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LEGAL SERVICES CORPORATION

OPERATIONS AND REGULATIONS COMMITTEE MEETING

OPEN SESSION

Friday, January 27, 1995

9:10 a.m.

Washington Marriott Hotel
1221 22nd Street, Northwest
Washington, D.C 20037

COMMITTEE MEMBERS PRESENT:

LaVeeda M. Battle, Chair
John G. Brooks
F. Wm. McCalpin
Ernestine P. Watlington
Douglas Eakeley
STAFF PRESENT:

Alexander Forger, President
Patricia Batie, Secretary
Victor Fortuno, General Counsel
Suzanne Glasow
Laurie Tarantowicz
John Tull
Renee Szybala

OTHER

Linda Perle, (CLASP)

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P R O C E E D I N G S

1
2 CHAIR BATTLE: I would call to order the meeting of
3 the Operations and Regulations Committee this morning and
4 welcome all of the committee members. I would like to
5 welcome everyone here to our Operations and Regulations
6 Committee meeting this morning. We have a full committee
7 this morning, with Ernestine and with John and with Bill
8 present.

9 As I understand it, Alex Forger will be joining us
10 very shortly. But we're going to go ahead and get started
11 with some of the preliminary things that we need to cover
12 today.

13 You should have before you in the Board book a copy
14 of the agenda for our meeting with the matters to be
15 considered listed therein. Are there any changes to the
16 agenda?

17 (No response.)

18 CHAIR BATTLE: If not, then I'll entertain a motion
19 to approve the agenda as written.

M O T I O N

20
21 MR. McCALPIN: So moved.

22 MS. WATLINGTON: Second.

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1 CHAIR BATTLE: It has been moved and properly
2 seconded that the agenda be approved as written. All in
3 favor?

4 (Chorus of ayes.)

5 CHAIR BATTLE: All opposed?

6 (No response.)

7 CHAIR BATTLE: Okay. Motion carries.

8 The second item on the agenda is approval of the
9 minutes of the December 12, 1994, meeting. As you may
10 recall, I was present by teleconference for that meeting.
11 And I think all of the other members who are present here
12 were present in person.

13 Are there any changes to the minutes or questions
14 about the minutes?

15 MR. McCALPIN: Madam Chair, directing your
16 attention to page 31 in the tan agenda book, under the
17 heading "March," it says we were to have comments to Part
18 1604 and Part 1611 on eligibility. I think that was right.

19 But I think that we agreed at that time that 1609
20 and 1610 would be scheduled for consideration at a committee
21 meeting to occur between the January and March meetings, so
22 that I believe that as reflected on page 31, that doesn't

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1 accurately portray what we agreed at that time.

2 And I think before we finish this meeting today or
3 tomorrow, we're going to be considering discussing a possible
4 meeting in February to consider those issues at which members
5 of the public have asked to be heard with respect to these
6 matters.

7 So I think that the minutes ought to be amended to
8 reflect that 1609 and 1610 would not be considered in March
9 but rather at a meeting of this committee probably next
10 month.

11 CHAIR BATTLE: Can you put that in the form of a
12 motion?

13 M O T I O N

14 MR. McCALPIN: I move that the minutes be amended
15 to reflect that.

16 MS. WATLINGTON: Second.

17 CHAIR BATTLE: Any further discussion?

18 (No response.)

19 CHAIR BATTLE: I seem to remember, as well, Bill,
20 that we discussed having a meeting in February to consider
21 1609 and 1610, particularly because we're already aware that
22 there are members of the public who want to have an

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1 opportunity to participate in that discussion.

2 It has been properly moved and seconded that the
3 minutes be amended as articulated by Bill McCalpin. All in
4 favor?

5 (Chorus of ayes.)

6 CHAIR BATTLE: All opposed?

7 (No response.)

8 CHAIR BATTLE: Motion carries.

9 M O T I O N

10 MR. McCALPIN: I move that the minutes be approved
11 as amended.

12 CHAIR BATTLE: All in favor?

13 (Chorus of ayes.)

14 CHAIR BATTLE: It hasn't been seconded, but I'll
15 just take the second to the first motion as a second to the
16 second. All in favor?

17 (Chorus of ayes.)

18 CHAIR BATTLE: There has been a vote. It's done.

19 The first item that we have on our agenda to
20 consider and act on proposed changes to the Corporation's
21 bylaws grew out of some discussions that have taken place
22 over the last two months.

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1 I received a memo from Bill, who has worked very
2 diligently along with Laurie, on our bylaws over the past
3 several months. And we as a committee considered the bylaws
4 about mid-year last year. And since then, there were several
5 discussions around certain provisions in the bylaws, and some
6 additional changes were made. And tomorrow or today -- is it
7 today that we're intending or tomorrow?

8 MR. MCCALPIN: Tomorrow, it comes before the Board.

9 CHAIR BATTLE: We're anticipating that the bylaws
10 will be considered by the Board tomorrow. And we thought
11 that because there are several suggestions regarding the
12 bylaws, that this committee could reexamine those suggestions
13 and make a full report to the Board tomorrow regarding the
14 bylaws. So we intend to undertake a review of some of the
15 revisions that have been made since our last review to the
16 bylaws today.

17 Laurie, do you want to come forward? Bill McCalpin
18 has graciously been a committee of one to undertake working
19 along with Laurie to look at the bylaws, to think through
20 them carefully, and to have discussions with other Board
21 members and other members of the public who have concerns
22 about the bylaws.

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1 We have talked about them briefly this morning.
2 But I would like to basically for purposes of going over the
3 sections in the bylaws turn it over to Bill to give his
4 report as to where things are at this point. And then, we'll
5 go through each of the sections to see if there are any
6 changes, comments, or suggestions from the committee.

7 Bill?

8 MR. McCALPIN: All right. I didn't realize that
9 you were passing the ball to me, but I'll run with it as best
10 I can.

11 By way of background, you may recall that we had
12 prepared a draft of bylaws in May or June of last year. And,
13 as a matter of fact, this committee passed that draft onto
14 the Board for its consideration. But at the same time, we
15 had two or three or four pages of amendments that we wanted
16 the Board to consider. And quite properly, I think, the
17 Board thought that that was too much to digest at one point.

18 So I believe it was at the July meeting that the
19 Board deferred consideration of the bylaws until the next
20 meeting of the Board. For one reason or another, there was
21 not a consideration at that time. But in the meantime,
22 Laurie Tarantowicz took those two or three or four pages of

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1 amendments that we had handwritten, incorporated them into a
2 draft, which I foresaw, I think, in October.

3 We worked that over. It turned out that when we
4 got all of the amendments into a draft, there were some
5 things that hadn't appeared where they were separated. And
6 so we worked on it some more. And I think at the December
7 meeting, I reported that that was the status we were at.

8 At that point, this committee, understandably and
9 properly, decided that the redraft that we had prepared ought
10 to be circulated to the committee for final consideration or
11 further consideration before the matter went to the Board.

12 So on December 19, we sent out a draft of the
13 bylaws as they then were, together with a cover memorandum
14 raising a couple of issues in connection with it and asked
15 the members -- that was just to the members of this committee
16 -- and asked the members of this committee to respond by I
17 think it was the 4th of January, so that we could meet the
18 representation which had been made that the full set of
19 bylaws would be circulated to the Board the first week in
20 January for consideration and adoption at this meeting.

21 There were a few comments, changes made as a result
22 of that circulation to the committee as a result of which

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1 there was sent to each of us under date of January 6th from
2 Laurie and Vic Fortuno a proposed revision of the bylaws in
3 two versions, one and two. And that was sent to the full
4 Board.

5 We asked that members of the Board indicate to
6 staff, Laurie, by this past Monday if they had any
7 recommendations, changes that they wanted to make, so that we
8 could focus and make this meeting as concise as possible. I
9 was advised by Laurie yesterday that, in fact, no comments or
10 suggestions had been received from other members of the
11 Board.

12 But when I got back to my hotel room about 5:30
13 last evening, I had a call from Linda Perle, who is arriving
14 on the scene as I speak. And we spent about 40 minutes going
15 over some comments, suggestions that she had with respect to
16 the January 6th draft of the bylaws.

17 I took down her comments. I reviewed them last
18 night. And I made some suggestions for language changes to
19 meet most of her comments and suggestions. And I reviewed
20 those with LaVeeda this morning. We had a discussion about
21 it.

22 And so, with that background, I think that we are

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1 prepared to move through the bylaws, with the expectation
2 that we will have completed our work on them by noontime, so
3 that they will be in a position to go to the Board tomorrow.
4 I think that there will be some production needed between the
5 end of this meeting and the time they get to the Board
6 tomorrow, because there quite likely will be some changes in
7 the draft which you have before you as a result of this
8 meeting now.

9 CHAIR BATTLE: So that's what we have got.

10 MR. McCALPIN: I think I've talked long enough for
11 Alex and Linda to have arrived.

12 CHAIR BATTLE: That's right. I think so. And Alex
13 should be at the table just shortly. Can we get clarified --
14 the December 19th version that we received, does it differ at
15 all from the January 6th? We have in the January 6th version
16 two copies, one which shows the changes that were made, and
17 the other which is a clean copy. And there are also
18 amendments or changes, right?

19 MR. McCALPIN: Let me say this. There are a few
20 changes between the December 19th draft and the January 6th
21 draft. I think that there's nothing momentous about it.
22 They're grammar, punctuation, selection of a different word

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1 to convey a thought. They're very minor changes between
2 December 19th and January 6th.

3 What we are going to be talking about now are
4 acceptance or modification of the January 6th draft. And as
5 you rightly point out, they have come to us in two versions,
6 the so-called "red line" or legislative format, which shows
7 the changes, and the clean version. Actually, it was when I
8 finally got around to reading the clean version that it
9 occurred to me that there were a few things that ought to be
10 changed, because I was so used to reading the other.

11 But I think with that, recognizing that we have a
12 good way to go, we probably ought to get to it. And let me
13 say that the first comment or change that has been suggested
14 to me is on page 4. And I would think that if anybody has --

15 CHAIR BATTLE: Why don't we do it this way? I
16 would like to at least give all the committee members an
17 opportunity to state whether they have changes to any of the
18 sections. So why don't we just go through and see, starting
19 at the front, the first page?

20 John?

21 MR. BRODERICK: You wanted to do it page by page,
22 LaVeeda?

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1 CHAIR BATTLE: Yes. Let's go page by page.

2 MR. BRODERICK: I'm ashamed to say that I have been
3 away, and then I had a week with the flu. And I have missed
4 the deadline. I have several very minor semantic suggestions
5 and a couple of substantive ones which we can come to as we
6 go through the draft.

7 My first suggestion is on the colored page, where
8 in the table of contents, Article III, Section 3.03 of 3.04,
9 I believe the numbers in the text of the titles have been
10 reversed. In other words, 3.03 in the text is
11 "qualification," and 3.04 in the text is "the Board Chair and
12 the Vice Chair."

13 MR. McCALPIN: You're absolutely right. And what
14 happened was, we changed the sequence of the provisions, but
15 we failed to change the sequence in the index.

16 CHAIR BATTLE: And we appreciate you for catching
17 that very much.

18 MR. BRODERICK: Very important.

19 CHAIR BATTLE: Thank you. Are we all working off
20 of the red line version? Is that the copy that we all have
21 before us?

22 MR. McCALPIN: I don't think it makes a lot of

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1 difference.

2 CHAIR BATTLE: When we get to page numbers, that
3 would.

4 MR. McCALPIN: You're right.

5 MR. BRODERICK: I'm working off the December 19th
6 edition, which I made my notes on. But I've also checked out
7 the January 6th, and I think they're exactly the same for
8 purposes of my comments.

9 CHAIR BATTLE: Alex, is there anything that you
10 would like to say before we get into a point by point review
11 of the bylaw revisions?

12 MR. FORGER: Since I've got to head over to
13 Provisions, could I make one point that I raised with Bill
14 about the bylaws and their interplay with the regulations?
15 If a committee is appointed, such as was appointed at our
16 last meeting, an Ad Hoc Committee on Governance, that is
17 comprised of Board members, as well as nonBoard members.

18 And I guess I had the mistaken impression that this
19 was a nonexecutive committee that was not subject to all of
20 the restrictions with respect to public notice and the like,
21 whereas, in fact, as I look at the revised bylaws, it sends
22 me over to 1622, which applies to all of the provisions of

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1 the Sunshine Act, to every committee.

2 So it struck me as being worthy of some
3 consideration, when this committee has as its only function
4 looking at governance of the committees and what is their
5 jurisdiction and what should they be called and should there
6 be more committees.

7 And it's very difficult for us to -- now, we have
8 to give notice seven days in advance, and we have to have the
9 opportunity of the public to participate. And it seemed to
10 me to create a lot of formality for a rather inconsequential
11 activity. It's not changing a policy of the Legal Services
12 Corporation. It is simply reviewing how we function in
13 committees.

14 And once that committee has some recommendations,
15 it would come to the Board, and it would come to public
16 notice, and it would be subject to debate if the world at
17 large thought it was important that A&A had responsibility
18 for personnel instead of Operations and Regs or some such
19 thing.

20 So I would just ask that you might give some
21 thought to it. I know that the bylaws in their revised stage
22 have been back and forth on this issue as to the requirements

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1 of meetings of nonexecutive committees.

2 CHAIR BATTLE: As I understand it -- and we have
3 had earlier discussions about the scope of nonexecutive
4 committees' responsibilities under the Sunshine Act. And at
5 present, there is a distinction drawn between executive and
6 nonexecutive committees in the bylaws.

7 However, until we have an opportunity to address
8 all committees in 1622, it seems to me that we are bound, at
9 this point. But we can take into account the concern that
10 you've raised and potentially make some distinctions, if
11 necessary, before we get on the road.

