it much better document and they would
20 not have been made if we hadn't gone through this
21 exercise and, yes, it's time-consuming and, yes, it's
22 laborious but frankly, I think it's the most important
23 work we can do, much more important than voting on the
24 schedule.

25 VICE CHAIRPERSON THERNSTROM: Jennifer, my

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1 point is --

2 COMMISSIONER HERIOT: I have a proposal
3 though. What if we had a rule that says we have to
4 vote on each finding and recommendation upon the
5 request of any individual Commissioner so that if in
6 the future there is some report where nobody really
7 wants to do this, that we can bypass it.

8 VICE CHAIRPERSON THERNSTROM: Jennifer, my
9 point is not that this wasn't valuable. The only
10 point is is there a way to do it in a more expeditious
11 way and the answer may be no.

12 COMMISSIONER BRACERAS: I don't think so
13 because I think the public has the right to hear the
14 debated substantive issues and that is really what we
15 are paid to do, not vote on the scheduling.

16 VICE CHAIRPERSON THERNSTROM: I'm not sure
17 we were debating substantive issues today.

18 COMMISSIONER HERIOT: I think it was a
19 good thing to go through these things one at a time on
20 this report.

21 COMMISSIONER YAKI: Yes. I know I thought
22 I was.

23 COMMISSIONER BRACERAS: I think the edits
24 that were made were all excellent and it's a much
25 better product because we looked at them one at a

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1 time.

2 VICE CHAIRPERSON THERNSTROM: All right.

3 COMMISSIONER BRACERAS: Even the nit-picky
4 things like what you call the Council or what have
5 you. That wouldn't have been made if we hadn't
6 brought it up here.

7 VICE CHAIRPERSON THERNSTROM: All right.

8 I withdraw my comments.

9 VII. STATE ADVISORY COMMITTEE ISSUES

10 CHAIRMAN REYNOLDS: All right. Next up is
11 the State Advisory Committee Issues. We are
12 rechartering right now Virginia.

13 COMMISSIONER BRACERAS: I'm sorry, folks.

14 At this time, I need to get off the call because I
15 need to go to the doctor and take one of the kids to
16 the doctor since we're all sick here.

17 CHAIRMAN REYNOLDS: Okay.

18 COMMISSIONER BRACERAS: Which is why I
19 couldn't be there in person. So I'm signing off.
20 Thank you and we'll see you in May.

21 CHAIRMAN REYNOLDS: Very good.

22 (Commissioner Braceras exits meeting.)

23 CHAIRMAN REYNOLDS: We are rechartering
24 two state advisory committees. May I have a motion to
25 recharter the Virginia State Advisory Committee?

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1 Under this motion, the Committee appoints the
2 following individuals to that committee based on the
3 recommendations of the Staff Director, Linda Chavez,
4 Lloyd Cohen, Stanley Cook, Morris Cooper, Tao Du,
5 Rachel Fisher, James Hengley, Curt Levy, Richard Samp,
6 Janeen Sims, Andrew Shannon, Raog Su, Jason Torcinski
7 and Lacey Ward.

8 Furthermore, I also move that the
9 Commission appoint Linda Chavez as Chair of the newly
10 rechartered Virginia State Advisory Committee. These
11 members will serve as uncompensated Government
12 employees and the Commission approves the hard work
13 that they will no doubt contribute to this SAC. Under
14 this motion, the Commission authorizes the Staff
15 Director to execute the appropriate paperwork for the
16 appointment. Is there a second?

17 COMMISSIONER KIRSANOW: Second.

18 COMMISSIONER YAKI: I move to divide the
19 question.

20 CHAIRMAN REYNOLDS: Okay. Someone explain
21 to me what that means?

22 COMMISSIONER TAYLOR: Membership and
23 chair?

24 COMMISSIONER YAKI: Yes.

25 CHAIRMAN REYNOLDS: I'm sorry.

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1 COMMISSIONER TAYLOR: Membership and
2 chair. That's all.

3 COMMISSIONER KIRSANOW: Divided on the
4 membership and chair.

5 CHAIRMAN REYNOLDS: Okay. So --

6 COMMISSIONER TAYLOR: Second.

7 CHAIRMAN REYNOLDS: All right.

8 COMMISSIONER YAKI: Actually, there is no
9 second on a motion to divide the question. It's a
10 privileged motion. Discussion.

