

BEFORE THE  
CALIFORNIA CITIZENS REDISTRICTING COMMISSION

In the Matter of  
Full Commission Business Meeting

Los Angeles City Council Chambers  
Los Angeles, California

Reported by:  
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**COMMISSIONERS PRESENT:**

Gabino T. Aguirre

Angelo Ancheta

Vincent Barabba

Maria Blanco

Cynthia Dai

Jodie Filkins-Webber

Connie Galambos-Malloy

Lilbert R. "Gil" Ontai

M. Andre Parvenu

Jeanne Raya

Michael Ward

Peter Yao

**COMMISSIONERS ABSENT:**

Michelle DiGuilio

Stanley Forbes

**STAFF PRESENT:**

Commission Liasion Janeece Sargis

Executive Director Daniel Claypool

Chief Counsel Kirk Miller

**ALSO PRESENT:**

George Brown

Dan Kolkey

Kahn Scolnick

**STAFF PRESENT:**

Ana Henderson

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**CHAIRPERSON BARABBA:** I'd like to call the meeting to order of the Citizen's Redistricting Commission meeting here in the hallowed halls of the City of Los Angeles --

**MALE:** (Inaudible).

**FEMALE:** Yeah, there's an echo.

**CHAIRPERSON BARABBA:** I like that part.

(Laughter)

**CHAIRPERSON BARABBA:** Do you have a comment?

Yes.

**MALE:** Somebody is speaking (inaudible).

**MALE:** (Inaudible) public comment.

**FEMALE:** Public comment.

**CHAIRPERSON BARABBA:** Yes. Okay. But you want to do the roll call first.

**COMMISSION LIASION SARGIS:** Commissioner Aguirre?

**VICE-CHAIRPERSON AGUIRRE:** Here.

**COMMISSION LIASION SARGIS:** Commissioner Ancheta?

**COMMISSIONER ANCHETA:** Here.

**COMMISSION LIASION SARGIS:** Commissioner Barabba?

**COMMISSIONER BARABBA:** Here.

**COMMISSION LIASION SARGIS:** Commissioner Blanco?

**COMMISSIONER BLANCO:** Here.

**COMMISSION LIASION SARGIS:** Commissioner Dai?

1           **COMMISSIONER DAI:** Here.

2           **COMMISSION LIASION SARGIS:** Commissioner  
3 DiGuilio?

4           Commissioner Filkins-Webber?

5           **COMMISSIONER FILKINS-WEBBER:** Here.

6           **COMMISSION LIASION SARGIS:** Commissioner Forbes?  
7 Commissioner Galambos Malloy?

8           **COMMISSIONER GALAMBOS MALLOY:** Here.

9           **COMMISSION LIASION SARGIS:** Commissioner Ontai?

10          **COMMISSIONER ONTAI:** Here.

11          **COMMISSION LIASION SARGIS:** Commissioner Parvenu?

12          **COMMISSIONER PARVENU:** Here.

13          **COMMISSION LIASION SARGIS:** Commissioner Raya?

14          **COMMISSIONER RAYA:** Here.

15          **COMMISSION LIASION SARGIS:** Commissioner Ward?

16          **COMMISSIONER WARD:** Here.

17          **COMMISSION LIASION SARGIS:** Commissioner Yao?

18          **COMMISSIONER YAO:** Here.

19          **COMMISSION LIASION SARGIS:** The quorum is  
20 present.

21          **CHAIRPERSON BARABBA:** You have to grab it  
22 yourself.

23          **FEMALE:** No, we can share one.

24          **MALE:** All right. I'm (inaudible).

25          **FEMALE:** (Inaudible).

1           **FEMALE:** No, I'm using this one.

2           **FEMALE:** Okay.

3           **CHAIRPERSON BARABBA:** With everyone here and I'm  
4 impressed that everyone is here given how long we worked  
5 last night at the Long Beach meeting, which I thought was  
6 a quite an interesting meeting. And I was talking to my  
7 son this morning and I said that it was really  
8 interesting to hear the maturity of that audience  
9 relative to how they embraced diversity of their  
10 communities. And one who was raised here in the '60s and  
11 '70s, you would not have expected to hear that, in those  
12 days.

13           **MALE:** Yeah, that is so true.

14           **CHAIRPERSON BARABBA:** And it looked to me like  
15 everybody had come a long way in that community.

16           All right. With that, are there any comments  
17 from the public, anyone would like to speak from the  
18 public? Yes, please, sir.

19           **MR. CLAYTON:** Thank you for allowing me to speak.  
20 My name is Alan Clayton. I've been involved in doing  
21 redistricting since 1986. Some of you may be familiar  
22 with Valley Succession and that individuals ran under 14  
23 districts; those districts the elections were null and  
24 void because it didn't pass, but I drew the districts  
25 that were -- that they ran under. So I'm very familiar

1 with the process. It ended up there were two maps that  
2 County Council said were legal and then comes down to the  
3 discussions and they decided to go with the map that I  
4 drew in the city -- well, sorry, school board in 1991, I  
5 drew the map that was pretty much adopted intact, which  
6 created a second Latino voting rights seat in Los Angeles  
7 School District. I've been involved in all the major  
8 redistrictings in Los Angeles dealing with L.A. School  
9 District, L.A. County redistricting, and I've also been  
10 involved in state redistricting, testifying. If you go  
11 back and look at the record in '91, you'll see I gave  
12 extensive testimony during the process both on the  
13 congressional senate and assembly. I was involved in  
14 2001 in drawing maps; these maps were not in the public,  
15 they were used in discussions. I volunteered to  
16 represent and work with the Latino Caucus in terms of  
17 mapping. Myself and another gentleman drew all the  
18 internal maps that were used in negotiations. So that's  
19 just my background.

20 I'm very interested in the process. I'm involved  
21 in other redistricting, but this is one that I've been  
22 involved in since 1991. I commend you on the hearings.  
23 I commend you on going out and listening to the  
24 community. I've been through many, many hearings and  
25 many, many meetings, and it's always a great honor to see

1 the public participation where people really are  
2 interested in the lines.

3           Just so you know, at the end of the redistricting  
4 process I filed an administrative complaint with the  
5 Department of Justice challenging the lines that were  
6 adopted and voted through the legislature because I felt  
7 they violated the Voting Rights Act Section 2. And there  
8 was also a court case and, of course, the court case  
9 proceeded but I have the complaint at the Department of  
10 Justice and once it's filed in court, as you know, the  
11 complaint is not there anymore. But I was seriously  
12 concerned because I knew what was there, the potential.  
13 I knew there were issues dealing with voting rights and I  
14 thought it should be brought to the attention of  
15 Washington because the Department of Justice does review  
16 both. We have a Section 5 in four counties and they also  
17 have the ability to look at a Section 2 in terms of  
18 potential litigation. So I'm watching the process  
19 carefully, listening to what goes on and what I hope is  
20 that the plans that come out are like plans the special  
21 masters drew. I was involved in -- I actually prepared  
22 testimony for one individual before the Master, they gave  
23 him an hour to do the argument and I wrote his argument.  
24 And it was a very fair process. The judges, people were  
25 concerned they wouldn't be fair to the minority



1 community; not true. I mean I had disagreements with  
2 them over certain areas where they drew but I thought  
3 they did an outstanding job overall in recognizing that  
4 minority communities have been split in the past for  
5 partisan reasons. And they attempted, if you go back and  
6 read Wilson versus Yu and then you read the special  
7 masters to put those minority communities together, and  
8 that resulted in a huge change in California. Latinos  
9 had four seats in the assembly and three in the senate  
10 today, what the change is. That change brought about  
11 probably the election of the first Latino Speaker because  
12 Latinos went up to twelve seats when he ran the second  
13 time successfully and he received eleven votes from the  
14 members who were Latino as part of the Assembly  
15 Democratic Caucus.

16           So this is something that's very important to the  
17 Latino community. I was the Research Chair for the  
18 Latino Redistricting Coalition on a number of issues  
19 dealing with redistricting. I still am involved with  
20 redistricting. Currently, last night I was up late  
21 drawing a map, not this one it was another map, but it's  
22 something that I believe is very important that the  
23 communities be involved in. I actually supported and I  
24 was over at the legislature talking to people that they  
25 have the same thing for this process, which was the

1 judges. Because I like the judges, they're very -- you  
2 can go talk to them, present evidence in the process,  
3 they gave you enough time to make your arguments and I  
4 think in the end the Commission, the three judges with  
5 the help of the staff and the input from the  
6 public -- because they had all of the testimony from the  
7 senate and assembly hearings that they took into account.  
8 And then they had their own testimony. So we had  
9 voluminous amount of testimony. And in some areas  
10 advocates basically received -- seats were very close to  
11 what they advocated for because they dealt with community  
12 of interest, packing and cracking, key issues in  
13 redistricting. The -- you're governed of course by  
14 federal and state laws; I'm very familiar with them  
15 because when you draw, if you're a mapper and you draw  
16 and you wanted to have your map adopted, you better know  
17 the law. So I constantly I have a binder I carry around  
18 with the Supreme Court cases and I keep up with them  
19 because that's the way you have to do to be a -- anybody  
20 can be a mapper; if you want to have a map adopted and be  
21 able to defend that map, you better know what is the best  
22 defense for the offense that's going to come against your  
23 map. Shaw challenges, Section 2 challenges, voter  
24 dilution, packing, cracking, challenges on one person one  
25 vote. There's a whole variety of challenges out there;

1 some of them will go no place but, you know, sometimes  
2 courts do intervene and do find there's a violation of  
3 the law.

4           Again, I really appreciate the fact you're taking  
5 the time, giving this new deliberation. I know you're  
6 doing a lot of hearings and I look forward -- I will  
7 be -- I live in the San Gabriel Valley, I live in the  
8 city, wonderful city of San Gabriel and I've been there  
9 for many, many years and I'm really enjoying going over  
10 to Mission. So my wife lives there too; she's lived  
11 there I believe about 28 years now, so we're excited  
12 about it. Thank you very much.

13           **CHAIRPERSON BARABBA:** I'm sorry, what was your  
14 name again?

15           **MR. CLAYTON:** My name is Alan Clayton.

16           **CHAIRPERSON BARABBA:** Alan Clayton.

17           **MR. CLAYTON:** That's correct. A-L-A-N,  
18 C-L-A-Y-T-O-N.

19           **CHAIRPERSON BARABBA:** Any time you want to send  
20 us a note giving your background and experience, you feel  
21 free to do that because we read everything you get.

22           **MR. CLAYTON:** If you -- I'd be glad to respond on  
23 the record on any questions that you have because I've  
24 been doing mapping since 1986 and I know how much -- how  
25 hard it is to do a good map, how many issues. Last night

1 we drew one and then we went hmm, there's a problem here;  
2 we have to start over and redraw. That's how you look at  
3 it. It's a very complex puzzle doing a map that does not  
4 violate either Shaw either Miller or either DeGrande or  
5 either Bartlett. There's a whole series of cases out  
6 there that you have to pay attention to, if not, you will  
7 fail in terms of knowing how to protect your district.

8 **CHAIRPERSON BARABBA:** Okay. Thank you very much.

9 **MR. CLAYTON:** Thank you.

10 **COMMISSIONER ANCHETA:** I just -- I know Mr.  
11 Clayton from way back when in the early '90s when I was  
12 working on some Asian-American issues and I'll  
13 definitely attest to his thoughtfulness and experience in  
14 these areas, so.

15 **CHAIRPERSON BARABBA:** Yeah. Thank you.

16 **COMMISSIONER ANCHETA:** It's good to see it.

17 **MR. CLAYTON:** Appreciate it.

18 **CHAIRPERSON BARABBA:** Are there any other  
19 comments from the public? If not, we'll move into the  
20 session and first on the agenda is an executive  
21 director's report.

22 **EXECUTIVE DIRECTOR CLAYPOOL:** Good afternoon. Is  
23 this on? Now?

24 **CHAIRPERSON BARABBA:** Yeah.

25 **EXECUTIVE DIRECTOR CLAYPOOL:** Okay. I have to

1 speak closely. Good afternoon.

2 **CHAIRPERSON BARABBA:** I don't think you  
3 (inaudible).

4 **EXECUTIVE DIRECTOR CLAYPOOL:** And I'd like to  
5 just say that for most of the things that I would have  
6 normally reported I sent you some e-mails during the  
7 weeks that have covered the topics, the highlights of the  
8 last couple of weeks. We -- our augmentation as you know  
9 is now in the hands of legislature and we fully intend to  
10 move your budget out to 3.5 million. We are current on  
11 our postings for the upcoming venues. We're working well  
12 with the Department of General Services, which is a very  
13 big highlight for us. We have the Statement of Works for  
14 both the in-line review process and for the racially  
15 polarized voting analysis are in process. We are very  
16 fortunate that we are coming close to solidifying our VRA  
17 attorney contract and our move is still planned in May  
18 for our offices to the new site and as soon as we can get  
19 you into it, you're going to be just amazed at how well  
20 we've been taken care of again.

21 I'd like to just take the remainder of the time  
22 that I've got because I know time is very short today to  
23 talk about your upcoming budget change proposal that will  
24 be the basis of your funding in the near term from  
25 September 1<sup>st</sup> through June 30<sup>th</sup>, 2012. We have a budget

1 that also in this budget, which has been given to the  
2 Finance and Administrative Administration Committee as  
3 well as the Chair so that they could take a look at it.  
4 We have a \$1.5 million budget put into place. I would  
5 like to also say that part of that, and I've been in  
6 discussion earlier with the members of the Finance  
7 Administration Committee, that part of it is also  
8 built-in with that 300,000 that we had removed and had  
9 built forward when we talked about it yesterday moving  
10 our numbers down from 3.8 to 3.5. So the things that  
11 come in to this budget are three alternatives that we  
12 presented to the Department of Finance and the Department  
13 of Finance has actually seen the spreadsheets on these  
14 prior to this and we're in an on-going discussion with  
15 them. They have not seen the budget change proposal  
16 itself because that has to be approved by you first  
17 before we move forward on it.

18           There were three alternatives that were given to  
19 them as things that you may wish to move forward, which  
20 is the tradition of a budget change proposal. We are  
21 also in the tradition of those proposals recommending  
22 that they accept alternative three.

23           The first alternative was pretty much a bare  
24 bones, we get through the archiving, the litigation and  
25 the public records request and then you pretty much close

1 down as a Commission.

2           The second alternative included a constitutional  
3 amendment for changes that you believed needed to be seen  
4 so that you have this process is better run or it has a  
5 chance to be better run in the future when we go to it in  
6 2019.

7           And then the third alternative had a budget  
8 amount of \$150,000 that would allow for a study of the  
9 Commission, which you have approved and that you would  
10 like to see. And we would have that stand in support of  
11 the constitutional amendments that you would recommend.

12           When we brought the budget change proposal to the  
13 members of the -- to the chair and the vice chair and one  
14 member of the Finance Administration Committee is, as is  
15 allowed under Bagley-King (phonetic) we had recommended  
16 twelve meetings for you post September. Those twelve  
17 meetings were designed to give you the opportunity to get  
18 together and make sure, you know, for any business that  
19 was occurring. In the meeting with these individuals,  
20 I've recommended that you push that meeting amount to  
21 twenty and I've also recommended that we go to a 3-1 day  
22 prep time for it. The reason that I'm making the  
23 recommendation in support of the staff counsel is that  
24 although we know that the litigation coming up will cover  
25 the costs of the litigation, there is no assurance that

1 that amount will cover the cost of you meeting and you  
2 traveling. It seems intuitive to us that that would be  
3 part of litigation, but all it says is it will cover the  
4 cost of litigation and we can only assume at this point  
5 that that would be the cost of outside counsel.

6 So what we would like to do is to make sure we  
7 build in a sufficient amount of time so that you can meet  
8 and travel and support yourself in any litigation. If  
9 for any reason we find that they will cover those costs,  
10 then it would be a matter that you would simply be  
11 returning the money to the State. We are, in this  
12 particular case, trying to budget you for the worst case  
13 scenario and the worst case in this particular instance  
14 would be that you weren't funded for that activity.

