

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

MEETING

+ + + + +

Friday, June 8, 2001

+ + + + +

LIBRARY
U.S. COMMISSION ON CIVIL RIGHTS

To Library

The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., Mary Frances Berry, Chairperson, presiding.

PRESENT:

MARY FRANCES BERRY, Chairperson

CRUZ REYNOSO, Vice Chairperson

CHRISTOPHER EDLEY, JR., Commissioner

YVONNE Y. LEE, Commissioner

ELSIE M. MEEKS, Commissioner

RUSSELL G. REDENBAUGH, Commissioner

ABIGAIL THERNSTROM, Commissioner

VICTORIA WILSON, Commissioner

LESLIE R. JIN, Staff Director

DR. ALLAN J. LICHTMAN, Consultant

STAFF PRESENT:

LUTHER ADAMS
 KIMBERLEY ALTON
 DAVID ARONSON
 TAMMY CHU
 EDWARD DARDEN
 BARBARA DELAVIEZ
 TERRY DICKERSON
 GRETCHEN DOUHOLUK
 PAMELA A. DUNSTON
 BETTY EDMISTON
 MICHAEL FOREMAN
 EDWARD A. HAILES, JR., General Counsel
 ANTOINETTE HAMLET
 GEORGE M. HARBISON
 ANNA KAUFFMANN
 JENNY PARK
 PETER REILLY, Parliamentarian
 KWANA ROYAL
 ALIJAH SCHNEIDER
 DAWN SWEET
 VICTORIA TUNG
 MARCIA TYLER
 AUDREY WIGGINS
 MICHAEL WOLF
 AUDREY WRIGHT
 MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

KRISTINA ARRIAGA
 PATRICK DUFFY
 ELIZABETH OUYANG
 CHARLOTTE PONTICELLI
 SCOTT SCHREIBER
 KRISHNA TOOLSIE
 EFFIE TURNBULL

A-G-E-N-D-A

PAGE

I. Approval of Agenda 4

II. Approval of Minutes of May 4, 2001
Meeting 5

III. Announcements 6

IV. Staff Director's Report 6

V. State Advisory Committee Report
Delaware Citizens Guide to Civil Rights
and Supporting Services (Delaware) 9

VI. Discussion of Report on Voting
Irregularities Occurring in Florida
During the 2000 Presidential Election 10

VII. Future Agenda Items 146

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

(9:38 a.m.)

CHAIRPERSON BERRY: The meeting will come to order. I am Mary Frances Berry, Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania in Philadelphia where I teach history of American law. I am also Chairperson of the United States Commission on Civil Rights.

I. Approval of the Agenda

CHAIRPERSON BERRY: The first item on the agenda is the approval of the agenda.

Could I get a motion to approve the agenda?

COMMISSIONER EDLEY: So moved. But Madam Chair, I'd like to offer an amendment.

CHAIRPERSON BERRY: Okay.

COMMISSIONER EDLEY: Item 6 which is the discussion of the Florida Report, I'm very concerned that we be sure to have as much discussion of the substance as necessary, so I'd like to amend, move to amend the agenda so that item 6 would be broken into three subparts.

CHAIRPERSON BERRY: Okay.

COMMISSIONER EDLEY: The first presentation of the report or opening, presentation of the report by the Chairperson and senior staff. Then second, a discussion by the Commissioners of the substance of the report and its

1 recommendations. And then the third item being a
2 discussion of any procedural issues related to the report.

3 CHAIRPERSON BERRY: Okay.

4 COMMISSIONER EDLEY: Followed by a vote.

5 CHAIRPERSON BERRY: Okay.

6 COMMISSIONER EDLEY: And just to be clear, my
7 goal here is to make sure that we don't spend hours and
8 hours talking about procedural issues, leaks and timing and
9 who shot whom and that we try to focus on the substance of
10 the issues.

11 CHAIRPERSON BERRY: With that, does anyone
12 else have any items that they'd like to add to the agenda?

13 Okay, all in favor of approving the agenda
14 with that change, indicate by saying aye.

15 (Ayes.)

16 Opposed?

17 COMMISSIONER REDENBAUGH: No.

18 **II. Approval of Minutes of May 4, 2001 Meeting**

19 CHAIRPERSON BERRY: The next item is the
20 approval of the minutes of May 4th. Could I get a motion
21 to approve the minutes?

22 COMMISSIONER WILSON: So moved.

23 COMMISSIONER EDLEY: Second.

24 CHAIRPERSON BERRY: Any discussion? All in
25 favor, indicate by saying aye.

1 (Ayes.)

2 CHAIRPERSON BERRY: Opposed?

3 **III. Announcements**

4 CHAIRPERSON BERRY: Next item is
5 announcements. We would like to welcome, if the interns
6 are here, if they got in the room and introduce the interns
7 working with us at this time. In the Office of the Staff
8 Director we have Tammy Chu from the University of Michigan.
9 Hail to the Victors Valiant. And Victoria Tung from the
10 University of Pennsylvania.

11 In our Office of Public Affairs, we have
12 Gretchen Douholuk from the University of New Hampshire.
13 Antoinette Hamlet from Findley University in Ohio; Ann
14 Kauffman from Furman University; Aliyah Schneider from
15 Washington University; and in our Office of Civil Rights
16 Evaluation we have Michael Wolf from Columbia University.

17 So I don't know if they're in here, but we're
18 very grateful to have all of these interns here working
19 with us this summer and I hope you enjoy it.

20 **IV. Staff Director's Report**

21 CHAIRPERSON BERRY: The next item on the
22 agenda is the Staff Director's Report. Does anyone have
23 any questions or anything concerning the Staff Director's
24 Report that they'd like to raise at this time?

25 COMMISSIONER LEE: Madam Chair?

1 CHAIRPERSON BERRY: Yes, Commissioner Lee.

2 COMMISSIONER LEE: I'd like to ask the Staff
3 Director for a report on the request that the Commission
4 made for further information from DOE.

5 STAFF DIRECTOR JIN: Certainly, Commissioner
6 Lee. Our Office of Civil Rights Evaluation in the last
7 four or five weeks have made numerous calls over to the
8 Department of Energy regarding whether that Department
9 plans to do anything further on Wen Ho Lee and whether they
10 have any documents on Mr. Lee. The definitive conversation
11 probably came when we talked to one of the Deputy Inspector
12 Generals who made it clear that they did not have any other
13 documents on Wen Ho Lee that they planned to release. They
14 were not working on anything else on Wen Ho Lee and that we
15 should not expect anything further regarding Wen Ho Lee.

16 COMMISSIONER LEE: Madam Chair, it's been
17 almost 9 months which this Commission had asked both
18 Department of Energy and Department of Justice for
19 information on both the Wen Ho Lee case and also general
20 racial profiling allegations at National Labs and I really
21 appreciate the staff's effort, but it seems like the
22 Departments have been very slow in coming with the
23 information that we really have requested.

24 In light of the Energy Secretary's release of
25 his zero tolerance on racial profiling, and just a few

1 weeks after that release, a Member of Congress and his
2 assistant, they were both denied entrance to the Department
3 of Energy when the Congressman was invited to speak at the
4 Department's Asian Pacific American Heritage celebration.
5 I think that it is really incumbent upon this Commission to
6 seek other ways to get this information from both
7 Department of Energy and DOJ.

8 CHAIRPERSON BERRY: The letters that we got,
9 they did respond, it's just that they didn't include the
10 information.

11 COMMISSIONER LEE: They responded last month
12 and the Inspector General's report was a four-page report.
13 It was based on four cases, alleged racial profiling, but
14 even the media report had cited more than four. So I think
15 the Commission had asked for more information, but it seems
16 like they're not going to release anything until this
17 Commission does something to compel them to release more
18 information that we had asked for.

19 CHAIRPERSON BERRY: Why don't we try next --
20 we received response, but you're saying the response didn't
21 address the issues in the way that we wanted.

22 Why don't we try next getting a meeting with
23 the Energy Secretary and having a discussion with him about
24 this before we start compelling anybody to do anything?

25 COMMISSIONER LEE: And also I would like to

1 request a meeting with the Attorney General too because we
2 had also made that request to DOJ.

3 CHAIRPERSON BERRY: Well, I think we need to
4 start with Energy though. So why don't we, if Energy has
5 not responded satisfactorily, why don't we have the staff
6 first call over there, follow up and if we don't get any
7 follow up, then we'll go over and meet with the Secretary
8 and see if we can get some answers before we do anything
9 else, okay? Is that acceptable to you, Commissioner? Yes.

10 COMMISSIONER EDLEY: Ultimately, what could
11 we do?

12 CHAIRPERSON BERRY: If the only way we can
13 compel him to respond is to have a hearing and subpoena.

14 COMMISSIONER EDLEY: A subpoena.

15 CHAIRPERSON BERRY: But I think we don't need
16 to do that, but I hope -- I think what we should do is just
17 simply keep asking and then go over and have a meeting and
18 see if we can get some answers.
19 And then we can decide whether we need to do anything else.

20 So for now, that's where we'll leave it, Commissioner Lee.

21 COMMISSIONER LEE: Thank you.

22 CHAIRPERSON BERRY: Does anyone else have
23 anything else on Staff Director's Report? Okay.

24 **V. State Advisory Committee Report, Delaware**
25 **Citizens Guide to Civil Rights and Supporting Services**

(Delaware)

1
2 CHAIRPERSON BERRY: The next item on the
3 agenda is the State Advisory Committee Report called
4 Delaware Citizens Guide to Civil Rights and Supporting
5 Services. The Delaware State Advisory Committee, like the
6 other Advisory Committees to this Commission is constituted
7 of citizens who are willing to give of their time as
8 volunteers to work on these issues and to hold forums and
9 to meet with people and to be our eyes and ears out there
10 in the States.

11 The Delaware State Advisory Committee
12 prepared this report. Could I get a motion to approve
13 their report?

14 COMMISSIONER LEE: So moved.

15 COMMISSIONER MEEKS: Second.

16 CHAIRPERSON BERRY: Any discussion of the
17 Delaware Citizens Guide to Civil Rights and Supporting
18 Services?

19 All right, all in favor, indicate by saying
20 aye.

21 (Ayes.)

22 Opposed? I think they did a good job and it
23 should be very informative and useful to the people in
24 Delaware.

25 VI. Discussion of Report of Voting Irregularities

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Occurring in Florida During the 2000

Presidential Election

CHAIRPERSON BERRY: The next item on the agenda is a discussion of the report on voting irregularities occurring in Florida during the 2000 Presidential Election.

Consistent with the agenda item we will begin with an introduction and then we will go on to discuss the substance and we have Professor Lichtman here to discuss the statistical matters when we get those to that point.

So I am going to read an introduction to this subject at this time.

The Commission conducted the most extensive public investigation of record concerning allegations of voting irregularities in Florida during the election. We exercised the subpoena power in conducting three days of hearings, collecting over 30 hours of testimony from over 100 witnesses and securing relevant documents containing more than 118,000 sheets of paper.

Numerous witnesses gave heart rending accounts of the frustrations they experienced at the polls in attempting to participate in the election. Potential voters talked about inept poll workers, antiquated machinery, inaccessible polling places and other barriers to exercising their right to vote. Widespread voter

1 disenfranchisement and not the dead heat contest was the
2 extraordinary feature in the Florida election.

3 The most dramatic undercount in the election
4 was the nonexistent ballots of the countless unknown
5 eligible voters who were wrongfully purged from the voter
6 registration rolls, turned away from the polls and by
7 various other means prevented from exercising the
8 franchise.

9 Statistical data in the report reinforced by
10 credible anecdotal evidence point to widespread
11 disenfranchisement and denial of voting rights. It is
12 impossible to determine the extent of the
13 disenfranchisement or to provide to adequate remedy to
14 people who just were not able to vote. And the
15 disenfranchisement of the voters fell most harshly on the
16 shoulders of African Americans. Other people were
17 affected, but it fell more harshly on the shoulders of
18 African Americans. Statewide, based upon county level
19 statistical estimates, African American voters were nearly
20 10 times more likely than white voters to have their
21 ballots rejected. And AFAMs comprise about 11 percent of
22 all the voters and cast about 54 percent of the rejected
23 ballots.

24 The report has no conclusive evidence in it
25 that there was any conspiracy among the highest officials

1 in the State. Instead, the report concludes that the
2 Governor and the Secretary of State, in particular, chose
3 to simply ignore the mounting evidence of rising vote
4 registration rates in communities with outdated voting
5 technology. As a result, African American voting districts
6 were disproportionately hindered by antiquated and
7 error-prone equipment such as the punch card ballot system.

8 Furthermore, State officials ignored the
9 pleas of local county supervisors for guidance and help.
10 In addition, the county supervisors in those places where
11 there were the worse problems, failed to prepare
12 adequately. They didn't demand necessary resources and
13 they didn't tell the public that they didn't have the
14 resources. So we had a lack of leadership in the important
15 area of protecting voting rights that encouraged this broad
16 array of problems.

17 Also, there was the unequal distribution of
18 quality equipment and other needed resources across the
19 State and the public was simply unaware that this was going
20 on.

21 Poor counties, particularly those with
22 significant minority populations, were more likely to have
23 these voting systems with high spoilage rates than the more
24 affluent counties with significant white populations. And
25 so the report talks about the high correlation between the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 percentage of African American precincts and the
2 percentages of spoiled ballots. That and the 10 counties
3 with the highest percentage of African American voters had
4 spoilage rates above the Florida average that focuses on
5 Gadsen County which had the highest rate of spoiled ballots
6 and also the highest percentage of African American voters.

7 Of the 10 counties with the highest
8 percentage of white voters, only two counties had spoilage
9 rates above the State average. There were 180,000 total
10 number of spoiled ballots and for every 10 percent increase
11 in black voters, ballot rejection increased by 1.8 percent.

12 Of the 100 precincts with the highest number of
13 disqualified ballots, 83 are majority black precincts.
14 That's out of 100.

15 The statistical data in the report shows that
16 African Americans were barred from the voter rolls not only
17 due to spoiled ballots. I mean there's statistical data
18 that shows the spoiled ballots, but there were other things
19 going on here in Florida. The failure to incorporate motor
20 vote registrants and the State-sponsored purging procedures
21 significantly contributed to the dilution of the African
22 American vote.

23 The report also talks about the lack of
24 uniformity and the absence of clear guidance from top
25 officials in the State as well as the allocation of

1 procedures and the decisions that did this viewed in the
2 context of social and historical factors, prove
3 discrimination and a violation of the Act.

4 The report's finding that the Florida
5 election was not equally open to all must be seen in the
6 context of this Commission's jurisdiction and authority.
7 This Commission is a fact-finding body and authorized to
8 investigate allegations of voting discrimination, fraud and
9 other irregularities. However, the Commission does not
10 adjudicate violations of the law. We're not a court. We
11 don't hold trials and we don't determine whether anybody
12 civilly or criminally is liable. That's within the
13 jurisdiction of the U.S. Department of Justice and Florida
14 law enforcement officials who must be the persons to seek
15 appropriate sanctions and remedies.

16 Based on the hearing record, that is the
17 testimony we got and the people who came forward, fraud
18 does not appear to be a major factor in the Florida
19 election. Instead, overzealous efforts conducted under the
20 guise of an anti-fraud campaign resulted in the inexcusable
21 and patently unjust removal of disproportionate numbers of
22 African American voters from Florida's vote registration
23 rolls.

24 Then we have the purge system, the felon
25 purge systems which proceeds on the premise of guilty until

1 resources. It talks about the absence of voter education
2 funds and effective poll worker training.

3 The report explains that there's a strong
4 basis for concluding that violations of Section 2 of the
5 Voting Rights Act of 1965 did occur in the State of
6 Florida. The Voting Rights Act of 1965 prohibits voting
7 discrimination. It is aimed at subtle, as well as obvious
8 State action that has the effect of denying a citizen the
9 right to vote because of his or her race.

10 Although the Voting Rights Act at first
11 focused on African Americans, the law has been amended
12 several times to include Native American Indians, Asian
13 Americans, Alaskan Natives and people of Spanish heritage.

14 Additionally, the Voting Rights Act has a provision that
15 recognizes the need for language assistance for non-English
16 speakers and the Act requires no intent to discriminate.
17 Neither is proof of a conspiracy required. We don't prove
18 a conspiracy and proof is not required.

19 Violations of the Act can be established by
20 evidence that the actions of responsible officials and
21 other evidence constitute a totality of circumstances that
22 denied the right to vote. For example, if there are
23 differences in voting procedures or voting technologies and
24 the result of those differences is to advantage white
25 voters and disadvantage minority voters, then the laws, the

1 proven innocent. The process placed the burden on the
2 voter to justify that they can be on the rolls. And then
3 you have all of these errors and the lack of effective
4 control in the State's list maintenance system which ends
5 up with the exclusion of voters, instead of the expansion
6 of voter participation.

7 Under the purge system, voters, AFAMs were
8 placed on purge lists more often and more erroneously than
9 Hispanic or white voters. For instance, in Miami-Dade, the
10 State's largest county, over 65 percent of the names on the
11 list consisted of African Americans who represented only
12 20.4 percent of the populations. Hispanics were 57.4
13 percent of the population, but only 16.6 percent of the
14 purge list. Whites were 77.6 percent of the population,
15 but 17.6 percent of those purged.

16 The report says that there were no clear
17 guidelines from the Governor, the Secretary of State or the
18 Director of the Division of Elections to employ strategies
19 in using these lists that would protect eligible voters
20 when they were trying to vote.

21 The report also finds that there were
22 cautionary steps taken before the 1998 election by the
23 officials who were in office in Florida then. At that
24 time, the State told the supervisors at the County level to
25 verify the exclusion list before they were removing people

1 in a felon purge.

2 They were told that this had to be done very
3 carefully and that they ought to provide opportunities for
4 people who said they were not felons to vote by using an
5 affidavit ballot, that is filling out something saying I
6 should be on the rolls, an affidavit, before they removed
7 them because the lists were very unreliable and that they
8 wanted to make sure that they were not taking people off
9 who should be on.

10 Before the 2000 election, the Secretary of
11 State who was in office then in the Division of Elections,
12 issued no such caution to anyone about the use of these
13 rolls, these purge systems. And also, the State failed to
14 provide adequate training to the County Supervisors in how
15 you go about verifying these felon purge procedures. And
16 there were numerous instances that we heard of -- and the
17 report has it of communications breakdowns and
18 malfunctioning machinery on election day. Many election
19 officials failed to use affidavits to permit people to vote
20 when they could have. The inability to reach Central
21 Offices to certify voters, long lines, unprepared and
22 untrained workers and accessibility problems were
23 widespread.

24 The State's highest officials responsible for
25 ensuring efficiency, uniformity and fairness in election

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

were grossly derelict in fulfilling their responsibilities and unwilling to take responsibility.

The Governor insisted that he had no specific roll in election operations and pointed to his Secretary of State as the responsible official. After the election, however, the Governor exercised responsibility in electoral matters. He took the commendable action of appointing a task force to seek recommendations on the problems that occurred. Furthermore, the Governor's post-election commitment to increase voter education initiatives for new and minority voters contrasts sharply with his actions before the election. Before the election, he failed to support a modest budget request of \$100,000 for voter education.

The Secretary of State, the chief elections officer, denied any responsibility for the problems of disenfranchisement in the election. Beyond a "ministerial role", she pointed to the county officials as the authorities responsible for the election. Her claims of no responsibility sharply contrasts to her actions in the aftermath of election day. While she described her role in the policies and decisions affecting the actual voting as limited, she asserted ultimate authority, she said she had ultimate authority in determining the election count.

The report concludes that the purposeful use

1 of erroneous listings to promote the State's purging
2 priorities and the permanent disenfranchisement of
3 discharged felons raise important questions of fundamental
4 fairness. Florida has an onerous and infrequently rendered
5 clemency process which should be analyzed and questioned.

6 The report says that former offenders who
7 have paid their debt to society should have their
8 citizenship rights restored. It notes that African
9 American disproportionately charged, convicted and
10 sentenced in the criminal justice system, are
11 disproportionately affected by the State's purging policies
12 and practices. It asks that the Governor exercise moral
13 authority to recommend reform in this area of State law.

14 There's a section in the report on
15 accessibility issues, for people who are -- persons who
16 have disabilities. There were countless voters in Florida
17 with special needs who were disenfranchised due to
18 inaccessible precincts and ballots. Persons with
19 disabilities who rely on wheelchairs were forced to
20 negotiate steps and unreachable polling booths undergo
21 humiliation by relying on others to lift them into polling
22 places to exercise their right to vote. Others who lacked
23 assistance, who had nobody to lift them were simply turned
24 away, thus denying them their right to participate fully in
25 the political process. Also, despite the requirements for

1 language assistance to non-English proficient voters a
2 large number of such voters were denied this assistance in
3 Florida in the election. In some Central Florida counties,
4 Spanish speaking voters received no bilingual assistance
5 and some of these counties are specifically required to
6 provide language assistance under the Voting Rights Act.
7 The failure to provide language assistance then resulted in
8 widespread voter disenfranchisement in an estimated several
9 thousand Spanish speaking voters in that area.