12 And I'll let Bill, who has looked at this real
13 carefully, respond, as well. My first inclination is that we
14 need to take a careful look at it, as you have suggested,
15 because there are some things that are not at the level which
16 would require public review when you're talking about
17 internal matters, which at present, the way that the Sunshine
18 Act reads, regardless of how the Board constructs a
19 committee, it is covered, and you have to have public notice,
20 and you have to have meetings open to the public.

21 So I don't know that that's something that you can
22 necessarily correct in the bylaws alone without looking at

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1 the Sunshine Act itself and assuring that it covers the scope
2 of what the law requires us to cover and gives some
3 flexibility down the line to what the Board's needs may be
4 internally.

5 MR. McCALPIN: Let me respond, Alex, as I did when
6 we talked about this on the phone a while ago. The present
7 bylaws in effect subject all committee meetings both to the
8 Sunshine Act and Part 1622 of the regulations, so that the
9 proposed bylaws do not impose any obligation that's not
10 already there.

11 In fact, what the proposed bylaws say, as the
12 statute does, is that any executive committee is subject to
13 the Sunshine Act and our regulation. A nonexecutive
14 committee is not subject to the Sunshine Act but is subject
15 to Part 1622.

16 And we will be considering a revision of Part 1622
17 at our March meeting, so that actually, we are not imposing
18 any additional burden on Nancy's ad hoc committee. We're
19 trying to alleviate the problem slightly.

20 MR. FORGER: That, I understood. And that's what I
21 wanted to at least raise for your future consideration,
22 because the kinds of activities that would go on in this ad

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1 hoc committee would be no more I guess substantive than a
2 conversation I would have with senior staff.

3 And certainly, I'm not required to have seven days'
4 public notice before I talk to Martha Bergmark, for example.
5 So it just struck me that that should get some attention. It
6 just means that we have got to be functioning in a more
7 formal way as a committee. Or maybe we should call it
8 something other than a "committee."

9 MR. McCALPIN: Well, a committee by any other name
10 is a committee.

11 CHAIR BATTLE: I think we are constrained, given
12 the way that 1622 now reads. And, in fact, even if the
13 provisions of the bylaws as now written are adopted, until we
14 have an opportunity to look at 1622, I think we are still
15 bound. So it's going to be a two-part process to unravel and
16 create an opportunity for a task force or an entity to deal
17 with internal matters that does not have Board authority.

18 MR. FORGER: I wouldn't want to end your agenda
19 now. It's nice to know that there's still something more
20 that you'll be working on.

21 CHAIR BATTLE: Are there any other comments,
22 Ernestine or John, before we get into our point by point

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1 review?

2 MR. BRODERICK: I do expect to bring up a question
3 on public announcement of some of the committee meetings,
4 which I think was inadvertently left out. But it ties in
5 with what Alex has just been saying. We can cover that in
6 due course.

7 CHAIR BATTLE: As we go to the bylaws.

8 MR. McCALPIN: Are we ready now to go to page 4?

9 Linda, I have given consideration to all the points
10 you raised yesterday. I have tried to communicate as best I
11 could what your positions were to LaVeeda when we met this
12 morning. But chime in if I don't accurately reflect what was
13 on your mind when we talked last night.

14 As I recall, the first comment you made was with
15 respect to Section 1.03(j). And I think you raised the
16 question --

17 CHAIR BATTLE: Why don't we do this, Bill? Just in
18 terms of procedure, let's just go through and see if there
19 are any earlier questions before just handling the ones that
20 you got from Linda as we go through.

21 MR. McCALPIN: And there will be others other than
22 from Linda. The next one I had was 1.03(j).

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1 CHAIR BATTLE: Does anybody have anything earlier
2 than 1.03 (j) as the first one? John?

3 MR. BRODERICK: I suggest 1.03(g) and (h) are out
4 of order alphabetically. "Person" should come before
5 "political."

6 MR. McCALPIN: (d), (e), (f), (g), (h).

7 MR. EAKELEY: I think he means "person" and
8 "political" are out of order.

9 MR. McCALPIN: Oh, "person" and "political."
10 Excuse me.

11 CHAIR BATTLE: Okay. So those two just simply need
12 to be switched.

13 MR. McCALPIN: Linda and I both missed that and
14 Laurie, too.

15 CHAIR BATTLE: That's why we're going to go through
16 it. And (j), I think, was the next one that you wanted to
17 address on it.

18 MR. McCALPIN: If I understood Linda's comment last
19 night, it was a suggestion that the first line read, in
20 effect, "'Telefax' or 'express mail' refers to any means for
21 transmitting written or electronic messages." And I pointed
22 out to her that the electronic communication was contained in

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1 the last line of the definition. And so I thought that we
2 had agreed to leave it the way it was.

3 So with that, I think we can pass on to anybody who
4 has something thereafter. I don't have anything in Article
5 II.

6 CHAIR BATTLE: Yes. I had just basically the same
7 concern, that as we move forward, electronic mail or E-mail
8 will be one means of being able to transmit messages, as well
9 as express or telefax. There are some distinctions between
10 them.

11 MR. McCALPIN: Right.

12 CHAIR BATTLE: Page 5, which deals with other
13 offices and agents. Article III, the Board of Directors,
14 Section 3.01, "general powers." Section 3.02, "numbered term
15 of office and qualifications." If there are none on that
16 page -- I'm sorry.

17 John?

18 MR. BRODERICK: No. 3.03.

19 CHAIR BATTLE: 3.03, I think, is one that we're
20 going to have some discussion about. It deals with
21 qualifications. And there are two alternative proposals
22 before us as to the language in 3.03. And there are reasons

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1 why there is a distinction between the first paragraph and
2 the second. And I'll give Bill an opportunity to explain
3 that distinction.

4 MR. McCALPIN: Well, the background for this is
5 that as we moved through this and began to read it all put
6 together, it appeared that we in effect were saying that a
7 director who went through the confirmation process was fully
8 qualified to act as a director. And we left under a cloud
9 the right of a person receiving a recess appointment to act
10 validly as a director.

11 So rather than leave it open to question whether a
12 recess appointee was a qualified director or not, we thought
13 that we ought to address the issue. And, of course, that put
14 us squarely in the area of Dana versus McCalpin versus Dana
15 and Wilkinson versus the LSC and all the rest.

16 So the first sentence, "A director shall be deemed
17 qualified when he or she is appointed by the President, the
18 Senate having given its advice and consent" didn't raise any
19 question about qualification. Linda raised a question about
20 whether -- this is my word, not hers -- the untutored, the
21 unsophisticated would understand that sentence.

22 The fact of the matter is, we went to some trouble

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1 to ascertain the precise sequence in the nomination,
2 confirmation, appointment of a director. And it appears that
3 the President nominates, sends a nomination to the Senate;
4 the Senate gives its advice and consent; and then, the
5 President makes the appointment, so that the first sentence
6 accurately reflects the process that is, in fact, carried
7 out.

8 Whether people don't understand that or not or
9 won't understand that, I don't know. All I can say in
10 defense of it is that it is accurate. It's the way it
11 happens.

12 CHAIR BATTLE: Are there any concerns about the
13 language as it is written?

14 John?

15 MR. BRODERICK: Nitpick. I think the word in the
16 second line of the first alternative, end of the line,
17 "during the recess," I think it should be "during a recess."
18 And similarly, in the next alternative.

19 MR. McCALPIN: I haven't come to that.

20 MR. BRODERICK: But substantively, I have no
21 problem. I prefer alternative two. But I think the language
22 is satisfactory.

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1 CHAIR BATTLE: Right. I was really asking a
2 question just about the first sentence. Because then, for
3 purposes of sentence two and alternative two, we're going to
4 consider that, I think, next. Your point is well taken,
5 though, about the first one.

6 MR. McCALPIN: Let me say with respect to the
7 second sentence, I confess that the way it's written first
8 adopts the decision of Judge Green in Wilkinson. Let me say
9 first of all, some people have not had the benefit of the
10 memorandum dated December 19th, which went into some
11 background about this whole thing.

12 I should point out first of all that the position
13 of this Board -- not this Board -- the excised Board in
14 McCalpin versus the Legal Services Corporation as it was
15 filed was that the President never has the right under the
16 Constitution and the statute to make a recess appointment to
17 this Board.

18 We lost that in Judge Norman Johnson's opinion.
19 And, in effect, Judge Green has picked up that portion of
20 Judge Johnson's opinion, so that both of these versions
21 tacitly accept the proposition that the President does, in
22 fact, under some circumstances have the right to make a

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1 recess appointment to this Board.

2 The way the sentence was first written adopts our
3 litigating position in Wilkinson versus LSC, that in effect,
4 a vacancy does not occur simply upon the expiration of a term
5 of office, that a vacancy occurs only by death, resignation,
6 or removal of a director under the statute, which is provided
7 for in the statute.

8 There are many in the Legal Services' broad field
9 who believe that that is right, is appropriate, and that the
10 expiration of a term should not cause a vacancy in office.

11 The alternative finesses the issue. It simply says
12 that, "A director appointed by the President during a recess
13 of the Senate to fill a validly existing vacancy" -- and that
14 leaves open for a future judicial determination whether a
15 vacancy exists by reason of the expiration of a term or not.

16 Judge Green's opinion in Wilkinson has not yet
17 ripened into a final judgement in the trial court. It, of
18 course, has not gone to an appellate court, so that it's hard
19 to say. There are analogous situations in other governmental
20 entities which do provide or hold that the expiration of a
21 term does create a vacancy.

22 Whether we will eventually come under those

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1 holdings remains to be seen, so that we have here the
2 alternative of two approaches to this. One is to adopt the
3 litigating position of this Board in Wilkinson. And that's
4 the first alternative. The second is to take the broad
5 approach and leave it to future determinations for when a
6 vacancy occurs, and we simply say "a validly existing
7 vacancy."

8 The option is there. I think that we have, again,
9 options. Either this committee can take a position on what
10 it thinks this provision 3.03 ought to be, or we can simply
11 pass the choice between the two alternatives onto the full
12 Board. I pointed that out in the December 19th memo. The
13 committee up till now has not made a distinction between the
14 two. But we can --

15 CHAIR BATTLE: I think we need to have some
16 discussion today about it.

17 And John, you mentioned that your preference was
18 the second alternative. If you would like to give us your
19 thoughts on that now, we can start our discussion.

20 MR. BRODERICK: All right. First, I think in
21 relation to your suggestion, Bill, that we put it up to the
22 Board, I think obviously, it's a Board decision to make

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1 between alternative one and alternative two. But I think we
2 ought to come up with a recommendation to the Board as to
3 which we believe and why.

4 It seems to me this has been a matter of judicial
5 interpretation twice now. We think they're coming down to a
6 refinement of exactly what the judicial system is going to
7 decide. On the other hand, I think it's a little
8 presumptuous of us on the one hand to make that decision now.
9 It's a decision I don't think we have to make.

10 I think what we need to do is get the substance of
11 it, which is the validly existing vacancy, which ties in with
12 both decisions, as far as we can tell, and leave it at that.
13 If there's any further refinement of Judge Green's opinion,
14 the bylaw would be consistent with it. And I just think it's
15 not necessary for us to go into the detail.

16 We can handle it in the commentary, if we want,
17 say, "This is what we believe the rule to be, namely, the
18 vacancy exists only if there hasn't been a death, retirement,
19 or resignation or removal." And it just seems to me it's
20 better policy and drafting to have the simpler of the two
21 alternatives and not try to cut it too fine at this point.

22 CHAIR BATTLE: I think that's a good point, John.

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1 And in my discussion this morning with Bill, I also raised in
2 the first alternative the question of whether if you have
3 already fulfilled your term and you are a director who has
4 been appointed by the President with the advice and consent
5 of the Senate and you are still in that position when a new
6 President comes in whether a vacancy exists.

7 And the reading of the first one does not
8 necessarily clarify whether or not you're in a vacant
9 position as a holdover director and, therefore, the President
10 has the right to appoint someone in your place or if in the
11 interim -- for example, for those of us who have terms that
12 will expire before the end of the existing President's term
13 -- if we are to be reappointed, if that would give us
14 insulation from being unappointed before that term expires.

15 The language of "validly existing vacancy" leaves
16 open the opportunity for some further clarification from the
17 court as to what a vacancy is and as to what creates a
18 vacancy on both of those fronts. And I think that that puts
19 us in a better position to not have to reexamine this issue
20 down the road.

21 So I agree with what John is saying about the
22 language and think that we're better off using language that

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1 breeds open judicial determinations as to what a "validly
2 existing vacancy" might be.

3 MR. McCALPIN: In this era, I think it might be
4 said that the alternative is the more conservative position.

5 MR. BRODERICK: Well, I'm the conservative
6 Republican. You're the radical Republican, I guess.

7 (Laughter.)

8 MR. McCALPIN: Well, I agree. I think that the
9 alternative is the better position. And we can either send
10 the two of them to the Board tomorrow and let the Board make
11 a decision, or we can, I think, simply say at this point,
12 "We're going to put the alternative in in place of the second
13 sentence and send it to the Board with the alternative in."
14 It's a question of how much discussion we want to have on
15 this at the Board level.

16 CHAIR BATTLE: My suggestion would be -- and I
17 think as a committee, we can make a determination as to how
18 we want to go about this -- that we make a determination as a
19 committee of which alternative we think is appropriate and
20 simply in our discussion with the Board bring out instances
21 where there were other alternatives, so that the Board can be
22 aware of it.