15 I'd like to say that the amount, if we push it  
16 out, would go from 1.5 -- and I'm just estimating this  
17 number -- to about 1.7 million. This would still be less  
18 than the last governor recommended you be funded for when  
19 he initially recommended that the \$1 million augmentation  
20 that you're receiving right now was actually slated by  
21 Governor Schwarzenegger to be a \$3 million augmentation;  
22 it would have pushed you to a total of 6 million. So  
23 you're still under the amount that the governor himself  
24 and his staff believed that you would need to operate at  
25 a minimum.



1           This plan envisions, if they go with alternative  
2 three and actually all three alternatives have about the  
3 same level of staffing, would have an executive director,  
4 a chief counsel, a budget officer, a communications  
5 director and two staff; the rest of your staffing needs  
6 would be taken care of through personal services  
7 contracts the way we have to hold the costs down.

8           As you take a look at this, I would recommend  
9 that you remember that although it does seem like we will  
10 have a significant number of senior staff involved with  
11 your administration of your process as you move forward  
12 that they are E employees and as we pointed out when we  
13 handed out the Commission staff hours, most of the  
14 overtime that you've had so far has been unpaid overtime  
15 that comes from having any employee in that position.

16           And the last thing I would say is that we're  
17 going to start the BCP process, budget change process, is  
18 for the remainder of this fiscal year which we're going  
19 to term the near term. And then you're going to start in  
20 the fall with a budget process for 2012-13 and that's  
21 where you're going to have to really start to decide what  
22 the structure of your staffing will be, what the  
23 structure of your duties running into the future are and  
24 how you wish to do that.

25           So at this time, I would hope that we could come

1 to an agreement that I be allowed to move this budget  
2 change proposal forward as recommended with the  
3 recommended changes of 20 with a 3-1 staff with 3-1 prep  
4 time to the Department of Finance so that they can begin  
5 the process of moving it forward into the governor's  
6 budget. We are very late in this process, but as I said  
7 yesterday and I'll repeat again and repeat as often as I  
8 can, the Department of Finance has done an incredible job  
9 on your behalf. Every rule that can be broken at Finance  
10 has been broken on your behalf and they continue to  
11 understand the enormous time pressure that you're under  
12 and they've been nothing but gracious in the way they've  
13 handled our requests.

14 So that's my report.

15 **CHAIRPERSON BARABBA:** Commissioner Dai.

16 **COMMISSIONER DAI:** Yeah, I just wanted to make a  
17 few comments. As Dan said, this is really kind of  
18 dealing with the worst case scenario. There is a major  
19 assumption here that the legislature in its infinite  
20 wisdom may choose not to actually fund commissioner time  
21 or staff time should we be sued. And so this is kind of  
22 putting a contingency in place.

23 Having said that, it still gives us the freedom  
24 to take a fresh look at this probably in the fall when we  
25 have a better idea if we've been sued, how many lawsuits

1 are out there, what the volume of Public Records Acts  
2 requests are and we would be free to look at a  
3 reconfiguration of staff. You know people who know state  
4 government know that they may not be as creative as the  
5 private sector in terms of part-time staff or creative  
6 consulting arrangements. So that's something we need to  
7 consider. But Connie, who also met with Dan and I over  
8 lunch to talk about this, in any case, you know, I think  
9 this Commission would be sure to have this meeting in  
10 enough time in the fall to give our staff plenty of  
11 advance notice should we decide to reconfigure the  
12 staffing arrangement in order to save the taxpayers money  
13 if we don't see a need for a full staff load moving  
14 forward.

15 **COMMISSIONER GALAMBOS-MALLOY:** The only thing I  
16 would add to what's been said is that we're also -- this  
17 gives us some time to be able to explore other options as  
18 well, such as would there be the possibility of wrapping  
19 some of the CRC functions under another existing agency  
20 of the State, possibly the Secretary of State. There may  
21 be other options that we haven't explored. And so,  
22 again, I guess the bottom line is we need to get this  
23 request in now. We can scale back; we can't scale up.  
24 So if none of those other options pan out we may find  
25 ourselves in a situation where we're not able to support

1 ourselves at the bare minimum to defend our maps moving  
2 into the future.

3 So after careful deliberation, we feel that this  
4 is the best move for the Commission.

5 **CHAIRPERSON BARABBA:** Any questions?  
6 Commissioner Ontai.

7 **COMMISSIONER ONTAI:** Well, I think the analysis  
8 and discussion points that Commissioner Dai and Galambos  
9 Malloy makes total sense. So if a motion is in order, I  
10 would like to make the motion that we approve the  
11 recommendations by Mr. Claypool.

12 **CHAIRPERSON BARABBA:** Janeece is not -- oh. It's  
13 going to be a really good motion.

14 **COMMISSIONER DAI:** And allow -- authorize Mr.  
15 Claypool to move forward in submission.

16 **COMMISSIONER ONTAI:** And allow Mr. Claypool to  
17 move forward with whatever is necessary to get it  
18 approved.

19 **FEMALE:** Second.

20 **CHAIRPERSON BARABBA:** Second by Mister --

21 **FEMALE:** Oh, sorry.

22 **CHAIRPERSON BARABBA:** -- let's try again.  
23 Commissioner Aguirre. All right. Any further questions?  
24 Any questions from the public? There being none, if we  
25 could just vote on this. All in favor indicate by saying

1 aye and raising your hand.

2 **ALL:** Aye.

3 **CHAIRPERSON BARABBA:** Any opposed? So passed.

4 **MALE:** Thank you.

5 **CHAIRPERSON BARABBA:** All right. Next on the  
6 agenda is the main purpose of today's meeting, which is  
7 to go through the Voting Rights Act training and that  
8 will be led by our counsels from Gibson, Dunn and  
9 Crutcher. Gentlemen, I assume you're ready and ready to  
10 go.

11 **MALE:** We're ready.

12 **FEMALE:** Jodie is going to introduce them.

13 **CHAIRPERSON BARABBA:** Oh, okay. So Jodie, you're  
14 going to make some introductory comments.

15 **COMMISSIONER FILKINS-WEBBER:** Thank you,  
16 gentlemen. Members of the public, I'm pleased to  
17 introduce for the first time before this Commission in a  
18 formal capacity, Mr. George Brown of Gibson, Dunn &  
19 Crutcher and his partner Dan Kolkey, and you also have  
20 with you an associate of yours, Matt Scolnick. And so I  
21 certainly appreciate the time that you've taken in  
22 preparation for today's meeting. Looking forward to  
23 hearing everything that you have to offer. Looking  
24 forward to hearing your legal advice and what proposals  
25 you may have to this Commission and filling us in on what

1 we have been struggling with since day one when it has  
2 come to Voter Rights Act requirements as we have  
3 struggled with over the last several months. And  
4 certainly look forward to hearing everything you have to  
5 say. Welcome, gentlemen.

6 **MR. BROWN:** Thank you.

7 **COMMISSIONER FILKINS-WEBBER:** Thank you very  
8 much.

9 **MR. KOLKEY:** Thank you.

10 **MR. BROWN:** Let me just kind of set the stage for  
11 us and let you know what we plan to do. First, we've got  
12 some materials that I hope are being distributed. It's  
13 Kahn Scolnick, by the way.

14 **COMMISSIONER FILKINS-WEBBER:** So sorry. I'm  
15 sorry (inaudible).

16 **MR. BROWN:** And as those are being passed out,  
17 well, let me first say I'm George Brown with Gibson, Dunn  
18 and Crutcher. This is my colleague Dan Kolkey. We're  
19 very pleased to be here. We're very delighted that the  
20 Commission chose to hire us as their counsel and we're  
21 eager to do the very best job we can in helping the  
22 Commission get its job done.

23 Now let me start by explaining briefly the  
24 materials we've handed out and what we hope to do today.  
25 I'm going to start with a few points about our objectives

1 and how we go about giving our legal advice. Then Mr.  
2 Kolkey is going to talk a little bit about the equal  
3 population requirements and the equal protection  
4 requirements of the Fourteenth Amendment. Then I'm going  
5 to pick it up and go through Voting Rights Act, Section 2  
6 and Section 5. And I've designed my portion of the  
7 remarks to try to be practical and get down to what are  
8 we going to do in light of the requirements of the Voting  
9 Rights Act. So I hope that's helpful.

10 Then what we will do is Dan will then pick up and  
11 talk about the other requirements of the California  
12 Constitution. And I'll say now, and we'll say again,  
13 that all of the issues are inter-related and that's why  
14 we're discussing all of them and to successfully defend  
15 the maps on Voting Rights Act issues or constitutional  
16 issues, everything you do with respect to all the  
17 categories will come in to play. And that's why we care  
18 about all of them.

19 After he does that, we'll go into what I think  
20 you've seen as discussion points about a suggested  
21 approach to getting started with line drawing and they  
22 are just suggestions and they're all preliminary. And  
23 we're here to offer them as something to think about.

24 And then I'll pick up again and we'll look at  
25 some detailed data. And we've received a number of

1 questions from the commissioners and we hope to walk  
2 through and answer as many of them as we can.

3           So with that, let me start with a few points  
4 about our objectives as your legal counsel. One basic  
5 objective of ours is to protect the Commission by helping  
6 it develop the procedures and the record that it's going  
7 to need to defend the choices that the Commission makes.  
8 And to do that, we're going to give you the best legal  
9 advice we can on the issues you face. And you should  
10 know we're well positioned to do that. We have, as you  
11 may have heard, our law firm is now nearly a thousand  
12 lawyers. And so while I may not know the answer to any  
13 question you pose immediately, I'm very confident that we  
14 can find the best answer that's available. So when you  
15 ask me a question sometimes I may say gee, I don't  
16 readily know, here's my view, but we can get the answer,  
17 trust me.

18           Now success for everyone we believe will be  
19 achieved when the maps are upheld by the courts or when  
20 there are no legal challenges because potential  
21 challengers watching this process will see that the  
22 Commission has built a solid legal defense of its maps  
23 and the process of creating those maps. So that's what  
24 we think is success.

25           Now I want to also make a note before Dan starts



1 about the nature of our giving legal advice in  
2 interpreting U.S. Supreme Court and federal case law.  
3 What we're trying to do is predict what courts are going  
4 to do if the maps are challenged on particular issues.  
5 And it should be apparent to most of you that the voting  
6 rights act has been subject to vigorous debate and  
7 litigation since its inception. And the Supreme Court  
8 has issued many opinions and not surprisingly many of  
9 those decisions are split decisions; they don't always  
10 agree on the issues, there are different points of view  
11 about how the various issues should be resolved. And so  
12 some of those decisions are five to four, some of them  
13 have greater majorities and some of them are plurality  
14 decisions. That means, as most of you know, that there's  
15 three votes for one position, a couple for another  
16 position, a few for another, some are overlapping and  
17 what you're trying to do and what we're trying to do is  
18 figure out under -- on particular issues are there five  
19 votes; if this gets to the U.S. Supreme Court are there  
20 five votes for this issue? And that's sort of the nature  
21 of what we're trying to do and it's not just the U.S.  
22 Supreme Court. The California Supreme Court could see  
23 this; the circuit level federal courts could see this.

24           So our advice is based on the premise that if  
25 there are likely to be five votes for a particular

1 position, then the Commission will be on safer ground if  
2 it makes decisions consistent with that position. Now  
3 you don't have to do that. We have clients all the time  
4 that are on one end or the other of the aggressiveness  
5 spectrum in what they want to do. Some clients say look,  
6 I've got a business to run, the last thing I want to do  
7 is be in litigation. Other clients say no, this issue is  
8 really important to my business, so bring it on; let's  
9 get ready and defend it. Civil Rights lawyers bring  
10 cases where the law doesn't look favorable to them  
11 because they're going to bring it until they can get a  
12 change in the law.

13           So our starting point, and you could tell us to  
14 move off our starting point, but our starting point is  
15 how do we think the courts are going to decide this when  
16 they get this issue, are there five votes for the  
17 particular issue. And it's not always easy to do this,  
18 to discern how Supreme Court justices will rule on a  
19 particular point, in part because the facts of every case  
20 are different. And the facts of what happens in  
21 California are going to be different from anything that  
22 they've seen before.

23           So that's sort of a bit of the nature of our  
24 challenge here. And again, we're doing the very best we  
25 can to try to consider all of that and then deliver to

1 you our advice.

2 So Dan, you want to take over here.

3 **MR. KOLKEY:** All right. So I am going to, before  
4 I go into some of the actual granule criteria, I do want  
5 to go into a little bit more depth as to legally  
6 defensible maps and a legally defensible record because  
7 that's going to basically color everything, all the  
8 advice that we give you. And I think that you've got to  
9 assume that on August 15<sup>th</sup>, various groups and people are  
10 going to have studied the maps that have been noticed for  
11 14 days and they're going to be preparing challenges to  
12 those maps. And if, for instance, there is a population  
13 equality issue, there may be a challenge. If there's a  
14 failure to comply with the Voting Rights Act, there may  
15 be a challenge. If you don't minimize the divisions of  
16 counties, cities and communities of interest to the  
17 maximum extent based on the language of the California  
18 Constitution, which I'll get into a little bit later,  
19 there could be a challenge just because there could be  
20 other maps that would minimize the divisions which your  
21 map doesn't while complying with all the other criteria.

22 In addition to that, you could have a challenge,  
23 for instance, if you made a direction to simply provide  
24 for districts to be drawn to create majority minority  
25 districts and that was your sole instruction, there could

1 be a challenge based on the 14<sup>th</sup> Amendment that race was  
2 the predominant basis by which those districts were drawn  
3 and that could be the basis for a challenge. So the  
4 advice we're going to try and give you and, again as  
5 George said, you know, there's gradations of advice;  
6 what's the most conservative versus what's the most  
7 aggressive. But the advice we're going to try and give  
8 you is advice to avoid those challenges.

9           There's another thing that you have to think  
10 about too. Even if someone decides that there is not a  
11 basis for effectively challenging the maps, there could  
12 be a referendum petition. As you know, the Constitution  
13 provides for the right to referendum the maps. And as  
14 you may know that if there's a referendum and it  
15 qualifies for the ballot, the maps are stayed. Any  
16 legislation subject to a referendum is immediately stayed  
17 upon the qualification of the referendum before there's  
18 an election on the referendum. And that means that the  
19 maps are stayed and the courts will have to move in to  
20 decide what districts to put in place for the next  
21 election cycle, starting with the June 2012 primary.

22           So in terms of our advice as well, we're going to  
23 be thinking what undermines the motivation for a  
24 referendum petition. And what undermines the motivation  
25 of a referendum petition is if the districts you draw are

1 similar to the districts that one could expect from a  
2 court drawn map prepared by special masters because  
3 Section 3 of Article 21 of the California Constitution as  
4 enacted by Propositions 11 and 20, provide not only that  
5 in the event of a challenge may the Supreme Court of  
6 California make a remedy which includes its right to  
7 appoint special masters to draw districts, and that's  
8 specifically referenced in the California Constitution,  
9 but the California Supreme Court would also have the  
10 right if there's a referendum petition that stays the  
11 districts, meaning that there are no districts other than  
12 the unconstitutional ten-year-old districts that we have  
13 right now and they're unconstitutional because they're so  
14 disproportionate now in terms of their population. That  
15 means that the California Supreme Court would be drawing  
16 districts. But if the districts you draw basically  
17 simulate what one might expect from a court, the sort of  
18 just straight and narrow districts that follow the  
19 criteria and look compact and seem to comply with  
20 everything, there's not going to be much advantage to  
21 someone going to a court and either trying to challenge  
22 the districts or have a referendum because they're going  
23 to end up with similar district from the court in any  
24 event.

25 **CHAIRPERSON BARABBA:** Excuse me.

1           **MR. KOLKEY:** Yes.

2           **CHAIRPERSON BARABBA:** Yeah, this question, it  
3 seems to me also in the Act was that we were supposed to  
4 go and listen to the public and capture what they were  
5 identifying for us. And how would that fit in to what  
6 you would expect of judges?

7           **MR. KOLKEY:** Well, if the judges appoint special  
8 masters to do the work which, again, the California  
9 Supreme Court would be authorized to do in the event of a  
10 challenge before the Supreme Court and under the  
11 California Constitution the California Supreme Court has  
12 exclusive jurisdiction as a state court that's separate  
13 from the federal courts but those special masters that a  
14 court would appoint would also presumably hold hearings  
15 or consider the hearings that you held and consider that  
16 testimony in drawing districts.