10 The report says that the electoral reform law
11 adopted by the Florida legislature and signed by the
12 Governor is a positive development. However, it points out
13 that the law does not address several important issues
14 including assessibility for persons with disabilities,
15 language assistance and other barriers to voter
16 participation.

17 The report recommends that any reforms must
18 include clear guidance, responsibility and accountability
19 measures and any suggested reforms must include effective
20 monitoring systems and adequate resources.

21 Finally; the report calls upon the Attorney
22 General of the United States to begin immediately the
23 litigation process to determine liability and remedies
24 concerning the matters described. To reiterate, the report
25 finds a strong basis for concluding that Section 2 of the

1 Voting Rights Act of 1965 has been violated in these
2 matters.

3 Okay, now I'm going to call upon the General
4 Counsel, but before I do that I do want to mention, we have
5 a procedural discussion later, but I think it's important
6 for me to say before I call upon the General Counsel, that
7 it has been much booted about publicly about how the
8 Commission operates and just for the public's information I
9 will briefly state that the Commission often discusses its
10 operations. Commissioners when they come on board are
11 given a handbook that describes how the Commission
12 operates. As recently as our April meeting, we had a
13 discussion of how Commissioners would operate and do
14 operate and how that affected this report that we are
15 discussing today and I explained again at that meeting that
16 Commissioners and their assistance can meet with the staff
17 director to discuss the report at any time they wish, give
18 advice, talk about it, at any stage of the process. This
19 was done previously and it was reiterated at the meeting in
20 April. I understand from the Staff Director that no
21 Commissioner asked to meet with anyone to discuss the
22 report or the on-going work of the report.

23 Also, to point out that my role as chair is
24 that since I have to determine the agenda of the Commission
25 and we've had some discussion of that in the meetings with

1 the support of the Commissioners, I consult very frequently
2 with the Staff Director and meet with him and occasionally
3 with his staff to discuss what's going on here. I do that
4 even though I teach at Penn. and spend a lot of my time in
5 Philadelphia. I do, in fact, and am aware of what goes on
6 here and do talk to them about matters that are going on
7 here on a regular basis.

8 The other thing I wanted to point out is that
9 all Commissioners -- we had a discussion about when we
10 would receive this report in the April meeting and one
11 Commissioner asked that question and was told that we would
12 receive it when we did receive it and so I wanted to clear
13 that up if anyone was concerned.

14 The final thing is to say that when we do the
15 procedural matters, we will have a discussion probably of
16 the question of leaks and just want to tell you the
17 Commission has had a number of leaks and discussions about
18 leaks over the last year or two since we started doing high
19 profile reports that people seemed to care about as opposed
20 to not, in my view that is. And we had a big discussion of
21 that and had an IG look into the question and so I think
22 we're probably going to need to make some new policies
23 about how we release reports, but I'll leave that to the
24 procedural discussion.

25 Now the General Counsel should come forward

1 and talk. Eddie, why don't you go over there?

2 STAFF DIRECTOR JIN: Madam Chair, before the
3 General Counsel speaks, may I have a minute or two?

4 CHAIRPERSON BERRY: Yes, Staff Director,
5 please.

6 STAFF DIRECTOR JIN: Thank you, Madam Chair.

7 CHAIRPERSON BERRY: While he's going over
8 there.

9 STAFF DIRECTOR JIN: This will work nicely.
10 I just wanted to make a few comments, preliminary comments.

11 The Commission, of course, in its December 2000 meeting
12 decided to go down to Florida to examine issues of voting
13 problems down there associated with the November election.

14 The Commissioners' mandate to the staff was
15 to make this project its top priority. Thus, despite the
16 looming holiday season the staff broke into action. As a
17 result, we were down in Tallahassee in January for hearings
18 and went back to Miami for more hearings the following
19 month. Of course, with the completion of the hearings that
20 didn't mean the project ended. It only meant that we went
21 to a new stage. We then began with examination, analysis,
22 writing and rewriting of the report.

23 As of earlier this week, of course, the staff
24 provided the Commissioners with a final draft of that
25 report.

1 In terms of timeliness, going from a project
2 concept to a final written product in six months is
3 unprecedented in the Commission's history and probably
4 almost twice as fast as the Commission has ever finished a
5 written report, especially one of that magnitude and
6 complexity.

7 In terms of quality, of course, that is for
8 the Commissioners to decide and if the Commissioners do
9 decide to adopt this report ultimately for the public to
10 judge, my opinion, this is a quality report and one that
11 will stand the test of time nicely and will be viewed for a
12 long time as a product that is one of the more valuable
13 pieces of work associated with the 2000 election.

14 I am very proud to be the Staff Director
15 associated with this product, even though I didn't have
16 really that much to do with it.

17 Finally, I would like to give my enormous
18 gratitude, express my enormous gratitude to the staff for
19 all their hard work on this project and for the high
20 quality of professionalism they have brought to the
21 project. Of course, we're here today to speak about the
22 Florida voting project and thus I must first commend the
23 General Counsel and his staff for their hard work.
24 Virtually all of his staff was involved in this project at
25 one time or another. However, it's not only them, it's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 many other staffers with the Commission who spent many,
2 many hours, worked many, many evenings and many, many
3 weekends to do this report and to do some of the other
4 projects the Commission might remember they had asked them
5 to do over time.

6 I think a lot of lawyers are very excited at
7 this moment because you are about to embark on the only
8 thing they really cared about six months ago when you asked
9 them to do this project which is to have their work product
10 examined on the merits and hope that they have an
11 opportunity for their hard work to be translated into
12 something that will further voting rights for this country.

13 Madam Chair, I thank you for the opportunity
14 for those comments.

15 CHAIRPERSON BERRY: Absolutely, Staff
16 Director, that's fine and so we'll go ahead to General
17 Counsel. Eddie Hailes, General Counsel.

18 GENERAL COUNSEL HAILES: Thank you, Madam
19 Chairperson, Commissioners and Staff Director. The staff
20 certainly appreciates your comments. I would like to
21 mention, in particular, that I'm assisted today in this
22 presentation --

23 CHAIRPERSON BERRY: Ed, why don't you come up
24 here and take my chair, take somebody's chair so people can
25 see you.

1 GENERAL COUNSEL HAILES: I only want the
2 Commissioners to see me.

3 (Laughter.)

4 CHAIRPERSON BERRY: You don't want anyone to
5 you see, come on, Eddie. Why don't you come up? Let's
6 slide over and somebody push his chair. Here's a chair,
7 come on, come on sit up here so that the world -- so that
8 people can see you and don't have to look at your back.

9 What was that?

10 GENERAL COUNSEL HAILES: Commissioner Edley
11 passed me a note to powder my nose.

12 (Laughter.)

13 GENERAL COUNSEL HAILES: Again, Madam
14 Chairperson and Members of the Commission, Staff Director,
15 hi. Apart from being a father, this is one of the proudest
16 moments of my life in presenting this report to the
17 Commissioners for your consideration. It was only about 25
18 short weeks ago that this Commission asked the staff to
19 conduct an investigation of the allegations of voting
20 irregularities in Florida during the November 7th, 2000
21 Presidential Election. And within a very short time the
22 staff engaged in formal research and investigation to
23 produce a report for your consideration.

24 In December, the staff began extensive
25 research efforts, contacted State and county officials and

1 in January a hearing was held in the Florida State capital.

2 We selected that site or recommended that site for the
3 Commissioners because we believe that it was important to
4 this investigation to have top State officials testify
5 under oath before the Commission and to secure necessary
6 documents to corroborate testimony and to examine the
7 evidence of these allegations. The staff, in addition to a
8 number of telephonic interviews with these officials, also
9 had face to face meetings with representatives of the
10 Governor, of the State Highway Patrol and other top State
11 officials and with county officials.

12 The staff also had face to face contacts with
13 persons who had told the Commission staff of their first
14 hand accounts of voter disenfranchisement on November 7th
15 and these were not the top officials you see on TV. They
16 don't write books. They're everyday people. They don't
17 consider themselves perspicacious. They just simply talk
18 in barber shops and beauty parlors and churches and
19 synagogues about their right to vote and how it was denied
20 on November 7th.

21 After the hearing in Tallahassee on January
22 11th and 12th, the staff continued its research efforts,
23 verified the transcript, began to prepare for another
24 hearing in the southern part of Florida and this hearing
25 was held in the largest county in Florida, Miami Dade

1 County and because the Commission has subpoena powers that
2 reach for 100 miles, we were able to also subpoena
3 officials from Palm Beach County, Broward County and other
4 counties that had relevant information for this
5 investigation.

6 Again, there were face to face contacts by
7 the staff and some of the representatives, key officials
8 before the hearing and the staff was able to prepare
9 information relevant to the investigation.

10 Following the Miami Dade hearing we also, as
11 a staff, propounded interrogatories to officials, received
12 their responses, examined those responses. We conducted a
13 deposition at the request of Commissioners of one official
14 who testified at the Miami Dade hearing, but the
15 Commissioners believed that additional information was
16 necessary and the deposition was conducted.

17 At all times, the staff was interested in
18 securing facts and to present them in a logically, legally
19 sufficient manner.

20 As the research was going forward, the staff
21 determined that these allegations and the first hand
22 accounts that we received were not isolated or episodic,
23 but systematic and it was believed with the documents that
24 we had secured from the State officials and the county
25 officials that a statistical analysis would be helpful to

1 this investigation and we asked the Staff Director if he
2 would involve the Office of Civil Rights Evaluation in
3 examining the evidence that we had secured by doing a
4 statistical analysis and one was performed.

5 The Office of Civil Rights Evaluation and its
6 staff produced information that showed a direct correlation
7 between race and spoiled ballots, but believed and
8 recommended that a more refined analysis should be
9 conducted and suggested, in particular, that an ecological
10 regression analysis be performed by an expert.

11 We retained such an expert, Dr. Allan
12 Lichtman who is here today, to present his analysis and to
13 respond to questions about it. And you will see that he
14 concludes that his direct correlation between race and
15 spoiled ballots, rejected ballots, ballots that were cast,
16 but not counted, is significant and disproportionately
17 African Americans did not have their votes counted.

18 In addition to that statistical analysis, the
19 staff continued its investigation. We followed all of our
20 procedures including performing a legal sufficiency review
21 to determine that our sites were correct, that the cases
22 that are provided or discussed in this report are, in fact,
23 relevant to the points that are made. We undertook a
24 defame and degrade analysis and this is fairly important,
25 Madam Chair and Commissioners, because the Commission has a

1 regulatory responsibility to ensure that persons who are
2 mentioned in a report in a manner that may tend to defame
3 or degrade that person be afforded an opportunity to review
4 those statements and after reviewing those statements to
5 provide a response and the review period is 30 days. The
6 response period is 20 days. And it is within those
7 comments by the respondent must be incorporated in the
8 report. It's been the general practice of this Commission,
9 of course, not to include matters that tend to defame or
10 degrade any individual and that's the purpose of our defame
11 and degrade procedure, but where the remark for some reason
12 is relevant to the investigation, it must be included. We
13 afford the opportunity.

14 The staff diligently looked at the report to
15 determine whether there are any statements that would
16 require us to give any individual a 30-day opportunity to
17 respond to specific statements and we have seen a number of
18 accounts in the media that suggest that these procedures
19 require agencies to have a 30-day review period of an
20 entire report. That's a complete misreading of our
21 regulatory obligations. We were asked, for example, by the
22 Office of the Governor of the State of Florida to send a
23 copy of our report, our draft report to his office before
24 the Commissioners received it because he believed or his
25 legal representatives believed that that was required under

1 our regulations. That simply is not true.

2 Our internal guidelines for affected Agency
3 review do require us to send portions of a report that
4 pertain to the activities and responsibilities of that
5 Agency, send those portions of the report to that affected
6 Agency and give them an opportunity to review those
7 portions, not the entire report, particularly not before
8 the Commissioners get the entire report, but those portions
9 to that Agency allow them to review them and comment.

10 The staff sent the relevant portions of the
11 draft report to the nearly 30 affected agencies, agencies
12 whose activities and responsibilities are mentioned in this
13 draft report. We received approximately five responses.
14 For the Office of the Governor, we received affected Agency
15 comments from his legal counsel, Mr. Charles T. Canady, the
16 General Counsel. We saw his comments in the media before
17 we received them, but having received them we took them as
18 we do all affected Agency comments, review them to
19 determine whether it was necessary and appropriate to make
20 changes in the draft report and I believe his letter was
21 approximately seven pages and we found two areas in perhaps
22 the last two pages of his response that required us to
23 consider making necessary and appropriate changes and we
24 have made those changes based on his response.

25 And I can talk now -- one of those changes,

1 Madam Chair, is in reference to testimony we received and
2 we report in this draft report from the testimony about a
3 letter that was sent by the Governor to some members, some
4 citizens about the election encouraging them to vote by
5 absentee ballot. And you may recall the testimony that
6 some persons believed that taxpayers' monies were used
7 because it appeared to be, there appeared to be the
8 official seal of the State on the letter and it was sent to
9 Republican voters according to the witness and only
10 Republican voters, encouraging them to vote by absentee
11 ballot and more specifically from the convenience of your
12 home and the witness believed that was in violation of the
13 law because this is not a mail-in State where mail-in
14 voting is permitted as it is in other States.

15 In his response, Mr. Canady told us that the
16 letter we referred to in the report was misleading and in
17 some ways incorrect, for the letter that the Governor sent
18 was not on the official stationery of the State, but it was
19 from the desk of Governor Jeb Bush. The seal in the
20 background of the letter was not the current seal of State,
21 but an older version of the seal of State. So we believe
22 it's important to put in the record to make sure it's
23 complete that the Governor's legal representative believed
24 that we should let people know that this was not the
25 current seal, it was an old seal. This is from the desk of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrross.com

1 Jeb Bush and it wasn't paid, and this is significant and we
2 are making the change, this was not paid for with
3 taxpayers' monies.

4 Another change that we make because it's in
5 response to affected Agency review and that's why we have
6 affected Agency review, if there's an inaccuracy,
7 incomplete information, the agencies can let us know that
8 changes should be made and we will consider them. We had
9 pointed out in the report that county supervisors requested
10 and needed voter education monies and the funds, I believe,
11 \$100,000 had been requested by the Division of Elections
12 for \$100,000 to go into the budget and the Governor did not
13 promote that \$100,000 funding for voter education funds.

14 We received again a response from the
15 Governor that said that in fact an investigation was
16 conducted and the Division of Elections, the Secretary of
17 State never did request the \$100,000 voter education funds.

18 So in the report we will reflect that contrary to the
19 sworn testimony of L. Clayton Roberts, the Director of the
20 Division of Elections, the Governor says that the monies
21 were never requested from the Secretary of State. That
22 will be in the report.

23 CHAIRPERSON BERRY: So it is accurate to
24 state as I read that the Governor failed to support the
25 request for \$100,000?

1 GENERAL COUNSEL HAILES: That is accurate
2 because he said it never came to his desk to support it.

3 CHAIRPERSON BERRY: But Mr. Roberts who was
4 the Director --

5 GENERAL COUNSEL HAILES: Said that it did, so
6 there's a dispute, but I think we should put both in. We
7 should put the dispute in there.

8 We also had and we thank the Staff Director
9 for naming some extremely well qualified experienced
10 staffers to the Editorial Policy Review Board. They did a
11 wonderful job making suggestions on how we could change the
12 --

13 VICE CHAIRPERSON REYNOSO: I am sorry, can I
14 ask, did you have a response from the Secretary of State?

15 GENERAL COUNSEL HAILES: I have a list before
16 me and we did then a major portion, perhaps the largest
17 portion and the staff will correct me if I'm wrong, perhaps
18 the largest portion of the report that was sent out for
19 affected Agency review went to the Office of Secretary of
20 State Katherine Harris and looking at my listing and
21 knowing it to be a fact, we did not receive any comments
22 from the Secretary of State and we did not receive comments
23 from the Director of the Division of Elections, although we
24 sent major portions of the report to both bodies.

25 COMMISSIONER THERNSTROM: Mr. Hailes, could

1 you wrap up?

2 GENERAL COUNSEL HAILES: Sure. So following
3 the legal sufficiency review, the editorial policy review,
4 the affected Agency review, other changes, the staff
5 completed this report and I'm proud to work with the team
6 leaders, Mr. Peter Riley, Deborah Reed, Michael Foreman,
7 Audrey Wiggins and other staff members who worked very
8 diligently on this report, including Bernard Quarterman,
9 Joyce Smith and Barbara Delaviez and Jenny Park, all of
10 whom did an exceptional job on this report.

11 CHAIRPERSON BERRY: Are they in here?

12 GENERAL COUNSEL HAILES: I know our team
13 leaders are, Audrey Wiggins, Michael Foreman, Peter Riley
14 are here. I think I saw Jenny --

15 CHAIRPERSON BERRY: They're the good looking
16 people sitting in the room.

17 (Laughter.)

18 CHAIRPERSON BERRY: Okay. Is that it?

19 GENERAL COUNSEL HAILES: That is it.

20 CHAIRPERSON BERRY: Okay, then according to
21 the change in the --

22 COMMISSIONER THERNSTROM: Can we have a
23 chance to ask --

24 CHAIRPERSON BERRY: -- we would go to the
25 substantive portions of the report.

1 COMMISSIONER THERNSTROM: Can we have a
2 chance to ask Mr. Hailes a couple of questions?

3 CHAIRPERSON BERRY: If they're not
4 procedural.

5 COMMISSIONER THERNSTROM: No, well, I want to
6 know, for instance, what -- how you decided what a relevant
7 portion of the report was to send to the affected parties
8 and the Governor --

9 GENERAL COUNSEL HAILES: Sure --

10 COMMISSIONER THERNSTROM: Can I just finish
11 my question?

12 GENERAL COUNSEL HAILES: I'm sorry, I thought
13 that was the question.

14 COMMISSIONER THERNSTROM: The Governor, the
15 Secretary of State were basically blamed for everything in
16 this report. I don't know why they shouldn't get the
17 entire report specifically. It's my understanding they
18 didn't get the spoiled ballots section of the report and
19 what was the downside of simply sending them the entire
20 report since it did, in its entirety address delinquency,
21 alleged delinquency on their part?

22 GENERAL COUNSEL HAILES: We did send portions
23 of the report that pertained to spoiled ballots to the
24 Secretary of State and the Division of Elections.

25 COMMISSIONER THERNSTROM: My question remains

1 since the report in essence blames the Governor and
2 Secretary of State for everything in Florida, why not send
3 the entire report to them?

4 GENERAL COUNSEL HAILES: If you give me
5 specific references to portions of the report that blame
6 the Governor and the Secretary of State for everything, I
7 can tell you whether we did, in fact, send those portions
8 to them or not. Certainly, the supervisors of elections
9 were given those portions that relate to their
10 responsibilities and their activities and the purpose of
11 affected Agency review, just to answer your question very
12 specifically in how we selected the portions that are
13 relevant, it's based on activities and responsibilities.
14 We have a full chapter in this report that looks at the
15 election code of Florida, identifies the specific
16 responsibilities of those top officials and then discusses
17 whether in the context of the sworn testimony and subpoena
18 documents we received, they performed the responsibilities
19 as outlined in that election code and those are the
20 portions of the report that they received for affected
21 Agency comments. We did receive from Mr. Canady a response
22 and he identified some of the new provisions in the
23 electoral reform bill, but there's a full chapter on that
24 and --

25 COMMISSIONER THERNSTROM: What was the

1 downside to sending the entire report?

2 GENERAL COUNSEL HAILES: I just thought it
3 would be a bad idea to send -- we never have done it
4 before. The Commissioners had not received or requested
5 the full report and so we just thought it would be a bad
6 idea because there are responsibilities and activities that
7 don't pertain to the Governor's office, that do pertain
8 more directly to the supervisors of elections and that's
9 where we made the decision to select those portions based
10 on identifying responsibilities and activities.

11 CHAIRPERSON BERRY: When we proceed with the
12 report, if anyone has a question about whether a page or a
13 section should have been sent to them, they can point that
14 out as we go along with the report so that we don't delay
15 considering the report.

16 Also, General Counsel, you did not point this
17 out but affected Agency review is not even required, it is
18 a matter of courtesy to officials that you do it and you
19 also did not point out when you were explaining defame and
20 degrade that you found no defame and degrade issues in this
21 report.

22 GENERAL COUNSEL HAILES: Well, let me make
23 that clear. I thought I did. We did thoroughly examine
24 the report and found no statement that would constitute
25 defame and degrade as it relates to the persons identified

1 in the report.

2 COMMISSIONER THERNSTROM: Is it required
3 under our internal regulations? It's not simply a matter
4 of courtesy and we have given entire reports in the past as
5 I understand it, for instance, in the New York police case.