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1 MR. EAKELEY: Unless the committee's split on the
2 issue. And I haven't heard Ernestine. But it seems to me
3 that if you've got a recommendation that's unanimously
4 adopted, just present the bylaws as recommended with a
5 footnote for the discussion that the committee took
6 considerable time considering the alternative or what it was
7 -- it's not really the alternative, but it is the alternative
8 -- you've got two choices, you chose one and chose not to
9 follow the other -- for these reasons and just flag it. I
10 don't anticipate there will be a lot of need for discussion.

11 MR. McCALPIN: When we do it, the second sentence
12 goes in.

13 MR. EAKELEY: We're really talking about this
14 Board's interpretation of the Congressional intent. That's
15 really not binding on the Congress or the judiciary or the
16 President, but I think that we do the best we can to keep
17 these bylaws --

18 CHAIR BATTLE: Consistent with all of the above.

19 MR. EAKELEY: That's right. I'm not aware of
20 anything that would create a vacancy upon the -- well, I
21 don't want to go that far. But it seems to me that I would
22 not like to see us adopt a position that Board members duly

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1 qualified whose terms expire thereby automatically become
2 unqualified.

3 CHAIR BATTLE: Yes.

4 MR. EAKELEY: And I think that would be the worst
5 case. And I don't think anyone is intending or construing or
6 purporting to construe the statute in that fashion.

7 MR. MCCALPIN: If we can move on, Madam Chair.

8 CHAIR BATTLE: We certainly can. Is it unanimous?
9 I see Ernestine shaking her head "yes." And I think every
10 other member of the committee has expressed an interest in
11 alternative two. I think we can, then, move on.

12 MR. MCCALPIN: My next comment is in the very next
13 section, 3.04(a). Linda, reading the first sentence, which
14 says "shall elect a Chair and vice Chair of the Board from
15 among its voting members, each of whom" -- and she thought
16 that the "each of whom" was ambiguous as to whether it
17 referred to voting members or the officers.

18 So in order to clarify it, I would suggest that we
19 put a period after "voting members" and then say, "Each such
20 officer shall serve." It seems to me it eliminates that
21 confusion if, indeed, it was significant.

22 CHAIR BATTLE: Okay. Are there any other changes

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1 to Section 3.04, to (b) or (c)?

2 (No response.)

3 CHAIR BATTLE: If not, Section 3.05, "outside
4 interest of directors."

5 (No response.)

6 CHAIR BATTLE: Section 3.06, "removal." I'm sorry.

7 MR. BRODERICK: Excuse me. 3.05(b), the first word
8 in the fourth line, "past," I think there has been some
9 effort to change "past" to "prior" in other contexts. I
10 suggest we do the same here.

11 MR. McCALPIN: That's 3.05(b).

12 MR. BRODERICK: 3.05(b), first word of the fourth
13 line.

14 CHAIR BATTLE: "Prior." Okay.

15 Section 3.06 on "removal." Any questions about
16 that?

17 MR. McCALPIN: On 3.06(d), when we get down to (d),
18 I will have comment. Is there any before we get to (d)?

19 (No response.)

20 MR. McCALPIN: If not, yesterday, Linda raised the
21 point with me that as presently worded, this would not appear
22 to take care of the situation in which a director, the

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1 subject of a removal action, is personally unable to appear
2 but may choose to appear by counsel only. Because it says
3 "appear in person with or without counsel at the meeting."

4 So I would suggest that we can take care of that by
5 saying "by appearing in person with, without, or by counsel."
6 "By appearing in person with, without, or by counsel" and
7 take out the word "present." So it would read, "by making
8 written submissions to the other members of the Board and by
9 appearing in person with, without, or by counsel at the
10 meeting at which the vote concerning removal is taken." I
11 think that's --

12 CHAIR BATTLE: Does that present any conflict as to
13 the interpretation of what is meant by "appearing in person"?
14 Are all these qualifiers to "in person"?

15 MR. McCALPIN: Yes, I think.

16 CHAIR BATTLE: So one can appear in person by
17 counsel?

18 MR. McCALPIN: Yes. That's the whole purpose of
19 the change. You can appear in person with counsel, in person
20 without counsel, or by counsel.

21 CHAIR BATTLE: With, without, or by.

22 MR. McCALPIN: Vic, you've got a problem?

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1 MR. FORTUNO: No. I just came up to share a note
2 with Laurie. But I have nothing to interject at this point.

3 CHAIR BATTLE: Anything else in section (d)? It's
4 3.06(d).

5 (No response.)

6 CHAIR BATTLE: Section 3.07 on "resignation."

7 (No response.)

8 CHAIR BATTLE: 3.08, "compensation."

9 MR. McCALPIN: Yes. Linda points out, and I think
10 it's accurate, that this section attempts to accomplish too
11 much in one sentence. It's unwieldy and somewhat uncertain
12 in its meaning. I have rewritten the first long sentence
13 into two sentences. And what I have essentially done is to
14 take the rate of compensation out of the big sentence and put
15 it in the second sentence.

16 So let me read it to you, and you can follow along.
17 "To the extent provided by resolution of the Board, directors
18 shall be entitled to receive compensation for their services
19 on the Board, on any committee thereof, or for any other
20 activity relating to the business or affairs of the
21 Corporation.

22 "Such compensation shall be at a rate not in excess

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1 of the per diem equivalent of the level 5 rate of the
2 executive schedule specified from time to time in Section
3 5332 of Title V, U.S.C." So all I've done is taken the rate
4 of compensation out of the long, convoluted sentence and put
5 it in the second sentence.

6 MR. BRODERICK: You leave in "at appropriate rates
7 determined by the Board"? As I heard you --

8 MR. McCALPIN: No. "To the extent provided for by
9 resolution of the Board."

10 MR. BRODERICK: Oh. All right.

11 CHAIR BATTLE: So you took out the "at appropriate
12 rates described by the Board"?

13 MR. BRODERICK: As being unnecessary.

14 CHAIR BATTLE: As redundant.

15 MR. McCALPIN: "At appropriate rates described by
16 the Board." I did. I said "to receive compensation" --

17 CHAIR BATTLE: "Not in excess of the per diem."

18 MR. BRODERICK: Will you read it once more, Bill?

19 MR. McCALPIN: Maybe you're right. "To the extent
20 provided by resolution of the Board," which is the same,
21 "directors shall be entitled to compensation." And at that
22 point, I have not made any change up to that point. You're

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1 right. I did leave out the "at appropriate rates prescribed
2 by the Board." But then, I specified --

3 CHAIR BATTLE: But that's inherent.

4 MR. McCALPIN: Pardon?

5 CHAIR BATTLE: Don't you think that's inherent? If
6 it's a resolution by the Board of the Board --

7 MR. McCALPIN: I would think.

8 CHAIR BATTLE: The rates have got to be deemed
9 appropriate by the Board.

10 MR. McCALPIN: As well as the circumstances, it
11 seems to me.

12 CHAIR BATTLE: The second sentence reads --

13 MR. McCALPIN: "Such compensation shall be at a
14 rate" -- and this reflects the language that's there -- "not
15 in excess of the per diem equivalent of the level 5 rate of
16 the executive schedule specified from time to time in Section
17 5332 of Title V, U.S.C."

18 MR. BRODERICK: Then, where do you go from there?

19 MR. McCALPIN: Then, we leave in, "Directors also
20 shall be entitled to receive" -- all the rest of it stays in.
21 I've simply recast the first sentence into two sentences and
22 left the rest of the section alone.

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1 MR. BRODERICK: So the "reimbursement for travel"
2 is still part of the first sentence?

3 MR. McCALPIN: That stays in.

4 MR. BRODERICK: Yes, but before that --

5 CHAIR BATTLE: It's the third sentence.

6 MR. McCALPIN: As the third sentence.

7 CHAIR BATTLE: It will be a third sentence.

8 MR. McCALPIN: And then the fourth sentence is, "A
9 director shall not serve in any other capacity." In other
10 words, the only change is what is presently the long first
11 sentence, which is broken into to somewhat shorter sentences.
12 The third and fourth sentences remain the same.

13 CHAIR BATTLE: You're taking out the word
14 "receive." I think in the copy we have, you said "entitled
15 to compensation."

16 MR. McCALPIN: No, "entitled to receive
17 compensation."

18 CHAIR BATTLE: Oh, you've got "receive." When you
19 read it before, you didn't have it.

20 MR. McCALPIN: I'm sorry. "Entitled to receive
21 compensation."

22 CHAIR BATTLE: All right.

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1 MR. BRODERICK: I think it would help if we could
2 see that written out at some point.

3 CHAIR BATTLE: Laurie, is it going to be possible
4 -- I guess it's going to have to be possible for us to get a
5 written copy of this as soon as we can so that we can review
6 it before the Board meeting tomorrow. I think Bill is taking
7 notes. We can get to you --

8 MR. McCALPIN: I am marking up a clean copy here as
9 we go along. And I'm sure Laurie is, too.

10 CHAIR BATTLE: Article IV, "meetings of directors,"
11 Section 4.01, "meetings." Any changes to that?

12 MR. McCALPIN: John, did you have something about
13 4.01? I thought I heard you say earlier you had something.

14 MR. BRODERICK: No. 4.02, I have a very small
15 thing.

16 MR. McCALPIN: I do have something in 4.01(c) on
17 page 9. Linda's point was that as presently drafted, it
18 doesn't say specifically that members of the Board who are
19 participating by telephone will be able to hear the comments
20 of the public.

21 I think it's a stretch to worry about that. But it
22 can be fixed, I think, if we take the fourth line, "and by

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1 which interested members of the public are able to hear, be
2 heard by, and identify all persons." And if it is a problem,
3 I think that fixes it.

4 MR. BRODERICK: I don't think it's a problem.

5 MR. McCALPIN: I don't think it's a problem,
6 either.

7 MR. BRODERICK: "All persons participating in the
8 meeting are able to hear one another." That would include
9 the public, as well as the Board, I would think.

10 MR. McCALPIN: I would think so. I think we can
11 leave it alone.

12 CHAIR BATTLE: I think we can, too. I think that
13 the first provision covers all persons. And it's redundant
14 to add a particular provision for the public on that.

15 MR. McCALPIN: Okay. Then we can go on.

16 CHAIR BATTLE: Okay. We'll go on, then, to Section
17 4.02, which is the section pertaining to notice and waiver of
18 notice.

19 John?

20 MR. BRODERICK: A small thing. In paragraph (b),
21 the fifth line, starting "by him or her for the purpose of
22 this notice." I think it should be "such notice." This is

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1 tracking the language of the old bylaw. But I still think it
2 could be improved.

3 CHAIR BATTLE: Okay. Anything else in "notice and
4 waiver of notice"?

5 MR. McCALPIN: Yes. In (c), it says, "Unless a
6 majority of the directors determines by recorded vote that
7 Corporation business requires fewer than specified days
8 notice." Linda's comment was that this paragraph as
9 presently written does not posit any standards for the Board
10 to determine whether the business of the Corporation requires
11 otherwise. I said to her I didn't think standards were
12 required.

13 I think that directors can determine whether the
14 business of the Corporation requires it or not. And I don't
15 really see the necessity of trying to incorporate some
16 standards by which the Board shall make that determination.

17 CHAIR BATTLE: I would think that it would be
18 difficult to posit a standard there that would have the
19 flexibility of covering all circumstances where the Board
20 would need to make a determination of constricting the
21 notice.

22 MR. McCALPIN: The way life goes, if we posited a

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1 standard the first time it arose, it would be outside the
2 standards.

3 CHAIR BATTLE: Right. Is there anything else in
4 the "notice and waiver of notice" provision that we needed to
5 look at?

6 (No response.)

7 CHAIR BATTLE: Section 4.03, "agenda."

8 MR. MCCALPIN: No change.

9 CHAIR BATTLE: Section 4.04, "public announcement."

10 MR. MCCALPIN: I would simply point out here that
11 in paragraph (d), Linda and I have previously agreed that in
12 the third line, the Arabic numeral 7 will go in parentheses
13 after the word "seven" simply to be consistent throughout.
14 Linda and I have made a couple of little things like this,
15 which I don't think we need to spend any time on.

16 CHAIR BATTLE: Okay. Prior to this -- I'm just
17 looking at this provision on public announcement -- was there
18 a determination made -- we talk about the manner of public
19 announcement in the second part. "And notice is to be sent
20 in the Federal Register and to the governing board and the
21 program director of every recipient." Is that as it was
22 before, or does that go beyond the scope of the way it was

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1 before?

2 MR. McCALPIN: I think it's the same.

3 CHAIR BATTLE: Okay. Section 4.05, "organization
4 of directors."

5 MR. McCALPIN: Again, one of the things that Linda
6 and I have talked about, there ought to be an apostrophe
7 after the word "directors" in the title, because that change
8 was made in the table of contents, but it wasn't made when we
9 got here. So that will be done.

10 CHAIR BATTLE: 4.06, "quorum, manner of acting and
11 adjournment." I had a question here, because it speaks to a
12 quorum for the Board. But when we get down into the section
13 dealing with committees, I don't think the committee section
14 actually sets out a quorum.

15 MR. McCALPIN: Yes, it does.

16 CHAIR BATTLE: It does?

17 MR. McCALPIN: Yes.

18 CHAIR BATTLE: Okay.

19 MR. McCALPIN: That's where we get to the
20 committee.

21 MR. BRODERICK: 4.06 is one of the places where
22 there's a minor change from the December draft to the January

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1 draft.

2 MR. MCCALPIN: Right.

3 CHAIR BATTLE: Okay. Are there any questions about
4 the section on quorum?

5 (No response.)

6 CHAIR BATTLE: 4.07, "public meetings and executive
7 session." I had a question on 4.07. And it may have been
8 answered by our discussion with Alex before he left.
9 Committees are not contained in 4.07, only the Board.