17           So there would be either a special master holding  
18 hearings or benefiting from the hearings that you held in  
19 drawing districts. And certainly the importance of these  
20 hearings is to determine, you know, where there are  
21 appropriate communities of interest, where there might be  
22 Voting Rights Act issues where you need to draw majority  
23 minority districts. But in hearing the testimony, of  
24 course, you'll want to fall back on what the criteria are  
25 in the Constitution and if someone is asking you to do

1 something that's contrary to the criteria, you've got to  
2 adhere to the criteria or you're subject to challenge.

3 **CHAIRPERSON BARABBA:** I'm trying to understand  
4 the implications of what you said and I want to make sure  
5 that I heard it correctly. But it would seem to me that  
6 we should base our decision on what we heard, not what we  
7 would expect judges to do.

8 **MR. KOLKEY:** You should base it on what you hear,  
9 but what you hear and following the criteria should  
10 result in what judges will do because the criteria  
11 falls --

12 **MR. BROWN:** And just to -- let me just interject  
13 here. You need to base your decisions on what  
14 information you gather and on evidence. I think that  
15 it's really important that this body gathers evidence and  
16 make a record, but you're constrained by the law and I  
17 think you all know that. But you're constrained by the  
18 law in many different ways and that's part of what we're  
19 trying to explain is the ways in which you're constrained  
20 by the law and your decisions are implicated by what  
21 people might do subsequent to you finishing your task.  
22 And that's what we're trying to explain. So yes, you  
23 have to, and you must go out and get public input and get  
24 evidence and base your decisions on the evidence that  
25 you've collected. But you're also constrained by the

1 structure of the California Constitution.

2 **CHAIRPERSON BARABBA:** I meant that part I  
3 understood. But my question is, is when he mentioned the  
4 criteria that you would expect a judge's panel to use, I  
5 didn't even know how to go about doing that because every  
6 panel I've ever seen they're all different.

7 **MALE:** (Inaudible).

8 **COMMISSIONER WARD:** Thanks, (inaudible). It  
9 seems to me like what I'm hearing so far is Gibson,  
10 Dunn's continuing to give a full picture of options for  
11 us. And I think at the end of this they're going to be  
12 asking for some direction as to how we want to go ahead  
13 and proceed with that. I had a number of questions that  
14 I think as a Commission we need to philosophically decide  
15 as well that go along with you. But I'd kind of like to  
16 finish hearing them out, you know, before I --

17 **CHAIRPERSON BARABBA:** All right.

18 **COMMISSIONER WARD:** -- have that debate.

19 **CHAIRPERSON BARABBA:** I would be -- delay any  
20 further questions on that matter.

21 **MR. BROWN:** Well certainly you should feel free  
22 to, you know, break in with questions where, you know,  
23 you have a disagreement or we're not clear. All right.  
24 So --

25 **COMMISSIONER ONTAI:** I do have a question. On



1 that issue that the Chair just mentioned --

2 **MR. KOLKEY:** (Inaudible).

3 **COMMISSIONER ONTAI:** -- are you then going to be  
4 prepared to give case studies that demonstrates how we  
5 would take public testimony in terms of creating  
6 minority, majority districts but within the constraints?  
7 You're going to present case studies to us.

8 **MR. KOLKEY:** Well, I'm not sure what you mean by  
9 case studies, but we will be prepared to suggest how you  
10 should use the material and submissions from the public  
11 to make sure that you comply with the Voting Rights Act,  
12 which would include where required majority minority  
13 districts.

14 **COMMISSIONER ONTAI:** I understand, but wouldn't a  
15 court support our decisions if there are case studies  
16 that would demonstrate a particular map that we drew that  
17 we had to determine was a --

18 **MR. KOLKEY:** Well, the case studies, the cases  
19 will support your decisions where you follow the criteria  
20 that the courts have said you should follow in  
21 determining whether there is a Voting Rights Act  
22 violation --

23 **COMMISSIONER ONTAI:** Right.

24 **MR. KOLKEY:** -- that requires a remedy, namely a  
25 majority minority district, or where the cases say here

1 is how you define retrogression for a section five --

2 **COMMISSIONER ONTAI:** Yeah.

3 **MR. KOLKEY:** -- county.

4 **COMMISSIONER ONTAI:** But what I'm saying, you're  
5 going to present cases where that will be supportive of  
6 our decision.

7 **MR. KOLKEY:** Right. Oh, absolutely.

8 **MR. BROWN:** Yeah.

9 **MR. KOLKEY:** What we would do is provide you with  
10 the case law that helps advise you as to how you should  
11 weigh the criteria.

12 So what I was going to do, this was just by way  
13 of background as a backdrop. I was now going to move  
14 into population equality --

15 **COMMISSIONER FILKINS-WEBBER:** Which I did want to  
16 just make one point for the Commission. As a litigator,  
17 what Mr. Kolkey has explained is it's a general  
18 philosophy that we see with lawyers, which is great. And  
19 I really was impacted by this type of presentation.  
20 There's different types of lawyers; those that will, you  
21 know, appellate lawyers that sit behind a desk and can do  
22 all the legal research and give you all the case  
23 authority, but what objectives they've just provided to  
24 us is from a litigation standpoint, which is an ability  
25 to provide us legal advice that could assist us in having

1 fully litigated defensible maps, which is a philosophy  
2 from a litigation standpoint. And these two gentlemen  
3 with their litigation background I find extremely helpful  
4 to this Commission, which is so there's a balance  
5 between, you know, research lawyers who sit behind a desk  
6 versus this philosophy that's being presented to us as,  
7 you know, providing us litigation defensible maps. So  
8 it's just a different in philosophy and I appreciate  
9 that, gentlemen. Thank you.

10 **CHAIRPERSON BARABBA:** Commissioner Blanco?

11 **COMMISSIONER BLANCO:** So and I really want to get  
12 to the heart of this, but I think since the first part of  
13 the presentation is the approach, you know, I think this  
14 is a good place to talk about the approach.

15 I think there's -- I would add something and I  
16 think this will be part of what we as a Commission have  
17 to decide. I think absolutely there's no doubt that what  
18 we have to do is get the legal advice and have our legal  
19 counsel help us have defensible maps. I think at the  
20 same time, and I really mean at the same time, you know,  
21 when you mentioned Mr. Brown that different clients have  
22 different comfort zones with risk, I think I don't want  
23 us to sort of decide on our risk comfort but I do think  
24 that the other part of this is also saying to us as we  
25 are reviewing the testimony and working with the maps and

1 everything, if we say we feel strongly from what we've  
2 heard that this we want to see what we can do to have a  
3 majority minority district here, that that's part of it  
4 too. So like it's also find -- give us within the  
5 parameters of what's going to be defensible, whether it's  
6 with the California Supreme Court or the U.S. Supreme  
7 Court, this is what we want now, tell us how we can do  
8 that. So I think it's that in addition to telling us  
9 what our exposure might be legally is also what can we do  
10 here if we really want to do this.

11 **MR. BROWN:** Yes. And I think that's very  
12 important because the really hard part is when you have  
13 facts and evidence. Right now we're just telling you our  
14 ideas based on the facts as we know them, but what you  
15 really need to do is get into area by area what, you  
16 know, somebody wants to do it one way, someone wants to  
17 do it another way, what are the issues, what are the  
18 legal issues, what are the constraints. And so that's  
19 where you really get into the nitty-gritty decision  
20 making; we're kind of wading into it now.

21 **MR. KOLKEY:** And fact is, after we go through  
22 some of the nuances of the law, we are going to talk  
23 about suggested approaches and they actually will be done  
24 in a way that does allow you to do the things that you  
25 want to do while being protected in what you're doing.

1 And we thought that the best way to structure this was to  
2 first set forth some of the specific legal issues and  
3 then once you've got that background, say now that you  
4 know what some of these issues are, now let's talk about  
5 approaches as to how you address and achieve those legal  
6 issues and satisfy those legal issues. So that's kind of  
7 our sort of concept in terms of the structure for this  
8 afternoon.

9           Before I just leave this topic, the only other  
10 thing I want to say is that back to Commissioner  
11 Barabba's question, is that the evidence that you get,  
12 the hearings and submissions that you receive are very  
13 important for your work and have to be integrated into  
14 your work and would also be integrated into the work by a  
15 court. The court, however, then will apply the criteria,  
16 the same criteria you have to that evidence. And our  
17 only point is, is that in just applying the criteria as  
18 it is to the evidence is the best way of developing a map  
19 that's going to be legally defensible and one where what  
20 the court is going to do if the court were to do it would  
21 not be so significantly different from what you did, that  
22 someone is going to say I'm going to bring a referendum  
23 or I'm going to bring a legal challenge because I can see  
24 a material benefit to me in having the court doing it  
25 rather than the commission doing it. So that is really

1 the only point there. So let me turn to -- okay. All  
2 right.

3 **MALE:** (Inaudible).

4 **MR. KOLKEY:** Yes. Let me proceed to population  
5 equality. You've heard, I know, a fair amount and read a  
6 fair amount about population equality, so it's not my  
7 intention to spend a lot of time on it. But I do want  
8 you to understand what your legal options are and then  
9 what the most risk averse options are; just really a  
10 minute or two on population equality for congressional  
11 districts.

12 You know the standard; it's that they're to be  
13 equal as nearly as practicable as possible. And  
14 practicable is different from practical. Practicable  
15 means capable of being done. Something can be capable of  
16 being done but not as practical. But the standard is as  
17 nearly as equal as practicable, which means as nearly as  
18 equal as can be done, which as a result, as you know, the  
19 U.S. Supreme Court has basically said that it's got to be  
20 a good faith effort to achieve precise mathematical  
21 equality. And indeed, states now can do these  
22 congressional districts with zero or one person  
23 deviations, and we do think that is the most risk averse  
24 approach to take because given that very strict standard,  
25 parties will be looking to attack congressional districts

1 that don't have that kind of population equality. But  
2 you should know that the Supreme Court has said that  
3 there can be variances as long as they're not significant  
4 and they are a result of consistently applied neutral  
5 criteria.

6           So for instance, U.S. Supreme Court in Kartcher  
7 said, any number of consistently applied legislative  
8 policies might justify some variance, including for  
9 instance making districts compact, respecting municipal  
10 boundaries, preserving cores of prior districts and  
11 avoiding contests between incumbent and representatives.  
12 As long as the criteria are non-discriminatory, these are  
13 legitimate objectives that on a proper showing could  
14 justify minor population deviations. So the only point  
15 by the Supreme Court is as long as they are still minor  
16 and it is a consistently applied neutral criteria that  
17 still can be defensible.

18           Having said that, the risk averse approach would  
19 be to go to zero or one person difference among  
20 districts. But, you know, as you proceed with your  
21 hearings you may see some reason why there ought to be  
22 some minor deviation. And, for instance, in the '90s,  
23 the California Supreme Court approved a .25 percent  
24 deviation where it was done to maintain census tracks  
25 which the special masters had explained are created by

1 the census bureau to provide homogenous population groups  
2 with shared economic interests which have either manmade  
3 or natural boundaries. So in essence, they're like a  
4 neighborhood and the masters and the court felt that  
5 splitting a census tract basically split a neighborhood  
6 and it would be better to keep the tract intact. And in  
7 that case, the court found that notwithstanding 8.25  
8 percent deviation, that was acceptable under the U.S.  
9 Supreme Court's jurisprudence.

10           Having said that, as I say, the most risk averse  
11 approach is to go to zero or one because the one standard  
12 that the court does use is that if you say that you have  
13 a legitimate criteria consistently applied that will only  
14 produce a minor deviation but someone else produces a map  
15 using that same neutral criteria consistently applied and  
16 they have a lower deviation, the court will say well, you  
17 did not achieve the lowest possible deviation to achieve  
18 your neutral criteria. Someone else has just shown us  
19 that you could have achieved a smaller deviation and  
20 still achieved that neutral criteria, in which case, your  
21 deviation then becomes too large and a basis for legal  
22 challenge. Which is why with congressional districts  
23 because of that nearly as practicable as possible  
24 standard the risk averse approach is zero to one person.

25           So that's all I'm going to say on the



1 congressional districts. But you know, I want you to  
2 understand what the options are there.

3           So let me turn to state legislative districts.  
4 And this is actually, you know, intellectually somewhat  
5 interesting because I haven't seen many people focus on  
6 the fact that there are really two standards for equal  
7 population among state legislative districts.

8           On the one hand you have the federal equal  
9 protection clause, which is what the Supreme Court uses  
10 in its decisions and says that state legislative  
11 districts have greater flexibility in terms of achieving  
12 population equality and it simply needs to be reasonably  
13 equal populations. But the California Constitution then  
14 uses that language and has some exceptions. And so  
15 there's a good argument that there is a separate  
16 California constitutional standard on equal population  
17 too, the federal equal protection clause and the language  
18 in the California Constitution, which talks about  
19 reasonably equal populations except to the extent  
20 required to comply with the Voting Rights Act or is  
21 allowable by law.

22           So let me just talk a bit about those two  
23 components and then again just discuss the most, you  
24 know, risk averse approach. From the federal equal  
25 protection clause standpoint for state legislative

1 districts, the U.S. Supreme Court has said that state  
2 legislative districts are presumed to be valid where they  
3 have a maximum deviation of under ten percent. However,  
4 even if you have a maximum deviation of under ten  
5 percent, there have been some cases that have held that,  
6 you know, nonetheless that deviation is illegal because  
7 it's simply a presumption if it's under ten percent that  
8 it's lawful, not that it necessarily is.

9           And so with the federal equal protection clause  
10 the best thing to do is to use the same standard that the  
11 Supreme Court has said for whether it's over or under ten  
12 percent, which is that deviations must be justified by,  
13 again, a consistent and non-discriminatory application of  
14 the legitimate state policy, such as the policies I  
15 mentioned before like municipal boundaries and so on.

16           In the case of the state constitution, the  
17 reasonably equal population language was adopted after  
18 the special masters in the '70s drew districts. And  
19 those masters said that population equality for  
20 California state legislative districts should be under  
21 one percent except in unusual circumstances they could be  
22 up to two percent. When the special masters views were  
23 then followed by an amendment to the California  
24 Constitution, the California Attorney General construed  
25 reasonable population, the language presently in the

1 California Constitution and the language before  
2 Proposition 11, the California Attorney General construed  
3 that language as meaning that you should have deviations  
4 of no more than one percent or in unusual circumstances  
5 no more than two percent.

6 Now Prop 11 and Prop 20 created an exception to  
7 the reasonable population language and provided that it  
8 was reasonable population except where the deviation is  
9 required to comply with the federal Voting Rights Act or  
10 allowable by law. Given that we don't have any case law  
11 construing whether or not that exception allows you to go  
12 more than one percent or up to two percent for purposes  
13 of the state California Constitution, the risk averse  
14 advice is to keep the deviation at one percent or in  
15 unusual cases two percent if you are doing the one  
16 percent or two percent to comply with the Voting Rights  
17 Act or comply with a legitimate state policy that's  
18 consistently applied across the board. So one percent or  
19 in unusual cases two percent. Now obviously the safest  
20 thing would be, again, getting it down to zero or one  
21 but, again, the Constitution does not seem to require you  
22 to do that.

23 And again, if you take what was done in the '90s,  
24 the special masters felt that the census tracks, because  
25 they are tracks of homogenous population units that they

1 felt shouldn't be fragmented plus they didn't have the  
2 technology to fragment them, but because they also felt  
3 that it was a defensible unit to keep intact in terms of  
4 their representation, you've got California Supreme Court  
5 authority that says yes, maintaining those and having a  
6 deviation you know, under one percent, you know, is  
7 justifiable.

8 Let me now turn --

9 **COMMISSIONER ANCHETA:** Can I -- a question, Mr.  
10 Kolkey. I understand the source that you're relying  
11 upon, which is both the Attorney General opinion and the  
12 court's opinion in Wilson v. Yu, and I understand the  
13 general point about, you know, and we're looking at risk  
14 aversion as well, but I'm wondering I don't think  
15 necessarily asserting that in terms of legal presence, I  
16 wouldn't term Wilson v. Yu as the court having to decide  
17 and publish maps; right. So that and the AG opinion is  
18 an AG opinion, it's not binding on anybody necessarily,  
19 but disinterest of the source of law, I'm not entirely  
20 sure that it's fully binding necessarily on the  
21 Commission. But I understand that the point is that that  
22 body took a very smart approach I think in saying let's  
23 keep it really low. But in terms of precedential value  
24 or strength of the source of law, is it your proposal  
25 that it's actually binding on the Commission or that it's

1 simply really good and strong policy that the court  
2 adopted as the policy maker, rather than as the court as  
3 a decision-making body.