6 But I believe it is incorrect to say from you
7 know, we can decide with each report whether we feel like
8 exercise the courtesy.

9 CHAIRPERSON BERRY: I'll answer it because I
10 said it. The answer to the question is since it is an
11 internal policy that was made by the Commission and it is
12 not a regulation, it is not a statute, that the Commission
13 decided that the staff -- it's actually in the
14 administrative instructions that apply to the staff which
15 can be changed at any time by the Staff Director, that is a
16 matter of courtesy. Some years ago, before we even got
17 here, that people ought to be given pieces of it that refer
18 to them and the Commission can decide to do it or not to do
19 it, but it's always done. And in my time on the Commission
20 it's been given to people concerning the matters where they
21 are listed or discussed or their responsibilities are
22 discussed.

23 But let's just go on with the report. Let's
24 not delay and if anyone has any questions as we go along
25 about whether some specific portion should or should not

1 have been given, you may point that out as we proceed.

2 GENERAL COUNSEL HAILES: Madam Chair, just
3 one last point. I really would be remiss if I didn't
4 mention the assistance that was provided without which we
5 could not have gotten to this point with our legal
6 secretary, Pam Moye, who did a fabulous job in helping us
7 put together this project and getting it to the point where
8 it is today.

9 CHAIRPERSON BERRY: Okay, and I want to
10 personally thank the staff and I'm sure that all the
11 Commissioners do.

12 We're going to proceed with the report and
13 we're going to begin and we're going to go page by page,
14 section by section to see if Commissioners have any
15 comments or any questions and they will be answered.

16 The first chapter is the one that contains
17 the statistical analysis, if I'm not mistaken, is that
18 right or am I confused? Yes.

19 So we're going to ask Professor Lichtman to
20 come up and give us a summary of the statistical portions
21 and to see if anyone has any questions. And he'll stay
22 while we go through the chapter to see whether there's
23 anything that we would like to ask him and so we need him
24 to come over here now.

25 You should come over here so people can see

1 you, Allan. You can sit over here. Everyone stay and you
2 can sit here. Les is going to give up his chair while
3 you're here.

4 DR. LICHTMAN: Thank you very much, Chairman
5 Berry and distinguished members of this Commission, for
6 this opportunity to present to you a summary of my findings
7 on the racial impact of rejection of ballots in the 2000
8 Presidential Election in the State of Florida.

9 I am Allan J. Lichtman. I'm a Professor of
10 History at American University here in Washington, D.C. I
11 am former chair of the History Department and former
12 Associate Dean of the College of Arts and Sciences at
13 American University. I received my Ph.D. from Harvard
14 University, a lot farther back than I'd like to recognize,
15 but back in 1973, in History with a specialty in
16 Quantitative Analysis of Historical Information. I'm the
17 author of numerous books and articles on political history,
18 quantitative methodology and the application of social
19 science methods to voting rights issues. I have been a
20 consultant or expert witness in more than 60 federal voting
21 rights and redistricting cases. It's hard to believe that
22 I've had time to do anything else. I worked for plaintiffs
23 and defendants in these cases. I have worked in many cases
24 for the United States Department of Justice going back to
25 the early 1980s, so spanning many different Presidential

1 Administrations. I have worked for Democratic interests
2 and I have worked for Republican interests, including the
3 Republican Redistricting Task Force in Massachusetts in the
4 post-1990 redistricting and very recently Rudy Giuliani's
5 Charter Revision Commission within the City of New York.

6 I have applied to this study the same
7 methodologies I have used in these numerous voting rights
8 cases and the same methodologies that have been accepted by
9 the United States Supreme Court, in its landmark 1986
10 voting rights decision, Thornburg versus Gingles.

11 Let me state at the outset what my report was
12 designed to do and of course, what it was not designed to
13 do. My report was designed to answer a very simple
14 question, were there differences in the rate at which
15 ballots were rejected to African Americans and non-African
16 Americans in the State of Florida in the 2000 Presidential
17 Election. In other words, were there racial disparities
18 between African Americans and all others considered as a
19 group in the rate at which ballots were rejected. I was
20 not attempting to consider the issue of whether ballot
21 rejection did or did not result from any intentional
22 discrimination or the activities of any individuals in the
23 State of Florida or anywhere else. I was simply trying to
24 document whether or not there were differences in the
25 rejection rate based upon race.

1 Let me also say when I was first approached
2 by the staff of the U.S. Civil Rights Commission, two
3 gentlemen who I did not know, to do this project, I was
4 extremely skeptical. In my capacity as a voting rights
5 consultant I had worked on a previous lawsuit that involved
6 voting technology and my view of the whole matter was it's
7 a technological issue. You had certain technologies which
8 caused high rates of ballot rejection, other technologies
9 which resulted in lower rates and that was the key factor.

10 I was quite skeptical and unaware that there might be
11 racial disparities involved, even among counties using the
12 same technology, indeed, even within a single county. So I
13 really approached this and I think this is important given
14 all the unfortunate political heat that surrounded these
15 issues, I approached this from the position of a skeptic,
16 not from the position of someone who started out with any
17 kind of belief or predisposition to finding racial
18 disparities. And quite frankly, I was quite amazed by what
19 I found in the State of Florida.

20 What the Civil Rights staff presented to me
21 was kind of a basic analysis that they had done which was
22 simply to look at a simple chart which charted on the one
23 hand the racial composition of the counties in the State of
24 Florida and on the other hand, the rate of ballot rejection
25 and if you would turn to appendix 2A, Graph 1, you see such

1 a chart. And this chart essentially shows not a perfect
2 relationship, no relationship in social science is ever
3 perfect and we're dealing where with counties, some of
4 which have very large numbers of persons aggregated within
5 them, but nonetheless there is a relationship here that is
6 suggestive of a strong correlation between the racial
7 composition of counties and the percent of rejection
8 ballots.

9 I've heard some criticism that this
10 correlation which is .5, the squared correlation is .25,
11 does not establish a causal relationship between race and
12 ballot rejection. I could not agree more. This is simply
13 suggestive of a relationship. In fact, I state quite
14 explicitly in my report that not only doesn't this
15 correlation prove causality, but it's only the first step
16 of analysis, a correlation does not even by itself prove
17 that they were disparate rates at which ballots are
18 rejected for African Americans and non-African Americans,
19 it is simply subjective. That's why the Civil Rights
20 Commission apparently came to someone with a great deal of
21 experience in this area and a great deal of experience in
22 voting rights litigation which presents these issues to use
23 more advanced statistical procedures to try to see if at
24 the county level you could, in fact, estimate whether there
25 was differences in the rate of ballot rejection for African

1 Americans and non-African Americans.

2 The first thing I wanted to do was to refine
3 the analysis a little bit by looking only at those counties
4 that used either punch cards or optical scanning methods
5 recorded centrally, because about 90 percent of rejected
6 ballots were located in those counties using those kinds of
7 technologies. That's where the action was with respect to
8 rejected ballots and if you look at Graph 2 which is
9 Appendix 2-B, you can see the relationship between race and
10 ballot rejection does not wash out, when in essence, you
11 kind of hold the technology constant and look within those
12 counties using the technology that is likely to produce
13 much higher rates of ballot rejection and that account for
14 the overwhelming bulk of rejected ballots. You still see a
15 strong correlation between the racial composition of the
16 counties and the percent of rejected ballots. Again, this
17 does not prove causality, of course. It doesn't even yet
18 prove that there is when you look within the data
19 differences in the rates at which African Americans and
20 non-African Americans had their ballot rejected. That's
21 why I utilized the methodology which the General Counsel
22 referred to of ecological regression which goes beyond
23 simple correlation to actually estimate if you divide the
24 population into African Americans and non-African Americans
25 the separate rate of rejection for each group. And it does

1 this by looking at this comparison of the racial
2 composition of the counties and the rate at which each
3 county had rejected ballots and it comes up with, in
4 essence, a prediction equation, the best prediction
5 equation that predicts the overall rate of ballot rejection
6 by having a separate estimate for the African Americans
7 within the counties and a separate estimate for the non-
8 African Americans within the county.

9 And I did the analysis in the most
10 conservative way. I did a separate analysis for where the
11 great bulk of the rejected ballots were, the punch card and
12 centrally recorded precinct counties and a separate
13 analysis for the counties using optical scanning methods
14 recorded by precinct.

15 The result was startling, although I stress,
16 as I do in my report these county level results need to be
17 interpreted with caution because they're based on county
18 level data with large numbers of voters in many of these
19 counties and while you have many heavily non-African
20 American counties, you do not have many heavily African
21 American counties. In fact, you only have one majority
22 African American county in Florida, so this is a
23 statistical projection at the county level that needs to be
24 interpreted with caution.

25 Nonetheless, the results were startling. It

1 showed a 14.4 estimated rejection rate for ballots cast by
2 black voters as compared to a 1.6 percent rejection rate
3 for non-black voters, less than 2 percent for a ratio of
4 about 9 to 1. Now I know there's been a lot of discussion
5 in the media about these ratios. I personally don't like
6 dealing with ratios because they don't tell you about
7 people. You could have a .1 and 1 rejection rate, it's 9
8 or 10 to 1, but it doesn't involve a lot of people. The
9 way to really look at this is to look at the percentage
10 point difference between the estimated rejection rate for
11 black voters and the estimated rejection rate for
12 non-black voters. It's about 13 percentage points. In
13 other words, there is a double digit difference between the
14 estimate rate at which non-black voters were rejected and
15 the estimated rate at which black voter ballots were being
16 rejected. In other words, if African American and non-
17 African American rejection rates had been the same 13
18 percent more African American ballots would have been
19 counted, and when you consider the fact that hundreds upon
20 hundreds of thousands of African Americans cast ballots in
21 the Florida 2000 Presidential Election, you are talking
22 about a disparate impact between non-African Americans and
23 African Americans involving many tens of thousands of
24 voters who thought they had cast -- African American voters
25 who thought they had cast a valid ballot in the Florida

1 election, but whose ballots were rejected.

2 I'll repeat that because this is the essence
3 of it. You have to talk about the voters. Tens of
4 thousands of African Americans, as compared to non-African
5 Americans in terms of the rates of rejection, tens of
6 thousands of additional African Americans who thought they
7 had cast a valid ballot had their ballots rejected, a 13
8 percentage point differential. Extremely significant. And
9 moreover, there's a gloss on this. All the attention after
10 Florida was paid to the so-called undervotes, those
11 precarious hanging or dimpled chads. That's not where the
12 main problem was with uncounted votes. About nearly a 2 to
13 1 ratio, overall, there were more so-called overvotes than
14 undervotes, that is, votes that were invalid because they
15 had more than one punch or you read more than one choice as
16 opposed to ballots that weren't counted because you
17 couldn't read any choice and that's where the major
18 discrepancy occurs between black voters and non-black
19 voters is not on those ballots where you couldn't count a
20 vote, but on those ballots that were thrown out because
21 supposedly more than one vote was counted.

22 Now does this prove causation? No. Does
23 this prove anything intentional was done? No. But it does
24 show at least from projections at the county level, this
25 enormous disparate impact. In fact, if you were to apply

1 these numbers to all rejected ballots, again another
2 statistical projection, you would come up with a majority
3 of rejected ballots being cast in the 2000 election by
4 African Americans.

5 I did do one additional refinement on this
6 county level analysis because there's been so much talk
7 about well, it's not really race, it's education. Of
8 course, that's not the purpose of my study to sort out all
9 of these factors and prove causation. It was just to show
10 disparate impact and moreover, I'm not sure you can say
11 education levels are something that exist out there
12 separate from race, given the history of educational
13 discrimination in this country. Many voters in Florida
14 grew up in segregated school systems, so I'm not sure
15 education is something distinct from race. But be that as
16 it may, I entered at the county level a couple of measures
17 of education into the analysis to see if it would change
18 matters: percent high school graduates and estimates of
19 literacy and it didn't. The relationship between race and
20 ballot rejection remained essentially extremely strong and
21 statistically significant and those factors did not prove
22 to be statistically significant in comparison with race.

23 Having made these estimates with all the
24 cautions that are in my report, I decided I had to go
25 beyond what the Commission asked me to -- the Commission

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

staff asked me to do which was do an ecological regression analysis with respect to this county level set of relationships that they had discovered.

I thought it was important to get data for individual counties for several reasons. One, you could really hold things constant by looking at the precincts within the same county where everyone is supposed to be treated equally. Number two, you have much more fine grained data because you're dealing with precincts, a relatively small number of voters are included as opposed to counties and thirdly, you can go the whole gamut from essentially all non-African American precincts to essentially all African American precincts and I got authorization from the staff to go beyond and look at some county level data. And I was able to find on the web three counties, very large counties, that account for almost half of all rejected ballots in Florida. This isn't a small sample. These are well-known counties: Duvall County, Dade County and Palm Beach County.

If I may before I get into the statistical findings, I'd like you to look for a moment at Graph 3 which is Appendix 2C on your report and it's race and ballot rejection rates for Duvall County. You don't need a statistician, you don't need someone who has been in 70 voting rights cases to read graph 3. If you look at the

1 heavily non-African American precincts and there are a lot
2 of them down there, you can't even see them all because
3 they pile on top of one another. We're talking about very
4 large numbers. They cluster at the low end. When you look
5 at the heavily African American precincts, they cluster at
6 the much higher end, tend to cluster at 20 percent or more
7 as opposed to about 5 or 6 percent or less. This is
8 extraordinary. This is within a county that supposedly
9 applies things equally to everybody. You're getting this
10 incredible difference in what's actually happening in the
11 black precincts as opposed to the non-black precincts and
12 it's pretty steady across the line. You're talking here
13 about an enormously high correlation.

14 We further indicate, based on that chart, in
15 the 90 percent black precincts of Duvall County, about 22
16 percent of ballots cast were rejected, 22 percent. In
17 other words, somewhere between 1 out of 5 and 1 out of 4 of
18 people who walked into the polling booth in the heavily
19 black precincts in Duvall County, who thought their ballots
20 were being counted, found their ballots were not being
21 counted. That's 1 out of 5 to 1 out of 4, and we know from
22 experience around the country, we shouldn't be having
23 ballot rejection rates greater than 1 percent. And here
24 we're talking about between 20 and 25 percent.

25 Again, when you think about it in terms of

1 the people which the only way that makes sense to me,
2 that's just an extraordinary number of people not having
3 their ballots counted. In contrast, while the non-black
4 precincts I think still had much too high a rate and I'm
5 glad to see they're changing the technology that was used
6 here, it's only about 6 percent. So you're talking about a
7 16 percentage point difference, 16 percentage point
8 difference between the heavily non-black precincts and the
9 heavily black precincts.

10 While that's the most extreme, you get
11 similar results in other counties. In Dade County, the
12 black precincts had a 9 percent rejection rate; the non-
13 black precincts, a 3 percent rejection rate. In Palm Beach
14 County, the black precincts had a 16 percent rejection
15 rate; the non-black precincts a 6 percent rejection rate.

16 I also wasn't just satisfied with looking at
17 the extreme ends of it, although most of the whites and a
18 lot of the blacks are at the extreme end, again I applied
19 the methodology of ecological regression to each individual
20 county and here we had fine grained precinct data and we
21 had a whole range of data to look at, so it's not the same
22 kind of projection, although it is, of course, an estimate,
23 but it's not the same kind of projection that we had for
24 county level data.

25 And I found in Duvall County black vote

1 rejection rate was an estimated 23.6 percent as compared to
2 5.5 percent for the non-black rejection rate, an 18
3 percentage point difference, very comparable to what we
4 found among the heavily black and heavily non-black
5 precincts. I found in Dade County, black voter rejection
6 rate was 9.8 percent; non-black voter rejection rate was
7 3.2 percent. I found in Palm Beach County black voter
8 rejection rate was 16.3 percent; and non-black voter
9 rejection rate was 6.1 percent. All of these numbers are
10 very comparable to what we found in the heavily black and
11 the heavily white precincts. On average, in these three
12 counties, based on very fine grained data, based upon data
13 spanning the whole range, approximately 15 percent of
14 African American ballots were rejected, in other words, 1
15 out of 7 approximately of African Americans who went to the
16 polls in these counties and thought they were casting a
17 valid ballot, had their ballots rejected as opposed to
18 about a 5 percent. So you're talking again about results
19 comparable to what we found with the county-wide data, a
20 double digit gap, even when holding the counties constant
21 between the rejection rate for black voters and the
22 rejection rate for non-black voters and again, the problem
23 was concentrated in the so-called overvotes. It wasn't --
24 the problem was not where you couldn't read a vote. It was
25 where supposedly the machinery said there was more than a

1 single vote cast and as a result the ballot was rejected.

2 So even when you get to individual counties,
3 fine grained precinct level data using both this kind of
4 extreme case method where you look at the heavily wide and
5 heavily black precincts or using the ecological regression
6 method, you find enormous disparities in the rejection rate
7 for non-black and black voters.

8 Does this say anything was done
9 intentionally? No. That was not the purpose of my
10 analysis to study that question. The purpose of my
11 analysis was to simply establish whether or not there were
12 disparate rejection rates.

13 Also, based on my analysis, very briefly I'll
14 mention, I did have some comments upon possible ways of
15 reducing the disparate rejection rate without pointing any
16 fingers at anybody at all. I said I was very pleased if,
17 in fact, we were going to get optical scanning recorded by
18 precinct in all counties in Florida, that's a very positive
19 step because it will reduce the level overall of rejection
20 rates for both blacks and whites. But I also caution that
21 technology alone may not be the answer and let me say a lot
22 of counties are going to be using brand new technology for
23 the first time and having studied these matters now, voting
24 matters for over 30 years, that always sends up red flags.

25 So it's extremely important in my view that technology be

1 accompanied by an effective program of education for
2 voters, for election officials, for poll workers and
3 sufficient resources to make sure that this never happens
4 again in the State of Florida.

5 Thank you very much. I'd be happy to
6 entertain any and all questions about my analysis.

7 CHAIRPERSON BERRY: Okay, Allan, what we're
8 going to do is go through the chapter and people can ask
9 you, we're not going to get into a discussion of your
10 analysis all by itself.

11 DR. LICHTMAN: Can I add one thing? Let me
12 add one thing. When I finished my report and this took me
13 a lot longer than I thought because I went much farther
14 than the Commission initially asked me to do, in my report
15 I included all the raw data, and I included pointers to all
16 the web sites where anyone could download this data. In
17 fact, this data has been available publicly for a very long
18 time, but I did this because I know there are eminent
19 social scientists on this very Commission so that any one
20 of them could run the numbers for themselves and come up
21 with their own conclusions, but you know, I've heard a lot
22 of heat and a lot of comment about all of this Commission
23 report. The one thing I've never heard yet is anyone
24 saying there wasn't a disparate impact, that there wasn't a
25 difference in the rejection rates of African Americans and

1 non-African Americans.

2 CHAIRPERSON BERRY: Your report will be
3 appended to the document and we also, of course, use your
4 report to -- the staff did in writing Chapter 1 which is
5 what we're going to discuss now. And we can ask you
6 questions as we go along --

7 DR. LICHTMAN: Please.

8 CHAIRPERSON BERRY: -- When we get to the
9 charts.

10 Does anyone have any questions or changes on
11 pages 1 through 5? Pages 1 through 5?

12 Yes?

13 VICE CHAIRPERSON REYNOSO: Madam Chair, I
14 have actually several suggested changes, even before that,
15 even in the introduction, but none of them are substantive,
16 so if we're going to follow the normal procedure, I'll
17 simply present these to the staff.

18 CHAIRPERSON BERRY: Right, right, if you do
19 that. We're talking about substantive changes, not that
20 you saw a typo, you think it should be edited this or you
21 think the phrasing ought to go that way. Those you turn
22 in, and the staff will make those changes and try to
23 reconcile everybody's literary style, the typos and all the
24 rest of it before the end. We don't need to do that here.

25 But I'm talking about if you have any

1 questions or any substantive problems and Vice Chair, could
2 you come over here and sit beside me and I always feel more
3 comfortable when you're sitting beside me.

4 COMMISSIONER THERNSTROM: I am sorry, Madam
5 Chair. I don't quite understand the question in that I've
6 got problems with yes, the entire introduction, but I will
7 be writing a dissent and will address those.

8 CHAIRPERSON BERRY: Right. We understand
9 that.

10 COMMISSIONER THERNSTROM: I don't see the
11 point at this point of going page by page and I have to say
12 that this process of going page by page when the Commission
13 has had this report for three days does not seem to me the
14 best way to proceed, although obviously this is your call.

15 But I do have some very general comments to make, for
16 instance, to Professor Lichtman, about his analysis.

17 CHAIRPERSON BERRY: You may do that at the
18 end when we finish the chapter. We prefer to go through
19 the chapter, if you don't mind.

20 Are other Commissioners comfortable with me
21 asking you whether you have any problems with various
22 sections as we go along, just to make sure that everyone
23 has had a chance to ask whatever they want and then at the
24 end of the chapter if you have any general comments about
25 the chapter, you may make them then.