10 MR. MCCALPIN: Well, yes, that's right. This is
11 Board meetings. Committee meetings is in 5.

12 CHAIR BATTLE: Okay. 4.08, "public participation."
13 (No response.)

14 CHAIR BATTLE: Section 4.09, "emergency
15 procedures."

16 (No response.)

17 CHAIR BATTLE: Section 4.10, "minutes."

18 MR. MCCALPIN: Linda last night raised the question
19 that she thought that the bylaw ought to specify that the
20 minutes contain at least a resume or a synopsis of the
21 discussion preceding any Board action. And she said that
22 when she was doing Board minutes, that's the way they were

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1 written.

2 And I told her that that isn't the way they had
3 been written recently. And she said, "Well, if that's the
4 way you're doing it, okay." But I think left to her own
5 devices, she would have preferred to see minutes reflecting
6 the discussion preceding an action. I think I talked her out
7 of it.

8 MR. EAKELEY: I think if it's the consensus of the
9 Board that further amplification of the minutes would be
10 helpful, then we can do that. But we do have recorded and
11 transcribed records of our complete discussion, and they are
12 done in public.

13 CHAIR BATTLE: Yes. I think that takes care of it.
14 And I think for purposes of the bylaws, we need to just set
15 the minimal requirement for the minutes.

16 4.11, "action by directors without a meeting." And
17 I raised this question this morning to Bill. We have got two
18 alternative sentences for taking care of a situation where
19 there needs to be action taken without there being a meeting.

20 In the first instance, the first provision has to
21 do with any action which may be taken without a meeting "if a
22 consent in writing setting forth the action so taken is

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1 signed by all the directors."

2 The question that I raised about this provision is
3 whether the way this is written, it infers unanimous consent
4 or whether it simply means that a consent form must be signed
5 by all the Board members and they must vote, and a majority
6 of them may agree to an action to be taken without a meeting.
7 And we had some discussion about that this morning.

8 And I think Bill's position, to me, is that
9 "consent in writing" is intended to mean that all of the
10 Board members unanimously must grant their consent, not that
11 they simply fill out a consent form.

12 MR. McCALPIN: Well, that's right. We also
13 discussed very briefly the fact that certain state statutes
14 require that action by written consent be unanimous, quite
15 specifically, in the statute. I wasn't sure what the D.C.
16 code was on that subject. But I would interpret the way it's
17 written to require consent to the action, not simply a
18 consent form signed, but a consent to the action be by all
19 the directors.

20 MS. TARANTOWICZ: The D.C. code reads much like
21 this section on the bylaws and doesn't, if I recall, amplify
22 at all the meaning. But I think it's correct that most

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1 states -- I did a little bit of research on this, and there's
2 not anything out there in D.C. that I could find to interpret
3 what the provision meant in the D.C. code.

4 But most states require unanimous consent to the
5 action taken. Because action without a meeting is basically
6 frowned upon under corporate law, because there's no
7 deliberation and there's no joint action.

8 MR. MCCALPIN: We could make it clear by adding "if
9 consent to the action" -- well, I would interpret this as
10 requiring unanimous consent to the action. But if there's a
11 question about it, maybe we ought to think about clarifying
12 it.

13 MR. BRODERICK: I think this is consistent with
14 many state statutes.

15 MR. MCCALPIN: And apparently, it's based on the
16 D.C. code.

17 CHAIR BATTLE: Is the language straight out of --
18 in other words, if we are reflecting the D.C. language in
19 this provision, then however it is interpreted for purposes
20 of D.C. law, this section can be interpreted. And I would
21 feel comfortable with it. But if you read it, you can get
22 that distinction, just based on the way that it is written.

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1 So, Laurie, is what you're telling us that this
2 language is, indeed, reflective of the language in the law,
3 so --

4 MS. TARANTOWICZ: I believe it is. I can check it
5 right now very quickly.

6 CHAIR BATTLE: Could you? It might be helpful to
7 do that.

8 MR. EAKELEY: I think the alternative would be to
9 just say something like "if a consent in writing to such
10 action is signed."

11 MR. BRODERICK: What else could it mean?

12 MR. EAKELEY: I could see a form where you have, "I
13 consent to action being taken without a meeting, but I
14 dissent from the action being taken."

15 CHAIR BATTLE: Yes. That's the question that I'm
16 raising.

17 MR. EAKELEY: So you say "if a consent in writing
18 to such action is signed by all of the directors."

19 MR. MCCALPIN: And would you leave in or take out
20 the phrase "setting forth" --

21 MR. EAKELEY: I would take it out, because it's
22 implicit in the "if a consent in writing to such action."

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1 MR. McCALPIN: "If a consent in writing to such
2 action" --

3 CHAIR BATTLE: "To such action is signed by all the
4 directors."

5 MR. McCALPIN: Okay. That, then, takes us to the
6 second -- yes, Laurie?

7 CHAIR BATTLE: Laurie?

8 MS. TARANTOWICZ: It does basically track the
9 language in the D.C. code. The D.C. code says, "Action may
10 be taken without a meeting if consent in writing setting
11 forth the action so taken shall be signed by all of the
12 members." And it goes on.

13 MR. EAKELEY: Ours is an improvement.

14 MR. McCALPIN: We're improving on this.

15 That brings us to the alternatives. And again, the
16 rationale for the alternatives is spelled out in the memo of
17 December 19th which the committee got. I want to say that I
18 personally was concerned about the prospect that a notational
19 vote reflecting an action of this Board could be publicized
20 or withheld at the discretion of the Chair or the president.
21 And that could be some significant action and could remain
22 undisclosed.

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1 On the other hand, I do understand that there may
2 be some instances in which we would prefer that such action
3 not become public. Any such action so taken shall be subject
4 to the FOIA, clearly, so that if we take a notational vote
5 and it gets in to the secretary, it's subject to disclosure
6 under FOIA, where the exemptions from disclosure are slightly
7 larger than the exemptions under the Sunshine Act, as I
8 recall.

9 But nonetheless, it seemed to me we're in a better
10 posture. If we had to take the action in open session, then
11 it ought to be disclosed. If we could take the action in
12 closed session, then it need not be. And that's the sense of
13 the alternative.

14 MR. EAKELEY: I think the alternative is in the
15 spirit of the Sunshine Act, also.

16 CHAIR BATTLE: I think so, too.

17 Ernestine, are you in agreement, as well, that the
18 second alternative is more specific and meets the spirit of
19 the Sunshine Act and the requirements that we at least have
20 some documentation on?

21 MR. MCCALPIN: I would point out that there is a
22 slight misprint in the alternative. The second to the last

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1 word, there is an extra "s" on the end of it.

2 MR. BRODERICK: I missed that one.

3 CHAIR BATTLE: Article V, "committees." Section
4 5.01, "establishment and appointment of committees." We're
5 really blocking out all of the previous language and
6 rewriting the section.

7 MR. McCALPIN: Right. Linda had a comment with
8 respect to 5.01(a)(1). We say there that "An executive
9 committee shall consist of two or more directors." And then,
10 going over to 5.02(a), we say that "One-half of the members,
11 if the number of the committee is even, shall be a quorum."
12 So she said, "This would give one director the right to act
13 for the Corporation."

14 She suggested either one of two things. Either
15 that the committee ought to consist of not less than three,
16 or that the quorum for it ought to be at least two. We can
17 go -- I think the not less than three is probably the better
18 approach.

19 MR. EAKELEY: I think the more directors you have
20 participating on committees, especially if they are cloaked
21 with the authority of the Board, the more reliable the
22 committee decision making process will be.

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1 CHAIR BATTLE: Well, this particular provision, I
2 think, relates to committees which will not exercise --

3 MR. McCALPIN: No. No, this is the executive
4 committee.

5 CHAIR BATTLE: This is both? Oh, okay.

6 MR. McCALPIN: This is the executive committee.
7 5.01(a)(a) is the executive committee.

8 MR. EAKELEY: I don't think we want smaller than
9 three people on a committee or a quorum of less than two.

10 CHAIR BATTLE: That would require no membership
11 minimum for committees. All right.

12 MR. McCALPIN: So that we change 5.01(a)(1) to say
13 "such committee must consist of not less than three
14 directors." Or should it be "fewer"? Should it be "less" or
15 "fewer"?

16 MR. EAKELEY: "Such committee must consist of three
17 or more directors."

18 MR. McCALPIN: "Of three or more." Okay.

19 CHAIR BATTLE: How do you have half of a quorum?

20 MR. McCALPIN: Well, it takes a quorum of two.
21 Now, it takes two to be a quorum.

22 CHAIR BATTLE: One and-a-half.

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1 MR. McCALPIN: No. It just says "half" -- if the
2 number on the committee is even, then half is a quorum.

3 CHAIR BATTLE: I understand. Do we have the same
4 problem, then, with two? That was the question that I
5 raised. When you have a committee that will not exercise the
6 authority of the Board, you do not have a minimum established
7 membership for that committee. So you could have a committee
8 of one.

9 MR. McCALPIN: I don't think it makes any
10 difference.

11 MR. EAKELEY: There, it makes sense to preserve the
12 flexibility, because there's no authority to act that the
13 Board has delegated.

14 MR. McCALPIN: Right.

15 CHAIR BATTLE: We have -- all of our committees are
16 in that posture at present, because we do not have an
17 executive committee.

18 MR. McCALPIN: That's correct. Although as we said
19 the last time, we could if we wanted to appoint an executive
20 committee, but we decided against it at the last meeting.

21 MR. EAKELEY: Yes.

22 CHAIR BATTLE: We are now still in Section 5.01,

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1 but (3)(b), I think, is on the next page.

2 MR. BRODERICK: (3)(b), I have one very small
3 comment on. The second word of the third line, "committee
4 chair," small "c." On paragraph 5.02(b), the next to the
5 last line, "committee Chair," cap "C."

6 MR. McCALPIN: Yes. I think it ought to be -- I
7 don't know. I believe in lower case, but we do say "Board
8 Chair." We capitalize the "C."

9 CHAIR BATTLE: The "committee chair," we do not.

10 MR. EAKELEY: But you keep committees lower case.
11 There's only one Board.

12 MR. McCALPIN: You know, let me say this. I hope
13 that when we adopt this, that the resolution gives to general
14 counsel or somebody the right to make punctuation,
15 grammatical changes such as that which don't affect the
16 meaning. And I think we haven't attempted to put all the
17 commas in or take them out.

18 CHAIR BATTLE: And particularly since what we will
19 have is a draft that will have been quickly done between
20 tonight and tomorrow, Bill, that makes good sense. So we
21 need to put that language in our resolution.

22 MR. McCALPIN: I can say that when I was the

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1 secretary of the American Bar Association, Constitutional
2 amendments, bylaw amendments, and resolutions carried with it
3 that authority in the secretary to make those changes.

4 CHAIR BATTLE: Section 5.02, "committee
5 procedures."

6 MR. BRODERICK: I have something in paragraph (b).

7 CHAIR BATTLE: Okay.

8 MR. BRODERICK: The third line, I think the
9 reference should be to 4.02(d) and not 4.02(e). If I
10 remember, there is no 4.02(e).

11 MR. McCALPIN: Yes. You're right, John.

12 CHAIR BATTLE: Is there anything else that you
13 have?

14 MR. EAKELEY: I had just one question to raise on
15 5.02(b). If we do get to committees authorized by the Board
16 to take action on behalf of the Board, which is what this
17 contemplates, I'm wondering whether the agenda for the
18 meeting should be prepared by the committee Chair in
19 consultation with the Board Chair and Corporation secretary.

20 MR. McCALPIN: I guess without thinking it through,
21 I sort of had the feeling that the Board Chair would probably
22 chair the executive committee.

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1 MR. EAKELEY: This applies to all committees. In
2 fact, what we try and do now is consult when we can. We
3 don't always do that, but --

4 CHAIR BATTLE: But then, if you make it a bylaw,
5 then that could hamstring the process of all committees,
6 unless we are all able to consult prior to putting an agenda
7 together. That's the only concern that I have. Right now,
8 that's almost our aspirational goal, as opposed to what we
9 have been able to do in all instances.

10 MR. McCALPIN: If I understand, Doug, your problem
11 would arise if the Chair of the Board is not Chair of the
12 executive board; is that what you're saying? Or are you
13 saying the president?

14 MR. EAKELEY: No. I'm just saying that it may be
15 helpful to have the Board Chair apprised in advance of the
16 agenda for the committee meeting.

17 MR. McCALPIN: Even of a nonexecutive committee?

18 MR. EAKELEY: Well, we're really dealing these --
19 these committee procedures apply to both types of committees.
20 And you're right. My concern is more with a 5.01(a)(1)
21 committee than with a 5.01(a)(2).

22 But I think it just tends to keep a little bit more

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1 coordination between the Board as a whole acting through the
2 Board Chair and the committee under those circumstances where
3 it might be desirable if we're going to be authorizing
4 committees to take action, and the Board Chair might not be
5 chairing that committee.

6 MR. MCCALPIN: In effect, are you suggesting that
7 the words "and the Board Chair" be added at the end of the
8 sentence?

9 MR. EAKELEY: That's correct. No more than that.
10 It's merely a consultation function.

11 MR. FORTUNO: If you do revise it along those
12 lines, that would apply to all committees, not just executive
13 committees.

14 CHAIR BATTLE: Yes.

15 MR. FORTUNO: But if the concern is exclusively or
16 principally executive committees, you may want to limit it to
17 that while at the same time giving some greater measure of
18 flexibility to nonexecutive committees. I understood you
19 before to be saying that the aspiration is to consult with
20 the Chair in all instances.

21 But you were concerned about maybe being hamstrung
22 because in some exceptional circumstances, it might not be

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1 practical for a nonexecutive committee. So I guess my
2 question is, do you mean to insert that revision to apply to
3 all committees, or only executive committees?