4           **MR. KOLKEY:** Well, first of all, that's an  
5 excellent question and it actually gives me an  
6 opportunity to further clarify this; so I thank you for  
7 it. I mean you're exactly right that, you know, it's not  
8 binding precedent in the sense that you've got say the  
9 California Supreme Court saying that, you know, you can't  
10 go above one percent or in most two percent because all  
11 you have really is the reference to the California  
12 Attorney General's interpretation of what reasonable  
13 population is. You then have the special master saying  
14 this may or may not be more strict than what's required  
15 by the California Constitution, but we're going to apply  
16 it here. And then you have the California Supreme Court  
17 saying we think you've met all your population equality  
18 standards by doing what you've done, because ultimately  
19 the masters were able to get the state legislative  
20 districts down to under .50 percent and congressional  
21 districts at or under .25 percent.

22           So you're exactly right. It is not binding  
23 precedent. Our problem, and it's what George alluded to  
24 at the very outset is that we are going to have  
25 situations here were we don't have a case exactly on

1 point. So what do lawyers do when they give advice where  
2 you don't have a case exactly on point? One is, you go  
3 to the language of the particular constitutional  
4 provision or the statute and say does the language  
5 support what my client wants to do; and secondly, to the  
6 extent you have some authority from the courts, you  
7 utilize it to say if you do this you should be safe.

8           And that's all I'm saying here is that you've got  
9 the special masters, you've got the California Supreme  
10 Court saying this satisfies, it may even be stricter than  
11 necessary, but this satisfies your obligations. So if  
12 you were to then be challenged and you were under one  
13 percent, you at least have some authority that supports  
14 what you've done and you can feel on safer ground. If  
15 you go above it, then the question is -- and I think, you  
16 know, and I'm absolutely positive that George and I could  
17 defend very vigorously deviations for state legislative  
18 districts over one percent under the California  
19 Constitution if done to comply with the Voting Rights Act  
20 or to consistently apply a legitimate state criterion  
21 that's in the California Constitution. I'm very  
22 confident that we could very vigorously defend it.

23           But it is nice to know if you've got some  
24 authority out there that has, you know, embraced the one  
25 percent deviation, you're on even safer ground. And so

1 the best we can do is tell you, you know, what's safe,  
2 what's defensible, what's risky.

3 **COMMISSIONER BLANCO:** So Prop 11 essentially, you  
4 know, now we've got a new constitutional redistricting  
5 mandate with Prop 11. So it's not just whatever was in  
6 the previous constitution and then the opinions AG and  
7 Supreme Court then interpreted that, but now we actually  
8 have a new constitutional mandate for redistricting. So  
9 I just, you know, and I agree with what you said but it  
10 seems to me we're going to at some point where we in the  
11 new constitutional mandate on redistricting if it says  
12 exception for Voting Rights Act -- and before that was  
13 sort of case law and now it's actually in the statute and  
14 not just the statute, it's in the Constitution, it seems  
15 to me we have -- one thing you'll have to do, right, is  
16 to interpret it not only whatever was the, you know,  
17 happened before with the previous cases and the AG, but  
18 really what was the, you know, what was the intent of  
19 Prop 11 to actually specifically mentioned the VRA when  
20 it talks about possible deviation; correct?

21 **MR. KOLKEY:** That is correct. And so let me just  
22 add one point to what you said, because what you said is,  
23 you know, exactly correct, very perceptive. The point I  
24 would add is that the prior version of the constitution  
25 also used the term reasonable population. So when the

1 same term is used in a subsequent statute or subsequent  
2 constitutional amendment, the normal rule is you apply  
3 the same meaning that was given to the same language used  
4 before.

5 Now you are right, and I pointed out that you've  
6 got this exception that you didn't have before. And in  
7 fact, is I was the one who added the allowable by law  
8 language in Prop 20 to the exception for reasonable  
9 population equality that's now in the California  
10 Constitution. The --

11 **COMMISSIONER BLANCO:** (Inaudible).

12 **MR. KOLKEY:** Well, I mean my intent was to  
13 capture the Federal Supreme Court jurisprudence that  
14 allowed you to make a greater variance where you were  
15 consistently applying a neutral redistricting criteria.  
16 That was my intent.

17 The difficult legal issue, which you will  
18 appreciate, is a court could either say we'll use the  
19 definition of reasonable population as it's been defined  
20 before but now there's these exceptions and so we can  
21 expand the variation. Or a court could say exactly what  
22 you said, which is that all they've done is made express  
23 in the constitution, which was understood before, so  
24 there's no change and it still may be one percent or a  
25 maximum of two percent.



1           So given all that uncertainty, and you're quite  
2 right on all your observations, given the uncertainty,  
3 all I can say there's, you know, various gradations of  
4 risk that you take. And that is my only point. So if  
5 you take away anything from this, you know, it's that in  
6 terms of state legislative districts you've got some more  
7 flexibility and the safest thing to do is if you're going  
8 to vary, you know, to vary applying something and still  
9 come under one percent or in unusual circumstances, two  
10 percent.

11           **CHAIRPERSON BARABBA:** Mr. Brown, I have a quick  
12 question, process question. Given the rate at which  
13 we're moving, would it be better -- and I know everybody  
14 has some questions for clarification, but will we able to  
15 get done at the rate at which we're moving do you think?

16           **MR. BROWN:** How much time have you allotted?

17           **MR. BROWN:** Probably not.

18           **CHAIRPERSON BARABBA:** Yeah.

19           **MR. BROWN:** We'll (overlapping) --

20           **FEMALE:** (Overlapping) --

21           **CHAIRPERSON BARABBA:** So with that -- oh, not the  
22 lawyers, I know it's impossible.

23           **CHAIRPERSON BARABBA:** In fact, if you could just  
24 write a note when you hear something you want to question  
25 on then we'll come back to them at the end.

1           **MALE:** (Inaudible).

2           **CHAIRPERSON BARABBA:** Yeah.

3           **MR. KOLKEY:** All right. So I'm going to turn now  
4 to the 14<sup>th</sup> Amendment and I'm going to speed this up just  
5 a little bit.

6           In some ways, while I'm going through some of the  
7 federal constitutional criteria here, this would more  
8 nicely follow George's presentation on the Voting Rights  
9 Act, so let me just say this about the 14<sup>th</sup> Amendment is  
10 that it is obviously critical to comply with the Voting  
11 Rights Act in the maps that you draw. I mean it is  
12 absolutely critical.

13           The issue is not complying with the Voting Rights  
14 Act it is how you comply with the Voting Rights Act and  
15 the one thing that you've got to be very aware of is this  
16 14<sup>th</sup> Amendment jurisprudence which you have heard about,  
17 starting with Shaw versus Reno, and then going on to  
18 Miller versus Johnson, where the U.S. Supreme Court ruled  
19 that a equal protection claim could be stated if race is  
20 the dominant factor or predominant factor in the decision  
21 to draw the districts.

22           So for instance, were there to be a direction to  
23 simply form a coalition district of two minority groups  
24 and that was the direction just in and of itself that  
25 would appear to be a direction based on race and there

1 would be a risk that there would be a 14<sup>th</sup> Amendment  
2 violation unless you were doing that based on evidence  
3 that suggested that you needed to do that to comply with  
4 the Voting Rights Act.

5           One thing that's different from your process from  
6 the past legislative processes and including the special  
7 masters is that you have got incredible transparency in  
8 this proceeding. And your directions are going to be  
9 public so that if someone is looking for evidence that  
10 race was the predominant factor in drawing districts, you  
11 are going to create a treasure trove of evidence for  
12 challengers here. So you have got to be very careful  
13 with your directions that you don't run afoul of the  
14 Supreme Court jurisprudence on the equal protection  
15 clause.

16           The bottom line on this, and I think a very good  
17 example -- and then I will basically rest on the 14<sup>th</sup>  
18 Amendment and turn it over to George, is Miller versus  
19 Johnson, because it's a good example of a situation that  
20 could arise where it seems as if the redistricting  
21 organization, the legislature is acting completely  
22 properly and they find themselves in an equal protection  
23 violation. And that is, is that the legislature in that  
24 case created three majority minority districts and they  
25 did it because the U.S. Department of Justice had

1 rejected previous legislative plans that did not include  
2 this third majority minority district. So the  
3 legislature felt that it was simply complying with what  
4 the Department of Justice was demanding with respect to  
5 getting pre-clearance. And the Supreme Court found that  
6 the third majority minority district was not required by  
7 the Voting Rights Act, that it had been drawn clearly  
8 based on race as the predominant factor because the  
9 decision was to draw a third majority minority district.  
10 But as I say, it was not required even though the  
11 Department of Justice thought it was. As a result, the  
12 court found that race was the predominant factor and  
13 struck down that plan and that district.

14           The court in so saying noted a couple things; one  
15 is, of course in that case you had a district that was  
16 very oddly shaped and the bizarre shape of a district can  
17 be circumstantial evidence of race being the predominant  
18 factor. The court said and I think it's just better just  
19 to quote the court, that it said that, "Nor can the  
20 state's districting legislation be rescued by the mere  
21 recitation of purported communities of interest." The  
22 evidence there was compelling that there was no tangible  
23 communities of interest because it spanned hundreds of  
24 miles along that particular district.

25           The court did say, however, that a state is free

1 to recognize communities that have a particular racial  
2 makeup, provided its action is directed toward some  
3 common thread of relevant interest in the community. But  
4 the court then went on and said, "But where the state  
5 assumes from a group of voters' race that they think  
6 alike, share the same political interests and will prefer  
7 the same candidates at the polls, it engages in racial  
8 stereotyping, at odds with the equal protection  
9 mandates."

10 So we're going to go in later as to approaches on  
11 this, but this constraint by the 14<sup>th</sup> Amendment is  
12 something that you need to be very aware of as you make  
13 instructions and develop your maps.

14 **COMMISSIONER WARD:** I was just wondering, is your  
15 presentation following the handout?

16 **MR. KOLKEY:** No.

17 **MR. BROWN:** No, it's not. Thank you.

18 **COMMISSIONER WARD:** Okay.

19 **MR. BROWN:** So rather than go through chapter and  
20 verse all the details that are in the handout, one of the  
21 things I'd like to do is try to digest complex facts,  
22 issues, law and try to make it simpler. And so I've  
23 designed my discussion to try to break this down into an  
24 accessible level discussion, and we're happy to answer  
25 questions at any level of detail even if we have to get

1 back to you.

2           What I'd like to start with just is a brief  
3 thought about the issues of race and politics. And in  
4 thinking about, you know, what we're engaged in, I was  
5 just reminded that so many people over the years are  
6 saying, you know, in certain settings there's some things  
7 you shouldn't talk about. You shouldn't talk about race  
8 and you shouldn't talk about politics; usually you're  
9 going to end up in an argument, so just avoid it. But  
10 here, of course, we can't avoid it really, right.

11           Any redistricting effort in California is going  
12 to involve issues of race and what the Commission is  
13 doing is drawing political boundaries. So we have to  
14 keep in mind that all of us and many people who are going  
15 to come to the public meetings, all of us tend to have  
16 deep feelings about issues involving race and politics  
17 and we may have strong reactions to people who disagree  
18 with us.

19           So in order to get the job done here we have to  
20 recognize that everyone is operating in good faith and  
21 we're trying to accomplish the end goal of drawing maps  
22 that will be upheld and become law.

23           Now there's going to be strong disagreements I  
24 suspect, but let's see if we can work through the  
25 disagreements in a disciplined and informed way to

1 accomplish our shared objectives.

2           Now let me start with the significance of race in  
3 line drawing by summarizing what Dan just went through in  
4 terms of 14<sup>th</sup> Amendment equal protection. I just want to  
5 make it very simple and straightforward. Conduct by  
6 state actors is subject to the 14<sup>th</sup> Amendment. And just  
7 to make it crystal clear, because of the California  
8 Constitution delegating authority to this Commission,  
9 you're a state actor; so what you do is subject to U.S.  
10 constitutional requirements.

11           Now, racial classifications and laws based on  
12 race are suspect under the 14<sup>th</sup> Amendment. And with  
13 respect to suspect classifications, the U.S. Supreme  
14 Court applies its highest standard of review, which it  
15 calls strict scrutiny. Now almost no cases survive  
16 strict scrutiny, even though the court describes ways  
17 that you can survive it. So you should know that. To  
18 survive strict scrutiny the person defending the  
19 classification has to come up with and explain what  
20 compelling state interest would justify the racial  
21 classification of the use of race. And to the extent  
22 that they are able to do that, whatever solution is  
23 adopted has to be narrowly tailored to remedy the  
24 particular issue, right. That's it. Now usually not  
25 successful.

1           So advice in light of that, we've got to try to  
2 avoid having whatever the Commission does be  
3 characterized as using race as the predominant factor;  
4 right. That's the goal. It's very hard to predict  
5 whether you've crossed the line into race being the  
6 predominant factor or not because many of the cases that  
7 come before the U.S. Supreme Court are pretty clear. The  
8 Justice Department told they state they weren't going to  
9 pre-clear the lines unless they draw some more districts  
10 based on race. So those are almost, you know, in looking  
11 back they're not hard to see that race predominated.

12           So here, you're going to, you know, people may  
13 argue about whether race predominated in a particular  
14 approach. If race does predominate, the Supreme Court  
15 has said a compelling state interest is compliance with  
16 Section 5 of the Voting Rights Act, or compliance with  
17 Section 2. Now let me catch myself when I said the  
18 Supreme Court has said; I think if you count votes in  
19 various decision, including descents and some majorities  
20 and some plurality, we think that more than five of them  
21 would agree with that proposition. That's what I mean;  
22 okay.

23           So you could win a lawsuit where race  
24 predominated if you were right that not doing that would  
25 lead to a violation of Section 2 or Section 5 and when



1 you drew the lines to remedy that situation you did it  
2 carefully using other neutral line-drawing criteria; one  
3 way to win a 14<sup>th</sup> Amendment challenge.

4 Now the court has also said that -- and we  
5 believe more than five would go with this -- that race  
6 can be taken into consideration in redistricting, it's  
7 almost unavoidable that people drawing the lines have the  
8 information about race in front of them. And so long as  
9 race is not the predominant factor, but one of several  
10 factors that are used in constructing districts, then  
11 with respect to 14<sup>th</sup> Amendment, strict scrutiny is not  
12 triggered. The reason that's important is because the  
13 standard that would then be applied is the rational basis  
14 standard, which essentially any rational basis for the  
15 lines that were drawn would defeat a 14<sup>th</sup> Amendment  
16 challenge.

17 And so with respect to 14<sup>th</sup> Amendment issues, we  
18 want whatever approach is taken to not have race  
19 predominate where possible; okay. And so you want to  
20 narrow the number of instances where that argument is  
21 available to someone who can challenge the maps.

22 All right.

23 **COMMISSIONER GALAMBOS-MALLOY:** Okay. What did  
24 you say triggers it to be going into a rational basis  
25 versus a strict scrutiny? You prefaced that with this

1 last section but I just want to review that again.

2 **MR. BROWN:** I'll say it two different ways.  
3 Where race did not predominate; right. The other way to  
4 say it is --

5 **COMMISSIONER GALAMBOS-MALLOY:** But it didn't  
6 predominate the discussion.

7 **COMMISSIONER BLANCO:** The decision.

8 **COMMISSIONER GALAMBOS-MALLOY:** The decision.

9 **MR. BROWN:** Was not the predominant factor.

10 **COMMISSIONER GALAMBOS-MALLOY:** Okay.

11 **MR. BROWN:** So in the cases that have rejected  
12 lines because they are an improper racial classification,  
13 they have explained that the shape of the district, for  
14 example, could not be explained on any basis other than  
15 race. So it's clear that there was no other basis for  
16 drawing the lines.

17 **COMMISSIONER GALAMBOS-MALLOY:** Okay.

18 **MR. BROWN:** Other than race.

19 **COMMISSIONER GALAMBOS-MALLOY:** Thank you.