1 All I am asking is whether -- and this is not
2 my procedure. It has been done at the Commission for
3 years. It's not a new procedure. It's not Berry Rules.

4 Does anyone have any questions or comments or
5 anything that is substantive that they'd like to do with
6 the first five pages. I asked that already.

7 Yes?

8 COMMISSIONER LEE: Madam Chair, can you give
9 us a deadline for submittal of the editorial changes?

10 CHAIRPERSON BERRY: Yes, we would like to
11 have the editorial changes, if you have them today. If you
12 don't, how many days should we give them, counsel? End of
13 next week, if you can. End of next week.

14 Does anyone have any questions on pages 5
15 through 7, that's the first chapter. This is the
16 introduction we're in. That's not a literary matter.

17 Now do we have any questions on the Chapter 1
18 voting systems controls and failures which begins on page
19 8, between page 8 and page 17. Does anyone have any
20 points?

21 Yes, Commissioner Thernstrom.

22 COMMISSIONER THERNSTROM: Professor Lichtman,
23 you and I have actually known each other for a long time.
24 I'm tempted to say, Allan, but anyway --

25 DR. LICHTMAN: I'm delighted to see you,

1 Commissioner Thernstrom.

2 (Laughter.)

3 COMMISSIONER THERNSTROM: Look, you would be
4 the first person to admit as a responsible social
5 scientists --

6 DR. LICHTMAN: A very responsible social
7 scientist.

8 (Laughter.)

9 COMMISSIONER THERNSTROM: I happened to write
10 a dissertation with somebody I know well at Harvard.

11 DR. LICHTMAN: Indeed.

12 COMMISSIONER THERNSTROM: That we have no
13 data on the race of the individuals who cast a ballot that
14 did not register a ballot vote and there's no way of going
15 back to those original ballots since we have secret ballots
16 in the United States, so that we don't know with any
17 precision how particular racial and ethnic groups voted or
18 whether their ballots actually counted. And it seems to me
19 I'm very troubled --

20 DR. LICHTMAN: May I respond to that?

21 COMMISSIONER THERNSTROM: Yes.

22 DR. LICHTMAN: Let me respond to that, first
23 of all. I agree with half of it and strongly disagree with
24 half of it as responsible social scientists often do
25 disagree.

1 I agree with the half of it which says we
2 have a secret ballot and there's no way to go back to the
3 individual ballots unless they're tracked in Florida and I
4 don't think they are. However, that doesn't mean, as you
5 well know, that social scientists cannot come up with
6 extremely reliable estimates of how any individual voter,
7 but extremely reliable estimates are group behavior and the
8 group behavior we're looking at here through standard
9 methods that you know well have been used in hundreds of
10 voting rights cases, that we are able to establish that as
11 a group, particularly within county data where we have 90
12 percent African American and 90 percent non-African
13 Americans established with a great degree of reliability,
14 that there is indeed a disparate impact between African
15 Americans as a group and non-African Americans as a group
16 and that impact is very substantial. I'm sure we could
17 agree on that.

18 COMMISSIONER THERNSTROM: Well, I'm about to
19 ask you about your methodology in arriving at that
20 conclusion. You draw a conclusions about the matter by
21 examining, as you said, basically county level data with
22 very little precinct level analysis --

23 DR. LICHTMAN: Again, I've got to stop, I've
24 got to object to that. I have extensive precinct level
25 data. We have precinct level data for three of the largest

1 counties in Florida that account for nearly half of all
2 rejected ballots, counties in different parts of the State
3 with different demographic compositions and we're getting
4 exactly the same result. I think that's a lot of precinct
5 level data actually. Hundreds upon hundreds upon hundreds
6 of precincts.

7 COMMISSIONER THERNSTROM: Well, I will look
8 again. It looked to me as if you were making -- well, as I
9 said earlier I only had three days to look at this, but it
10 looked to me as if you were making that county level data
11 is obviously far too crude, especially as you just said,
12 you do not have majority black counties here to make
13 meaningful statements about groups of voters and I mean
14 West Palm Beach County, for instance, includes a great many
15 highly educated, affluent voters and a great many very low
16 income voters and you know, you're talking about a
17 relationship here as you said, that's not very strong,
18 admits the correlation is .5 --

19 DR. LICHTMAN: We're mixing apples and
20 oranges. That's the county level correlation.

21 COMMISSIONER THERNSTROM: Yes, that's I'm
22 back to the county level correlation, but that is well --

23 DR. LICHTMAN: In Palm Beach County, the
24 correlation is about .9 which is about -- excuse me, that's
25 Duvall County, about as high as we ever see in social

1 science.

2 COMMISSIONER THERNSTROM: That's right, we
3 often see correlations and that is a meaningful
4 correlation. But --

5 DR. LICHTMAN: Not just meaningful, it's
6 extraordinary.

7 COMMISSIONER THERNSTROM: Yes, okay, but
8 correlations of .5 means it explains only about 25 percent
9 of the total variance and you know, if you want to know why
10 some Florida counties have a high and some a low rate of
11 spoiled ballots knowing their racial composition only
12 accounts for one quarter of the difference, it doesn't tell
13 you much. It's startling, in fact, that only a quarter of
14 the variances is explicable in terms of race or any other
15 variable that happens to be closely associated with race
16 like reading composition.

17 And I have to say on your ecological
18 regression you know better than I do all the faults with
19 reading composition. I have to say, I mean, ecological
20 regression, you know better than I do all of the faults of
21 ecological regression. And I have problems, frankly, with
22 the variables that you've used here, like lowest literacy
23 category and so forth. I mean I'm going to have to spell
24 this out, obviously, in my dissent. And I don't know why
25 you didn't correlate with first-time voting. I've got a

1 lot of problems with your methodology.

2 DR. LICHTMAN: Let me respond. First of all,
3 all of your comments, not one of them goes to what I'm
4 really demonstrating here, and that is disparate impact.
5 You and I can debate forever --

6 COMMISSIONER THERNSTROM: I don't think
7 you've established it.

8 DR. LICHTMAN: Let me finish. Okay. I'll
9 get to that. But you and I can debate forever whether
10 there are other factors, you know, that might -- that are
11 correlated with race that might come into effect here. You
12 don't like education, you don't like literacy, you want to
13 throw in first-time voters.

14 COMMISSIONER THERNSTROM: I do like education
15 and literacy. I'm not satisfied that --

16 DR. LICHTMAN: They don't help you explain
17 that relationship. I put them in there.

18 COMMISSIONER THERNSTROM: Well, I'm not
19 satisfied with your definition of literacy here. Go on.

20 DR. LICHTMAN: Fine. But the point is none
21 of those comments go to the heart of what I'm showing --
22 disparate impact. Secondly, given how large the counties
23 are, given that they use all these different technologies,
24 given that there are so many things that go into spoil
25 balance, a correlation of 0.5 at the county level is in

1 fact an extraordinary finding, one that I did not expect to
2 find. And as you know, you have to go and use the
3 ecological regression method to actually see if within that
4 correlation there is a disparate impact, and that's what I
5 find.

6 Then to check that, I went to these three
7 counties, which have nearly half of the rejected ballots
8 with precinct-level data, which spans the whole range and
9 which falls into none of the criticisms you have mentioned
10 and likewise shows a double-digit disparity in the rates at
11 which African-Americans and non-African-Americans had their
12 ballots rejected.

13 I also, just last night, because I knew --
14 you know, I had seen this criticism, I did another test of
15 whether it's really education and not race. And what I did
16 was I looked at, because Dade County has so many Hispanics
17 -- Hispanics and African-Americans have comparably low
18 rates of education, and therefore if it really was
19 education that was driving this, you should see, not
20 exactly, but a comparably strong relationship when you look
21 at the relationship between Hispanic racial composition of
22 the precincts and the percent of rejected ballots.

23 If I may pass it around, I did that, and I
24 was shocked. It's a negative relationship. The line goes
25 downward, not upward, in other contrast to the way the line

1 goes for African-Americans. And the reason is you've got
2 all these African-American precincts at close to the zero
3 rate of percent Hispanic that have these extraordinary high
4 rates of rejected ballots. And you have very low rates, in
5 fact, for the very heavily Hispanic precincts, not
6 counties, precincts within Dade County. So if it was
7 education that was driving this, you would never see a
8 pattern that looks like this.

9 I'm not claiming what the cause is here, but,
10 Abigail, I welcome your analysis. I promise you you will
11 find a disparate impact between race and ballot rejection,
12 no matter how you look at the data.

13 COMMISSIONER THERNSTROM: Allan, we'll slug
14 it out later, but let me ask one last question.

15 DR. LICHTMAN: Sure.

16 COMMISSIONER THERNSTROM: Who spoiled the
17 ballots? On page 18, it says, "On a practical level this
18 means persons that living in a county with a substantial
19 African-American or people of color population are more
20 likely to have their votes spoiled or discounted than
21 persons living in the rest of Florida." Is there a spoiler
22 out there? Was Jeb Bush wandering around spoiling ballots?

23 I mean --

24 DR. LICHTMAN: Abigail, I was --

25 COMMISSIONER THERNSTROM: Why the passive

1 voice?

2 DR. LICHTMAN: Let me answer that. First of
3 all, I didn't write that, but let me say, you all heard me
4 at the beginning of my talk. I said I'm not pointing
5 fingers at anyone. I'm not charging voter discrimination.

6 My job and my job only was to look at whether or not there
7 was a disparate racial impact. And whether you look at the
8 county level or the very fine-grained precinct analysis,
9 you get the same answer. It's a cherry pie. No matter how
10 you cut it, you're still getting cherries. And I promise
11 you you'll find that, as you would have had you run these
12 numbers up till now.

13 COMMISSIONER THERNSTROM: Well, since I can't
14 take the time that you've got to answer all these
15 methodological questions, again, we will slug them out
16 later.

17 DR. LICHTMAN: Very good.

18 COMMISSIONER THERNSTROM: But I remain
19 dissatisfied.

20 CHAIRPERSON BERRY: Vice Chair.

21 VICE CHAIRPERSON REYNOSO: Madam Chair, a
22 couple of comments. One, I'm not a social scientist; I'm a
23 lawyer and a retired judge. But I think I do know what the
24 Voting Rights Act is concerned about. And it's concerned
25 about the history in this country of sometimes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sophisticated mechanisms and many ways of having folk in
2 this country not vote or their votes not counted in the
3 same percentages as some other folk. And sad to say, in
4 the South, it's often been African-Americans whose vote
5 have not been counted.

6 So the legislation was very express that we
7 were not going to get into a pointing of fingers,
8 accusation, as to whether or not there was an intentional
9 discrimination. The law says we would look at disparate
10 impact. No matter what the mechanism is, no matter what
11 the standards are, if they end up impacting a given racial
12 group disproportionately and therefore, in my opinion,
13 unfairly, it violates the law.

14 And it seems to me, frankly, I was surprised,
15 and I must say all of us had been told at the last meeting
16 that we would receive this report this week, and we all
17 understood, none of us objected, because we knew the staff
18 was under a lot of pressure in terms of time to prepare
19 what, in my view, is an excellent report.

20 And so as we were asked to do, I set the time
21 aside to go over this report and chapter. And I must say
22 that I was taken aback by the extent of the disparate
23 impact on African-Americans. I've just got to say it's
24 quite condemnatory of the entire system irrespective of
25 intent.

1 CHAIRPERSON BERRY: Commissioner Edley?

2 COMMISSIONER EDLEY: I think that it would be
3 helpful if in the report -- I'm not quite sure where it
4 should appear -- but a couple of sentences, I think,
5 elaborating --

6 CHAIRPERSON BERRY: Excuse me just a moment,
7 Commissioner Edley. Would the Commissioners and the staff
8 please be in order, and would the special assistants to
9 Commissioners not have conversations with Commissioners who
10 they do not work for, which disrupt this meeting when that
11 Commissioner is not interested in having a discussion with
12 them. Could you please keep your staff in order?

13 COMMISSIONER THERNSTROM: I have just asked
14 that notes be passed to me rather than verbal comments.
15 And so that problem has been taken care of. But, of course
16 --

17 CHAIRPERSON BERRY: I appreciate it very
18 much. And I also forgot to say at the beginning of the
19 meeting, and I will say it now, would Commissioners please
20 behave toward each other in the spirit of friendliness and
21 collegiality and not personalize their behavior or their
22 actions or any comments, because this is about policy.
23 It's not about whether you like somebody, agree with
24 somebody or think something should be done or shouldn't be
25 done. So let's keep at a policy level, and let's be

1 friendly, let's be collegial, even if we disagree.

2 Now, Commissioner Edley.

3 COMMISSIONER EDLEY: Yes. My dear, beloved
4 Chair.

5 (Laughter.)

6 I'd like to suggest that at some point,
7 either towards the start of this chapter or perhaps even
8 back in the first chapter, that some elaboration along the
9 lines that the Vice Chair just stated be provided.
10 Professor Lichtman's --

11 CHAIRPERSON BERRY: Without objection.

12 COMMISSIONER EDLEY: Yes, because I think the
13 key that's --

14 CHAIRPERSON BERRY: I'm saying, without
15 objection, let's do it.

16 COMMISSIONER EDLEY: Thank you.

17 CHAIRPERSON BERRY: Okay. Go ahead.

18 COMMISSIONER EDLEY: I think that this is a
19 critical point for the public to understand, and, Professor
20 Lichtman, you mentioned this but it really bears
21 underscoring. The underlying mechanism, be it education,
22 be it income, be it the age of machinery, whatever it is,
23 the underlying mechanism is important to explore, but as a
24 legal matter, it's not necessary to establish that in order
25 to make out the initial case, the prima facie case, if you

1 will, of a disparate impact violation of the civil rights
2 statutes. And I think the more we can explain that in lay
3 terms in this report, I think it will be helpful to the
4 general public.

5 I wanted to ask, on pages 12 to 13, in a
6 similar vein, somewhere in there I'd like to ask that a
7 simple clarification be made that with respect to
8 establishing intentional discrimination, the foreseeability
9 of a policy is not sufficient. Some people may feel that
10 if a state or county pursues a policy which foreseeably has
11 a disparate racial impact, that that should suffice to
12 establish an intent to discriminate. I don't think it's
13 the black letter of law that that's not the case. You need
14 something in addition to foreseeability, and underscoring
15 that I think would be helpful.

16 I think that's all I have on this section.

17 CHAIRPERSON BERRY: Okay. Commissioner
18 Redenbaugh, did you want --

19 COMMISSIONER REDENBAUGH: Commissioner Edley
20 covered the point I had.

21 CHAIRPERSON BERRY: Oh, okay.

22 COMMISSIONER EDLEY: I'm sorry, Madam Chair.
23 Page 17, is that right?

24 CHAIRPERSON BERRY: Yes, 17.

25 COMMISSIONER EDLEY: I think somewhere in

1 there also, again, by way of clarification for the public,
2 underscoring that correlation does not equal causation in
3 the way that Professor Lichtman just did in his
4 presentation I think would also be helpful. We want to
5 make clear to people that we're not overclaiming here what
6 the data show.

7 CHAIRPERSON BERRY: Okay. So if there's no
8 objection, we'll do that too.

9 All right. Let's go on. Pages 18 -- let's
10 do 18 through 28. Does anyone have any substantive
11 questions that they would like to raise at this time on
12 those pages? Look at those pages and see if you have
13 anything that you'd like to raise at this time? Yes,
14 Commissioner Edley?

15 COMMISSIONER EDLEY: On page 22, there is a
16 phrase somewhere.

17 CHAIRPERSON BERRY: What does it say, and we
18 can help you find it?

19 COMMISSIONER EDLEY: Yes. Blacks propensity
20 -- African-Americans propensity to live in counties with --

21 CHAIRPERSON BERRY: Oh, it's in the beginning
22 of the second paragraph, I think. See the second beginning
23 of paragraph on that page, "In a very small part, the
24 county level relationship between race and racial ballots
25 rests in a greater propensity," do you see that?

1 COMMISSIONER EDLEY: Yes.

2 CHAIRPERSON BERRY: Is that where you mean?

3 COMMISSIONER EDLEY: Right. That's exactly
4 where I mean. That's a pretty peculiar locution as though
5 somehow African-Americans are making a choice to --

6 CHAIRPERSON BERRY: To live in a place with
7 no technology.

8 COMMISSIONER EDLEY: Yes, to go to a place
9 without any technology.

10 (Laughter.)

11 But I mean I understand what it's getting at,
12 but I think that needs to be corrected in some way.

13 CHAIRPERSON BERRY: Okay. All right.

14 COMMISSIONER EDLEY: I think that's a little
15 more substantive than purely editorial.

16 CHAIRPERSON BERRY: Okay. Let's go 28 -- 29
17 through the end of the chapter, which is page 38.

18 COMMISSIONER EDLEY: I have a question, Madam
19 Chair --

20 CHAIRPERSON BERRY: Yes.

21 COMMISSIONER EDLEY: -- for the staff. On
22 page 35, in some of the discussion of -- this is just a
23 factual question. I can't recall from the testimony, do
24 all precinct-level counting systems provide the opportunity
25 for self-correction? I think the answer is no. Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Well, this is -- so everybody understands what I'm getting
2 at, so the way that this is -- at least the way that this
3 was written, it confused me on that point, so I'd like that
4 point to be cleared up.

5 VICE CHAIRPERSON REYNOSO: I'm sorry, what
6 page or what section?

7 COMMISSIONER EDLEY: It's on page 35 is where
8 it jumped out at me. I'm not quite sure where on page 35.

9 CHAIRPERSON BERRY: Page 35?

10 COMMISSIONER EDLEY: Because yesterday my
11 dear, beloved Chairperson actually stole my marked up copy,
12 and I have an unmarked copy.

13 CHAIRPERSON BERRY: Is that why I have this
14 copy that doesn't look familiar to me?

15 COMMISSIONER EDLEY: Yes, that's right. With
16 my chicken scratch on it.

17 CHAIRPERSON BERRY: I'll give it to you.

18 COMMISSIONER EDLEY: Because if we're trying
19 to figure out -- this point towards the issue of
20 recommendations and so forth, if we're trying to figure out
21 what kinds of technology will result in lower error rates,
22 lower spoiler rates, it's not sufficient to simply say, "Do
23 the counting at the precinct level rather than at the
24 county level." It has to be precinct-level counting and
25 error checking. It's that conjunction of strategies that

1 will be key.

2 And, similarly here, I wasn't quite sure
3 whether the data, when it's been disaggregated to make
4 generalizations about what happens in precinct-level
5 systems as opposed to other systems, whether the precinct-
6 level systems that you're focusing upon were only those
7 precinct-level systems that involved error -- a second
8 chance error-checking mechanism. So I think you ought to
9 check that.

10 CHAIRPERSON BERRY: Okay. Could someone pass
11 my dear, beloved colleague his purloined chapter? Yes,
12 Vice Chair?

13 VICE CHAIRPERSON REYNOSO: Madam Chair, just
14 to get in an observation, more on the legal part, that is
15 that the disparity to me is so startling that it simply is
16 a basis, a prima facie basis, for the Justice Department to
17 then investigate to see if they agree with these results.
18 And if they do, then there are mechanisms and statutes
19 where the Justice Department can in fact explore with the
20 state how to correct these disparities so that in the
21 future we don't have those disparities, no matter what the
22 cause is, whether it's mechanical or procedural.

23 CHAIRPERSON BERRY: Fine. On the last page,
24 38, we should include the statement that the report finds
25 that there is a strong basis for concluding that Section 2

1 of the Voting Rights Act of 1965 has been violated.

2 VICE CHAIRPERSON REYNOSO: Sure.

3 CHAIRPERSON BERRY: That should be included
4 on this last page here --

5 VICE CHAIRPERSON REYNOSO: Page 38?

6 CHAIRPERSON BERRY: -- that we're talking
7 about. Yes, at the end, right at the end, after we
8 describe all this, that there is a strong basis for
9 concluding that Section 2 of the Voting Rights Act of 1965
10 has been violated, which is the disparate impact
11 requirement.

12 Professor Lichtman --

13 DR. LICHTMAN: Yes.

14 CHAIRPERSON BERRY: -- in your opinion, given
15 what you stated, you did not state it explicitly here,
16 although your report, which will be appended, will be
17 available too. The disparate impact that you were
18 referring to is under Section 2 of the Voting Rights Act.
19 That's the discussion when you say disparate impact. And
20 if you were testifying before a court, do you think that
21 this analysis would support the conclusion that there's a
22 strong basis for concluding that Section 2 of the Voting
23 Rights Act of '65 might have been violated?

24 DR. LICHTMAN: Absolutely, although my
25 report, of course, doesn't prove that. It just establishes

1 a basis for further investigation.

2 CHAIRPERSON BERRY: Right, right. And so --

3 DR. LICHTMAN: Particularly within the
4 counties, even, the differences are so great that it's not
5 just technology, apparently.