4 MR. EAKELEY: As a practical matter, nonexecutive
5 committees, depending upon the way the regulations are
6 amended, may not have notices required to be published of
7 agendas in any event if they're nonexecutory and have no
8 authority. And therefore, I think the consultation process
9 if something's required isn't going to be a roadblock.

10 This provision still requires consultation with the
11 Corporation secretary. I don't think it matters terribly
12 much more whether the Corporation secretary just is
13 responsible for the further consultation with the Board Chair
14 or not. But I would propose not making the distinction
15 there. But it doesn't matter a lot, I think.

16 MR. McCALPIN: I had the impression, Vic, that
17 Doug's intent was to apply it to all committees and not
18 simply the executive committee.

19 MR. FORTUNO: Okay.

20 MR. EAKELEY: Consultation doesn't need to be a
21 lot. It's just a sort of an advanced warning, that's all,
22 what's coming up. That's all.

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1 MR. BRODERICK: In your experience, Madam Chairman,
2 would that have been an unnecessary complication in setting
3 the agendas of your committee?

4 CHAIR BATTLE: Well, I don't think there's any
5 problem with faxing a copy so that we're all on the same
6 sheet of music when we get to it in a particular meeting.
7 The only concern I had, not so much for how we're operating
8 now -- we have not always done that. And my concern is, if
9 we put it in the bylaws, then that creates an organizational
10 framework that may be comfortable for the next Board Chair
11 coming in or not.

12 MR. EAKELEY: I get first drafts of every agenda
13 and review them more with management when we can't get
14 together and miss each other on the phone. But we try to
15 coordinate. We can probably do better than that. But I
16 think that when we're dealing with a delegation of authority,
17 it may be worthwhile just to have that consultation
18 requirement extend beyond the Corporation secretary to
19 include the Chair.

20 MR. BRODERICK: I just wonder whether it's
21 appropriate to put that in the bylaws and freeze it, to the
22 extent that that the bylaw freezes a procedure or whether a

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1 standing vote of the Board would accomplish the same thing
2 with a little more flexibility for the future.

3 In other words, the Board could have a standing
4 resolution directing each committee chairman to consult with
5 the Board Chair in setting the agenda and have it at the
6 Board level rather than at the bylaw level.

7 MR. EAKELEY: But we're talking about committees
8 authorized to take action on behalf of the Board.

9 CHAIR BATTLE: No, this is broader.

10 MR. EAKELEY: That's primarily the import which I'm
11 addressing. Yes, there are also committees contemplated --
12 it could even be a committee of one -- that don't have
13 delegated authority.

14 But for those committees where the Board has
15 delegated Board authority to act to a committee, it seems to
16 me that it would be prudent for the Board to want to have the
17 Board Chair, who approves the agendas for the Board meetings,
18 to at least be consulted in advance of the agenda being
19 prepared for the committee meeting.

20 MR. MCCALPIN: We could say --

21 MR. BRODERICK: All I'm saying is, the Board could
22 lay that down as a rule without having it carved in stone in

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1 the bylaws.

2 MR. EAKELEY: Yes. It seems to me this is
3 something you may want to -- regardless of whether the Board
4 Chair --

5 MR. McCALPIN: Let me say this. We can perhaps
6 solve this by making the change and say "and in the case of a
7 committee created under 5.01(a)(1), the Board Chair."

8 MR. EAKELEY: Sure.

9 CHAIR BATTLE: Yes. That's a good way to do it.

10 MR. EAKELEY: John, are you less opposed to that
11 one?

12 MR. BRODERICK: What?

13 MR. EAKELEY: Is that all right?

14 CHAIR BATTLE: If we can distinguish it to an
15 executive committee and a committee that has the authority to
16 act for the Board, under those circumstances, indeed, the
17 Board Chair should be consulted.

18 And we leave the flexibility for the Board to adopt
19 a rule as you have proposed for its own operation, given
20 whatever the comfort level is of the Chair and the directors,
21 prospectively for committees that do not have the authority
22 to act on their own. I think it's a good delineation.

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1 MR. BRODERICK: That's fine.

2 MR. McCALPIN: So we add at the end of 5.02(b),
3 "And in the case of a committee created under Section
4 5.01(a)(1), the Board Chair."

5 CHAIR BATTLE: Are there any other concerns in
6 paragraph (b)?

7 (No response.)

8 CHAIR BATTLE: (c)?

9 MR. BROOKS: I have a question about whether there
10 should be a public announcement of committee meetings as we
11 have for Board meetings. And the old bylaws did provide for
12 general notice, as they called it in the old bylaws.

13 And I don't remember that we deliberately dropped
14 the public announcement provision in relation to committee
15 meetings. But I don't see it here where -- the committee
16 meetings are open to the public. But I don't think there's
17 any provision for public announcement of the meetings as
18 there is in 4.04 for Board meetings.

19 CHAIR BATTLE: Now, John, I thought I asked that
20 earlier when we read through the section that has to do with
21 public announcement.

22 MR. BRODERICK: Well, we did. And the answer was

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1 that that applied to Board meetings, only.

2 CHAIR BATTLE: You're right. I'm going back to
3 that section that's 4.04 --

4 MR. McCALPIN: 4.02.

5 CHAIR BATTLE: 4.04 is "public announcement." And
6 it addresses a public announcement of every meeting of the
7 Board, but it does not speak to committees.

8 MR. BRODERICK: That's right. And the old bylaws
9 did refer back to the equivalent of 4.04 in relation to
10 committee meetings. And I think we should resurrect that
11 provision here.

12 MR. McCALPIN: What, in effect, you're suggesting
13 is that we ought to incorporate 4.04 as well as 4.02; is that
14 it? In effect. I'm not trying to draft it.

15 MR. BRODERICK: Yes. Because in the old
16 1601.28(b), "The agenda for the committee meetings shall be
17 prepared in accordance with 1601.18, and general notice of
18 the meeting shall be given in accordance with Section
19 1601.19."

20 MR. EAKELEY: Did we invoke 4.07, also?

21 MR. McCALPIN: What section is that, John?

22 MR. BRODERICK: That's the old 1601.28, page 7 of

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1 this.

2 CHAIR BATTLE: Doug, you're saying 1407, which has
3 to do with public meetings?

4 MR. EAKELEY: 4.07, "public meetings."

5 MR. FORTUNO: Do I understand you to want to
6 subject nonexecutive committees to the same notice
7 requirements as the Board and executive committee?

8 MR. BRODERICK: Well, I'm raising the question. I
9 think it ought to be at least for executive committee
10 meetings and probably for nonexecutive committees, also, just
11 to follow a general pattern of being open. Since all
12 meetings are open to the public to participate in or at least
13 to attend, I think there ought to be notice in advance.

14 MR. FORTUNO: It would be helpful to give them
15 notice in advance. But I guess my question was not so much
16 whether to give notice but whether you want to subject it to
17 the same notice requirements, that is, seven days and in the
18 same manner, or whether you want to use some broader, more
19 flexible language as in "reasonable advanced notice" or --

20 MR. EAKELEY: I think that was Alex's point, one of
21 his points earlier about some flexibility for --

22 CHAIR BATTLE: Well, as it stands, we don't have a

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1 notice provision at all for committees. Notice to the
2 public. We have a notice to the Board members.

3 MR. BRODERICK: Notice to the committee members
4 only.

5 CHAIR BATTLE: Right.

6 MR. McCALPIN: John, I don't think it is in the old
7 bylaws. 1628 says, "Notice shall be provided to the members
8 of the committee in the manner provided in .16 and .17(a)"
9 and .16 and .17(a) are only to directors.

10 MR. BRODERICK: Go ahead two more sentences.

11 MR. McCALPIN: Where? Where are you looking at?

12 MR. BRODERICK: Just go on. "Notice may be waived
13 in the manner provided in .16 or .17. The agenda for the
14 meeting shall be prepared in accordance with 1601.18, and
15 general notice of the meeting shall be given in accordance
16 with 1601.19." That is the general notice part of that.

17 MR. McCALPIN: And 1619 is now 4.04.

18 MR. BRODERICK: Yes.

19 MR. McCALPIN: So that's why I said basically,
20 you're talking about in substance incorporating 4.04 as well
21 as 4.02.

22 MR. BRODERICK: Exactly.

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1 CHAIR BATTLE: And what I hear Vic to say is to the
2 extent you have nonexecutive committees, do you want 4.04?
3 Do you want some standard that's a little bit more flexible,
4 as Alex may have mentioned?

5 MR. BRODERICK: Well, I think --

6 CHAIR BATTLE: 4.04 is public notice seven days in
7 advance, Federal Register.

8 MR. BRODERICK: Federal Register is probably the
9 key to that, whether it's necessary for nonexecutive
10 committee meetings.

11 MR. McCALPIN: Wait a minute. I think Alex really
12 -- if I understood him, the question he was raising was
13 whether it ought to be necessary at all to give public notice
14 of a meeting such as the Ad Hoc Committee on Governance. I
15 believe that's the point he was raising.

16 MR. BRODERICK: Well, that's the nonexecutive type
17 committee.

18 CHAIR BATTLE: Yes. That's what we're saying. And
19 if you were to amend this committee procedure provision to
20 include the notice in public announcement provisions in 4.04,
21 you would be expanding for that nonexecutive committee the
22 notice requirements, the public announcement requirements,

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1 potentially beyond what we may desire.

2 So it may make sense to devise a provision that
3 gives the kind of flexibility we need for nonexecutive
4 committees but does have a public notice requirement written
5 in. Or we may want to distinguish them just as we have
6 earlier with regard to the development of the agenda.

7 5.01(a)(1) committees, we may want to subject to
8 4.04 notice. And those nonexecutive committees, we may want
9 to devise a provision that will give flexibility to that
10 notice requirement.

11 MR. McCALPIN: That may be the way to do it.

12 MR. BRODERICK: I agree. I think that's the
13 sensible way to approach it. And I have not got any specific
14 language. I guess we could ask --

15 CHAIR BATTLE: Can we work on some language?

16 MR. FORTUNO: I think the two -- we can work
17 something up after this meeting. But it seems that the two
18 principal approaches would probably be one would provide for
19 reasonable advance notice. The other would provide for,
20 where practicable, the same kind of notice as given in the
21 case of executive committees. Either approach can be fleshed
22 out some, but those are two possible approaches, for example.

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1 MR. MCCALPIN: Well, or simply only to require the
2 public announcement in the case of a 5.01(a)(1) committee.

3 MR. BRODERICK: As a practical matter, presumably,
4 there would be similar notice of an Ops and Regs Committee
5 meeting scheduled but not required in the bylaws.

6 MR. EAKELEY: I think, with all deference to Alex,
7 that we don't want to walk away from public notice and public
8 meetings simply because we are continuing under a different
9 rubric with a committee structure that may look somewhat like
10 the one now. Our current committees, our permanent standing
11 committees, are or would be 5.01(a)(2) committees.

12 MR. MCCALPIN: Right.

13 MR. EAKELEY: And I don't think anyone is proposing
14 that we take those committees and their deliberations out of
15 the Sunshine.

16 CHAIR BATTLE: No.

17 MR. EAKELEY: A little more operational
18 flexibility, perhaps.

19 CHAIR BATTLE: Yes. My proposal is --

20 MR. MCCALPIN: We are going to take them out from
21 under the Sunshine -- under the strict procedures of the Act.

22 MR. EAKELEY: Under the Act. That's correct.

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1 MR. McCALPIN: But we'll substitute our own.

2 MR. EAKELEY: But I think we want a statement of
3 policy that public notice and public right to attend is still
4 there as part of our policy, too.

5 CHAIR BATTLE: I think that's right, and I think
6 that reasonable notice -- we need to construct some language
7 that gives us that flexibility but also establishes the
8 policy that we will continue to do public notice for all
9 nonexecutive committee meetings is what we ought to try to
10 utilize the language for this section, it seems to me, rather
11 than just simply taking it out and not having a provision at
12 all for nonexecutive committees.

13 MR. McCALPIN: Right.

14 MR. BRODERICK: This may be a little tricky -- and
15 I'm a little nervous, with all due respect to Laurie and Vic,
16 bringing it to us full blown tomorrow morning --

17 CHAIR BATTLE: Do you want to try to take a stab at
18 it now? Why don't we do that? We're talking about committee
19 notice as it relates to Section B. "Notice of a committee
20 meeting shall be provided to members of the committee in the
21 manner required for notice, meetings of the Board, in Section
22 4.02."

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1 MR. McCALPIN: I think what we need to do is insert
2 a new sentence after the next sentence, because waiver only
3 would apply to notice to members of the committee. So I
4 think what we have to do is frame or concoct a sentence after
5 that 4.02(d) correction that John gave us which embodies the
6 principle that we're trying to establish.

7 Then, we follow with the agenda for the meeting,
8 which is a separate subject. I would think we need to craft
9 a sentence beginning toward the end of the third line.

10 CHAIR BATTLE: Under 5.01(a), "Notice of a
11 committee meeting shall be provided to the public in the
12 manner required for notice as set out in Section 4.04." And
13 then under 5.01(a)(2), "Notice to the public shall be --
14 reasonable notice" -- well, let's see. "Reasonable notice
15 shall be provided to the public under 5.01(a)(2)."

16 MR. EAKELEY: I'm sorry --

17 MR. FORTUNO: I don't know whether it's redundant,
18 but it might not hurt to make it "reasonable advance notice."
19 I think "reasonable" sort of implies it's going to be in
20 advance.

21 MR. McCALPIN: Why don't we do this? Before the
22 Board meeting this afternoon -- this is just one sentence,

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1 and I think we're moving along pretty well here. We're still
2 trying to draft by committee. We ought to let them have a go
3 at this and look at it this afternoon.