20 **MR. BROWN:** What the courts have suggested and  
21 said is that race can be a factor so long as it is one of  
22 a combination of factors that are traditionally used in  
23 redistricting, like contiguity, compactness, communities  
24 of interest; it's in the mix of factors that are being  
25 considered. If the situation is characterized that way,

1 then with respect to 14<sup>th</sup> -- you might have other issues,  
2 but with respect to the 14<sup>th</sup> Amendment, you are not in  
3 strict scrutiny world, you're in rational basis world,  
4 which should be an easy win.

5 **COMMISSIONER YAO:** You used the term several  
6 factors, so several to me means more than two. Is that  
7 the way you meant it? (Inaudible) range shouldn't be  
8 it --

9 **MR. BROWN:** More likely than not it's going to be  
10 one of more than two factors, but it's going to be one of  
11 several factors because you have to consider all the  
12 things that a line drawer considers when drawing lines,  
13 as opposed to just where are all the people with this  
14 particular racial characteristic.

15 **MR. KOLKEY:** You know, let me just read something  
16 from Miller versus Johnson, because there's just two  
17 sentences that I think makes it very clear. In talking  
18 about making the equal protection claim showing, it says,  
19 to make this showing, the equal protection clause  
20 showing, a plaintiff must prove that the legislature  
21 subordinated traditional race neutral districting  
22 principles, including but not limited to compactness,  
23 contiguity and respect for political subdivisions or  
24 communities defined by actual shared interests, to racial  
25 considerations. Where these or other race neutral

1 considerations are the basis for redistricting  
2 legislation and are not subordinated to race, a state can  
3 defeat a claim that a district has been gerrymandered on  
4 a racial basis.

5 **MR. BROWN:** Okay. So that's somewhat helpful.  
6 It still, you know --

7 **COMMISSIONER GALAMBOS-MALLOY:** I was going to  
8 say, it's not (overlapping) --

9 **MR. BROWN:** Not crystal clear; right.

10 **COMMISSIONER GALAMBOS-MALLOY:** Okay. Not to  
11 split hairs here, but just to repeat because this, the  
12 paragraph you read actually does get at my question,  
13 which was that we have a variety of criteria to apply and  
14 our understanding is that there is a hierarchy to how we  
15 move about weighing them. And so what I'm hearing you  
16 say is that if race was to be one of the factors that we  
17 looked at it would need to come as the ultimate last in  
18 the hierarchy after all of the other issues have been  
19 dealt with, or am I interpreting too much here?

20 **MR. BROWN:** Well, we're going to come back to  
21 that.

22 **COMMISSIONER GALAMBOS-MALLOY:** Thank you.

23 **MR. BROWN:** And no, I don't think we're saying it  
24 quite that way.

25 **MR. KOLKEY:** But we will answer that question.

1           **MR. BROWN:** Okay. Now let's move into talking  
2 about Section 2 of the federal Voting Rights Act. You  
3 might think about what we've just talked about, the 14<sup>th</sup>  
4 Amendment claim violation as a claim that race played too  
5 great a role in the line drawing. Section 2 might be  
6 thought of as the opposite of that. The Commission could  
7 be accused of not adequately considering the implications  
8 of race in its line drawing. And note when I say race I  
9 mean all of the protected groups under the Voting Rights  
10 Act, including language minority groups.

11           So let's do a quick review of what I suspect you  
12 already all know by now, that is what needs to be  
13 established for a Section 2 violation. U.S. Supreme  
14 Court laid out in a case called Jingles three  
15 preconditions that have to be met before a Section 2  
16 claim can go forward, and that is there has to be a  
17 geographically compact minority population that could  
18 make up more than 50 percent of the eligible voting  
19 population in a district. Purposely used the word  
20 eligible, it's going to raise the issue of CVAP, which  
21 we'll talk about later. That's the first condition and  
22 if you don't meet that condition it's game over for a  
23 person trying to assert a Section 2 claim.

24           Next, the minority group has to be politically  
25 cohesive and they tend to vote similarly.

1           And third, the majority votes as a block and from  
2 time to time we get the question is it a White majority  
3 and I think based on the context of the cases the early  
4 cases used the phrase White majority and the later cases  
5 dropped the term. And so I think it's the better view is  
6 that it's the majority, whatever the relevant majority  
7 is, votes as a block.

8           If the -- and I'm going to come back to those  
9 last two considerations are done by analyzing what's  
10 known as racially-polarized voting. I'm going to talk  
11 about that a little bit later. If the Jingles  
12 preconditions are not satisfied, then a plaintiff may not  
13 proceed with the lawsuit and the case will be dismissed.  
14 If the Jingles preconditions are met, then the case  
15 proceeds to the next question that is whether under the  
16 totality of the circumstances the protected group has  
17 less opportunity to elect -- to participate in the  
18 political process and elect candidates that they prefer.  
19 And in the totality of the circumstances there are  
20 numerous factors that are considered and you've probably  
21 seen them before because they're detailed out in the  
22 guidelines for group submissions that's been circulated.

23           But one of the important considerations coming  
24 out of the case law is proportionality. And this came  
25 out of a case in Florida known as Johnson versus

1 DeGrande. And when looking at the total number of  
2 districts in the relevant area, how does it compare with  
3 the protected group's overall proportion of the state's  
4 population. Now let me say that again. When you look at  
5 the end of the day at the total number of majority  
6 minority districts, how does it compare with the  
7 protected group's relative proportion in the overall  
8 eligible voter population in the state in the case of a  
9 statewide challenge. And so that's an issue.

10           And what the totality of the circumstances factor  
11 means is that you won't be done deciding whether you've  
12 got Section 2 issues until you see the complete set of  
13 maps. So you'll have to grapple with issues along the  
14 way and then at the end you've got to look again and see  
15 how are we doing.

16           Now how does this apply to what the Commission is  
17 doing? First of all, the main thing that triggers this  
18 discussion, as you all know, is California Constitution  
19 Article 21, Section 2(d)(2), it says districts shall  
20 comply with the federal Voting Rights Act. Our  
21 interpretation of what that means, avoiding a federal  
22 Voting Rights Act violation is a higher priority than the  
23 other criteria below it. The only thing above it is U.S.  
24 Constitution, 14<sup>th</sup> Amendment, equal population  
25 requirements. How does it apply here? You have to

1 evaluate the evidence to determine where potential  
2 violations exist and if you determine that a potential  
3 violation exists, then you've got to take steps to avoid  
4 it.

5 I'm going to discuss an approach on how the  
6 Commission will go about doing this, but first I'd like  
7 to say a few words about what California Constitution  
8 Article 21, Section 2(d)(2) does not say. And I say this  
9 to be provocative, but I want to make a point. Okay. It  
10 does not say that the Commission can promote the  
11 underlying goals and spirit of the federal Voting Rights  
12 Act. And it does not say that the Commission can protect  
13 minority voting rights as an independent objective of the  
14 redistricting effort. And it doesn't say that the  
15 Commission can create districts that are not required by  
16 Section 2 of the Voting Rights Act based on this  
17 particular provision. It may get there another way, but  
18 not on this provision.

19 In other words, if there's not a violation of  
20 Section 2 or Section 5 that might occur, then the  
21 Commission's map could be attacked for failing to comply  
22 with the other criteria below this section in the  
23 hierarchy, unless whatever steps taken are consistent  
24 with the other provisions. And what that means is that  
25 influenced districts, for example, where there's less



1 than a 50 percent majority of a protected group, cannot  
2 be justified under this section of the California  
3 Constitution. Maybe under the communities of interest  
4 criteria, but because the courts have said that the  
5 failure to create an influenced district is not a  
6 violation of Section 2, you couldn't justify doing it  
7 based on this provision. And similarly, crossover  
8 districts where you achieve -- hope to achieve a 50  
9 percent majority with the help of majority voters  
10 supporting the protected groups of preferred candidates,  
11 crossover districts can't be justified under this section  
12 because the Supreme Court held I believe most recently in  
13 Bartlett versus Strickland, that the failure to adopt a  
14 crossover district is not a violation of Section 2  
15 because it doesn't meet the first Jingles criteria.

16 **CHAIRPERSON: BARABBA:** (Inaudible) some of them  
17 are (inaudible).

18 **MR. BROWN:** Sure. Let me make one more point and  
19 then we'll take a break; okay.

20 So just the bottom line here is if the Commission  
21 has an objective of allowing influenced districts or  
22 crossover districts to be created, they likely have to be  
23 justified by reliance on other criteria in the California  
24 Constitution such as communities of interest  
25 neighborhoods.

1           And so if this is a good time to take a break  
2 that would be great.

3           **CHAIRPERSON BARABBA:** Five minutes.

4           **COMMISSIONER BLANCO:** And then can you  
5 (inaudible) up, because this is really the heart of it, I  
6 really do have a question.

7           **MALE:** (Inaudible).

8           **CHAIRPERSON BARABBA:** Five minutes; that means we  
9 get started in five minutes whether you're here or not.

10                           **(Off the record)**

11           **CHAIRPERSON BARABBA:** All right. Okay. All  
12 right. Now Maria said that she had a question that just  
13 can't wait and it would be very important. And under  
14 those conditions, I granted her permission.

15           **COMMISSIONER BLANCO:** So Mr. Brown, this is for  
16 me sort of the heart of the matter what you're getting  
17 into right now. Let's see if I can phrase my question.

18           So your interpretation of Section 2(d)(2) that  
19 says we must comply with the Voting Rights Act means that  
20 what we have to prioritize is not violating the federal  
21 Voting Rights Act but it doesn't -- you're saying it's  
22 not a mandate like the federal Voting Rights Act is to  
23 not only avoid vote dilution but to maximize majority  
24 minority districts if the Jingles test is met.

25           **MR. BROWN:** That's our initial read of this and

1 certainly willing to listen to alternative ways  
2 (overlapping) --

3 **COMMISSIONER BLANCO:** I'm just trying to even see  
4 if I understood what you were saying.

5 **MR. BROWN:** Yes.

6 **COMMISSIONER BLANCO:** Right?

7 **MR. BROWN:** In light of -- yes. Exactly right.

8 **COMMISSIONER BLANCO:** So if to the extent that  
9 there's U.S. Supreme Court law that you described on as  
10 long as race is not the predominant factor, that race can  
11 be a consideration and that compliance with the Voting  
12 Rights Act is a compelling factor; right? Wouldn't that,  
13 the supremacy clause like trump Section 2(d)(2)? In  
14 other words, aren't we still -- what is our ultimate  
15 authority here, the Voting Rights Act or Section 2(d)(2)?

16 **MR. BROWN:** Well, okay. So the constraints on  
17 the Commission come from several different angles but I  
18 think it's a combination of the language of the  
19 California Constitution says shall comply with the  
20 federal Voting Rights Act, combined with series of  
21 Supreme Court cases, closes cases, 5-4 cases, that  
22 identify a number of things that are not a violation of  
23 the federal Voting Rights Act and then consequently  
24 ruling that the attempt to draw districts based on that  
25 fail. And so that's how we're reading the provision that

1 if it --

2 **MR. KOLKEY:** What George is saying is that you  
3 must comply with the Voting Rights Act but that does not  
4 mean that you do simply what is not prohibited by the  
5 Voting Rights Act. Complying means you do what's  
6 required by the Voting Rights Act, that's what the  
7 supremacy clause and the California Constitution requires  
8 is complying with it.

9 **COMMISSIONER BLANCO:** So in Bartlett -- I can't  
10 remember if it's Bartlett or Shaw, it was --

11 **MR. BROWN:** Bartlett.

12 **COMMISSIONER BLANCO:** -- Bartlett said you  
13 don't -- the argument that you had to do this, that that  
14 justifies this, that doesn't justify it, but we're not  
15 saying that you can't do it.

16 **MR. BROWN:** That's right.

17 **COMMISSIONER BLANCO:** Right?

18 **MR. BROWN:** So Bartlett and other cases suggest  
19 that a legislature could choose as part of a policy or an  
20 approach to use influence districts or crossover  
21 districts. I think without going back and looking at the  
22 case that's my sense of what several of those cases say.

23 **MR. KOLKEY:** But Bartlett also says that if  
24 creating a influence district or a crossover district  
25 would violate a state criteria, you've got to follow the

1 state criteria.

2 **MR. BROWN:** So that's the issue.

3 **MR. KOLKEY:** Right.

4 **MR. BROWN:** That's the issue. So in Bartlett,  
5 because they had a provision, the state had a requirement  
6 that counties be kept whole and to create the crossover  
7 district a county was fragmented, so as a result of not  
8 being able to justify that step by the Voting Rights Act,  
9 all that was left was that they had violated the whole  
10 county provision.

11 And so what I'm saying is that if you don't have  
12 a violation of the Voting Rights Act and you have other  
13 goals, those goals have to be consistent with and can't  
14 violate the other criteria in the proposition. So I  
15 didn't say that the Commission can't adopt something that  
16 looks like an influence district. What I'm saying is you  
17 can't justify that based on this particular provision in  
18 the California Constitution. But if there's an argument  
19 to the contrary, we're open, we have an open mind and as  
20 I tried to say at the outset, these are our preliminary  
21 views, you know, they could be informed by additional  
22 arguments and things that people have to say that would  
23 cause us to change. Okay.

24 Moving on. And I know that many of you are  
25 interested in going through the discussion of points for

1 potential guidelines for map drawers and we think that  
2 we're going to get to it soon, soon after I get through  
3 the Voting Rights Act section and Dan's going to explain  
4 a bit about the other criteria.

5 **MR. KOLKEY:** Quickly.

6 **MR. BROWN:** Quickly. But I think having  
7 discussed it, it'll --

8 **MR. KOLKEY:** Yes.

9 **MR. BROWN:** -- explain what we've set out here.  
10 That's kind of the idea here. So the next part of this  
11 we're still talking about Section 2 of the Voting Rights  
12 Act, here's an approach to how the Commission should  
13 evaluate potential Section 2 violations. It's meant to  
14 just be a practical so how are we going to do this  
15 discussion.

16 Step one, identify significant concentrations  
17 of -- and it's sort of a decision-free approach.  
18 Identify significant concentrations of minority  
19 populations for review, and we can talk about what that  
20 would be for starters.

21 Two, evaluate alternatives to protecting the  
22 minority voting rights under community of interest,  
23 neighborhoods and the other Section 2(d)(4) criteria  
24 using input from public hearings and written submissions.

25 Three, if you're satisfied after that analysis

1 that based on the outcome there would not be a Section 2  
2 violation or other concerns about diluting minority  
3 voting rights, then stop, because what you've done is  
4 you've complied with the constitutional provisions and  
5 you've resolved, you know, at least partially an issue.  
6 If not satisfied, evaluate the Jingles three  
7 preconditions, starting with the first one geographic  
8 compactness and the 50 percent requirement. If a  
9 geographically compact majority minority district can be  
10 formed, then I think you need to evaluate whether there's  
11 evidence of the other two factors. That's a racially  
12 polarized voting analysis. Some of that information  
13 might come in from outside groups and individuals, people  
14 who have collected it over time. Additionally, you can  
15 have an analyst if the Commission chooses to hire one do  
16 targeted inquiries I think in discreet areas to try to  
17 look for the existence of that evidence. And again, I  
18 don't think you'd be looking for the level of evidence  
19 that you would develop if you were litigating a case that  
20 was going to go to trial, but you're trying to gather  
21 some evidence on which you can base a decision.

22 Six, after considering the totality of the  
23 circumstances, draw majority minority district using a  
24 combination of racial demographics and following the  
25 other criteria in the California Constitution in trying

1 to make sure that race doesn't predominate. Someone may  
2 argue some day that it did, but the best you can do is to  
3 try to follow the various other criteria, city, county,  
4 boundaries, communities of interest and the racial  
5 demographics when you're trying to form a majority  
6 minority district.

7 Now if you can't meet the Jingles factors, then  
8 as I said before, you can only rely on other California  
9 Constitutional criteria. There was a question at the  
10 break about -- and I have it in my notes for  
11 later -- about the possibility of coalition districts. I  
12 think the Supreme Court has left open the possibility of  
13 a coalition group setting forth a Section 2 claim. My  
14 sense is that you'd have to develop similar evidence  
15 concerning first the existence of the group in a  
16 concentrated area that would meet the first Jingles  
17 precondition and you'd need slightly nuance, racially  
18 polarized voting analysis that would allow you to draw an  
19 inference that the two minority groups tended to vote  
20 alike while the majority consistently voted differently.  
21 And so I think you have to wait and see what the facts  
22 and circumstances are before you develop a more refined  
23 view on that, but that's our preliminary view.