6 CHAIRPERSON BERRY: Okay. I just wanted to
7 make sure. Yes?

8 DR. LICHTMAN: Even though there are
9 differences based on technology, as well, going on here.
10 So there's kind of a double impact.

11 CHAIRPERSON BERRY: Right. Commissioner
12 Thernstrom?

13 COMMISSIONER THERNSTROM: Well, I am,
14 obviously, not convinced that there is a violation of the
15 Voting Rights Act, and I do note that the Justice
16 Department has an entire section devoted to investigating
17 violations of the Voting Rights Act. It is almost their
18 sole job, these, by and large, career attorneys who have
19 long had a very deep commitment to investigating any
20 violations of the Voting Rights Act. And to date, they
21 seem not to have found any in the Florida case, although I
22 look forward to any future reports.

23 You are on the pages involving the purge
24 list. I think that the whole discussion of felon
25 disfranchisement is completely inadequate, as a number of

1 newspapers have now reported and a number of other reliable
2 sources putting together the various counts including the
3 London Economist, and now I see this morning from the
4 handout Stuart Taylor, who is a card-carrying Democrat in
5 the National Journal, have written.

6 It looks as if there were 5,600 voters who
7 were allowed to vote and shouldn't have been allowed to
8 vote and about 1,100 -- a little over 1,100 who were not
9 allowed to vote. I am, of course, concerned about any
10 voter who has not been allowed to vote, but there needs to
11 be, in any discussion of the felon issue and the purge list
12 issue, a complete account of both the erroneously -- the
13 voters who shouldn't have voted and did as well as those
14 who were kept off the rolls.

15 And in addition, of course, many counties did
16 not use that DBT list. We have no accurate counting of
17 whether they Democratic or Republican counties. It
18 matters. And this is just, in my view, for this and other
19 reasons, a completely inadequate account of exploration of
20 this very important problem.

21 And it really -- it points to this larger
22 problem that I have with the report. The Commission has an
23 important fact-finding role to play, and when it doesn't do
24 so with integrity, then the credibility of the Commission,
25 itself, is on the line.

1 CHAIRPERSON BERRY: Commissioner Thernstrom,
2 we're supposed to be discussing the report, not your views
3 about the integrity of the report.

4 COMMISSIONER THERNSTROM: Well, okay.

5 CHAIRPERSON BERRY: And I have asked you to
6 --

7 COMMISSIONER THERNSTROM: It seems to me
8 relevant to this, but in any case I will stop with my point
9 that this is a completely inadequate --

10 CHAIRPERSON BERRY: Are these comments on
11 this chapter?

12 COMMISSIONER THERNSTROM: Yes, it is. On
13 page --

14 CHAIRPERSON BERRY: I mean your last comments
15 about --

16 COMMISSIONER THERNSTROM: Well, it is
17 relevant to this discussion, yes.

18 CHAIRPERSON BERRY: Okay.

19 COMMISSIONER THERNSTROM: It is very
20 relevant.

21 CHAIRPERSON BERRY: All right. Okay. Thank
22 you. General Counsel.

23 GENERAL COUNSEL HAILES: And I'm not sure
24 that the Commission --

25 CHAIRPERSON BERRY: He doesn't have a

1 microphone? Could you let him borrow yours?

2 GENERAL COUNSEL HAILES: I just wanted to
3 note the Commissioner believes the report would be made
4 more adequate by referring to news accounts, media accounts
5 where sources and documents are not provided. Our report
6 is based on the subpoenaed documents that we've reviewed.
7 And we tried to stay away as much as we could from accounts
8 by reporters and pundits and news articles.

9 COMMISSIONER THERNSTROM: Well, I believe
10 that it is important to grapple with the numbers that --

11 GENERAL COUNSEL HAILES: Are reported in the
12 media?

13 COMMISSIONER THERNSTROM: -- Palm Beach Post
14 and so forth came up in studying the issue very closely.

15 GENERAL COUNSEL HAILES: But their sources
16 are not provided.

17 COMMISSIONER THERNSTROM: Well, I'm sure --

18 GENERAL COUNSEL HAILES: And I don't know if
19 anybody's reviewed the documents.

20 COMMISSIONER THERNSTROM: -- I'm sure that
21 you can track down those sources and track down the
22 methodology. I mean you cannot ignore numbers that vary as
23 much as these do with the Commission's and not address them
24 and not address the question at all of voters who cast
25 ballots and should not have been able to do so.

1 COMMISSIONER EDLEY: Why is that relevant?

2 I'm sorry.

3 COMMISSIONER THERNSTROM: Why is that
4 relevant?

5 GENERAL COUNSEL HAILES: That's not part of
6 the scope of our report.

7 CHAIRPERSON BERRY: Let's not all talk at
8 once, please; one at a time. Commissioner Edley?

9 COMMISSIONER EDLEY: Well, I guess I was just
10 confused as to why we have a charter to rove around and
11 explore the issue of who might have voted and who didn't
12 vote. I mean unless the goal of our study was to try to
13 examine all possible issues of voter fraud. But may I ask
14 a question while I have the floor?

15 CHAIRPERSON BERRY: Yes, please.

16 COMMISSIONER EDLEY: On page 36, the text at
17 note 94, of the 5,700 persons on the June 1999 list, 327
18 successfully appealed and therefore remained on the voter
19 rolls. Another 485 names were later identified as persons
20 who neither had their rights restored or who should not
21 have been on the list. How were those 485 names later
22 identified, through what process and by whom?

23 And I guess my overall question, the next
24 sentence is, "Thus, at least 14.1 percent of the persons
25 whose names appeared on the Miami-Dade County list appeared

1 on the list" -- this is the list of felons or alleged
2 felons to be purged, excluded -- "Thus, at least 14.1
3 percent of those persons whose names appeared on the Miami-
4 Dade County list appeared on the list in error. And it
5 sounds, if I understand this correctly, that 14.1 could in
6 fact be a very, very low estimate of the number of people
7 whose names erroneously appeared on the list to be purged,
8 because it doesn't capture those folks who were on the list
9 but who didn't go through some sort of appeal or -- I mean
10 we don't -- so I'm a little confused about where the 485
11 comes from.

12 CHAIRPERSON BERRY: General Counsel?

13 GENERAL COUNSEL HAILES: Yes. I don't know
14 the specific answer to your question, Commissioner Edley,
15 but I do know that we've been told that it is a fairly
16 time-consuming process to confirm whether the persons
17 should or should not have been on the list. In the
18 Affected Agency comments we received from the Florida
19 Division of Department of Law Enforcement, we were told,
20 for example, that they made extraordinary efforts to try to
21 resolve whether persons should or should not be on that
22 exception list.

23 And in one such case, I'm reading directly
24 from their comments, "A blonde voter in Hillsboro County
25 was personally," underline, "visited after hours by a

1 member of the Florida Department of Law Enforcement before
2 election day to fingerprint him and process his appeal so
3 that he would not have to lose time from work. He was
4 ultimately determined to be eligible to vote,
5 notwithstanding a name match to a convicted drug felon."

6 So I don't know that they made extraordinary
7 efforts in all instances, probably some of the issues that
8 are reflected in Mr. Leahy's testimony were underway but
9 not completed prior to election day.

10 COMMISSIONER EDLEY: Okay. And, finally, on
11 my first point, I understand and take Commissioner
12 Thernstrom's point to be that the staff made no inquiry to
13 try to understand the number of ineligible convicted felons
14 who actually cast votes, correct?

15 GENERAL COUNSEL HAILES: Right. That's what
16 I understand.

17 COMMISSIONER EDLEY: Is it also correct that
18 you made no inquiry into the number of absentee ballots or
19 military ballots or student ballots that were cast and
20 should not have been?

21 GENERAL COUNSEL HAILES: Yes. That we
22 believe to be, based on the testimony that we received, to
23 be outside the scope of this report and not -- we did not
24 have sufficient evidence to comment on that.

25 COMMISSIONER THERNSTROM: May I just answer a

1 question that was really addressed to me from Professor
2 Edley -- Commissioner Edley?

3 CHAIRPERSON BERRY: The Commission will speak
4 only when I recognize you first, and could you seek
5 recognition?

6 COMMISSIONER THERNSTROM: I just asked you a
7 question. May I respond?

8 CHAIRPERSON BERRY: Yes, you may.

9 COMMISSIONER THERNSTROM: Thank you very
10 much. I'm bewildered by your question of what the
11 relevance is of the number, if accurate, 5,600 voters who
12 voted and should not have been allowed to do so. If we're
13 talking about disparate impact here, and if these numbers
14 are accurate, then we've got five times the number of
15 felons who voted and were ineligible to do so than the
16 number who were in fact erroneously kept off the rolls.
17 That is a disparate impact question, and it seems to me
18 those numbers, again, if accurate, are highly relevant.

19 CHAIRPERSON BERRY: Would you like
20 Commissioner Edley to answer your question?

21 COMMISSIONER THERNSTROM: I would. Thank you
22 very much.

23 CHAIRPERSON BERRY: Commissioner Edley?

24 COMMISSIONER EDLEY: I think it's a nice
25 point and certainly a logical one. I guess the difficulty

1 here is just in trying to define the scope of work for the
2 staff and for the project. There, presumably, might also
3 be some kind of disparate impact with respect to all kinds
4 of improperly included votes or cast votes, for example,
5 among absentee ballots or military personnel or the like.
6 And I mean we could do another analysis trying to examine
7 all kinds of mistakes and all kinds of fraud, but I think
8 we just have to adopt reasonable limits to the scope of the
9 inquiry. But I take your logical point, though, as right;
10 it would be an offset.

11 CHAIRPERSON BERRY: It could be a nice study
12 to do, yes.

13 COMMISSIONER THERNSTROM: And I have a
14 question for Mr. Hailes here. You say you didn't rely --
15 you didn't want to rely -- although I think that some of
16 these newspapers did some very important counting that
17 needs to be looked at -- you said you didn't want to rely
18 on newspaper accounts. But on page 120, I believe you do
19 -- the excluded felon you do refer to comes from the
20 Guardian Observer. So there is a newspaper account you do
21 --

22 GENERAL COUNSEL HAILES: Okay. From page 35
23 to 120, you found an article that we referred to in a
24 footnote about one person. I'll accept that.

25 COMMISSIONER WILSON: Excuse me. You mean

1 out of a 200-page report, there's one mention of a
2 newspaper.

3 CHAIRPERSON BERRY: First of all, let me --

4 COMMISSIONER WILSON: This criticism is going
5 to be based on one mention of a newspaper?

6 COMMISSIONER THERNSTROM: No, no. My
7 criticism is --

8 CHAIRPERSON BERRY: Now, now, please, let's
9 not all talk at once. Everyone will get their turn.
10 Commissioner Wilson, your point?

11 COMMISSIONER WILSON: My point is that in a
12 200-some odd page document, there's one reference to a
13 newspaper, and I don't have it, because you've just brought
14 it up.

15 CHAIRPERSON BERRY: Well, I'll give you the
16 page number, but --

17 COMMISSIONER WILSON: But I hardly think that
18 that is basing an entire report or using newspaper accounts
19 for the predominant part of this report. It's ridiculous.

20 CHAIRPERSON BERRY: A point of information,
21 then I'll recognize everyone in order. A point of
22 information before this deteriorates into dispensing
23 misinformation. The Commission does use newspaper and
24 other accounts and cites them in its reports; there's
25 nothing wrong with that.

1 The point I take that Mr. Hailes was making
2 was not that one wouldn't use newspapers, which is the way
3 we've used them in the past, to report on things that the
4 paper said happened, like this newspaper account of this.
5 As I understood him, he did not want to rely on a newspaper
6 account for an analysis of the ballots and a statistical
7 analysis of what the analysis should be because there were
8 no citations in it that anybody could look up to check the
9 analysis, which, as any good reporter knows, and all
10 reporters are good reporters, that there's a difference
11 between just reporting that there was a fire and reporting
12 your analysis of something that happened. And as I
13 understood it, that was the point.

14 But there's nothing wrong with using
15 newspapers, magazines or whatever to report on things that
16 are supposed to be factual that happened. Yes,
17 Commissioner Thernstrom?

18 COMMISSIONER THERNSTROM: Well, I'm delighted
19 to hear it, and I would say that in some of the newspaper
20 accounts there is a careful discussion of the methodology
21 by which the numbers were arrived at. And it seems to me
22 that those analyses have to be taken into account and
23 looked at carefully. That's my only point. I did not say
24 that this entire report was -- and one footnote: I don't
25 know how many footnotes. Again, I've had three days to

1 look at this. I would have preferred that the Commission
2 have 30 days to look at this report so we could really have
3 a good discussion, but whatever. I don't know how many
4 footnotes.

5 CHAIRPERSON BERRY: Commissioner Thernstrom,
6 as the -- Vice Chair, would you mind just repeating once
7 again what you said, because Commissioner Thernstrom didn't
8 hear you.

9 COMMISSIONER THERNSTROM: I did hear. Thank
10 you very much.

11 CHAIRPERSON BERRY: She didn't hear you,
12 because she kept repeating the same thing.

13 VICE CHAIRPERSON REYNOSO: I want to repeat
14 it nonetheless.

15 CHAIRPERSON BERRY: Repeat it again. I'll
16 have you repeat it from time to time. Repeat it again.

17 VICE CHAIRPERSON REYNOSO: At the last
18 Commission meeting, we had an extensive discussion about
19 this report and the fact that particularly Commissioner
20 Redenbaugh and I have been urging the staff to get reports
21 out as quickly as possibly. We understood that this
22 report, to be finished for discussion today, would be
23 finished in record time. We're very pleased about that.
24 We were nonetheless surprised that we would not receive the
25 report until this week and that we ought to set time aside

1 to study it this week so we could have this discussion.
2 There was absolutely no objection and in fact an expression
3 of pleasure on the part of this Commission, I believe
4 unanimously, that it would be ready for our discussion
5 today.

6 CHAIRPERSON BERRY: Now, let's go on to -- I
7 had a question for Professor Lichtman, but I don't see
8 Professor Lichtman so I'll ask him afterwards. I'll hold
9 the question.

10 We need to do the findings and
11 recommendations for this chapter. Let's go to the findings
12 and recommendations for Chapter 1. And also let me remind
13 you, General Counsel, that where you have made a change,
14 since we received this as a result of the Affected Agency
15 Review, remind us of that as you go along.

16 GENERAL COUNSEL HAILES: Okay.

17 CHAIRPERSON BERRY: And where you have made
18 any change that we don't know about, if you could do that
19 as we go along.

20 Here is Professor Lichtman, and the point
21 that I wanted to ask you about, Professor Lichtman, is your
22 analysis of the Hispanic -- the last analysis that you said
23 you did last night.

24 DR. LICHTMAN: Yes.

25 CHAIRPERSON BERRY: We would like to, without

1 objection, include that in the report -- include it in your
2 report.

3 DR. LICHTMAN: Okay. I'll have to double
4 check it, because I did it last night.

5 CHAIRPERSON BERRY: And also what I was
6 struck by -- if you could just quickly in one sentence say
7 what it showed.

8 DR. LICHTMAN: It showed that there was not a
9 positive relationship at the precinct level between the
10 percent of Hispanics in a precinct and the percent of
11 rejected ballots, that, in fact, the relationship was
12 slightly negative. And the reason is because you've got
13 these precincts that are heavily African-American that have
14 virtually no Hispanics in them, and those are the precincts
15 that have the extraordinary high rates of ballot rejection.

16 And the point of this was if it was -- you know, going a
17 little beyond my original study because this has been so
18 controversial, if it really was education that was driving
19 this, because Hispanics and African-Americans have
20 comparable education levels, you would not see this
21 negative relationship. Clearly, there is a racial effect
22 going on here.

23 CHAIRPERSON BERRY: Okay. I just wanted to
24 -- yes, Vice Chair?

25 VICE CHAIRPERSON REYNOSO: I'm sorry, I just

1 have one question, if I might, of Commissioner Thernstrom.
2 You mentioned that you had some qualms about the approach
3 -- you may have some qualms about the
4 sociological/scientific approach of this study. Did you
5 have any qualms about the conclusion there was a disparate
6 impact?

7 COMMISSIONER THERNSTROM: Yes, I do, because
8 if I have questions about the methodology, the method of
9 analysis, then, obviously, I've got questions about the
10 conclusions themselves. They will be spelled out in a
11 lengthy dissent that I will be writing. And, you know, I
12 mean it's just impossible in this context to go into them
13 --

14 CHAIRPERSON BERRY: Thank you.

15 COMMISSIONER THERNSTROM: -- point by point.

16 CHAIRPERSON BERRY: Thank you very much.

17 COMMISSIONER EDLEY: Madam Chair?

18 CHAIRPERSON BERRY: Just a second. I don't
19 want to lose my point, because I don't want to have to ask
20 Professor Lichtman to say it all over again. The reason
21 why I had you say that about the comparison between the
22 Hispanic precincts and the black precincts in Florida --

23 DR. LICHTMAN: This is in Dade County.

24 CHAIRPERSON BERRY: I mean Dade County --
25 which showed that there was a much higher rate in the black

1 community; is that correct?

2 DR. LICHTMAN: Correct, vastly higher.

3 CHAIRPERSON BERRY: Than in the Latino, is
4 because the report and the testimony showed that in Dade
5 County -- I just wondered if there was any relationship,
6 and I know we can't tell -- it was in the black precincts
7 where the Supervisor of Elections testified that there were
8 these major communications problems, because they did not
9 have access to laptop computers. He put all of them in
10 other districts and that we were asking about that, and
11 that he didn't put them in the black -- the black districts
12 had major problems with their polls, their precinct
13 workers, and all the rest of it. And I just noticed that
14 he said he put them mostly in Cuban-American voting
15 precincts. And in fact you can only put -- he had 18 -- one
16 in the largely African-American precinct.

17 I think the staff ought to look at that again
18 in terms of the resource allocation in the Dade County as
19 you go through this one more time. In the light of these
20 numbers. And I know the difference between correlations
21 and regression and all the rest, so you don't have to
22 explain it to me again. But I just thought it was
23 interesting to note that. Yes?

24 DR. LICHTMAN: Can I add two things? One,
25 regardless of the methodology, we actually have, in Dade

1 County, Duvall County, and Palm Beach County -- and I can't
2 repeat this often enough -- the actual results in the
3 heavily black and the heavily non-black precincts. These
4 are not estimates. Now, admittedly, they don't necessarily
5 apply to the whole county without doing statistical
6 estimates, but it is still nonetheless striking that the
7 actual rejection rates in the heavily black precincts, as
8 compared to the heavily non-black precincts, in three
9 separate counties, simply chosen because the data was
10 available, not any preconceptions, there was such enormous
11 differences averaging out to about ten percent, which is
12 tens of thousands of voters.

13 CHAIRPERSON BERRY: Commissioner Edley had
14 the floor.

15 COMMISSIONER EDLEY: Two things. On your
16 last point about the laptops and so forth, I just wanted to
17 clarify that the logical link -- it's not that disparities
18 in the allocation of laptops explained the results that
19 Allan got last night --

20 CHAIRPERSON BERRY: Right, right.

21 COMMISSIONER EDLEY: -- which are about
22 ballot spoilage.

23 CHAIRPERSON BERRY: Right, I understand.

24 COMMISSIONER EDLEY: It's that both of them
25 point to an issue --

1 CHAIRPERSON BERRY: That there are issues
2 there.

3 COMMISSIONER EDLEY: -- concerning resource
4 allocation.

5 CHAIRPERSON BERRY: Right, that there are
6 issues there.

7 COMMISSIONER EDLEY: Is there any way of
8 understanding -- I don't know if it's for this chapter or
9 not -- is there any way of understanding -- I take it we
10 don't have any data related to the age of equipment?

11 CHAIRPERSON BERRY: Later on we've got
12 equipment, but I don't know if we have data on age.

13 COMMISSIONER EDLEY: We don't have age data,
14 right? If I recall somebody saying that would be
15 exceptionally difficult to get, because you'd have to go
16 inspect individual machines. We were never able to get
17 that, were we?

18 GENERAL COUNSEL HAILES: We're looking for a
19 staff member who attempted to get that information. And I
20 know in different places we talk about how antiquated the
21 machinery was in Miami-Dade and particularly in some of
22 those precincts, but I don't think we have the precise --

23 COMMISSIONER EDLEY: No way to --

24 VICE CHAIRPERSON REYNOSO: -- precinct by
25 precinct.

1 COMMISSIONER EDLEY: No way to correlate that
2 with racial composition. Okay.

3 CHAIRPERSON BERRY: Commissioner Thernstrom?

4 COMMISSIONER THERNSTROM: Yes, I have a
5 question for Allan. It is, as you've described it, the
6 problems that you identify are either that black voters
7 made two choices for the same office or made no choice --
8 overvotes, undervotes, right? Okay. What did any Florida
9 official have to do with voters committing either of these
10 errors? And it would seem to me that --

11 DR. LICHTMAN: I'd be happy to answer that
12 question.

13 COMMISSIONER THERNSTROM: Yes. And it would
14 seem to me that when you're talking about disparate impact,
15 that you have to point to some procedure or some mechanism,
16 intentional or not, that if the voters themselves are the
17 source of the error, that you really cannot have a
18 disparate impact analysis here.