11 CHAIRMAN REYNOLDS: And we're talking
12 about the chair, right?

13 COMMISSIONER YAKI: No, the membership.

14 COMMISSIONER MELENDEZ: I wanted to talk
15 about SACs in general because at the beginning of the
16 Staff Director's report we could have talked about but
17 then kind of waited for this time to talk about SACs
18 in general. My understanding is that there will be
19 several retirements in the coming months from the
20 Commission regional office and this plays into it
21 because we're talking about a process of how
22 recommendations for the names that are submitted to
23 the Commission actually come to us.

24 So my concern is that we're losing a
25 number of regional office people there or the people

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1 that head up those offices and I just need to know how
2 do we plan to facilitate that without chairs because I
3 think they play into this whole issue of
4 recommendations coming from the different regions as
5 far as the SAC.

6 I never totally understood what the
7 process is on that because at some point, I thought
8 that maybe they had some hand in recommending or
9 whether or not it was the Staff Director here that
10 recommends or whether or not it was the Commissioners
11 that throw a couple names into the hat. So I think
12 before we start to get in there, I think we should
13 define exactly what is the process because I think the
14 outcome obviously plays into this because we're
15 supposed to have a diverse array of people that end up
16 on these SAC committees and we raised it a number of
17 times that it seems to be not staffed just along party
18 lines, but it doesn't seem to be staffed evenly as far
19 as women on these committees.

20 If we look at the Virginia SAC, we have 21
21 percent women, 79 percent men. We have two Democrats,
22 seven Republicans, five Independents. We seem to be
23 many times turning out to be Republicans from what
24 I've seen so far. So I'm just saying at some point
25 we're supposed to be somewhere close to balance on

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1 this, but we've raised this on a number of other
2 recharter packages. So I just think that we need to
3 talk about, have frank discussion, as to what is this
4 process? Is it working or did the regional director
5 submit names and we're not really listening to them
6 and I'd like to even ask on this one who did the
7 regional staff recommend for that and then have the
8 Staff Director tells us why some of those names were
9 rejected or others inserted in their place and I think
10 that's a fair question that we really need to know
11 those answers before we vote on this, not only this
12 one, but the Michigan SAC also. I'm just raising that
13 question up.

14 COMMISSIONER YAKI: Point of order. I
15 would request a two minute recess to talk with the
16 Chair.

17 CHAIRMAN REYNOLDS: Sure. Off the record.

18 (Whereupon, the foregoing matter went off
19 the record at 1:39 p.m. and went back on the record at
20 1:58 p.m.)

21 CHAIRMAN REYNOLDS: On the record. Okay.
22 We were scheduled to vote on the Virginia and
23 Michigan rechartering packages for Virginia and
24 Michigan. We have received a letter from the Chairman
25 of the Committee of the Judiciary, John Conyers. The

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1 letter is also signed by Gerald Nadler who is the
2 Chairman of the Subcommittee on the Constitution Civil
3 Rights and Civil Liberties.

4 Rather than -- And in this letter, they
5 have raised questions about our process in terms of
6 selecting members for the SACs. Rather than vote on
7 these rechartering packages, we believe that out of
8 deference and respect for the Chairman that we respond
9 to the letter prior to voting. So I move that we
10 table the vote on the rechartering packages for the
11 states of Virginia and Michigan until next month. Is
12 there a second?

13 COMMISSIONER KIRSANOW: Second.

14 CHAIRMAN REYNOLDS: All in favor?

15 (Chorus of ayes.)

16 CHAIRMAN REYNOLDS: Any in opposition?

17 (No response.)

18 CHAIRMAN REYNOLDS: Any abstentions?

19 (No response.)

20 CHAIRMAN REYNOLDS: The motion passes
21 unanimously. Folks, we are --

22 COMMISSIONER YAKI: Out of here.

23 CHAIRMAN REYNOLDS: I'm sorry.

24 COMMISSIONER HERIOT: Look at your agenda.

25 Is that --

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1 . VICE CHAIRPERSON THERNSTROM: That was the
2 whole reason for doing this was to get out.

3 CHAIRMAN REYNOLDS: We are adjourned. Off
4 the record.

5 (Whereupon, at 2:00 p.m., the above-
6 entitled matter was concluded.)

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