4 MR. BRODERICK: I think we can do it during the
5 lunch break sometime. I've got one sentence down, I think,
6 for the Executive Committee, which will just refer back to
7 4.04. And the trick is to say what difference there would be
8 for nonexecutive committees.

9 And we used the word "public announcement" back in
10 4.04 rather than "advance notice." So carrying that motif, I
11 think we can work on a second sentence reasonably easily.

12 CHAIR BATTLE: Are we now then satisfied with how
13 we're going to approach (b)? If we are, let's move on to (c)
14 and (d).

15 MR. BRODERICK: One other question on (d).

16 CHAIR BATTLE: On (d)?

17 MR. BRODERICK: On 5.02(d). Minutes of the Board
18 meeting we expressly provide are open to the public. On
19 committee minutes, we do not make that same provision. 4.10
20 is the one applicable to Board meeting minutes.

21 That is, the minutes of the meeting or a portion
22 thereof -- this is 4.10 -- wait a minute -- "or a portion

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1 thereof open to public observation shall be available for
2 inspection by the public in the form approved by the Board."
3 Here again, we may want a distinction between executive
4 committees and nonexecutive committees. But it seems to me
5 at least as to the 5.01(a)(1) committees, the minutes ought
6 to be similarly open to inspection for the public.

7 CHAIR BATTLE: I think we can probably take the
8 language that you've got in Section 4.10 and just assure that
9 "Minutes of each meeting, the portion thereof open to the
10 public of the committees, shall be available for inspection
11 by the public in a form approved by the Board."

12 MR. McCALPIN: Let me say, John, I frankly think
13 that the last sentence in 4.10 is superfluous. Because I
14 think, in fact, under FOIA, they are open to the public.
15 Under the law, they're open. And I think the same thing
16 applies to minutes of committee meetings. I think they are
17 records of the Corporation which are subject to FOIA.

18 MR. BRODERICK: Well, on (a), I don't think there
19 should be a distinction in language between the Board minutes
20 and the committee meetings.

21 MR. McCALPIN: I agree.

22 MR. BRODERICK: They ought to be the same. And

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1 either we go along with the statute, or as happens often in
2 bylaws -- and I think it's very helpful that sometimes, the
3 statutory requirements are restated in the bylaws as has been
4 done in 4.10.

5 MR. McCALPIN: I think what we do is just, in
6 effect, take the last sentence of 4.10 and put it at the end
7 of --

8 CHAIR BATTLE: What I just said. Put that at the
9 end.

10 MR. McCALPIN: Let me say, "in the form approved by
11 the" -- and does it become "committee" instead of "Board"?

12 CHAIR BATTLE: Well, the form for the minutes, I
13 think, should be approved by the Board, generally. Don't you
14 think?

15 MR. McCALPIN: But the Board doesn't approve the
16 minutes.

17 CHAIR BATTLE: The form, not the minutes
18 themselves. We're talking about the form of the minutes. I
19 mean, whether or not -- what we talked about earlier is the
20 question as to whether or not you're going to have discussion
21 in your minutes or whether or not what we established were
22 the minimum requirements for the minutes.

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1 And if the Board says, "For purposes of our
2 minutes, we would like for you to have discussion and would
3 like for you to have some other things, then I think that
4 ought to be what the committee does with regard to its
5 minutes, as well."

6 So my view is that we ought to use the Board
7 standard for what the form of the minutes should be. And the
8 Board will have, for purposes of Section 4.10, established
9 that form. So you just use that for committees, as well.

10 MR. BRODERICK: I disagree on that. I think it
11 should be up to the committee to prescribe what form its
12 minutes ought to take, "in what form they shall be open to
13 the public," in the same manner as the Board approves the
14 form for its own minutes.

15 CHAIR BATTLE: I understand, John. I then question
16 whether the first part of Section 4.10 in minutes, which sets
17 the minimum requirements for minutes, in your view, ought to
18 also be left up to the committee to a separate structure.
19 Because 4.10, basically -- we had some discussion earlier
20 about whether or not the minimum requirement for minutes
21 should be recording the names of the directors present, the
22 actions taken, and some discussion, as well. If you decide

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1 that you don't want that form --

2 MR. McCALPIN: We said no discussion.

3 CHAIR BATTLE: We said no discussion, and we left
4 it up to the Board to prescribe as it saw needed and fit
5 whether or not they wanted anything more than this minimum.
6 Are we then saying for the committee that we're going to
7 allow the committee to decide its own minimum, as well as all
8 other standards and forms?

9 MR. BRODERICK: 5.02(e) does just that. It
10 parallels the Board provision.

11 CHAIR BATTLE: It sure does. So you're saying --

12 MR. BRODERICK: I would just suggest adding the
13 last sentence of 4.10, "The minutes of each meeting or
14 portion thereof open to public observation shall be available
15 for inspection by the public in the form approved by the
16 committee."

17 MR. McCALPIN: I think this is much ado about
18 nothing. I think that the minutes, whatever they are,
19 however they are in the record of the Corporation, are, in
20 fact, subject to FOIA. And we can't have one form for public
21 disclosure and another form for ourselves. It seems to me
22 we're tilting at a windmill here.

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1 MR. BRODERICK: Well, I think they ought to be
2 consistent between the Board -- 4.10 and 5.02 ought to be the
3 same.

4 MR. MCCALPIN: I agree.

5 MR. BRODERICK: And I would just leave out "in the
6 form approved by the Board." I think you're right, Bill.

7 CHAIR BATTLE: Just "public" and period?

8 MR. BRODERICK: Yes.

9 CHAIR BATTLE: "The minutes of each meeting or
10 portion thereof open to public observation shall be available
11 for inspection by the public."

12 MR. BRODERICK: Period. In both 4.10 and 5.02(d).

13 CHAIR BATTLE: Okay. So we're at 5.02(e).

14 MR. MCCALPIN: Linda had a question in connection
15 with (e), raising the question of whether this would give a
16 Board member access to a record of the committee made in
17 closed session.

18 I thought that it did. It may be if we simply say
19 "to all the records of any committee," it would resolve the
20 problem easily. So I suggest that maybe we simply insert the
21 word "all" in (e) to all the records of any committee.

22 CHAIR BATTLE: We discussed that a little bit this

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1 morning, and I think that makes good sense. Article VI,
2 Section 6.01, "officers of the Corporation." Are there any
3 questions about the first section, Section 6.02,
4 "appointment, term of office, and qualifications"?

5 MR. McCALPIN: Yes. Again, Linda pointed out that
6 the second sentence reads, "An officer shall hold office
7 until his or her successor has been duly appointed or until
8 the officer resigns or is removed." And she said, "What if
9 the officer dies?"

10 I would think that we're not going to try to hold a
11 dead officer to the performance of obligations. But we
12 simply could say, "until the officer dies, resigns, or is
13 removed." And that takes care of that. What is that?
14 That's 6.02.

15 CHAIR BATTLE: That's 6.02. Section 6.03,
16 "removal."

17 MR. McCALPIN: .03 and .04 taken together involve a
18 question raised by Linda yesterday. And that is, an officer
19 is both an officer and an employee of the Corporation. Does
20 removal or resignation as an officer necessarily terminate
21 the employment of that individual?

22 And you can think of situations where a person may

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1 resign from an office, but everybody is desirous of that
2 person remaining as an employee of the Corporation. And the
3 same would be true with respect to resignation.

4 So in an attempt to address that question, I have
5 done some redrafting on 6.03 and 6.04. Let me read you 6.03
6 first. "Any officer may be removed" -- and I think you
7 insert the words "from office" -- "may be removed from office
8 with or without cause by a majority of the directors in
9 office, any such removal without prejudice to contract
10 rights, if any."

11 And then, add, "Removal from office may or may not
12 terminate the employment of the person so removed as
13 determined by the Board in the case of the president or by
14 the president in the case of any other officer."

15 CHAIR BATTLE: Could you go back over that one more
16 time?

17 MR. MCCALPIN: Sure. "Removal from office may or
18 may not terminate the employment of the person so removed as
19 determined by the Board in the case of the president or by
20 the president in the case of any other officer." Because the
21 president appoints other employees, has that right to appoint
22 or remove other employees.

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1 Just to put them all together, I've done
2 essentially the same thing with slightly different language
3 for 6.04. "Any officer may resign his or her office" -- and
4 I think we want to distinguish it by putting that there --
5 "at any time by giving a written notice of resignation" -- I
6 don't think we have to repeat the "his or her" there -- "to
7 the Board Chair."

8 And the next sentence remains the same, and so does
9 "such resignation take effect" remains the same. And then,
10 add the following sentence: "Resignation from an office does
11 not necessarily terminate the employment of the person so
12 resigning. That determination will be made by the Board or
13 the president, as the case may be."

14 In slightly different language, I have attempted to
15 parallel the situation in resignation and removal.

16 CHAIR BATTLE: The language you gave the first time
17 is tighter, "where the determination is made by the Board in
18 the case of the president or by the president in the case of
19 other employees" than "as the case may be."

20 MR. McCALPIN: Well, I don't have any great pride
21 of authorship, if you want to, in effect, tell them to
22 tighten it by being closer --

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1 CHAIR BATTLE: Tighten it by using that first
2 drafted language in the paragraph above. That is, the
3 proposal for Section 6.03, "removal," parrot the same
4 language for purposes of 6.04, the section on resignation.

5 MR. BRODERICK: I have a minor question. Did you
6 leave in the written notice of intention to resign?

7 MR. McCALPIN: Yes. I didn't change that. Oh, no,
8 I didn't. You're right.

9 MR. BRODERICK: What does that mean?

10 MR. McCALPIN: I don't know. I did change it. I
11 said "may resign."

12 MR. BRODERICK: It seems to me that resigning to
13 one person and giving notice of intention to resign to
14 somebody else doesn't make much sense, although that's the
15 way it was in the old bylaw.

16 MR. McCALPIN: You're right, John. I did change
17 that. I said, "Any officer may resign his or her office."

18 MR. BRODERICK: Good.

19 CHAIR BATTLE: What if the Board doesn't want to
20 accept that resignation?

21 MR. McCALPIN: It doesn't make any difference. It
22 says it's effective without acceptance.

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1 CHAIR BATTLE: Okay. Now, that has already been
2 clarified by the change that you made to the sentence.

3 MR. McCALPIN: I think so.

4 MR. FORTUNO: How about the third line in 6.04,
5 "written notice of the intention to resign"? Do you mean to
6 keep that notion of intention there, or written notice of
7 resignation?

8 CHAIR BATTLE: Written notice of resignation.

9 MR. McCALPIN: "To also submit his or her
10 resignation to the president."

11 MR. FORTUNO: This may be -- in fact, I think it is
12 clear. But just out of an excess of caution, going back up
13 to 6.02, that last line, "may be held by the same person," do
14 we all agree -- and maybe I'm just making a record here in
15 case there's ever a question more than suggesting that we
16 revise the actual language -- but do we all agree that that
17 is a person may simultaneously hold two offices, as opposed
18 to in succession?

19 MR. BRODERICK: This, I think, is common statutory
20 language.

21 MR. McCALPIN: I think that's right.

22 MR. FORTUNO: And just so that the transcript is

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1 clear in case anyone has to look back over it years from now,
2 what we intend here is that the person could simultaneously
3 hold two offices?

4 MR. McCALPIN: Right. That's as I understand it.

5 CHAIR BATTLE: Okay. 6.05, "the president." Are
6 there any changes?

7 MR. McCALPIN: To the very last line. Again, this
8 is one of those consistency changes. We will probably
9 hyphenate "nonvoting," because we have been hyphenating that
10 consistently throughout.

11 CHAIR BATTLE: 6.06, "the vice president."

12 MR. McCALPIN: Yes. Linda points out quite
13 properly that the word "such" at the end of the second line
14 ought to be omitted.

15 CHAIR BATTLE: "With any determinations of the
16 Board," as opposed to "any such determinations."

17 MR. McCALPIN: Yes.

18 CHAIR BATTLE: Okay. Section 6.07.

19 MR. McCALPIN: Yes. Subsection (d). Linda points
20 out that literally read, this would impose upon the secretary
21 the obligation to file tax returns, which is not ordinarily
22 an obligation of the secretary. I think that we might

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1 consider a change which would eliminate the words "required
2 by law" and substitute the phrase "over which the secretary
3 has custody or control."

4 CHAIR BATTLE: Are there any other changes to 6.07?
5 (No response.)

6 CHAIR BATTLE: 6.08, "the treasurer."

7 MR. McCALPIN: Yes. Again, Linda raised the
8 question of whether we want to require the treasurer to go
9 down the street to the bank with the deposits in hand and
10 physically make the deposit and suggested that we add the
11 words, "The treasurer shall deposit or cause to be deposited
12 all such funds."

13 CHAIR BATTLE: Do you need "deposit and cause to be
14 deposited"?

15 MR. McCALPIN: "Or."

16 CHAIR BATTLE: Isn't "cause to be deposited"
17 sufficient for both?

18 MR. McCALPIN: I guess. Okay. "Shall cause to be
19 deposited." Just take out "deposit."

20 CHAIR BATTLE: Right.

21 MR. McCALPIN: Then, in the same section, and in
22 Section 7.01, we have a very arcane subject which has been

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1 the discussion between Laurie and me. That's the question of
2 whether it's "depositories" or "depositorys." It seems to
3 me that we went through this once, Laurie, made a change.
4 And I think Linda's suggestion was that it ought to be the
5 "o" instead of the "a," whereas we have gone to the "a."

6 CHAIR BATTLE: Did you do some research on this,
7 Laurie? Can you enlighten us as to whether it should be an
8 "a" or an "o"?