19 DR. LICHTMAN: Can I respond to that?

20 CHAIRPERSON BERRY: Go ahead, and then the
21 General Counsel has a point.

22 DR. LICHTMAN: Yes. I'm not going to deal
23 with the ins and outs of the legality. The answer is,
24 obviously, I did not go precinct by precinct and study what
25 went on in these precincts. But, hypothetically, certainly

1 one could think of all kinds of things that should be
2 studied, and I hope the Justice Department will do that,
3 that could at least help explain this.

4 If confusing instructions, for example, were
5 given in some precincts but not another; that's point one.

6 Point two, if there were more resources available at the
7 polls so voter questions could be answered in some
8 precincts than another. Point three, if there were better
9 trained poll workers in some precincts rather than another.

10 Point four, if there was more up to date, better
11 functioning technology in some precincts rather than
12 another.

13 In other words, there are any number --
14 that's four -- any number of hypotheses that would apply
15 not to what the voter was doing but to what was going on in
16 the precincts that could all or in part explain the
17 disparate impact. That's the whole point of finding a
18 disparate impact is to point them to things that you need
19 to go on and investigate. Are those things true or not?
20 You don't know, I don't know. That's why we need to look
21 at it.

22 COMMISSIONER THERNSTROM: Exactly. You've
23 got no evidence on any of those.

24 DR. LICHTMAN: Well, wait a minute. When you
25 say I have no evidence, it sounds like you're charging me

1 with something.

2 (Laughter.)

3 COMMISSIONER THERNSTROM: No, I'm not.

4 DR. LICHTMAN: Like the whole point of my
5 analysis was to demonstrate -- do you deny that there's a
6 disparate impact?

7 CHAIRPERSON BERRY: May I interrupt to say
8 only that we don't need evidence, as I understand it, on
9 any of those. Once you prove a prima facie case, as
10 Commissioner Edley has said -- and he can say it again too;
11 everybody can say everything again -- once you prove a
12 prima facie case, the burden shifts to have someone look to
13 see what all the reasons are.

14 And why is that the case? This is important
15 for everybody to understand. Because the history of this
16 country is that African-Americans and other people of color
17 were, for years, were denied the right to vote, and they
18 were denied the right to vote by all sorts of mechanisms
19 and all kinds of devices and all kinds of actions that
20 people took. And for years and years, people like my
21 mother and my aunts and my relatives were told, "You can't
22 prove we intended to do anything to you. And as long as
23 you can't prove that, then that's too bad." And so the
24 Voting Rights Act -- I have the floor, thank you, ma'am --

25 COMMISSIONER THERNSTROM: I wasn't

1 interrupting you.

2 CHAIRPERSON BERRY: -- the Voting Rights Act,
3 therefore, is written in such a way that one section
4 requires intentional discrimination, that you prove it.
5 And if we end up, as I hope, asking the Justice Department
6 to pursue this matter, they can go see whether anybody did
7 anything.

8 And another part of it says, "As long as you
9 can establish a disparate impact on you folks who've been
10 locked out for so many years, people like you because of
11 your color, you can in fact force people to show why this
12 all happened so that you're not sitting there saying, "I
13 can't prove intent, so therefore we just have to go on and
14 on with the situation." So there's good reason for it, and
15 it doesn't prove a conclusive case, but it does make a
16 prima facie case, which requires that there be further
17 exploration. And that's what this is all about.

18 General Counsel, did you want to say anything
19 or did I say it?

20 GENERAL COUNSEL HAILES: I think between you
21 and Dr. Lichtman, the points I intended to raise have been
22 covered.

23 CHAIRPERSON BERRY: Okay. We need to do the
24 findings and recommendations. Do you have questions about
25 the findings and recommendations, Commissioner Thernstrom?

1 COMMISSIONER THERNSTROM: No. I have a
2 comment on what you just said, that I hope we are not
3 confusing the egregious violations of basic 15th Amendment
4 rights in 1964 when 6.7 percent of eligible voters in
5 Mississippi were actually registered to vote with what we
6 -- the confusion and errors that we found today, this year,
7 in Florida and would probably find in every other state in
8 the nation, but as you said, did not amount to anything in
9 the report, anything resembling intentional
10 disfranchisement, which, of course, was the whole story
11 prior to the passage of the Voting Rights Act.

12 CHAIRPERSON BERRY: Commissioner Thernstrom,
13 I am not confused. I am very clear about what I said. So
14 you don't need to worry about Commissioners being confused.
15 I, for one, am not confused.

16 But, therefore, we will go on, and I'll point
17 out at this juncture, since you mentioned other states, the
18 Commission has made a survey of other states, which we
19 reported in a public meeting the staff has, and we've
20 written to the governors of those states and other
21 officials and received responses from most of them. And we
22 will, at a later time, considering whether we in fact wish
23 to have investigations in other states. So other states
24 are not totally left out of this.

25 Let's go to the findings and recommendations.

1 Yes, Commissioner Edley?

2 COMMISSIONER EDLEY: I have one on page 170.

3 CHAIRPERSON BERRY: Okay.

4 COMMISSIONER EDLEY: Well, first of all, on
5 page 169, the bullet at the bottom, there are five Florida
6 counties that are in conflict with the jurisdiction of the
7 Voting Rights Act. I assume that refers to preclearance or
8 something. So that needs to be corrected.

9 CHAIRPERSON BERRY: You need to explain that.

10 COMMISSIONER EDLEY: On page 170 -- or,
11 certainly, just insert the preclearance jurisdiction of the
12 VRA -- on page 170, recommendation 1.4: The State of
13 Florida should institute effective monitoring systems to
14 ensure the uniform implementation of a standardized voting
15 process that requires all voters use the same technology.
16 I think I disagree with that.

17 CHAIRPERSON BERRY: Where, 1.4?

18 COMMISSIONER EDLEY: First sentence of 1.4.
19 The notion that all voters must use the same technology.

20 COMMISSIONER THERNSTROM: Isn't that now
21 Florida law? Am I mistaken?

22 COMMISSIONER EDLEY: The question is what are
23 our recommendations, right? And, actually, I don't think
24 it's now Florida law.

25 COMMISSIONER THERNSTROM: No? Okay.

1 COMMISSIONER EDLEY: I think it's that they
2 can't do punch cards. They can choose, at a minimum,
3 between optical and DRE. And what I'm worried about here,
4 I would like, in the fullness of time, that the nation
5 moves to this electronic DRE systems that would facilitate
6 multiple languages, be more accessible to the disabled --
7 to the people with disabilities and the like. So anything
8 here that would seem to suggest that we think that folks
9 should be locked in to one kind of optical scanning
10 technology I think would be very unfortunate. Quite
11 another thing would be to indicate that there ought to be a
12 uniform, acceptably, minimum standard, performance standard
13 with respect to accuracy and spoilage rates and the like.
14 I think that would be fine. But I object to the
15 recommendation, as framed.

16 CHAIRPERSON BERRY: Well, I think you object
17 with good reason and also because we were informed, and in
18 it's in the report, that there were problems even with
19 optical scan technology --

20 COMMISSIONER EDLEY: Absolutely.

21 CHAIRPERSON BERRY: -- and others. So we
22 should not be locked into any particular system.

23 COMMISSIONER EDLEY: I would --

24 CHAIRPERSON BERRY: Or reasons for
25 recommending any particular system.

1 COMMISSIONER EDLEY: Yes, I would agree with
2 the requirement, which I do believe is in the Florida law,
3 that there be precinct-level, second chance or error-
4 correcting systems in place so that voters will know if
5 they're casting an undervote or an overvote and be allowed
6 to correct it if they so choose.

7 CHAIRPERSON BERRY: And that those systems be
8 employed, because there's something in the report about how
9 you can have the system in place and then not use it, the
10 so-called kickback system. So if there's no objection, we
11 would modify this recommendation in conformity with -- no
12 objection from people who intend to support the report
13 since we've been told -- or even those who don't intend to
14 support it. Is there any objection to changing this? You
15 have objections to --

16 GENERAL COUNSEL HAILES: Not an objection. I
17 just wanted to say that the new law requires that the
18 county must use an electronic or electro-mechanical
19 precinct count tabulation voting system.

20 CHAIRPERSON BERRY: Okay.

21 GENERAL COUNSEL HAILES: That's the specific
22 language.

23 CHAIRPERSON BERRY: Okay. Other points on
24 the recommendations? Does anyone else have any --

25 COMMISSIONER EDLEY: Well, I have another one

1 if nobody --

2 CHAIRPERSON BERRY: Yes, go right ahead.

3 COMMISSIONER EDLEY: On page 171, and this
4 could be made with respect to a number of the
5 recommendations here. I'm not happy with simply
6 recommending that the Justice Department investigate. I
7 think that with respect to the disparate impact here, we
8 ought to affirmatively recommend that they litigate.
9 Obviously, they will proceed to investigate in support of
10 -- or to evaluate whether or not they will accept the
11 recommendation.

12 But my understanding was that the Justice
13 Department allegedly began some kind of an investigation
14 back in December. They've had many months. We're
15 providing them with this report and presumably making boxes
16 of data and depositions and so forth available to them. If
17 they want to investigate further, I'm sure they will want
18 to investigate further, but I think we have enough to
19 affirmatively recommend that they initiate enforcement
20 action. So I would like to strengthen --

21 CHAIRPERSON BERRY: The recommendations?

22 COMMISSIONER EDLEY: -- 1.8 and the other
23 recommendations along that line. Again, I want to
24 emphasize, we haven't decided that there was a violation;
25 we are not a court. As you said, Madam Chair, we're not a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 court. But as to the question of whether or not we think
2 there was a violation that deserves -- we think it likely
3 that there was a violation that deserves to be pursued,
4 whether we think there's the evidence there for a prima
5 facie case, I take it the answer for many of us, at least,
6 is yes. Therefore, the recommendation ought to be to
7 litigate.

8 CHAIRPERSON BERRY: That's why -- yes, Vice
9 Chair?

10 VICE CHAIRPERSON REYNOSO: Madam Chair, the
11 recommendation does ask the Justice Department to initiate
12 those procedures to ensure compliance with the Voting
13 Rights Act. It may be that Florida will simply agree to
14 change their procedures without the necessity of
15 litigation. So I'm a little bit concerned about
16 recommending litigation.

17 CHAIRPERSON BERRY: I would think that --
18 well, but I think it's more than investigation.

19 VICE CHAIRPERSON REYNOSO: Yes.

20 CHAIRPERSON BERRY: Thank you, Commissioner
21 Edley. And the way we had put it, and the way I put it in
22 the summary that I gave, from what I inferred from the
23 report, is that they would begin the litigation process.
24 What that meant was --

25 VICE CHAIRPERSON REYNOSO: Okay. That's

1 acceptable.

2 CHAIRPERSON BERRY: -- if they can
3 investigate or if they can meet some agreement, then that's
4 fine. But that they do something more than just
5 investigating.

6 COMMISSIONER EDLEY: May I just add, Madam
7 Chair, here that I think some might say, "Well, look, they
8 passed a statute, so doesn't that substantially address any
9 concerns with respect to possible violations of the
10 statute?" My own sense is no, because they haven't
11 implemented it. They haven't necessarily funded it the way
12 it ought to happen, and that at a minimum, since we're
13 talking about what happens prospectively -- nobody's trying
14 to overturn, or at least nobody right here in this
15 proceeding is trying to overturn the results of the
16 previous election -- there's still the possibility of
17 getting important declaratory relief or injunctive relief
18 just to make sure that they do what they promised to do,
19 even assuming what they promised to do by statute suffices,
20 and I'm not sure it does, which we'll get to later on.

21 CHAIRPERSON BERRY: Okay. And the way I had
22 put the addition that I made to Chapter 1 was that there's
23 a strong basis for concluding that Section 2 of the Voting
24 Rights Act had been violated.

25 VICE CHAIRPERSON REYNOSO: I agree with that.

1 CHAIRPERSON BERRY: Right. Okay. Yes, Vice
2 Chair?

3 VICE CHAIRPERSON REYNOSO: I do have one --
4 I'm sorry, I do have one comment pertaining to our
5 discussion on the standardized voting process. And just a
6 reminder that the testimony we heard was that the most
7 accurate voting is actually the old-fashioned voting where
8 you have paper and you have a pencil, and you put an X on
9 it. And sometimes progress turns out to be not progress,
10 and I hope that some folk will even consider going back to
11 the old-fashioned way of voting.

12 CHAIRPERSON BERRY: Yes. Yes, Commissioner
13 Thernstrom?

14 COMMISSIONER THERNSTROM: I'm just -- I
15 continue to be bewildered by this whole recommendation.
16 The Department of Justice, the Voting Section of the Civil
17 Rights Division has been aggressively investigating
18 violations of the Voting Rights Act for now 36 years. The
19 career attorneys who gravitate to that Voting Section are
20 compassionately committed to stopping any form of
21 discrimination anywhere that they can find it. I agree
22 with that commitment. Of course that's what they should be
23 doing. And this implies they've suddenly been delinquent,
24 fallen down on the job. These are people who have long
25 been there. They haven't come in new with this

1 Administration, and I don't understand the point.

2 CHAIRPERSON BERRY: Commissioner Edley?

3 COMMISSIONER EDLEY: Well, I guess I
4 respectfully and, of course, lovingly disagree.

5 (Laughter.)

6 I mean, first of all, that's not what I --
7 the characterization that I intend, but also I guess I
8 would disagree with the record. There are an awful lot of
9 people who think that the Justice Department, under any
10 administration, has not done all that it should or could
11 have done. And I think for very good reason. And that was
12 certainly true during the Clinton Administration. That's
13 one reason why there's a private right of action under the
14 Voting Rights Act because of the recognition that Justice
15 Department, even career employees, are still supervised by
16 political appointees who make the decisions about whether
17 to investigate and whether to bring an action and whether
18 to make a settlement. So as wonderful as the career
19 employees may be, they are still are supervised by
20 Democratic or Republican political appointees, number one.

21 Number two, I expressed in this Commission
22 considerable concern back in December that the Clinton
23 Justice Department was moving too slowly to investigate
24 what was going on in Florida. So my concern is without
25 regard to the party in control of the Justice Department.

1 Number three, the fact remains that the
2 Justice Department has limits on its resources, and there
3 are not enough people in the Voting Rights Section to
4 pursue all of the even important and significant
5 allegations of voting rights abuses. So they could have
6 the best of intentions in the world. They could even agree
7 with us on the merits and still not feel that they have the
8 resources available to pursue it actively. And in that
9 sense, a recommendation from us might help them in setting
10 priorities for the allocation of their resources.

11 CHAIRPERSON BERRY: And I might point out
12 again that this Commission has consistently criticized the
13 Justice Department Civil Rights Division no matter who was
14 over there for not doing enough. And we have also
15 consistently reported that they have inadequate resources.

16 There are official reports in this Commission that time
17 and time and time again, and as recently as a few months
18 ago, pointed that out. And if you want to read the report
19 we did on the Clinton Administration, the score card, we
20 point out some deficiencies there. So I think the
21 recommendation one should take umbrage at recommendations
22 that one do something even if one already plans to do it.
23 That would be great. We'll hear back that they're already
24 planning to do it.

25 Now, let's go. Any other comments on the

1 findings and recommendations for this chapter, the chapter
2 that Professor Lichtman has shared with us? Any others or
3 we can go to the next chapter? Okay. We'll go to Chapter
4 2, and we'll thank you very much for your help.

5 DR. LICHTMAN: Thank you very much. Thanks
6 for the opportunity.

7 COMMISSIONER EDLEY: Madam Chair?

8 CHAIRPERSON BERRY: Yes.

9 COMMISSIONER EDLEY: Will Professor Lichtman
10 be asked or have an opportunity to provide the Commission
11 with comments on the dissenting or supplemental --

12 CHAIRPERSON BERRY: Yes.

13 COMMISSIONER EDLEY: -- views that are
14 authored by any of the Commissioners?

15 CHAIRPERSON BERRY: Right.

16 COMMISSIONER EDLEY: Just so that we get the
17 benefit of his social science expertise?

18 CHAIRPERSON BERRY: Right. We will have him
19 analyze the dissent that is submitted.

20 COMMISSIONER EDLEY: Thank you.

21 CHAIRPERSON BERRY: To the extent that it has
22 statistical information in it, since he is our statistical
23 expert. Yes, Commissioner Wilson?

24 COMMISSIONER WILSON: I had a question for
25 Professor Lichtman.

1 DR. LICHTMAN: I'd better stay then.

2 (Laughter.)

3 COMMISSIONER WILSON: We're never going to
4 let you go.

5 DR. LICHTMAN: You know, this is my tenth
6 anniversary. My wife is in Cancun waiting for me. All you
7 folks out there, sympathy.

8 (Laughter.)

9 COMMISSIONER WILSON: Maybe your wife is
10 watching you.

11 DR. LICHTMAN: From Cancun, I don't know.

12 COMMISSIONER WILSON: It's called misplaced
13 priority.

14 (Laughter.)

15 DR. LICHTMAN: You may well be right.

16 COMMISSIONER WILSON: Okay. Well, in that
17 case, you've made me feel so guilty.

18 DR. LICHTMAN: No, please ask. No, no. My
19 plane is not till five o'clock, so, please, go ahead.

20 COMMISSIONER WILSON: My question has nothing
21 to do with the way in which you conducted your analysis.
22 It's a question having to do with you personally. You said
23 you started off -- or you took on this assignment feeling
24 skeptical.

25 DR. LICHTMAN: Yes.

1 COMMISSIONER WILSON: And as the figures
2 began to unfold and the story began to be clear to you,
3 what was your response, just on a personal level?

4 DR. LICHTMAN: I was amazed and shocked, I
5 have to say, on a personal level. I didn't have any idea
6 -- as I said, I'd worked on a lawsuit that involved
7 technology, and I figured technology was it; that's what
8 was driving this. I was amazed, I was shocked, I felt
9 something had gone terribly wrong in this election. No
10 group of individuals should be walking in a ballot place in
11 any county in America and having over 20 percent of their
12 ballots discarded. Two percent, three percent, five
13 percent is too high, and here we're consistently in these
14 counties finding ten to over 20 percent of African-American
15 ballots discarded. Leave aside the statewide projections.
16 We're talking about what's actually going on within these
17 counties. We have this finally-grained data. I was amazed
18 and shocked and utterly convinced we need to look into this
19 more. As I said, I point no fingers at anybody. I am
20 claiming no intentional discrimination. But I am saying
21 this is an extraordinary thing for America in the 21st
22 century to have these kinds of ballot rejection rates for
23 any group in America. Throughout the country African-
24 Americans are voting in places where rejection rates are
25 less than one percent.

1 CHAIRPERSON BERRY: So those were your
2 feelings.

3 DR. LICHTMAN: Personal feelings.

4 CHAIRPERSON BERRY: Right. So we don't have
5 to have anyone comment on your personal feelings, right?

6 DR. LICHTMAN: I hope not.

7 CHAIRPERSON BERRY: Unless they just wish to
8 express their personal feelings.

9 DR. LICHTMAN: Yes, I was asked to profess my
10 personal feelings. As I said, I started out as a skeptic.

11 CHAIRPERSON BERRY: All right. Well, then
12 thank you very much.

13 DR. LICHTMAN: Thank you.

14 CHAIRPERSON BERRY: Let's go to Chapter 2.
15 Does anyone have any questions on the first half of Chapter
16 2? Let's go up to pages -- from page 39 to, let's say,
17 page 50. Does anybody have any questions on those pages,
18 substantive questions? Yes, Commissioner Edley?

19 COMMISSIONER EDLEY: Do we -- I recall that
20 we had some testimony, and I've certainly read of
21 allegations, about different treatment regarding requests
22 for identification. Maybe I missed that.

23 GENERAL COUNSEL HAILES: In response, we
24 heard accounts, not at the hearing, about those
25 identification requirements that were different, except in

1 one instance. And that was a person who I believe
2 overheard or saw a person ask for different identification
3 than the witness was asked for. And I think we may have
4 referred to it, and I'm going to ask the staff person to
5 assist me, but I only remember one instance where there
6 were two different precincts in one polling location, and
7 there was a difference of the way the voters were treated.

8 But we do remember hearing, again, media accounts, and we
9 heard accounts expressed at the forum the NAACP held of
10 persons being asked for two and three pieces of
11 identification but not testimony we received under oath.

12 CHAIRPERSON BERRY: Okay. Commissioner
13 Redenbaugh?

14 COMMISSIONER REDENBAUGH: The bulk of this
15 chapter is based on the Miami hearing or both hearings?

16 GENERAL COUNSEL HAILES: Both hearings. Most
17 of the testimony reported here came from the Miami hearing
18 since the focus of the Tallahassee hearing was mostly on
19 state and county officials.