24 Now, a little bit on how to get this done. So I  
25 just went through sort of a conceptual framework of what



1 needs to be done. Here's the how to get it done. Sorry.

2 **CHAIRPERSON BARABBA:** Could you be better than I  
3 am and put the microphone closer to you. Thank you.

4 **MR. BROWN:** Right. So how to get this done, you  
5 need to, I would suggest, have Voting Rights Act counsel  
6 and the line drawing consultant work together to identify  
7 areas of focus as soon as possible and we'd come up with  
8 some criteria. Then I think that it would be a good idea  
9 to have the line drawing consultant provide some  
10 preliminary alternatives based on information from public  
11 hearings and written submissions from individuals and  
12 groups. And then these preliminary ideas could be  
13 concerning districts and alternatives could be shown to  
14 the Commission to help consider whether to investigate  
15 further the rationally polarized voting analysis.

16 Then you'd gather the data on RPV and report back  
17 to the Commission and at that point the Commission then  
18 can consider the evidence and decide whether to create a  
19 majority minority district.

20 I realize there's a bit of a logistical challenge  
21 there and one of the things that I've been interested in  
22 since first our firm getting selected is that we really  
23 need to get written submissions from interested parties,  
24 persons, groups, what have you, who have something to say  
25 about these issues because the Commission needs to start

1 to grapple with the evidence. I think we can get started  
2 identifying the areas of focus and where the issues might  
3 be, but we really need the additional input.

4 That's all I have to say about Section 2 for now.  
5 I know there are some questions I have later in my notes.

6 So a brief note on Section 5 and this -- we've  
7 got materials and data; time permitting, we'll go through  
8 some of it. Section 5 also seeks to protect against  
9 dilution of minority voting strength or discrimination in  
10 voting practices, but it takes a protective approach.  
11 And I know you guys know this. It prohibits any changes  
12 unless they're first pre-cleared by the Justice  
13 Department or federal court in Washington, D.C., and the  
14 standard is also different. The standard is  
15 non-retrogression. There's a lot written about it but it  
16 comes down to essentially not going backwards.

17 You need to evaluate on several levels the status  
18 and strength of minority voting in the covered areas.  
19 And you know those are Yuba, Kings, Merced and Monterey.  
20 And you need to make sure that new districts that are  
21 drawn do not make the minority voters worse off. You  
22 need to compare the most recent districts drawn in 2001  
23 and you need to look at all potentially relevant  
24 statistics. That is, what was the minority voting  
25 percentages in the districts in 2000; what is it as of

1 the 2010 census; what does CVAP show; what does voting  
2 age population show.

3 Part of the reason you need to do that is because  
4 the Supreme Court does have a totality of the  
5 circumstances test with respect to Section 5. Although,  
6 in 2006, when Congress amended Section 5, they tried to  
7 pair back the Supreme Court's position on that a bit.  
8 Section 5 now requires that existing ability to elect,  
9 meaning existing majority minority positions need to be  
10 protected. In the sense that you couldn't do what the  
11 Supreme Court suggested in Georgia v. Ashcroft and say  
12 you know, I think this particular minority group would be  
13 better off with two influence districts instead of one  
14 majority minority district. Congress seemed to want to  
15 reverse that particular view.

16 So that means if a majority minority district  
17 touches a Section 5 county in California, it likely needs  
18 to continue to be a majority minority district. Not  
19 necessarily in the exact same lines, but likely needs to  
20 continue to be a majority minority district.

21 We've got numerous tables and charts in your  
22 materials and I plan to go through that a little bit  
23 later, time permitting. But now I'm going to turn it  
24 back to Dan to talk about the other constitutional  
25 criteria and get into the guidelines, potential

1 guidelines for map drawing.

2           **MR. KOLKEY:** All right. So I'm going to just  
3 take a brief time just to talk about the other  
4 constitutional criteria and to just raise some things  
5 about the other criteria that may not have come to your  
6 attention. So after you got the population equality and  
7 compliance with the Voting Rights Act, you've got  
8 contiguity.

9           And there's two points to make about this. One  
10 is, interestingly enough, unlike all the other subsequent  
11 criteria which say follow this criteria except to the  
12 extent it conflicts with the higher prioritized criteria,  
13 this one doesn't say that at all, it just says the  
14 districts are to be contiguous. And I think one reason  
15 is that it's hard to find any conflict between contiguity  
16 and population equality or the Voting Rights Act. But  
17 what I find more interesting as I kind of dug into this,  
18 is I used to think that contiguity was simply that you  
19 could travel from one end to the district to another  
20 without crossing a district line. But interestingly  
21 enough, the language on contiguity comes from our prior  
22 version of our Constitution and the language hasn't  
23 changed at all, suggesting that the interpretation from  
24 the earlier version of the Constitution on contiguity  
25 applies here. And Proposition 6, which established the

1 earlier version of the Constitution said the following in  
2 the legislative analyst's analysis of what contiguity was  
3 in terms of redistricting. And the legislative analyst  
4 said in the ballot argument, "Contiguous districts.  
5 Proposition 6 would require the districts be composed of  
6 adjacent territory and not widely separated areas. It  
7 would also help deter odd shaped districts which join  
8 distant communities only by corridors along beaches,  
9 highways and waterways." So at least if one looked at  
10 the valid materials construing contiguity it is saying  
11 that the district is composed of adjacent territory and  
12 that you are not going to swing through some narrow  
13 corridor and bring in widely separated areas, as the  
14 legislative analyst put it.

15           So there is a compactness component to the  
16 contiguity criteria. So I just want to note that in  
17 terms of what contiguity is.

18           Let me now turn to the geographic integrity  
19 criteria. And as you know, the California Constitution  
20 now says that the geographic integrity of any city and  
21 county, local neighborhood or local community of interest  
22 shall be respected in a manner that minimizes their  
23 division to the extent possible without violating the  
24 requirements of any of the preceding subdivisions.

25           Just a couple of points to make on this. Number

1 one, unlike the prior constitution that talked about  
2 respecting geographic integrity to the extent possible,  
3 this talks about minimizing their division to the extent  
4 possible. So it adds really a more objective almost  
5 mathematical provision that says that you are to minimize  
6 the division of cities, counties and communities of  
7 interest to the extent possible, which means that someone  
8 could challenge a map that has not minimized the division  
9 of cities, counties and communities of interest to the  
10 extent possible. And obviously the reason for doing that  
11 was to try and avoid gerrymandering and to try and  
12 provide for, you know, either easily observable  
13 boundaries like those of cities and counties, or specific  
14 communities of interest.

15           The other thing to notice about this is that  
16 Proposition 11 talked about communities of interest and  
17 Proposition 20 added local to communities of interest.  
18 Actually it's -- and I may have left this out when I was  
19 reading this -- its local neighborhoods or local  
20 communities of interest; so both are local. And the fact  
21 is, I was the one who added local to neighborhood and  
22 community of interest, with the purpose again of avoiding  
23 gerrymandering where someone would argue that one could  
24 form a community of interest by doing something that  
25 would be non-contiguous by just drawing in distant areas

1 and saying well, I've got a community of interest here  
2 and so I'm not supposed to divide it.

3 Now, you know, having said that, that these are  
4 local communities of interest that are not to be divided,  
5 that does not mean that you cannot have a district with  
6 multiple communities of interest. I mean there's nothing  
7 that says you can't have a district that has say a Latino  
8 community of interest her and another Latino community of  
9 interest over there. All this says is that a community  
10 of interest itself is a local one and whether you look in  
11 the dictionary definition of what local is, which is of  
12 or relating to a specific place, or you look at it in the  
13 context that local certainly means that you don't bypass  
14 nearby areas to grab more distant areas, local means of a  
15 particular locale. So that is what you are not dividing,  
16 cities, counties and local communities of interest.

17 And I might add just a word about -- just a word  
18 of defense of cities and counties. When Proposition 6,  
19 which preceded Prop 11 and 20 and set up the earlier  
20 version of the California Constitution, which talked  
21 about respect for the geographic integrity of cities and  
22 counties in geographic regions but didn't talk about  
23 communities of interest, Proposition 6 ballot arguments  
24 spoke about why this provision was talking about  
25 respecting the integrity of cities and counties and it

1 gave three reasons. Reason one was that respecting the  
2 geographic integrity of cities and counties would prevent  
3 the irrational division of cities for purely partisan  
4 purposes. Two, it said it would help protect minority  
5 communities from being carved up just to dilute their  
6 votes. And three, maintaining cities and counties would,  
7 "Help maintain local control by giving cities and  
8 counties effective representation in the legislature."  
9 So there were some policy reasons behind the concept of  
10 respecting cities and counties. And now with  
11 Propositions 11 and 20 minimizing the division of cities,  
12 counties and local communities of interest and local  
13 neighborhoods and then I just come back and, again it's  
14 just for your consideration, you know, one benefit of the  
15 census tracks is that they are kind of like local  
16 neighborhoods in the sense that they are divided by  
17 either thoroughfares or natural boundaries and they are  
18 homogenous populations of similar economic interest. So  
19 again, you're kind of, to the extent you can maintain  
20 census tracks, you may be maintaining local neighborhoods  
21 as well.

22 All right. I think that is all I've got on  
23 communities of interest, cities and counties,  
24 compactness --

25 **COMMISSIONER ANCHETA:** (Inaudible) this is a



1 question.

2 **MR. KOLKEY:** Yes.

3 **COMMISSIONER ANCHETA:** So obviously city, county,  
4 city and county of San Francisco, we know where they are;  
5 right, I'm pretty sure you can figure out where those  
6 are. Neighborhoods and local community of interest, now  
7 obviously what we're getting a lot of (inaudible) keep my  
8 neighborhood, keep my community intact, but for  
9 litigation purposes, I'm thinking about whether there  
10 might be a challenge to the failure or the division of  
11 community of interest or the division of a neighborhood,  
12 when does it trigger? In other words, a lot of, you  
13 know, a bunch of people come with public input, a lot of  
14 people send us written comments, community of interest;  
15 are we then on the hook to say, okay, somebody has  
16 identified a community of interest, therefore we have to  
17 pay attention to it and not divide it, or do we have to  
18 make a determination that here's a community of interest  
19 that's been identified and we shall try as much as  
20 possible given the ranked order not to do it? Because  
21 the concern I have is that we may not know at the end of  
22 the day all these neighborhoods, all these communities of  
23 interest and then somebody later on comes, hey, you  
24 forgot about this neighborhood; right. So and sort of  
25 trying to figure out what is our affirmative obligation

1 to actually identify things and say either, okay, we're  
2 going to go with it, we might have to divide it, but I'm  
3 concerned about sort of the initial first threshold which  
4 is there it is, or we -- or sometimes we'll say no,  
5 that's not really a community of interest, in which case  
6 we've made a determination that it actually isn't one, we  
7 don't have to worry about division. Because again, we're  
8 going to get a lot of different input; one person may say  
9 it and then all of a sudden they're okay, there it is,  
10 we're open to possible litigation if we don't think  
11 about it or look at it. So I'm wondering where the  
12 threshold might fall. Because it's -- and it's a tough  
13 one because these are even though a community of interest  
14 has more flush to it, these are inherently fuzzier than  
15 cities and counties.

16 **MR. KOLKEY:** Well first of all, it's a fabulous  
17 question and it gets to, you know, one of the key facets  
18 of the decisions that you've got to make. So let me at  
19 this stage, and I'm answering this in a vacuum as opposed  
20 to having, you know, specific facts before me, but in a  
21 vacuum let me just say the following and make a couple  
22 points.

23 One is I don't think any court is going to fault  
24 you for failing to form a community of interest where you  
25 got no testimony about it. I mean you are holding the

1 most extensive hearings on redistricting in the history  
2 of the state, well beyond what was done in the '70s and  
3 the '90s. If someone does not identify a community of  
4 interest or say a neighborhood, you are not going to be  
5 faulted for failing to determine one. Now that doesn't  
6 mean you can't if on your own you say, you know, just  
7 given what I've seen and so on and this is truly a  
8 community of interest, but you won't be faulted for not  
9 forming one without having the public testimony. And no  
10 one will be able to, I think, credibly raise a challenge  
11 based on that.

12           Number two, in assessing communities of interest,  
13 and this is something I didn't mention which I guess is  
14 one of my faults is I like to speak without looking at my  
15 notes and then there's something in my notes that if I  
16 had just been reading from them I would have remembered  
17 to say. But one of the things that I meant to say is  
18 that with respect to communities of interest there is a  
19 definition which, by the way again, I wrote this section  
20 the definition and I took it from what the special  
21 masters had used in the '90s, which they then had taken  
22 from what the special masters have used in the '70s. And  
23 the definition speaks in terms of sharing common social  
24 and economic interests.

25           So that means not that you may have the same

1 objective, I don't think it's an objective that's  
2 relevant. For instance, you know, let's get everybody  
3 who wants to reduce taxes in the same district; we're  
4 talking about shared social and economic interests. So it  
5 might be, you know, those in a rural area who are having  
6 water problems because of a cutback in water, they would  
7 have a shared interest, you know, similar living  
8 standards, shared transportation, things here that are  
9 mentioned in the definition would all be facets of shared  
10 social and economic interest. So that in looking at the  
11 testimony you get you should examine, all right, are we  
12 talking about shared social and economic interests of the  
13 nature set forth here in the definition which is are  
14 those common to an agricultural area or an urban area,  
15 those with people who share similar living standards, use  
16 the same transportation facilities. Certainly it might  
17 be, you know, people within the same school district who  
18 share the same economic circumstances; that could be a  
19 community of interest. But you will have to asses that  
20 and just as the Supreme Court said in not using race as a  
21 predominant factor, you know, race may be a factor in  
22 addressing whether there's a community of interest but it  
23 can't be the predominant factor in determining whether  
24 this is a community of interest. You've got to look at  
25 the shared social and economic interests of that

1 community.

2           So for instance, the special masters in the '90s  
3 were asked to join the Latino community in Imperial  
4 County to a Latino section of San Diego. And they said  
5 well, the Latino community in Imperial is agricultural  
6 and the Latino community in San Diego is urban and they  
7 are separated such that they are not a geographically  
8 compact area. So because this would also affect other  
9 criteria, we're not going to recognize that as a  
10 community of interest. So I mean you've got to look at  
11 this on a factual basis to determine is it a local  
12 community of interest, do they share economic and social  
13 interests. And then it's not that they simply share  
14 them, but that they should be part of a single district  
15 because they share them. Because that's the definition  
16 used that it's a contiguous, meaning that they, you know,  
17 all kind of adjoin each other, a contiguous population,  
18 kind of going back to our definition of contiguity  
19 earlier, a contiguous population which shares common  
20 social and economic interests that should be included  
21 within a single district for purposes of its effective  
22 and fair representation. So there's really a number of  
23 components there and, again, it has to be local.

24           **COMMISSIONER ANCHETA:** So for just even actually  
25 just to really play it safe we might not even want to say

1 the Latino community of interest, we might want to say  
2 the Latino working class immigrant commuters in Long  
3 Beach that rides the bus system within that particular  
4 neighborhood. To be really safe, and not being facetious  
5 either; that we want to actually use the vocabulary that  
6 expands how we label various communities of interest. To  
7 play it safe.

8 **MR. KOLKEY:** Well (overlapping) you'd want to  
9 look beyond, you know, just, you know, Spanish-speaking  
10 or --

11 **MALE:** (Overlapping) --

12 **MR. KOLKEY:** -- (overlapping) race, you'd want

13 **MALE:** (Overlapping).

14 **COMMISSIONER ANCHETA:** -- I think for really just  
15 when we talk about communities eventually we should, in  
16 fact, not just say a particular ethnic group let's say,  
17 but we should actually talk about (overlapping) --

18 **MALE:** (Overlapping) --

19 **COMMISSIONER ANCHETA:** -- a geographic area or,  
20 again, various interests that are shared, we should  
21 actually -- I think it would be smart to label them as  
22 all those things rather than sort of short-handing saying  
23 that Latino district (inaudible) down in (overlapping) --

24 **MR. BROWN:** I don't think you should use race or  
25 language minority as --

1           **COMMISSIONER ANCHETA:** -- the label.

2           **MR. BROWN:** -- as descriptor of a communities of  
3 interest or the sole factor.

4           **MR. KOLKEY:** And you should be digging into the  
5 shared economic and social interests. And again, it's  
6 contiguous, it's local.