9 MS. TARANTOWICZ: I don't recall exactly what we
10 looked at. I know we came to the "a." And I'm sorry. I
11 can't remember -- we can look it up again.

12 MR. MCCALPIN: I remember we had a conversation on
13 the phone about this.

14 MS. TARANTOWICZ: Yes.

15 MR. MCCALPIN: I don't know which it's supposed to
16 be. Linda?

17 CHAIR BATTLE: Linda?

18 MS. PERLE: This is based on my thesaurus checker
19 on my computer. And it's my understanding from that -- I
20 looked at this, and I said, "This is spelled wrong," because
21 I never heard that word. So first, I spellchecked it. In
22 fact, there was a word, "depository." But that means "a

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1 trustee," as I understood it.

2 A "depository" is sort of one who guarantees a
3 deposit. That's my understanding of the word from the
4 minimal amount of information and time I had to spend on it.
5 And a "depository" is a place where one deposits funds. So I
6 don't think it's of great importance, but I thought it should
7 be "depository."

8 In the original bylaws, you had "depository" in one
9 place and "depository" in another. I don't think it's all
10 that important, but maybe somebody should just look it up in
11 a more definitive place of reference.

12 MS. TARANTOWICZ: I'll look it up.

13 MR. MCCALPIN: Let me suggest we submit this for
14 the award for nitpicking.

15 MS. PERLE: I probably would never have noticed it,
16 had you not changed it the second time.

17 MR. MCCALPIN: I think we send you back to the
18 dictionary or whatever, and we abide whatever Webster or
19 whoever says.

20 MS. TARANTOWICZ: Okay.

21 MR. BRODERICK: My impression is that Depository
22 Trust Company, which was responsible for all securities --

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1 and I also think that in terms of libraries, they talk about
2 "depositories," which I think bears out Linda's --

3 MR. McCALPIN: What's a bank?

4 CHAIR BATTLE: There are distinctive uses of the
5 word. And in Subsection (a), you're talking about "banks,
6 trust companies, or other depositories." I don't know. What
7 Linda's saying is, you're talking about either the person or
8 the place.

9 MS. PERLE: I think that's right, but I'm not
10 absolutely certain. I've raised it as an issue that somebody
11 else ought to resolve.

12 MR. BRODERICK: I suggest we be consistent one way
13 or the other and not worry about it.

14 MR. McCALPIN: I think we will be.

15 MS. PERLE: I think if we use "depository," we're
16 not wrong. We might be wrong if we use "depository," but I
17 can't tell you that.

18 MS. TARANTOWICZ: I'll look it up.

19 CHAIR BATTLE: Is there anything else in Section
20 6.08, "the treasurer"?

21 (No response.)

22 CHAIR BATTLE: Section 6.09, "other officers."

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1 (No response.)

2 CHAIR BATTLE: Section 6.10, "compensation."

3 (No response.)

4 CHAIR BATTLE: Section 6.11, "prohibition against
5 the use of political test or qualification."

6 (No response.)

7 CHAIR BATTLE: I do have a question about this. I
8 notice at the beginning that we have a definition of
9 "political." And then, I didn't see the use of the word
10 "political" anywhere else.

11 MR. BRODERICK: There is one place.

12 CHAIR BATTLE: There's one other place?

13 MR. BRODERICK: I worried about that one, too, in
14 6.11.

15 CHAIR BATTLE: When you go back to the
16 definition --

17 MR. MCCALPIN: Well, 6.11 is what she's talking
18 about, isn't it?

19 MR. BRODERICK: That's right. But from the
20 definition of "political," which didn't seem to me to have
21 any applicability until I got to 6.11. And then, the
22 definition tied in with the text.

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1 CHAIR BATTLE: Okay.

2 MR. McCALPIN: Let me remind you also that we
3 mollified the definition in 1.03 after we did Regulation --

4 MS. TARANTOWICZ: 1608.

5 MR. McCALPIN: Which?

6 MS. TARANTOWICZ: Isn't it 08, 1608?

7 MR. McCALPIN: 08?

8 CHAIR BATTLE: 1608?

9 MS. PERLE: Maybe.

10 MR. McCALPIN: So what we tried to do was to make
11 the definition here essentially consistent with 1608. Is it
12 1608?

13 CHAIR BATTLE: Well, I think it is 1608.

14 MS. PERLE: It's not exactly the same way.

15 MR. McCALPIN: No, it's not exactly. I said
16 "essentially consistent." It's not exactly the same.

17 MR. BRODERICK: Didn't we intend the definition in
18 the bylaw to be broader? Then, when we got to 1608, we
19 further refined it for purposes of that section?

20 MR. McCALPIN: Right.

21 MR. BRODERICK: So that it tended to be more
22 consistent, but one more elaborate than the other.

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1 MS. PERLE: Actually, I think it's just the
2 opposite, if you look at it. Because the difference, as I
3 saw it, was that this definition deals with membership, i.e.,
4 the relationship of an individual with a party or a political
5 organization, whereas the other definition in 1608, I think,
6 says -- "associated with"?

7 MS. GLASOW: "Associated with."

8 MS. PERLE: "Associated with," which I think is a
9 somewhat broader term. I think with respect to a person, in
10 the first part of the sentence, membership is perfectly
11 appropriate. If you're going to include selecting or
12 monitoring, you might want to broaden it to include
13 association, as well, because it's unlikely that a grantee or
14 a contractor, which is an organization or an entity --

15 MR. McCALPIN: Are you talking about the regulation
16 or the bylaw?

17 MS. PERLE: Well, I think the bylaw provision is
18 narrower than the regulation. And to the extent that you're
19 talking about it with respect to an individual's membership,
20 that's fine. When you're talking about selecting or
21 monitoring any grantee, as you have done in 1611 -- you've
22 added that -- you might want to use a broader term, because a

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1 grantee is not going to be a member of a political party.

2 CHAIR BATTLE: I understand your point. I was
3 concerned about the breadth and application of that
4 definition when you get back to 6.11, as well. Because it
5 did appear that it went to membership only. And it appeared
6 that it would have direct application, if what you're talking
7 about is personnel actions just within the management staff,
8 as opposed to when you get out into the field, the second
9 part of that, which has to do with monitoring a grantee.

10 MR. BRODERICK: Well, it goes beyond membership
11 here, I think, "membership in a political party or
12 participation in a campaign or engendering support."

13 MS. PERLE: Right. But those, I think, are
14 generally things that are associated with the actions of an
15 individual, rather than an organization. Maybe the
16 "engendering support" is something -- I don't think it's a
17 major point. But if you wanted to use the same language
18 that's in 1608, I think it would cover everything. I don't
19 have any significant problem --

20 CHAIR BATTLE: What is the language in 1608 that
21 we're talking about?

22 MS. PERLE: The language in 1608 -- and I should

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1 make it clear, this is proposed language. This is not the
2 language that's in the current rule. It says "political
3 means associated with a political party or the campaign of
4 any candidate for elected public or party office or
5 engendering support for or opposition to" --

6 CHAIR BATTLE: Which section is it in?

7 MS. PERLE: I'm sorry.

8 MS. GLASOW: It's Tab 2.

9 MR. MCCALPIN: 1608.2(b).

10 MS. PERLE: Correct. It's on the page -- the
11 bottom right hand --

12 CHAIR BATTLE: I see it. "Political means
13 associated with a political party or the campaign of any
14 candidate for elective, public, or party office or
15 engendering support for or opposition to any such political
16 party or candidate."

17 MS. PERLE: Right. So I think the essential
18 difference is that the regulation used "associated with."
19 And your bylaw uses "membership in." I think that's the
20 difference between the two. And I don't think it's a major,
21 significant difference, but I think maybe the "associated
22 with" is a little broader, and it covers more other

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1 situations.

2 But it's really up to the committee to decide
3 whether they want to use the same definition in both or
4 whether they feel that this is tailored to a particular
5 situation they had in mind. However, I don't think it's of
6 tremendous significance.

7 MR. McCALPIN: Well, in the sense, though, that the
8 bylaw uses the word "organization," it's broader than 1608.

9 MS. PERLE: "Party or organization." Correct.

10 MR. McCALPIN: So that "organization" broadens the
11 bylaw over the regulation.

12 MS. PERLE: Correct.

13 CHAIR BATTLE: In that sense. But I think the
14 point that Linda is making is that when you speak of
15 membership either in an organization or a political party,
16 you're speaking of a person having membership. If you're
17 talking about doing monitoring of a grantee and using that as
18 a political test, then the grantee would not have membership
19 in the party. Some individuals in that organization might.

20 So I think that if you change the language to say
21 "associated," it would cover both instances, but it would
22 broaden the prospect that it could be applied to both an

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1 individual, as well as an entity, which is part of the point.

2 MS. PERLE: Or you could say "membership in or
3 association with."

4 MR. McCALPIN: You're talking about changing
5 1.03(g); is that right?

6 MS. PERLE: Right. But again, I don't think it's
7 of overwhelming importance. But I think that --

8 CHAIR BATTLE: "Membership in or association with"
9 would broaden it to include individuals, particularly when
10 you're talking about political tests being applied to
11 personnel actions for our management. And then "association
12 with" would cover grantees in the second portion.

13 MS. PERLE: Right.

14 CHAIR BATTLE: Okay. Does everybody agree on the
15 committee? Okay.

16 Section 6.12, "outside interests of officers and
17 employees." Were there any --

18 MR. McCALPIN: Let me get back to that. I don't
19 have anything on that.

20 CHAIR BATTLE: Are there any questions about that?

21 (No response.)

22 CHAIR BATTLE: I don't have any. Article VII,

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1 "deposits and accountants." Do we have anything in 7.01?

2 MR. McCALPIN: Yes. Look at the end of the second
3 line.

4 CHAIR BATTLE: "Depositories" or "depositories."
5 We'll use the same evaluation for that as we have already
6 indicated that we will earlier.

7 Article VIII, "seal." 8.01. There are no
8 questions?

9 MR. BRODERICK: Do we need a "from time to time,"
10 do you think, on the end of the seal provision?

11 MR. McCALPIN: I'm sorry, John. I didn't hear you.

12 CHAIR BATTLE: "Shall be in a form adopted by the
13 Board from time to time."

14 MR. BRODERICK: "By the Board from time to time."

15 MR. McCALPIN: I think that that --

16 MR. BRODERICK: That's bylaw language.

17 CHAIR BATTLE: "From time to time" is fine. That
18 gives us the flexibility to change.

19 MR. McCALPIN: Why would we want to change the
20 seal?

21 MS. WATLINGTON: I don't know. That's what I'm
22 looking at. Once you get a corporate seal, if that's what

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1 you want, why would you change?

2 MR. McCALPIN: You can change it.

3 MS. WATLINGTON: I know. But like you said, why?

4 CHAIR BATTLE: This gives you the flexibility. You
5 want to have as much flexibility as you can.

6 Anything about the fiscal year?

7 (No response.)

8 CHAIR BATTLE: What I would like to do before we
9 start "indemnification" is take a five-minute break. Can we
10 do that? We will resume -- my clock says 11:15 -- at 11:20.

11 (A brief recess was taken.)

12 CHAIR BATTLE: I would like to go ahead and call us
13 back to order, if everyone will gather around. We have been
14 successful so far at getting through all of the provisions in
15 the proposed amended by laws. But we're on the final
16 section, which pertains to indemnification and, of course,
17 the very last section on amendments.

18 The language in -- if you're using the marked-up,
19 red line copy, it has only been changed very slightly in this
20 section. But there have been some questions about this
21 indemnification provision that I think we need to address at
22 this time and come up with what we feel comfortable with as a

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1 recommendation to the Board. So we'll begin on Article X on
2 "indemnification," Section 10.01.

3 Bill, can you tell us your thoughts on this? And
4 then I have some thoughts, as well.

5 MR. McCALPIN: Let me say, we are to that section
6 of the bylaws which everybody tries to avoid reading. Very
7 difficult sometimes. On the other hand, I think it is true
8 that this provision is reflected in many indemnification
9 bylaws in corporations around the country. It was not a
10 surprise to me to see it here, because I have encountered it
11 in my practice in the bylaws of numerous corporations that
12 I've had to look at.

13 It does take a real concentration to run yourself
14 through all of this and understand why the different sections
15 are there and what one section does that another section
16 doesn't do and that sort of thing.

17 When Linda and I had our conversation last night,
18 she pointed to the obtuse language of it, the difficulty of
19 following it. She suggested, as I recall, that what the
20 Board ought to do is establish a policy on what it wants to
21 indemnify and then reflect that policy in a bylaw. I said it
22 was clear to me that we couldn't do that in less than three

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1 to six months and that I hoped that we certainly were not
2 going to put off the adoption of the bylaws for any such
3 period as that.

4 She suggested, then, as I understood her, the
5 possibility that we could go ahead with this as it is,
6 subject to further study and modification at a later time.
7 As I thought about that afterwards -- and I didn't reflect
8 this to Linda -- I thought that it would be impolitic for us
9 to send up for reprogramming by itself a revision of the
10 indemnification provision. It would look as though we were
11 trying to protect ourselves or help ourselves in a way that
12 would draw close scrutiny when it went up.

13 Last night, I had the opportunity to discuss with
14 some people more fully than Linda and I discussed historic
15 experience problems with the particular bylaw of the Legal
16 Services Corporation. And as I understood it, the particular
17 difficulty that was encountered was centered on Subsection
18 (d) and the failure of prior Boards to make the determination
19 or take the action contemplated by the second sentence in
20 subparagraph (d).

21 Overnight, I have attempted to address that. And I
22 asked Bucky particularly to sit in on this portion of it

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1 because of his prior experience with this, his personal prior
2 experience.