20 COMMISSIONER REDENBAUGH: The reason I ask,
21 General Counsel, is because, as you probably remember, I
22 was at the Miami hearing but not at the Tallahassee
23 hearing.

24 GENERAL COUNSEL HAILES: Yes.

25 COMMISSIONER REDENBAUGH: How do you

1 generalize from the testimony we have at Miami that these
2 problems were widespread rather than anecdotal?

3 GENERAL COUNSEL HAILES: Well, it's a
4 combination, and I'm not certain if you were present for
5 the entire -- for the open session where we got a lot of
6 testimony from individuals about their firsthand
7 experiences at the polls. But we did --

8 COMMISSIONER REDENBAUGH: Was that sworn
9 testimony?

10 CHAIRPERSON BERRY: Yes.

11 GENERAL COUNSEL HAILES: Oh, yes, yes. In
12 our open session, the witnesses are under oath.

13 COMMISSIONER REDENBAUGH: And those witnesses
14 were viewed in the same way as other -- the same care was
15 taken with those witnesses as other witnesses?

16 GENERAL COUNSEL HAILES: That's absolutely
17 correct.

18 COMMISSIONER REDENBAUGH: Okay.

19 GENERAL COUNSEL HAILES: And I would go
20 further to point out that even though we were located in
21 Miami-Dade County, our hundred mile radius for the subpoena
22 authority gave us the authority to subpoena witnesses from
23 other counties, including Palm Beach and including Broward
24 and other persons who came forward voluntarily in the open
25 session from other parts of the state, including from

1 Hillsboro County, which is outside of our subpoena range,
2 but they voluntarily came forward and gave their reports.
3 So based on the information we got from those witnesses, we
4 could fairly conclude that these accounts were not
5 isolated.

6 CHAIRPERSON BERRY: Okay. Does that --

7 COMMISSIONER REDENBAUGH: That does.

8 CHAIRPERSON BERRY: Okay. Does anyone have
9 any questions there? If not, then we'll go to the next
10 one. Responsibility without accountability, Chapter --

11 COMMISSIONER EDLEY: Recommendations?

12 GENERAL COUNSEL HAILES: I should --

13 CHAIRPERSON BERRY: Oh, did I skip something?

14 GENERAL COUNSEL HAILES: And I should say
15 that according to our --

16 CHAIRPERSON BERRY: Ah, recommendations.
17 Thanks, Chris.

18 GENERAL COUNSEL HAILES: In response to, as
19 part of our Affected Agency Review, we did submit portions
20 of this chapter to county supervisors, and we got
21 information back that suggests to us that --

22 CHAIRPERSON BERRY: Just a minute, just a
23 minute. Do you think I'm going to the next chapter?

24 GENERAL COUNSEL HAILES: No, this is in
25 Chapter 2.

1 CHAIRPERSON BERRY: Oh, okay. Go ahead.

2 GENERAL COUNSEL HAILES: This is in Chapter
3 2, and it relates to some of the witnesses and their
4 accounts. And where they said under oath that they
5 believed that they had registered to vote in a certain time
6 frame, we gave the Supervisor of Elections an opportunity
7 to respond, and they sent back to us what we consider to be
8 fairly conclusive evidence that the applications were
9 incomplete, and so we are deleting a particular reference
10 in this section. And I just wanted to point that out.

11 CHAIRPERSON BERRY: Okay. Which one is it?

12 GENERAL COUNSEL HAILES: On page 40.

13 CHAIRPERSON BERRY: Okay. So the one --

14 GENERAL COUNSEL HAILES: Actually, it would
15 be on page 41.

16 CHAIRPERSON BERRY: Page 41.

17 GENERAL COUNSEL HAILES: Yes. The references
18 to Johnny -- yes.

19 CHAIRPERSON BERRY: The one in the middle on
20 page 71 -- 41.

21 GENERAL COUNSEL HAILES: That's right.

22 CHAIRPERSON BERRY: Okay. All right.

23 GENERAL COUNSEL HAILES: And a slight change
24 to the information in the first reference.

25 CHAIRPERSON BERRY: Okay. All right. And

1 that's in response to Affected Agency.

2 GENERAL COUNSEL HAILES: Yes. And one other
3 place, on page 45, just a slight change, based on Affected
4 Agency Review, to the last individual who's mentioned.

5 CHAIRPERSON BERRY: Okay. Are those the only
6 ones in that chapter?

7 GENERAL COUNSEL HAILES: That's correct.

8 CHAIRPERSON BERRY: Okay. Findings and
9 recommendations? Anyone have any questions or comments or
10 changes that you would like to make in the findings and
11 recommendations in this chapter, Chapter 2? Yes,
12 Commissioner Edley?

13 COMMISSIONER EDLEY: On page 173,
14 recommendation 2.3, concerning provisional ballots.

15 CHAIRPERSON BERRY: Okay.

16 COMMISSIONER EDLEY: The wording of the
17 recommendation is a little vague in terms of providing for
18 absolute access to a provisional ballot in every polling
19 location, et cetera. I think -- I'm not quite sure what
20 that means. It's apparently in contrast with what's
21 provided under the new Florida statute. I just want to
22 make -- I would like to make clear that I find the
23 limitation -- the precinct limitation in the provisional
24 ballot problematic.

25 I'm sorry, let me say that again. The new

1 Florida statute creates a right to a provisional ballot,
2 but then if it turns out that you're registered to vote in
3 some other precinct than the one in which you cast the
4 provisional ballot, the ballot gets thrown out, and that
5 strikes me as entirely too pinched an entitlement to a
6 provisional ballot. It's certainly not what I would
7 consider absolute access to a provisional ballot.

8 At a minimum, if you cast a provisional
9 ballot at the incorrect precinct polling place, your votes
10 should be counted for those offices on the ballot for which
11 you were entitled to cast a vote. I mean it may not be the
12 political -- it may not be the dog catcher for that
13 particular part of town, but certainly for a countywide
14 office or for a statewide office or for President, even if
15 you're in the wrong precinct, your provisional ballot ought
16 to count, it seems to me. So I'd like some change made in
17 recommendation 2.3.

18 GENERAL COUNSEL HAILES: That is the intent
19 of the recommendation, so we will make the language
20 clearer.

21 CHAIRPERSON BERRY: Okay. And I also thought
22 that -- I didn't know what you meant by absolute, whether
23 you meant mandatory, so that it would not be discretionary
24 to deny someone the right to fill it out, because the
25 legislation doesn't make it mandatory. Did you mean, by

1 absolute, mandatory?

2 GENERAL COUNSEL HAILES: Yes.

3 CHAIRPERSON BERRY: Oh, okay. Well, maybe it
4 should be changed, because I was confused.

5 GENERAL COUNSEL HAILES: And statewide.

6 CHAIRPERSON BERRY: All right.

7 COMMISSIONER EDLEY: May I ask, does the
8 legislation still require that in order to cast a
9 provisional ballot the precinct poll workers have to be
10 able to get the county on the phone or is that going to be
11 taken care of now with the statewide database and so forth?

12 If you could check that, because what we don't want is a
13 situation where you've got a right to a provisional ballot,
14 but you still have to wait three hours to get through to
15 somebody on a phone for approval to be issued a provisional
16 ballot.

17 CHAIRPERSON BERRY: Well, they don't; that's
18 the whole purpose. But the problem that -- you don't have
19 to call, I recall that, but you can check it again.

20 COMMISSIONER EDLEY: Okay.

21 CHAIRPERSON BERRY: But the point I was
22 making was that the way I read the language it does not say
23 that if you ask for a provisional ballot because they say
24 you're not on the list that they need to give you one when
25 you insist you are. It leaves it to their discretion to

1 decide whether to give you one. And I would like it to be
2 stated clearly that it's mandatory.

3 GENERAL COUNSEL HAILES: Well, one thing we
4 tried to do in these recommendations is to point out the
5 need for clear guidance from the Division of Elections to
6 the -- and uniformly -- to the county supervisors, because
7 the law is going to be fairly broad. It will leave room
8 for discretion of supervisors. And you can certainly
9 foresee that some county supervisors will have quick access
10 to provisional ballots. Others may say that there are
11 other procedures like touching base with the central place.

12 So I do think that clear guidance must be given by the
13 Division of Elections immediately, and that's part of what
14 we suggest. And monitoring mechanisms have to be in place,
15 too, to ensure that there's uniformity and that there is
16 that absolute or mandatory access through provisional
17 ballots.

18 CHAIRPERSON BERRY: Any other questions on
19 this? Yes, Commissioner Redenbaugh?

20 COMMISSIONER REDENBAUGH: It's my
21 understanding, from what the General Counsel said earlier,
22 that the section here on absentee ballots will be deleted.

23 I just wanted to confirm that.

24 GENERAL COUNSEL HAILES: In regard to the
25 Governor's letter?

1 COMMISSIONER REDENBAUGH: Yes.

2 GENERAL COUNSEL HAILES: Not deleted. We'll
3 just point out that he explained the letter in greater
4 detail than the information that we had from the hearing
5 offered.

6 COMMISSIONER REDENBAUGH: Doesn't the letter
7 rebut the issue?

8 GENERAL COUNSEL HAILES: I think reasonable
9 persons could differ. It clearly points out that it's not
10 the official seal. We never said it was. And a witness
11 testified that it was a seal of the state. He didn't say
12 it was the current, official seal of the state. And I just
13 think some people --

14 COMMISSIONER REDENBAUGH: But didn't the
15 issue go to the point -- the question of whether state
16 money was used?

17 GENERAL COUNSEL HAILES: I think that is
18 something that we will change, yes. It was another witness
19 that pointed out that she was sickened by the idea of the
20 taxpayer dollars and more importantly that some people
21 would be encouraged to vote from the convenience of their
22 home, which the government was encouraging.

23 COMMISSIONER REDENBAUGH: But the issue about
24 state money is rebutted.

25 GENERAL COUNSEL HAILES: At least from the

1 information that we got from the Governor. So, again, what
2 we generally do in these instances, Commissioner
3 Redenbaugh, we don't challenge the information, per se,
4 because it's not under oath. We gave them an opportunity
5 to respond, they responded, and we believe it's important
6 to include their comment in the report. And that's what we
7 plan to do unless we're directed otherwise.

8 CHAIRPERSON BERRY: So how will you handle
9 that specifically?

10 GENERAL COUNSEL HAILES: Let me see if I can
11 find it, because I was trying to remember if that was -- I
12 didn't think that was -- oh, yes, it is in this section.
13 Let me see if it's --

14 CHAIRPERSON BERRY: The only question I'm
15 asking is, will you take out the reference to it being paid
16 for with state money? That's the only thing I'm asking.
17 Or will you explain then that it was not?

18 GENERAL COUNSEL HAILES: Yes. We've put --
19 let's see, we're adding directly into the text, under the
20 absentee ballot section, including the supporting footnote,
21 which explains the source, "As a part of the Commission's
22 Affected Agency Review process, Governor Bush disagreed
23 with the above characterization of the letter. He
24 indicated that the letter did not bear the current state
25 seal but rather the state seal as it first appeared in 1868

1 and that no taxpayer money was used to pay for the letter."

2 COMMISSIONER REDENBAUGH: All right.

3 CHAIRPERSON BERRY: All right. Okay.

4 Anybody have any other comments or questions on those
5 recommendations? Does anybody have -- let's go to the next
6 chapter, Chapter 3. Does anyone have any substantive
7 points to make in Chapter 3, not editorial ones? Yes?

8 COMMISSIONER WILSON: Going back to what the
9 General Counsel said, I'm just curious to know if -- in
10 terms of the explanation about the differences in the
11 seals, that I understand. But the fact that -- I mean
12 Governor Bush's letter states that taxpayer money was not
13 used to mail this. So why wouldn't we take that out as
14 corrected?

15 GENERAL COUNSEL HAILES: Let's see, page 50.

16 COMMISSIONER EDLEY: I agree.

17 COMMISSIONER WILSON: I mean there just may
18 be some reason that I don't understand.

19 GENERAL COUNSEL HAILES: Right, and I want to
20 look at the specific --

21 CHAIRPERSON BERRY: I don't even think it
22 said it.

23 COMMISSIONER EDLEY: Madam Chair?

24 CHAIRPERSON BERRY: Yes.

25 COMMISSIONER EDLEY: I think we don't

1 actually have sworn testimony by anybody that it was
2 taxpayer money.

3 CHAIRPERSON BERRY: Yes, we do.

4 COMMISSIONER WILSON: Yes, the woman who
5 testified.

6 GENERAL COUNSEL HAILES: No, actually, she
7 didn't. This is her reaction to the belief that it was
8 taxpayer money.

9 CHAIRPERSON BERRY: Why don't we just strike
10 the part that says -- strike that part of her testimony?

11 GENERAL COUNSEL HAILES: Where it says, "It
12 makes me sick to think that my taxpayer money --

13 CHAIRPERSON BERRY: Just strike it, and then
14 put in the footnote that the Governor and affected agency,
15 whatever it was you said, indicated whatever he indicated
16 about the thing? Or put it in the text.

17 GENERAL COUNSEL HAILES: Okay.

18 CHAIRPERSON BERRY: Just simply say that
19 there was this letter, and then say that he responded by
20 explaining what he explained. Take out the part about the
21 money all together.

22 GENERAL COUNSEL HAILES: Okay.

23 CHAIRPERSON BERRY: All right. Now --

24 COMMISSIONER LEE: Madam Chair?

25 CHAIRPERSON BERRY: Yes.

1 COMMISSIONER LEE: Can I just ask the General
2 Counsel a question? You mentioned that the information
3 that's submitted by affected agencies. Is submitting this
4 information not under oath?

5 GENERAL COUNSEL HAILES: Well --

6 COMMISSIONER LEE: I mean there's no way for
7 you to verify the accuracy of the information?

8 GENERAL COUNSEL HAILES: Well, it's not under
9 oath, but there are ways for us to verify it. In fact, we
10 did make some telephone calls, and we got information. For
11 example, during the hearing, an attorney referenced a
12 particular case that had been filed challenging the
13 Governor's use of this letter. And we checked the site,
14 and the Governor, through his counsel, sent a letter
15 telling us that the case was dismissed in November, and no
16 appeal was filed. And so we contacted the attorney who
17 testified before us, and we determined that he was
18 referring to a different case. And so we actually do
19 follow up to verify the information that comes in some of
20 these Affected Agency comments.

21 But with regard to this, if you're asking me
22 did we attempt to determine whether in fact it was paid
23 with taxpayer money, we didn't. We accepted that.

24 COMMISSIONER LEE: Actually, I had a question
25 regarding the \$100,000 spending request.

1 GENERAL COUNSEL HAILES: Okay.

2 COMMISSIONER LEE: That the Governor's Office
3 implied that they never received that request.

4 GENERAL COUNSEL HAILES: Right. And I can
5 tell you what it specifically says. It said, "The
6 Governor's Office of Policy and Budget has reviewed this
7 matter, and in consultation with budget officials from the
8 Department of State, has determined that the Department of
9 State never made any such request." And so, again, we
10 didn't receive any Affected Agency comments back from the
11 Director of the Division of Elections, which is Mr. Clay
12 Roberts who made the comment.

13 COMMISSIONER LEE: But who made that?

14 CHAIRPERSON BERRY: But this is different.
15 Mr. Roberts made that testimony under oath --

16 GENERAL COUNSEL HAILES: Exactly.

17 CHAIRPERSON BERRY: -- and said that he
18 requested it.

19 GENERAL COUNSEL HAILES: Right. So that's
20 why we didn't take it out.

21 CHAIRPERSON BERRY: Okay. All right.
22 Anybody have any other questions on these? And if not,
23 let's go to the next chapter. Anybody have any substantive
24 questions on the next chapter, not editorial questions?
25 Okay. Because you can submit your editorial matters later.

1 Okay. Does anyone have any questions -- yes?

2 GENERAL COUNSEL HAILES: Okay, this is
3 Chapter 3?

4 CHAIRPERSON BERRY: Yes.

5 GENERAL COUNSEL HAILES: Okay. This is
6 exactly where the change was made regarding the Voter
7 Education Fund.

8 CHAIRPERSON BERRY: Okay. That's the one you
9 described earlier.

10 GENERAL COUNSEL HAILES: Yes.

11 CHAIRPERSON BERRY: Okay. How about the
12 findings and recommendations on this chapter? Anybody have
13 any substantive changes that you'd like to make? Okay.
14 Then let's go to the next one then, on resource allocation.

15 GENERAL COUNSEL HAILES: I'm sorry, Madam
16 Chair. I should have been more alert and pointed out that
17 in the section right under absentee ballots where we talk
18 about police presence at or near the polling sites? We
19 were asked to make a change that we did on page 51.

20 CHAIRPERSON BERRY: Yes.

21 GENERAL COUNSEL HAILES: And we're deleting
22 the last clause of the first sentence in that opening
23 paragraph on police presence that starts with "Arguably."

24 CHAIRPERSON BERRY: Okay.

25 GENERAL COUNSEL HAILES: And then we've added

1 a sentence right after "unusual." And this in response to
2 the Affected Agency Review sent by the Governor.

3 CHAIRPERSON BERRY: Okay. Which is as it
4 should be.

5 GENERAL COUNSEL HAILES: Yes.

6 CHAIRPERSON BERRY: Does anyone have any
7 comments or questions on the findings and recommendations
8 in this chapter? Okay. If not, let's go to the next one
9 then. Does anyone have any questions on the reality of
10 list maintenance about which we've had much discussion and
11 spent much time? And if not -- if you have editorial ones,
12 please submit them.

13 GENERAL COUNSEL HAILES: Yes. And, Madam
14 Chair, we just have some minor changes that we made based
15 on additional information we received from DBT Online
16 Choice Point Company, and it corroborated some of the
17 information that their official testified about. So where
18 we say he claimed or he asserted and they gave us
19 additional information, then we've been able to corroborate
20 it and add it, but it's only in a few places.

21 CHAIRPERSON BERRY: Okay. How about -- and
22 the recommendations there, anybody have anything they want
23 to add? Then we go to accessibility issues, Chapter 6.
24 Does anyone have any problems or substantive issues that
25 they want to raise with that? And do you have any changes?

1 GENERAL COUNSEL HAILES: Madam Chair, just in
2 the fifth chapter again, only one major change that we
3 made, and I mentioned it briefly earlier, but it's based on
4 the Affected Agency comments we received from the Florida
5 Department of Law Enforcement. And we are adding, on page
6 96, I believe --

7 CHAIRPERSON BERRY: Okay.

8 GENERAL COUNSEL HAILES: -- let me make sure
9 it's 96 -- actually, it's your page --

10 CHAIRPERSON BERRY: What is it about; I'll
11 help you.

12 GENERAL COUNSEL HAILES: Okay. On page 98,
13 directly under Division of Election payments and contract
14 status.

15 CHAIRPERSON BERRY: Okay.

16 GENERAL COUNSEL HAILES: And the Florida
17 Department of Law Enforcement told us that in addition to
18 its own toll-free hotline for voters who wish to confirm
19 their eligibility status, that's the part we're adding, and
20 then it points out already in the text what they have done
21 in performing the record checks. Then we go on to say in
22 the sentence after that that the FDLE responded to
23 approximately 5,000 voters whose names appeared on the
24 felon exceptions list. Of those voters who contacted FDLE
25 to appeal the notice from a local Supervisor of Elections

1 that they were ineligible to vote, approximately 50 percent
2 were found to be convicted felonies in Florida, and 50
3 percent were determined to not have Florida felony
4 convictions. They asked us to add that, and --

5 CHAIRPERSON BERRY: You did.

6 GENERAL COUNSEL HAILES: -- we put that in.

7 CHAIRPERSON BERRY: Okay. Yes?

8 VICE CHAIRPERSON REYNOSO: We're still on
9 Chapter 5 then?

10 CHAIRPERSON BERRY: Well, we went back,
11 because he wanted to add that.

12 VICE CHAIRPERSON REYNOSO: Oh. Well, we do
13 discuss the, I think, very serious problem of the legal
14 mandate in Florida that those convicted of felonies not
15 vote, as I understand, for life. We have testimony that
16 historically the restriction was less severe, that sometime
17 back they were simply proscribed from voting for five years
18 after they got out of prison. And I just wondered whether
19 we might not include, at the very beginning of the chapter,
20 some of those realities, including the ill-effect that it
21 has on particularly the African-American and Latino
22 communities of Florida.

23 CHAIRPERSON BERRY: Okay. Without objection,
24 we'll add that. Yes?

25 COMMISSIONER EDLEY: Madam Chair, just

1 quickly, on page 90, the characterization of the testimony
2 from the DBT Executive, Mr. Bruder, saying that his
3 testimony offered a fuzzy snapshot of the reality of list
4 maintenance activities. I guess I don't quite agree with
5 that characterization.