7           **COMMISSIONER BLANCO:** I just -- sorry.

8           **COMMISSIONER FILKINS-WEBBER:** Thank you. I have  
9 two questions. I just want to make sure I have an  
10 understanding because you've used a couple of phrases  
11 that confused me a little bit. In other words, when you  
12 were talking about communities of interest and that not  
13 court will fault you if there's no testimony regarding  
14 this thing, or that you're not forming one, and this is a  
15 little subtlety that I'm starting to think about. In  
16 other words, we're not drawing districts based on  
17 communities of interest; in other words, we're drawing  
18 based on the prioritization of the law regarding equal  
19 population and voting rights and when we come down  
20 to -- and correct me if I'm wrong, but this is what I'm  
21 trying to get at and my subtlety in this -- is that when  
22 we make a decision regarding drawing the lines, then we  
23 consider the communities of interest. In other words,  
24 because of the phraseology of the law is that we are to  
25 minimize their division. So you had mentioned and used

1 the phrase of, you know, you won't be in violation if  
2 you're not forming one, in other words not forming a  
3 district based on a community of interest, but actually  
4 the inverse is true. In other words, we're creating  
5 districts based on equal population and VRA and then  
6 minimizing division when we have to draw lines; is that a  
7 correct understanding of how we're using the community of  
8 interest testimony?

9 **MR. KOLKEY:** Right.

10 **COMMISSIONER FILKINS-WEBBER:** Okay.

11 **MR. KOLKEY:** That's right. You are minimizing  
12 their division. So I think that probably rather than  
13 using -- I use the word forming, but perhaps recognizing  
14 is a better term than forming, is that in drawing your  
15 lines as you go through your priorities and I'm going to  
16 get into an approach in a moment on this, but as you draw  
17 the lines, where you have recognized a local community of  
18 interest you are to minimize it's division. Now it may  
19 be that you've got a community of interest that goes over  
20 a city boundary and there then you'd say well, if we file  
21 the city boundary we're going to divide this community of  
22 interest and because they have equal weight, dividing the  
23 community of interest dividing the city has equal weight,  
24 then you as a Commission have got to decide, all right,  
25 what is the better approach here. But again, you'll want



1 to minimize division. So you're dividing a city to  
2 benefit not dividing a community of interest. Where it  
3 will really get tricky is if somehow you start having to  
4 divide a city four times to not divide one community of  
5 interest; then are you minimizing divisions if you do  
6 that? So I mean that, let's hope that doesn't arise,  
7 but.

8 **COMMISSIONER FILKINS-WEBBER:** I have one other  
9 preliminary question just on the community of interest  
10 and I don't know if there's any guide and so I'm asking  
11 the question essentially as to what your advice would be  
12 in this regard.

13 When we hear this testimony do we have leeway in  
14 considering potentially the voracity of the individuals  
15 who come before us? And I think that we've seen this and  
16 I was questioned today, you know, by some media outlets  
17 regarding some of the circumstances that had occurred  
18 last night and some rallies that had occurred with the  
19 legislature. So do we have some leeway there in  
20 potentially disregarding some testimony if the Commission  
21 determines that those who came before us did not  
22 necessarily have supporting documentation or that their  
23 veracity may very well be in question, or do we have to  
24 accept everything that somebody comes before us to state?

25 **MR. BROWN:** I think the Commission -- I'm glad

1 you asked that because I've been thinking about that. I  
2 think it's important that you do evaluate the evidence  
3 that you have in front of you because if you think  
4 forward in time when you have to now defend, what, you  
5 know, why did the Commission do X; and then someone  
6 points out that well, you know you only had one person  
7 show up to make that argument and it turns out they don't  
8 even live in that area. You know so I think there's, you  
9 know, it's not clear what you have to do but it seems  
10 like it would be prudent to evaluate the evidence that  
11 you have in support of particular decisions. And you  
12 know, my leanings would be to systematically document  
13 what you're doing along the way so that we have a record  
14 of what was done and why it was done.

15 **MR. KOLKEY:** And courts do understand the whole  
16 concept of weighing evidence. So the extent that a map  
17 would be challenged in court, the one thing the judges  
18 understand is that evidence is to be weighed. You do  
19 weigh evidence and you decide what weight to give that  
20 evidence.

21 **MR. BROWN:** Should we move into discussing the  
22 proposed guidelines or do you want to answer questions  
23 first?

24 **CHAIRPERSON BARABBA:** I guess (inaudible)  
25 questions.

1           **FEMALE:** I know.

2           **MALE:** I'll wait.

3           **COMMISSIONER GALAMBOS-MALLOY:** Mine just should  
4 be a quick one. This emphasis on the word local, which  
5 we haven't heard quite as much and I understand local  
6 being that it has to be something that's, you know,  
7 within close by in that tense, but is there a restriction  
8 on size and being -- without violating population? We've  
9 heard some testimony from communities of interest in  
10 terms of their -- it wouldn't be -- well, in terms of  
11 local it could be a whole mountain range, it could be a  
12 whole coastal range, I mean in terms of size when you  
13 throw in the term local.

14           **MR. KOLKEY:** Well, you know, it's easy on the  
15 extreme examples to say that taking the entire coastal,  
16 you know, the entire coast of California is not a local  
17 community of interest.

18           **COMMISSIONER GALAMBOS-MALLOY:** Okay. Well, let's  
19 say we've had some testimony that said this whole  
20 mountain, you know, the whole let's say the  
21 north -- pacific northwest of California, that whole  
22 coastal area from San Francisco north, you know,  
23 based -- whatever the population as long as you're not  
24 doing that or maybe another community of interest would  
25 be the whole mountainous range and based on sheer

1 population it'd have to be a very large community of  
2 interest in terms of size. So does that size of a  
3 community of interest have any bearing on the word local?

4 **MR. KOLKEY:** I would say that size does have a  
5 bearing. I don't know without, you know, really looking  
6 at the evidence I can say well, you know, how do you draw  
7 the line between what's too big. But certainly, you  
8 know, size does bear on whether or not it's a local  
9 community of interest. And another reason for local  
10 being in there is that if you had to minimize the  
11 divisions of communities of interest that were not local,  
12 you have an impossible task. How could you minimize  
13 divisions of huge expansive communities of interest and  
14 minimize their divisions. So (overlapping) --

15 **COMMISSIONER GALAMBOS-MALLOY:** But I can  
16 understand the contiguous nature (overlapping) --

17 **MR. KOLKEY:** -- (overlapping).

18 **COMMISSIONER GALAMBOS-MALLOY:** -- as long as  
19 they're contiguous; right?

20 **MR. KOLKEY:** Pardon me?

21 **COMMISSIONER GALAMBOS-MALLOY:** I mean as long as  
22 they're contiguous. So I mean if a whole mountain range  
23 says this is our common interest we share, economics, a  
24 way of life, you know, transportation modes, but yet that  
25 is going to cut off let's say five different counties, so

1 is there a local, I say priority of counties versus a  
2 local community of interest that is then considered so  
3 local because of the sheer size of it. I think this is  
4 an issue we'll face in some more under-populated areas,  
5 particularly in the north. So I'm just curious if this  
6 emphasis on local, maybe you could tell us more about it  
7 later in the sake of time, but maybe we could put that on  
8 the radar --

9 **MR. BROWN:** I would just like to say quickly,  
10 this is an example of an issue that there's not going to  
11 be a ready answer.

12 **COMMISSIONER GALAMBOS-MALLOY:** Okay. That's  
13 fine.

14 **MR. BROWN:** And my suggestion would be that to  
15 have some discussion among the Commission about what the  
16 Commission wants to do with local; I mean we could give  
17 you some further input but then to try to have some sort  
18 of objectivity about what you're going to do and try to  
19 apply it consistently throughout the state.

20 **CHAIRPERSON BARABBA:** Mr. Ontai.

21 **MR. KOLKEY:** And let me just make one other point  
22 on this, is that is community of interest is defined as a  
23 contiguous population which shares common social and  
24 economic interests. But local then is an added  
25 qualification to it, so the community of interest has to

1 be contiguous. But then in addition, it's got to be  
2 local. So local is like an added qualifier.

3 **COMMISSIONER ONTAI:** Then you use the term  
4 neighborhood often and maybe it's just semantics here,  
5 but it hasn't -- that has no relationship to actual  
6 numbers. You're not speaking about numbers. For  
7 example, you know, I'm a planning commission, when we  
8 talk about neighborhoods, we're generally talking about  
9 small, you know, four or five blocks in a city, but  
10 that's not really what you're referring to.

11 **MR. KOLKEY:** Well, actually I think that was the  
12 sense is that those small blocks, those you know,  
13 neighborhoods that are somewhat closely knit that that's  
14 what we're talking about not dividing, so --

15 **COMMISSIONER ONTAI:** Oh, so you do have that in  
16 mind.

17 **MR. KOLKEY:** Yeah. Right. Don't divide those  
18 neighborhoods. Don't have a neighborhood -- minimize  
19 dividing neighborhoods where people are sending their,  
20 you know, kids to the same school and so on. Minimize  
21 those divisions. And that's again why local was put in  
22 there so we're not talking about huge neighborhoods.  
23 Local neighborhoods where, you know, people interact with  
24 each other and they're picking up, they're going to the  
25 same YMCA and dropping their kids off.

1           **CHAIRPERSON BARABBA:** I'm going to have to  
2 intervene here because we don't get to the guidelines;  
3 we're going to miss a really big deal. So yeah, one more  
4 question and that's it.

5           **COMMISSIONER BLANCO:** Okay. So I'm concerned  
6 about a definition of community of interest where social  
7 and economics included but somehow race is not part of a  
8 neighborhood. I don't, I just really don't understand.  
9 I know you say you wrote that section, but what can be  
10 more social or characteristic sometimes than a racial  
11 composition of a neighborhood, or you mentioned language  
12 shouldn't be included. I mean that is often, I mean if  
13 you live in L.A. and you're looking at a neighborhood,  
14 you're like yeah, this is this neighborhood here they  
15 have a lot of recent Guatemalans that just moved here and  
16 you can see the signs in Spanish and, you know, they're  
17 all working class folks, you can tell they don't drive  
18 they take the number whatever bus to -- so I, the reason  
19 I wanted to -- I insisted on my question is because I  
20 don't want to leave this discussion of a definition of  
21 community of interest with at least it's not my  
22 understanding at all that we cannot include that race is  
23 somehow not part of a community of interest. And I want  
24 to clarify that.

25           **MR. KOLKEY:** It, no, it is -- or let me say it

1 can be part of community of interest. But there has to  
2 be other components as well. It's not merely  
3 because --

4 **COMMISSIONER BLANCO:** My point is that you  
5 limited the definition to social and economic and I think  
6 race is part of social.

7 **MR. KOLKEY:** It's, well, and it's part of it. It  
8 is part of it. But then you look at, you know, what the  
9 economic circumstances of the population --

10 **COMMISSIONER BLANCO:** No, I understand. But you  
11 explicitly excluded race when you defined social and  
12 economic and I just really don't think we should proceed  
13 like that as a Commission with that definition.

14 **MR. KOLKEY:** Well, it's not excluded from --

15 **COMMISSIONER BLANCO:** Yeah.

16 **MR. KOLKEY:** -- a consideration in determining  
17 whether you've got a community of interest.

18 **COMMISSIONER BLANCO:** Okay. Thank you.

19 **MR. KOLKEY:** It's --

20 **CHAIRPERSON BARABBA:** Let's move on because we've  
21 got to get to the guidelines.

22 **MR. KOLKEY:** All right. So --

23 **MR. BROWN:** Let's go right to the guidelines.

24 **MR. KOLKEY:** Yes. Right.

25 **MR. BROWN:** We can come back to the other stuff.



1 I'm just going to go with (inaudible).

2 **MR. KOLKEY:** Fine. So we've been giving, you  
3 know, a lot of thought as to, you know, how to approach  
4 the redistricting in conformity with the law and I've got  
5 to say as we thought about it, it just seemed absolutely  
6 daunting. How do you start to put this together? Do you  
7 have to wait until you get all the testimony in on every  
8 community of interest before you can do anything? How do  
9 you go about doing this?

10 So, you know, here are just some suggestions as  
11 to approaches. They are instructed by our legal analysis  
12 but this is solely a suggestion and, you know, I want to  
13 just start out with just a very short thought that I  
14 know, you know, may, you know, have differing reactions  
15 from many but it seemed to make some sense to us. And  
16 that is, if you divided just to start off you divide the  
17 state into northern and southern California where there  
18 were a whole number of congressional and senate districts  
19 in northern California and a whole number of senate and  
20 congressional districts in southern California and there  
21 was a good place to divide the two sections between north  
22 and south, the benefit would be is you'd have a more  
23 bite-sized area within which to then draw your districts  
24 because you would know that area would meet the  
25 population equality requirements. In other words, it

1 would be an area that you could create a whole number of  
2 congressional and senate, and therefore assembly  
3 districts.

4 And secondly, if there was an adjustment that had  
5 to be made in that area it wouldn't affect all the other  
6 districts in the other geographic region. Or if a court  
7 said well, we find a problem with this part of the map,  
8 it's adjustment of those districts wouldn't affect the  
9 districts that are --

10 **CHAIRPERSON BARABBA:** Dan, I think we have a feel  
11 for how we want to do it statewide or break it up and  
12 we'd like to get into the other parts of this issue,  
13 which I think are more directly related to the legal  
14 implications if we could.

15 **MR. KOLKEY:** Well, I just wanted to throw out the  
16 concept that --

17 **CHAIRPERSON BARABBA:** But that concept has been  
18 thrown out before and I think that's something we're  
19 going to have to work out ourselves. But I don't  
20 understand what the implications are legally for that and  
21 we don't have a lot of time to talk about things that  
22 might be ancillary here, unless other members of the  
23 Commission would like to hear it.

24 **COMMISSIONER BLANCO:** So, Commissioner, just so I  
25 think I understand what you're saying but I know

1 there's -- I see a lot of faces. You're saying that what  
2 we need to hear from counsel is how the options about how  
3 those criteria will be legally implemented together with  
4 the maps, map drawers; correct?

5 **CHAIRPERSON BARABBA:** The document that's been  
6 sent out has a lot of really important issues for us to  
7 discuss. And I think this is not one of the highest  
8 ones. That was my point.

9 **COMMISSIONER BLANCO:** That's right.

10 **MR. KOLKEY:** All right. So this is document A.

11 **MR. BROWN:** Tab A in your materials.

12 **MR. KOLKEY:** So it's tab A in your materials.  
13 The, you know, I've already discussed this a bit but in  
14 terms of congressional districts population the issue  
15 would be just, you know, as a preliminary matter, you  
16 know, what sort of population deviation would you want Q2  
17 to strive for in drawing the districts (overlapping).

18 **MR. BROWN:** Yeah, let's start with a little  
19 context about what the idea behind this is.

20 It was our understanding that the Commission  
21 wanted to think about process issues and how to kind of  
22 move the ball forward between now and the time you're  
23 going to first publish maps. And so the idea that we  
24 were trying to accomplish here is to come up with things  
25 that -- a couple of ideas. One is that you might take

1 the point of view -- the Commission could consider how  
2 much detailed involvement it has in line drawing along a  
3 continuum from doing nothing, saying to a line drawing  
4 consultant, gee, you know, you've heard all the  
5 testimony, go draw some lines and come back and show us  
6 what you got. To, you know, somewhere at the other  
7 extreme, the idea that this reflects is that the  
8 Commission wants to be involved in the process and make a  
9 record about what instructions were given and what they  
10 did and how they did it. And this is an attempt to start  
11 to get some initial instructions that basically take the  
12 idea of well, start off by complying with the California  
13 Constitution and in particular, here's what it means. So  
14 that's the idea behind this.

15           So with that introduction, maybe Dan you can go  
16 through these.

17           **MR. KOLKEY:** All right. So we start with  
18 population equality with congressional districts. I've  
19 already spoke about it and the issue would be, you know,  
20 whether you simply state we'd like districts, you know,  
21 as nearly as equal as practical meaning, you know, zero  
22 or one person deviation or whether you would like to have  
23 a higher deviation that nonetheless is defensible because  
24 it applies a neutral criteria consistently. So I mean  
25 that would be kind of issue one to discuss and I've

1 already gone into the various gradations of percentages  
2 and deviations that would be justified.