6 GENERAL COUNSEL HAILES: I'm sorry,
7 Commissioner. We did remove the "fuzzy."

8 COMMISSIONER EDLEY: Oh, okay.

9 GENERAL COUNSEL HAILES: I meant to tell you
10 we deleted that.

11 CHAIRPERSON BERRY: "Fuzzy snapshot" is gone.

12 COMMISSIONER EDLEY: Okay, thanks.

13 GENERAL COUNSEL HAILES: Yes. Snapshot -- we
14 do believe he gave us -- it was a snapshot.

15 COMMISSIONER EDLEY: That's right. And I
16 just want to comment. I don't know if this needs to be in
17 the report, but this variation, county by county, as to how
18 the supervisors responded to the list, whether they paid
19 attention to the list, that's the definition of
20 lawlessness.

21 CHAIRPERSON BERRY: Right.

22 COMMISSIONER EDLEY: In other words, whatever
23 your view is about the appropriate policy, it ought to be
24 the same policy. And so I find that very, very troubling.

25 CHAIRPERSON BERRY: Okay. We ought to make

1 sure that it's conveyed. It's in there, I think.

2 GENERAL COUNSEL HAILES: It is.

3 CHAIRPERSON BERRY: On accessibility issues,
4 anybody have any changes? Anybody have any -- yes?

5 COMMISSIONER LEE: On page 192, 6.11.

6 CHAIRPERSON BERRY: Six point one, one.

7 COMMISSIONER LEE: I'd like to delete the
8 word "intentionally," because I don't think Section 203 for
9 Language Rights Act implies you have to show intention.

10 GENERAL COUNSEL HAILES: Okay.

11 CHAIRPERSON BERRY: That's true. So that
12 must be a mistake. "Intentional" needs to go. Okay. Yes,
13 Commissioner?

14 COMMISSIONER EDLEY: I think somewhere in
15 here I don't see that there's anything wrong with
16 recommending that a state or a jurisdiction do more than is
17 required by Section 203 to support people's access,
18 language access to the ballot. The Voting Rights Act ought
19 to be interpreted as establishing a minimum federal
20 requirement. But if, for example, the counties in which a
21 smaller percentage than triggers the requirement under
22 federal law exists of a given language and minority, say,
23 of Koreans, it still seems to me, as a matter of
24 recommendation, that state and local officials ought to try
25 to accommodate those voters without the heavy hammers of

1 federal enforcement. And the same with respect to persons
2 with disabilities. So I think of that general thought that
3 going beyond the narrow -- the limited requirements of
4 federal law would certainly be desirable.

5 CHAIRPERSON BERRY: So they should see the
6 federal requirement as a floor, not a ceiling.

7 COMMISSIONER EDLEY: Correct.

8 CHAIRPERSON BERRY: Got that, Counsel?

9 GENERAL COUNSEL HAILES: Yes.

10 COMMISSIONER EDLEY: Do the right thing, not
11 just what's legally --

12 CHAIRPERSON BERRY: And state it that way,
13 "Do the right thing."

14 (Laughter.)

15 No, that you have a floor and not a ceiling.

16 Yes, Commissioner?

17 COMMISSIONER LEE: I also remember some of
18 the testimonies had said that they were trying to work with
19 state officials to develop strategies to provide language
20 assistance, and I would like to see that as one of the
21 recommendations --

22 CHAIRPERSON BERRY: Okay.

23 COMMISSIONER LEE: -- requiring the state
24 officials to work with affected communities to develop
25 action plans. And I do agree with Commissioner Edley that

1 they are going to have new jurisdictions that will fall
2 under immediate coverage and potential future coverage too.

3 CHAIRPERSON BERRY: Okay. Chapter 8, The
4 Machinery of Elections. I am sorry, Chapter 7, Casting a
5 Ballot. Does anyone have any changes to the Casting a
6 Ballot pages or the findings and recommendations?

7 If not, we will go to Chapter 8, the
8 Machinery of Elections, keeping in mind you can still turn
9 in editorial changes. The Machinery of Elections, does
10 anyone have anything that they would like to add or change
11 in these pages or in the findings and recommendations?
12 Okay.

13 Then, finally, Chapter 9, Where Do We Go From
14 Here? Does anyone have any changes that they would like to
15 make in Chapter 9? Yes, Commissioner Redenbaugh?

16 COMMISSIONER REDENBAUGH: Yes. I think page
17 156 is in Chapter 9?

18 CHAIRPERSON BERRY: Yes, it is.

19 COMMISSIONER REDENBAUGH: This is a
20 demographic with which I'm not familiar. I think it says
21 there "The nameless, faceless losers who call the State of
22 Florida home."

23 CHAIRPERSON BERRY: The nameless, faceless
24 losers.

25 COMMISSIONER REDENBAUGH: Faceless losers. I

1 couldn't decide if that was the people -- all of the people
2 in Florida or --

3 CHAIRPERSON BERRY: No, that's like the fuzzy
4 snapshot only worse.

5 COMMISSIONER REDENBAUGH: Well, it's
6 something. I mean I couldn't -- we ought to be more clear
7 than that. Everybody who lives there or the people who
8 voted and didn't like the outcome or -- it doesn't work.
9 It's imprecise.

10 CHAIRPERSON BERRY: So you need to change
11 that.

12 GENERAL COUNSEL HAILES: Yes, okay.

13 CHAIRPERSON BERRY: We agree, absolutely.
14 And, Counsel, you will delete that, and whatever you put
15 there must be artful or you must not have anything there,
16 okay?

17 GENERAL COUNSEL HAILES: The people don't
18 write books, they don't appear on TV, these are the
19 nameless faceless people.

20 CHAIRPERSON BERRY: I don't know what you're
21 talking about. He means by losers that they don't have
22 jobs, that they don't --

23 GENERAL COUNSEL HAILES: Losers.

24 CHAIRPERSON BERRY: -- whatever. I don't
25 know what he means.

1 COMMISSIONER REDENBAUGH: I thought it was
2 everybody; I couldn't tell.

3 CHAIRPERSON BERRY: Yes. So that needs to
4 go. Anybody have --

5 GENERAL COUNSEL HAILES: Staff is telling me
6 that was my characterization.

7 CHAIRPERSON BERRY: That's it. You said
8 that? My goodness.

9 (Laughter.)

10 We have an epilogue. Does anyone have any
11 points or questions or things that they found, any other
12 fuzzies or namelesses or anything else that anybody has
13 found?

14 COMMISSIONER REDENBAUGH: We can't identify
15 those people.

16 CHAIRPERSON BERRY: Right. They are hard to
17 identify. Okay. With that done, then we've gone through
18 all the chapters, and we said that the third thing we would
19 do on the list of things that we agreed to was to see if
20 anybody had any other procedural matters that they wished
21 to raise before we decided whether we wanted to vote on
22 this thing, because there is a motion on the floor that was
23 made before we began the discussion. Is there anything
24 else that anyone -- yes, Commissioner Redenbaugh?

25 COMMISSIONER REDENBAUGH: Are we on

1 procedural now?

2 CHAIRPERSON BERRY: Yes.

3 COMMISSIONER REDENBAUGH: Okay, great. Well,
4 I mean I guess I'll try and make this really short. I want
5 to start with a question for the General Counsel as to the
6 way you hold the administrative instructions for the
7 Agency. It's my understanding that these are designed to
8 conform to our statute and that they're not -- well, that's
9 my understanding. Is that yours?

10 GENERAL COUNSEL HAILES: My understanding is
11 that they are consistent with our statute and with our
12 regulations but that they are intended to give guidance to
13 the staff in interpreting the regulations and the statutes.

14 COMMISSIONER REDENBAUGH: And you feel then
15 that you and the staff should comply with these
16 administrative instructions.

17 GENERAL COUNSEL HAILES: Not only do I
18 believe that, we certainly do abide by the guidance that
19 they provide.

20 COMMISSIONER REDENBAUGH: So then if there's
21 something -- then they're far more than just a courtesy.

22 GENERAL COUNSEL HAILES: They're guidelines,
23 yes.

24 COMMISSIONER REDENBAUGH: Okay. Then in your
25 opening remarks, I was unclear in what you said about the

1 Affected Agency Review. You said that that was completed
2 by the affected -- the affected agencies -- could you say
3 again what you said?

4 GENERAL COUNSEL HAILES: Yes.

5 COMMISSIONER REDENBAUGH: It was unclear.

6 GENERAL COUNSEL HAILES: As I recall my
7 opening remarks, I mentioned that the staff diligently
8 provided opportunities for affected agencies to review and
9 comment on relevant portions of the draft report, and that
10 we have also diligently attempted to incorporate in the
11 draft report those comments that came back to us from those
12 affected agencies.

13 COMMISSIONER REDENBAUGH: And the AIs
14 stipulate that affected agency will have at least 20 days?

15 GENERAL COUNSEL HAILES: Oh, no, I'm sorry.
16 That's our -- there's no requirement or any guidance in our
17 administration instructions that requires a 20-day review
18 period. I was then referring to the defame and degrade
19 procedures that are outlined in our regulation, which are
20 separate and distinct from the administrative instructions.

21 COMMISSIONER REDENBAUGH: Right. So there's
22 no requirement for a length of time for Affected Agency
23 Review.

24 GENERAL COUNSEL HAILES: There's no
25 requirement. There's, again, a general guideline that says

1 that usually affected agencies, or the Affected Agency
2 Review will take a certain period of time.

3 COMMISSIONER REDENBAUGH: And what is that
4 period of time?

5 GENERAL COUNSEL HAILES: I believe it's 14 --
6 I don't know. I don't have it in front of me.

7 COMMISSIONER REDENBAUGH: But you did -- the
8 State of Florida did have that time.

9 GENERAL COUNSEL HAILES: The State of Florida
10 did not have that time that -- well, they did have the
11 time, because we're saying usually, and I think the
12 guideline gives enough discretion to the staff to determine
13 how much time is actually needed. For example, there are
14 some affected agencies that receive two pages, and the
15 Governor, for example, received approximately how many
16 pages, if we know? All right. Well, certainly not 198
17 pages.

18 COMMISSIONER REDENBAUGH: Eighty.

19 GENERAL COUNSEL HAILES: About 80 pages.

20 COMMISSIONER REDENBAUGH: And you think that
21 we gave the Governor enough time.

22 GENERAL COUNSEL HAILES: Oh, yes. Oh, yes,
23 definitely. And given the response that we received where
24 we made two changes, I think, certainly, there was
25 sufficient time. And that complies with our administrative

1 instruction. I say that clearly, unequivocally that we did
2 conform with our administrative instruction.

3 COMMISSIONER REDENBAUGH: Okay.

4 CHAIRPERSON BERRY: All right. Anybody have
5 anything else? Okay.

6 COMMISSIONER EDLEY: Can I move the question?

7 CHAIRPERSON BERRY: Yes, please. The
8 previous question has been moved so that all in favor of
9 voting for the report with the understanding that the staff
10 will, as usual, make changes in conformity with the
11 discussion here and editorial changes, as usual, indicate
12 by saying aye.

13 COMMISSIONER EDLEY: Aye.

14 COMMISSIONER MEEKS: Aye.

15 COMMISSIONER LEE: Aye.

16 VICE CHAIRPERSON REYNOSO: Aye.

17 COMMISSIONER WILSON: Aye.

18 CHAIRPERSON BERRY: Aye.

19 COMMISSIONER REDENBAUGH: No.

20 COMMISSIONER THERNSTROM: No.

21 CHAIRPERSON BERRY: The motion carries, one,
22 two, three, four, five, six to two. Commissioners
23 Redenbaugh and Thernstrom dissenting. And if Commissioners
24 have dissenting statements that they would like to have
25 included in the report, what would be a reasonable time for

1 those of you who want to propose such statements to get
2 them in? Rather than me giving you a time, let me ask you.

3 We need them within 30 days or 20 days would be good,
4 because we need to print the report. But do you have any
5 -- can you get it done within that time frame?

6 COMMISSIONER THERNSTROM: The time frame --
7 I'm sorry, the time frame you're suggesting is 30 days?

8 CHAIRPERSON BERRY: I said 20 days, but --

9 COMMISSIONER REDENBAUGH: Business days?
10 Calendar days or business days?

11 CHAIRPERSON BERRY: I would hope calendar
12 days --

13 COMMISSIONER REDENBAUGH: Okay.

14 CHAIRPERSON BERRY: -- but give me a --

15 COMMISSIONER THERNSTROM: Well, I can't work
16 on it either the rest of -- well, this week's almost gone
17 or next week at all.

18 CHAIRPERSON BERRY: Give me some dates.
19 Okay. We would need to have this, in order to have it
20 printed, how about by the 22nd of June, close of business.

21 COMMISSIONER THERNSTROM: I can only start
22 working on it on the 18th, so if you could give me a few
23 more days than that, I would really appreciate it. I am
24 really booked.

25 CHAIRPERSON BERRY: Well, what is your

1 pleasure, ladies and gentlemen? We will make available to
2 the press the thing is on our web site and in a draft form
3 that we've been discussing here. And we will put up
4 another draft on the web site after all these changes are
5 made so it will be available to people.

6 COMMISSIONER THERNSTROM: If you could give
7 me till --

8 CHAIRPERSON BERRY: Just a moment,
9 Commissioner Thernstrom.

10 COMMISSIONER THERNSTROM: I'm sorry, I'm
11 sorry.

12 CHAIRPERSON BERRY: That will be up early
13 next week, like Monday, for people, by the latest. And
14 then we can wait after that to get the dissent and
15 Professor Lichtman's analysis of the dissent before we put
16 anything else up on the web site. So there will be
17 something on the web site. So it's not as if there won't
18 be anything. And there will be copies of that available to
19 people who want them; that is hard copies. So how about if
20 we said -- how about the week of June 29? Is that long
21 enough?

22 COMMISSIONER THERNSTROM: That's fine. I
23 would appreciate that very much.

24 CHAIRPERSON BERRY: Close of business on June
25 29.

1 COMMISSIONER THERNSTROM: Thank you very
2 much.

3 CHAIRPERSON BERRY: Okay. All right. Is
4 there other business that -- ah, I need to -- yes?

5 COMMISSIONER THERNSTROM: Commissioner
6 Redenbaugh has something on this point.

7 COMMISSIONER REDENBAUGH: On this matter.

8 CHAIRPERSON BERRY: Oh, yes, Commissioner
9 Redenbaugh.

10 COMMISSIONER REDENBAUGH: Yes, I am baffled
11 by -- no, concerned, really, by having a Commissioner's
12 dissent reviewed and analyzed. I mean I think we have and
13 should have a one-bite policy or we get in a situation
14 where then are we going to then analyze the analysis?

15 CHAIRPERSON BERRY: Commissioner Redenbaugh,
16 the majority report of this Commission, by the vote of six
17 to two, is a report which includes a particular statistical
18 analysis. The vote was six to two.

19 COMMISSIONER REDENBAUGH: Yes, I'm aware.

20 CHAIRPERSON BERRY: And if the dissenters
21 want to challenge the statistical analysis, at least there
22 ought to be a possibility for the statistician to look at
23 it and to comment on it since the majority of this
24 Commission agrees to it. Now, if Commissioner Thernstrom
25 would then like to look at his analysis and analyze it, and

1 then if he would like to look at hers and analyze that,
2 fine, I don't care. You can analyze it till the cows come
3 home. But, in any case, since it is by a majority vote of
4 this Commission, that it is the position of this
5 Commission, it seems to me all together fitting and proper
6 that this be done.

7 Yes, Commissioner Thernstrom? Do you have a
8 point on that or something else?

9 COMMISSIONER THERNSTROM: No, on this. I
10 just wondered if there was any precedent on this matter?
11 It seems to me that you have a report, it's going to be
12 perfectly clear it was supported by six Commissioners, and
13 then you have a dissent to the report. And my
14 understanding is that's always the way it's been done. And
15 because otherwise, yes, I'm going look at Professor
16 Lichtman, and I'm going to say, "Well, Allan, I want to
17 respond to that." I agree with Commissioner Redenbaugh,
18 one bite of the apple. That's what we've always done, to
19 the best of my knowledge.

20 CHAIRPERSON BERRY: That's not what we've
21 always done.

22 COMMISSIONER EDLEY: Madam Chair?

23 CHAIRPERSON BERRY: And do Commissioners --
24 just so we can get out of this -- this is a democracy, can
25 I have a motion that we permit Professor Lichtman to

1 analyze the materials in the document that will be
2 submitted?

3 COMMISSIONER EDLEY: Madam Chair, I'd make
4 that motion and clarify that if he does do an analysis and
5 circulates the analysis, that you then just do sort of a
6 notational vote to find out if there's a majority of the
7 Commissioners that would like his analysis included in the
8 report.

9 CHAIRPERSON BERRY: Okay. All right.

10 COMMISSIONER EDLEY: Because it may be that
11 the majority would conclude that there's no need for it to
12 be.

13 CHAIRPERSON BERRY: Right. So if that's the
14 case, then why don't you make that motion?

15 VICE CHAIRPERSON REYNOSO: Say "So moved."

16 COMMISSIONER EDLEY: So moved.

17 (Laughter.)

18 CHAIRPERSON BERRY: Could I get a second?

19 COMMISSIONER LEE: Second.

20 COMMISSIONER EDLEY: Whatever the transcript
21 says I said.

22 CHAIRPERSON BERRY: All in favor indicate by
23 saying aye.

24 (Commissioners vote aye.)

25 CHAIRPERSON BERRY: So ordered.

VII. Future Agenda Items

1
2 CHAIRPERSON BERRY: Small piece of business.
3 November the 9th we have a Commission meeting; is that
4 right? November the 2nd. And I want to have you check to
5 see if you can meet on November 9 instead. I have to do
6 that, to ask you that question. And I hope you can figure
7 out whether you can or not.

8 COMMISSIONER EDLEY: Madam Chair?

9 CHAIRPERSON BERRY: Yes.

10 COMMISSIONER EDLEY: Again, on future -- do
11 you want that answer right now?

12 CHAIRPERSON BERRY: I need that answer.

13 COMMISSIONER EDLEY: Fine with me.

14 CHAIRPERSON BERRY: You don't know whether
15 you can or not, do you, Edley?

16 COMMISSIONER EDLEY: No, that's fine.

17 CHAIRPERSON BERRY: Edley, you're useless.

18 (Laughter.)

19 COMMISSIONER EDLEY: Is it going to be a good
20 meeting?

21 CHAIRPERSON BERRY: It's going to be a great
22 meeting.

23 COMMISSIONER EDLEY: Okay. Then I'll be
24 here.

25 CHAIRPERSON BERRY: Okay. All right. Then

1 November the 9th instead of November the 2nd. The last
2 thing I will say is that the staff wanted some or someone
3 to say or some opportunity to say something about their
4 feelings concerning criticisms of their report in the draft
5 form in the media, but I'm not going to let them do that,
6 because freedom of speech prevails in America, and people
7 have a right to say whatever they want to say about the
8 report or anything else. And I know how they feel, but
9 that's too bad. Yes, Commissioner Wilson?

10 COMMISSIONER WILSON: Thank you, Madam Chair.

11 I'd like --

12 CHAIRPERSON BERRY: Somebody hissed, but
13 that's okay.

14 (Laughter.)

15 COMMISSIONER WILSON: I just couldn't
16 recognize the sound, but thank you. I wonder if we should
17 discuss the issue of leaks.

18 CHAIRPERSON BERRY: Do we have to do that
19 now?

20 COMMISSIONER WILSON: Well, I know it's a
21 painful subject, but --

22 CHAIRPERSON BERRY: Well, I mean in terms of
23 time.

24 COMMISSIONER WILSON: Well, we don't have to
25 do it today, but I think it should be discussed. I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON D.C. 20005-3701

1 it's an important issue.

2 CHAIRPERSON BERRY: Right. I think you -- we
3 should raise it --

4 COMMISSIONER WILSON: It has led to a great
5 deal of chaos.

6 CHAIRPERSON BERRY: And we should revisit
7 your suggestion that you made at another meeting, which was
8 that we release the draft of the report publicly as soon as
9 it's available without waiting even when we give it to the
10 Commissioners. So I think we'll revisit that and try to
11 make a policy on it.

12 I will be here for any questions as the press
13 has of me as soon as this meeting is adjourned, if there
14 are any. Yes?

15 COMMISSIONER EDLEY: Madam Chair, for the
16 next meeting in July, I'd like to propose that we have a
17 discussion of recommendations that the Commission might
18 make to the United States Congress concerning election
19 reform.

20 CHAIRPERSON BERRY: Right. We should do
21 that, and if there's no objection, we should do that.

22 And, finally, I would like to ask the
23 Commissioners, I asked you earlier, do you agree that we
24 should have a meeting with the Attorney General to discuss
25 the recommendations in this report? Okay, we'll do that

1 then.

2 All right the meeting is -- without
3 objection, the meeting is adjourned. So ordered.

4 (Whereupon, at 12:52 p.m., the Commission
5 Meeting was concluded.)

6

7

8

9

10

11

12

13