3           Point two would be doing the same for your state  
4 districts, which is reasonably equal populations and  
5 determining whether, one, you want to do the same zero to  
6 one person deviation or recognizing that you've got more  
7 flexibility with the state legislative districts in terms  
8 of any challenge you want to provide for a deviation that  
9 again would allow for a consistently applied neutral  
10 criteria which could be, you know, in the case of Voting  
11 Rights Act compliance or compliance with municipal  
12 boundaries and again picking a percentage deviation that  
13 you feel safe with saying well, you know, given what was  
14 done in the past, let's provide for districts of one  
15 percent for lower population deviation.

16           **COMMISSIONER DAI:** (Overlapping) interrupt  
17 (inaudible). So Dan, sorry to interject here, but just  
18 for the rest of the Commission. So what we'd like to  
19 come out of this with is a set of principles that would  
20 allow Q2 to be able to create some actual maps that  
21 basically take our interpretation of the rank criteria.

22           So for example, based on advice from counsel, the  
23 one around equal population might be for congress we  
24 would like you to draw, you know, districts that whenever  
25 possible are within a deviation of one person but in the

1 event that that's not possible, you know, no more than  
2 .25 percent. Is that (overlapping) --

3 **MR. KOLKEY:** Right. That's right.

4 **COMMISSIONER DAI:** -- representation?

5 **MR. KOLKEY:** That's exactly the (inaudible).

6 **COMMISSIONER GALAMBOS-MALLOY:** So the point here  
7 is that --

8 **MALE:** And we report back if there are any  
9 problems (overlapping).

10 **COMMISSIONER GALAMBOS-MALLOY:** -- now that we've  
11 gotten the counsel, so the point is that we're making  
12 this -- we're having this discussion as a Commission,  
13 counsel is weighing in on some of these issues in terms  
14 of both of VRA issues and maybe some of the legality of  
15 the other things, but it's our role as the Commission to  
16 --

17 **COMMISSIONER DAI:** To decide.

18 **COMMISSIONER GALAMBOS-MALLOY:** -- to direct the  
19 line drawers as to our priorities and what we want to do.

20 **COMMISSIONER DAI:** And how much latitude we want  
21 (overlapping).

22 **COMMISSIONER GALAMBOS-MALLOY:** And that's  
23 (overlapping) for our discussion. Okay.

24 **MR. BROWN:** Let me just say, I could say this for  
25 any of these factors that nothing we put on this page

1 changes the priority because we couldn't. So we could  
2 list equal population as the last item on this list, it  
3 doesn't mean that you change the priority.

4 **MR. KOLKEY:** And you know another thing you can  
5 do is try and go for your, you know, minimum deviation  
6 and then as other criteria are applied, find out all  
7 right, well what is the deviation going to be if we  
8 really want to minimize divisions of all city and county  
9 boundaries for instance.

10 All right. The next item is simply making sure  
11 that you instruct about the contiguity of the districts  
12 and whether or not you want to utilize the legislative  
13 analyst's interpretation of contiguity that I read to you  
14 in terms of the territory adjoining each other and that  
15 you don't have long corridors that take distant areas  
16 into the same district.

17 Now the third thought, and again as George says,  
18 this does not change the priorities in the Constitution,  
19 but we were trying to figure out how do you make sure you  
20 comply with the Voting Rights Act without giving  
21 instructions that say let's not split any minority  
22 populations of over 50 percent eligible voting age  
23 population. One way to do this without running afoul the  
24 14<sup>th</sup> Amendment complying with your other obligations,  
25 would be to say let's look at what the map looks like if

1 we draw districts that minimize the divisions of cities  
2 and counties. If you do that and you draw districts that  
3 minimize the divisions of cities and counties, you're  
4 going to end up with majority minority districts because  
5 you're not dividing up cities and counties. And then you  
6 know you've minimized those divisions and then you  
7 started looking at your Voting Rights Act issues that  
8 remain. In other words, what populations are being  
9 fragmented, where do I need to make adjustments. This  
10 would allow you to say all right, I don't have a problem  
11 here. I can create a district that minimizes city and  
12 county divisions and I've got X number of majority  
13 minority districts following traditional criteria, not  
14 determining to do anything based on race as a predominant  
15 factor. Then I look at all right, where do I  
16 (overlapping) --

17 **FEMALE:** (Overlapping).

18 **MR. KOLKEY:** -- some issues. That's where you get  
19 your material on the Jingles factors and counsel works  
20 with Q2 to develop advice and recommendations as to  
21 whether and where you need to adjust the districts to  
22 bring in various minority populations so that you're in  
23 compliance with the Voting Rights Act. And then the  
24 other part of that would be simultaneously you are making  
25 judgments on your local communities of interest.



1           **COMMISSIONER DAI:** So that actually gets to the  
2 heart of my question. For example in the Long Beach  
3 hearing last night we kept on hearing testimony about a  
4 tale of two cities and there were a lot of people  
5 actually advocating splitting the city. So what if we've  
6 already had substantial public testimony advocating a  
7 split of cities or counties, because we've also had a lot  
8 of testimony advocating a split of counties, what I would  
9 be afraid to do is to draw a map ignoring all that public  
10 testimony now that we have it in the record. So --

11           **MR. BROWN:** Yeah, let's --

12           **COMMISSIONER DAI:** -- I could understand your  
13 advice in the absence of public testimony. I think this  
14 Commission would probably agree as a rule of thumb if we  
15 haven't heard anything yet that would tell us otherwise,  
16 let's keep cities and counties whole. That's easy, we  
17 know where they are; right. So I don't think there would  
18 be any problem with that. My question is now that we've  
19 actually, you know, done what eight hearings, seven or  
20 eight hearings, that we've gotten so much testimony  
21 already in particular cities and in particular counties  
22 advocating the split. What I would hate to do is go  
23 ahead and draw something with cities and counties intact  
24 anyway after we've gotten that testimony already.

25           **MR. BROWN:** I think that's a good point. Let me

1 say a couple of things and I'm sure Dan has something to  
2 say about that. One is this set of guidelines does not  
3 contemplate any maps being produced as first drafts until  
4 everything is done. So in other words, your decisions on  
5 communities of interest and your decisions on Voting  
6 Rights Act issues are done before the first draft maps.  
7 I think that really ought to be the goal.

8 This also says that you'll communicate to the  
9 line drawer that your decisions about communities of  
10 interest as soon as you decide them. And so it doesn't,  
11 you know, it doesn't necessarily say you've got to do  
12 just cities and counties first. And then it's just sort  
13 of when we were thinking about it we were thinking as  
14 just as a practical matter some stuff you know already,  
15 so you could at least theoretically get started at least  
16 in some parts of the state. But if you know that in a  
17 particular area there's going to be a lot of decisions  
18 about communities of interest, well (overlapping) --

19 **COMMISSIONER DAI:** We make those decisions.

20 **MR. BROWN:** -- but as soon as you told Q2, okay,  
21 we've decided, preliminarily decided that we want to try  
22 it this way --

23 **COMMISSIONER DAI:** So for example, because we're  
24 going to be doing regional wrap-ups this weekend on the  
25 four regions that we heard from before this region, we

1 could as part of our initial instruction in looking at  
2 some of our insightful alternatives, then we could  
3 actually take all that into consideration with the public  
4 input that we've heard already and give some initial  
5 direction.

6 **MR. BROWN:** That's the way I would see it.

7 **CHAIRPERSON BARABBA:** And since I think what you  
8 said is you're identifying a process to get started and  
9 that the initial maps are not the maps you're going to go  
10 with but they really give us insight into what other  
11 questions and ideas to bring forward. Is that --

12 **MR. BROWN:** Yes. Absolutely.

13 **CHAIRPERSON BARABBA:** Okay. Thank you..

14 **MR. BROWN:** Because what's going to happen is  
15 when you try to implement the ideas you're going to have  
16 other issues come up.

17 **COMMISSIONER DAI:** Right.

18 **MR. BROWN:** Because things are going to overlap  
19 and (inaudible).

20 **MR. KOLKEY:** Well, let me just further answer the  
21 question because everything George says is exactly right,  
22 this is just preliminary, it's a way of getting started.  
23 But the other two points I'd make is that if you're  
24 getting requests to divide a county and you don't need to  
25 divide the county for any Voting Rights Act reason or

1 population reason or communities of interest  
2 reason --

3 **FEMALE:** Right.

4 **MR. KOLKEY:** -- in other words, there's no reason  
5 of any of the criteria that would, you know, provide for  
6 you to divide the county and yet you're dividing it, you  
7 know, then there may be an issue that needs to be  
8 considered from a legal standpoint.

9 **COMMISSIONER DAI:** But they're communities of  
10 interest primarily.

11 **MR. KOLKEY:** L.A. is such a big county that I  
12 would bet that you can accommodate a request to split  
13 L.A. and still minimize divisions because you're going to  
14 have to split it anyway, and you can do it in the way  
15 that the public testimony suggested if it does not split  
16 communities of interest but maintains them, etcetera.

17 **COMMISSIONER DAI:** Right. Right.

18 **CHAIRPERSON BARABBA:** Peter?

19 **COMMISSIONER YAO:** I foresee that in some of the  
20 discussion on the individual counties no matter where we  
21 started because of the fact that we have to adhere to the  
22 Voting Right Act and community of interest, the amount of  
23 time that we spend on discussing the racial issues is  
24 probably going to be significant. So being such a public  
25 process, how would we defend ourselves that we didn't

1 base that decision on race as being a predominant factor?  
2 I guess I'm concerned about how to do that in the  
3 aggregate base and not where we're starting. For  
4 example, if you say that okay, we're going to take a look  
5 and see what the city boundary map looked like and then  
6 we're going to make adjustment based on the minority  
7 population, well, at the end of the day if somebody just  
8 keep track of the amount of minutes that we discuss race,  
9 that may end up being the bulk of the discussion. So how  
10 would we get accused of not drawing district line around  
11 race as being a predominant factor?

12 **MR. BROWN:** I think my view on that is that it's  
13 an interesting conundrum and I have some ideas around it.  
14 I do think at the end you're going to get accused of  
15 having had race as the predominant factor probably. You  
16 know hopefully not, but I wouldn't be surprised. But I  
17 think a way to think about it is that until the  
18 Commission is finished, it hasn't done anything. So the  
19 fact that you do it in a particular order or a different  
20 order doesn't change the problems you have to grapple  
21 with and I think the issues are going to need to be  
22 confronted no matter what. For example, if you have a  
23 significant concentration of a minority group, what are  
24 you going to do about it? And if you can deal with it in  
25 a way that's based on the other criteria, then even if

1 you spend lots and lots of time talking about it, there's  
2 not going to be a successful challenge that race  
3 predominated. And if you can't do it based on the other  
4 criteria, then you have to determine whether you've got a  
5 potential Voting Rights Act violation, and if you do,  
6 then you have more room to take action.

7           So it doesn't really -- you're not going to avoid  
8 it by saying well, I'll do it in this order or that  
9 order, I'll do it all at once; it's still going to be an  
10 issue that needs to be dealt with.

11           **CHAIRPERSON BARABBA:** Mr. Ontai?

12           **COMMISSIONER ONTAI:** In the interests of time, is  
13 it the Chair's desire that the Commission look at this as  
14 a set of standards or thresholds or some benchmarks that  
15 we can use this as at least a starting point for  
16 the -- our attorneys and the mappers to start organizing  
17 the data as we proceed down the road. Is that  
18 (overlapping) --

19           **CHAIRPERSON BARABBA:** Okay. I think we used the  
20 term principal to get started, yeah.

21           **COMMISSIONER ONTAI:** -- to get this approved by  
22 this Commission today?

23           **CHAIRPERSON BARABBA:** Yeah. That's what we'd  
24 like to do and that's one of the reasons I put that  
25 little chart out about the -- this is a way of generating

1 alternatives and none of them are ever committing to.  
2 They're just getting at them so that we could learn. And  
3 I think that's the important part of getting started is  
4 we have to learn from making some requests of how  
5 information comes together.

6 **MR. KOLKEY:** So, all right. So to solve this  
7 part of it, the thought is, is that if you try and  
8 minimize divisions of cities and counties, you're farther  
9 along on complying with one of the criteria that's  
10 subjective in the California Constitution. You then make  
11 adjustments for communities of interest and Voting Rights  
12 Act communities. Then your end result should be very  
13 justified because then you can say look at, we followed  
14 city and county boundaries, we formed these communities  
15 of interest which we delved into to address that they  
16 shared social and economic interest and we formed these  
17 additional, because it will be additional majority  
18 minority districts, clearly the districts is formed by  
19 keeping cities and counties intact will create majority  
20 minority districts. But you'll be able to say that we  
21 created these additional majority minority districts  
22 because we looked at the evidence and on the advice of  
23 counsel, it was appropriate to form these majority  
24 minority districts, which is why we had to do some  
25 further divisions of some cities in order to comply with

1 our federal Voting Rights Act obligations.

2           So then having said that, as you look at Voting  
3 Rights Act issues, we think that one of the first things  
4 you need to look at are your Section 5 counties in those  
5 districts. And it's because one, unlike your Section 2  
6 Voting Rights Act areas, your Section 5 counties need to  
7 be pre-cleared as George said. And the, you know,  
8 districts, the maps do not go into effect if you don't  
9 get pre-clearance.

10           So you may need to do more adjustments there and  
11 you want to make sure you get your Section 5 counties and  
12 your Section 5 districts right because they need to be  
13 pre-cleared. And what you do there may very well affect  
14 the adjoining districts. So let's get the Section 5  
15 districts right so you're on solid ground for your  
16 pre-clearance and then you'll know how it affects your  
17 other districts.

18           Now in dealing with the Section 5 districts, the  
19 thought would be is that you would have an instruction to  
20 preserve minority voting strength with respect to the  
21 districts that overlay those counties and Q2 would then  
22 look at also, in addition to preserving minority voting  
23 strength, also doing to the extent that it could  
24 minimizing divisions of counties and cities. And there  
25 might be a number of ways to preserve minority voting



1 rights for Section 5 and how you cut or divide cities and  
2 counties. And so you'd want Q2 to, you know, after  
3 consultation with counsel, come to you and say well here,  
4 you know, the actions available, each of these preserve  
5 minority voting rights in the Section 5 districts, but  
6 there are different ways of doing it. And then the  
7 Commission would address that.

8           Now the separate part of that is that even if we  
9 address Section 5 issues in those districts, we still  
10 have to also address whether there are any Section 2  
11 issues in those very same districts. And so once again,  
12 once you've preserved the minority voting strength, then  
13 there would have to be a focus on all right, are we  
14 fragmenting a minority community, are there Jingle  
15 factors, the three Jingle preconditions, you know, is  
16 there serious evidence that supports those Jingle factors  
17 such that we've got a Section 2 voting rights issue. And  
18 again in conjunction with counsel, Q2 would come to you  
19 with, you know, what the options are and how the lines  
20 need to be changed and whether or not there are a number  
21 of options available to doing that.

22           But ultimately the goal would be comply with  
23 Section 5, comply with Section 2 and then see which,  
24 after you do that, how do we minimize the division of  
25 counties and cities by the way which may have to also be

1 done in conjunction with how you are affecting the  
2 adjoining areas because there may be a larger picture  
3 minimizing divisions when you start looking at the  
4 adjoining districts that are not part of the Section 5  
5 counties.

6 And at the risk of being reprimanded, I will just  
7 say that, you know, one advantage of, you know, trying to  
8 do some general geographic regional focuses so that if  
9 you do something that needs to be changed in one region  
10 it won't necessarily affect through a trickledown effect  
11 all these other districts. And that's what the special  
12 masters did in the '90s is they divided up California  
13 northern southern, they used Tehachapi Mountains as one  
14 way of dividing it and then they did --

15 **COMMISSIONER DAI:** Mr. Kolkey.

16 **MR. KOLKEY:** Yes. Okay. All right.

17 **COMMISSIONER DAI:** We know that was the approach  
18 20 years ago.

19 **MR. BROWN:** So the next item in our list really  
20 is just very short; it's identifying issues under Section  
21 2 of the Voting Rights Act. And I think I walked through  
22 in more detail earlier how we would go about doing that.  
23 But so that's just meant to say look, we're going to work  
24 on those issues.

25 **COMMISSIONER DAI:** Can I ask you a question just



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