3 Then, this morning, as LaVeeda and I were going
4 through this, she raised a question which -- let me say it,
5 and then she'll say it exactly how she meant it. But it was
6 the question of whether under subparagraph (d) the Board in
7 making the determination that the applicable standards of
8 conduct set forth in (a) and (b) were realistic, recognizing
9 that the standard in (a) and (b) -- and if you look at the
10 seventh line down in (a) -- that the person seeking
11 indemnification "acted in a manner he or she reasonably
12 believed to be in the best interests of the Corporation."

13 That is clearly a subject standard which would
14 require the Board to get into the head of the --

15 CHAIR BATTLE: The person seeking indemnification,
16 actually.

17 MR. MCCALPIN: That's right. So against this
18 background, let me say that LaVeeda and I sitting together
19 decided to recommend a modification of (a) and (b) by
20 deleting the language I have just read so that it would be
21 "reasonably incurred by such person in connection with such
22 action, suit, or proceeding if he or she acted in good faith

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1 and in the best interests of the Corporation," leaving out
2 the subjective element of the reasonable internal belief of
3 the person seeking indemnification.

4 And the same language would come out in (b) in the
5 sixth line of (b). So the Board would then be called on to
6 act on the objective standard of whether the person acted in
7 good faith and in the interests of the Corporation.

8 MR. FORTUNO: But what if the actions of the
9 individual involved ultimately turned out to not be in the
10 best interests of the Corporation, but the person at the
11 time, if you're using a reasonable person standard, acted
12 reasonably; that is, reasonably believed that the actions
13 taken were in the best interests of the Corporation?

14 Are we going to be judging by the result and not
15 the reasonableness of the actions at the time they were
16 taken?

17 MR. MCCALPIN: It's not necessarily the result. I
18 think that if the Board believes that the person was acting
19 in the best interests of the Corporation, without getting
20 into the subjective element -- I don't see how we can make a
21 determination of what the person reasonably believed.

22 CHAIR BATTLE: Well, my concern was this -- that

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1 not only is it the Board -- in Section (d), the Board makes
2 the determination as to whether there ought to ultimately be
3 indemnification, looking at this two-part standard, whether
4 the person acted in good faith.

5 And secondly, the way it read at present was
6 whether also that person "acted in a manner that he or she
7 reasonably believed to be in the best interests of the
8 Corporation," which required the Board to then make a
9 subjective determination as to whether that person believed
10 they were acting in the best interests of the Corporation,
11 whether, in fact, the Board believes that was in the best
12 interests of the Corporation at that time or not.

13 Now, that subjective standard ultimately could be
14 decided by the Board either way. But provisions in part (d)
15 also say "unless ordered by a court." And my concern is,
16 once a court has to make that subjective determination
17 outside the parameters of the Board, that the subjectivity of
18 that standard doesn't really get at what I think the intent
19 was for purposes of indemnification, which is to look at the
20 best interests of the Corporation and whether the person was
21 acting in good faith, it seems to me.

22 MR. BRODERICK: I disagree. I think the belief of

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1 the person that the action was in the best interests of the
2 Corporation, in good faith, plus that belief, I think that's
3 the essential ingredient of this part of the indemnification
4 agreement.

5 MR. McCALPIN: How do we challenge that? Are we
6 stuck with it, if a person says, "I believed it was in the
7 best interests of the Corporation"? Do we have any --

8 MR. FORTUNO: The question is whether it was a
9 reasonable belief under the circumstances.

10 MR. BRODERICK: I think "good faith" is subjective,
11 also, the same way.

12 CHAIR BATTLE: The other concern I had is,
13 paragraph (a) speaks to whether or not you're participating
14 as a person, as plaintiff, or defendant. I have less of a
15 problem when you're talking about defending an action that's
16 being brought than I do when someone in the status of a
17 plaintiff brings an action against the Corporation and can
18 say, "I really believe in this action that I am bringing
19 against the Corporation."

20 But clearly, the Board of Directors in making a
21 determination regarding indemnification does not see it that
22 way, that that subjective belief of the person bringing the

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1 action against the Corporation should not be the standard for
2 determining indemnification. It ought to be the question as
3 to whether, in fact, it was a good faith effort; and
4 secondly, whether it was in the interests of the Corporation
5 for that action to be brought.

6 Linda, if you want to come forward.

7 MS. PERLE: I think that Bucky can probably address
8 this maybe better than I. I've had a couple of conversations
9 with some people who when they acted believed, in fact, fully
10 that what they were doing was in the best interests of the
11 Corporation.

12 A new Corporation Board came in which had a very
13 different view of what was in the best interests of the
14 Corporation and refused to indemnify people. So I think
15 there's just as much subjectivity in terms of the
16 determination of what's in the best interests of the
17 Corporation or there may be under a particular set of
18 circumstances. That bothers me.

19 You're making a distinction between whether someone
20 is the plaintiff or defendant. That may be a reasonable
21 distinction.

22 CHAIR BATTLE: Right. And I'm saying that my

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1 concern runs more to paragraph (a) than to (b). When you're
2 defending an action, I can see --

3 MR. McCALPIN: No, no, no. (b) is not defense.

4 CHAIR BATTLE: Which one is defense?

5 MS. PERLE: Both say "party."

6 MR. McCALPIN: That's right.

7 CHAIR BATTLE: I'm sorry. (c) speaks to defense.

8 (c) is the one that speaks in the defense of an action. But
9 (a) and (b) both speak to a situation where you can be both
10 plaintiff and defendant. And I do have some concern about
11 that subjective standard being applied when the Corporation
12 is actually being sued by someone and we're saying, "If you
13 think it was right." Of course that person thought it was
14 right.

15 MS. PERLE: What if it's not the Corporation being
16 sued but the person being either sued or --

17 CHAIR BATTLE: Well, that's defense. I feel
18 differently about defense than I do plaintiff with regard to
19 the application of that standard.

20 MS. PERLE: Okay. What if the Corporation was
21 suing someone? I don't know that that has, in fact,
22 happened.

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1 MR. McCALPIN: I would simply ask the members of
2 the Board to reflect on the history of the last year and the
3 potential for litigation arising out of the history of the
4 last year and whether we think we ought to be in a position
5 of being required to indemnify people who bring action
6 against the Corporation.

7 CHAIR BATTLE: As plaintiffs.

8 MS. PERLE: I think -- I agree that that's a real
9 concern. But I think that there are other situations, the
10 flip sides of those situations, which we have also
11 experienced in the less recent past. We don't want to throw
12 the baby out with the bath water. I think we want to be able
13 to think about those situations that either have arisen or
14 could arise in the future.

15 We don't want to be very shortsighted about this
16 and kind of get some sense from the Board about what the
17 Corporation's policy should be in this area.

18 MR. McCALPIN: Linda, I wish you would get closer
19 to the microphone. I have some difficulty hearing you.

20 MS. PERLE: I'm sorry. I guess I understand your
21 concern about reprogramming, although is it clear that these
22 need to be reprogrammed?

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1 CHAIR BATTLE: Yes. My suggestion would be this --

2 MS. PERLE: But I think we need to think a little
3 bit more.

4 CHAIR BATTLE: If there is a consensus among Board
5 members that at least there is some concern about that
6 standard as it relates to the way that the indemnification
7 section is written in that it applies in Subsections (a) and
8 (b) to plaintiffs, then maybe some language can be drafted to
9 take care of that concern.

10 When you're being sued based on your official
11 capacity of being either an officer or an employee of the
12 Corporation, then that whole issue of whether it was in the
13 best interests of the Corporation becomes really secondary,
14 because you're in a situation where you've got to defend
15 yourself. And so long as you've acted within the scope of
16 your authority, I think you have a right to indemnification.

17 MS. PERLE: And you're acting consistent with what
18 was then the policy of the Corporation or what you at least
19 perceived to be the policy of the Corporation and then that
20 policy changes.

21 MR. MCCALPIN: I would point out that the indemnity
22 in (c) is much narrower than the breadth or scope of the

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1 indemnity in (a) or (b). The indemnity in (c) is only
2 against "expenses actually and reasonably incurred," whereas
3 in (a) and (b), it's "expenses including attorney's fees,
4 judgements, fines, and amounts paid in settlement." So it's
5 a much narrower indemnity in (c) than in (a) and (b).

6 CHAIR BATTLE: For example, let's say that you've
7 got someone who qualifies as the "any person" who sues the
8 Corporation and loses. However, that person then is subject
9 to some judgement because there's a cross action by the
10 Corporation against that person?

11 Are we in a situation where we're saying that we
12 under that judgement have a right to the amount that we have
13 been awarded and then, that person has a right to come back
14 and say, "However, you must indemnify me for that"?

15 MS. PERLE: I'm not suggesting that --

16 MR. McCALPIN: It may be literally. That's the way
17 it is now.

18 MS. PERLE: It may be. I will tell you that with
19 respect to paragraphs (a) and (b), my initial reaction was
20 not a substantive one. It was simply, "This is impossible to
21 understand."

22 CHAIR BATTLE: We understood it.

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1 MR. McCALPIN: Difficult, but not impossible.

2 MS. PERLE: (b) is one sentence, as I see it. It's
3 probably about 12 lines long. It's one sentence.

4 MR. McCALPIN: (d)?

5 CHAIR BATTLE: (b).

6 MR. McCALPIN: Oh, (b).

7 CHAIR BATTLE: She's talking about the possibility
8 of getting through that one.

9 MS. PERLE: When something is too turgid and so
10 difficult to kind of penetrate, it becomes a substantive
11 problem, because there are so many ways that it could be
12 interpreted. And I think that was, in fact, part of the
13 problem that was experienced in the '80s.

14 I said to Bill -- although I apologize for not
15 bringing it -- I would say in the last 12 meetings of the
16 Board of Governors of the D.C. Bar, at least 3 or 4 of those
17 meetings, we have had an opportunity to revise various
18 indemnification proposals, because someone has brought up an
19 issue where the rule as stated is not clear, or it's subject
20 to varying interpretations.

21 And there is a constant effort to revise those to
22 assure that the people who are administering those provisions

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1 and who are subject to those provisions understand what their
2 rights are and to ensure that when people go into some
3 activity, they understand or they have -- at least if they
4 take the time to read the provision, they have a pretty clear
5 understanding of their liabilities and what might happen to
6 them and how they might be protected.

7 And I think that this absolutely does not do that.
8 I think it's just -- for most people, it's really
9 impenetrable. (a) and (b) are sort of impenetrable. And I
10 don't think that's particularly fair.

11 MR. McCALPIN: Surprisingly enough, when you drove
12 me back to reading this again last night, it was clearer than
13 it had been in a long time. That may be because I've read it
14 so many times.

15 MS. PERLE: And I was very tired when I read it.

16 CHAIR BATTLE: So, Linda, I guess from what you're
17 saying, the clarity of it could be better if we cut down on
18 having one sentence.

19 MS. PERLE: Well, first of all, if you broke it up
20 into four or five sentences, I think that would help.

21 CHAIR BATTLE: Now, that's something we can edit
22 and do. The secondary issue on the table is the whole

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1 question as to whether or not we're going to keep this
2 language in or out. And we began our discussion with that.

3 And if I can get some sense from the committee as
4 to where we are, maybe we can make that change and do some
5 intensive editing work just to change the sentence structure
6 to meet the concern that Linda has raised, we might be able
7 to get through this.

8 MS. PERLE: This is something I learned very early
9 in my legal career. The fact that a provision has appeared
10 over and over and over again in some document that some
11 corporation or something adopts over and over again doesn't
12 make it reasonable or rational. It probably just simply
13 means that somebody reviewed it and said, "What does this
14 mean?"

15 And the person before them said, "Oh, it has been
16 here forever" or that it has become a term of art, and that
17 may be. But I think to the extent that something like this
18 which really does describe people's rights and obligations
19 needs to be clear. And we're all lawyers sitting around this
20 -- or most of us -- excuse me. Not all.

21 Many of us are lawyers sitting around this table.
22 And if we tried hard enough, we could all read through this

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1 and make some sense of it. Not everybody who works at the
2 Corporation is a lawyer. Not everybody on the Board is a
3 lawyer. Not everybody who might be involved in some
4 litigation with the Corporation is a lawyer.

5 And lawyers can differ on what these things say.
6 And I think we should make some attempt to make it as clear
7 as possible.

8 CHAIR BATTLE: Sure. We can make some editing
9 attempts. Are there specific areas of provisions within (a),
10 (b), or (c) not being clear that we need to address is the
11 second part of my question before we move on.

12 MS. PERLE: I must tell you, I can't answer that,
13 because I was too tired to do it.

14 MR. McCALPIN: Let me say that I think it's
15 possible, looking at all of this, to say that since (c)
16 refers specifically to a person described in (a) and (b)
17 being a defendant, that the implication is that (a) and (b)
18 are intended to indemnify plaintiffs.

19 And I think the question is whether or under what
20 circumstances do we want to indemnify a plaintiff. And we
21 have recoupment provisions in various statutes which say that
22 a prevailing plaintiff is entitled to be recompensed.

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1 So maybe what we really ought to say is that a
2 prevailing plaintiff ought to be indemnified, however,
3 probably only to the extent that the defendant is indemnified
4 in (c), because the prevailing plaintiff is going to get a
5 judgement anyway.

6 MR. EAKELEY: I have several different reactions to
7 all of this. First, I have trouble with any indemnification
8 provision for the expenses of any plaintiff. I'm not used to
9 seeing it. I don't think we need it. If somebody is a
10 plaintiff and prevails, then presumably, that person will be
11 able to pay his or her expenses out of whatever is awarded,
12 unless there's an award of fees and expenses, as well.

13 MR. McCALPIN: Well, there may not be a monetary --

14 MR. EAKELEY: There may not be, but I don't know
15 why we have to indemnify plaintiffs. I think that the
16 indemnification provisions ought to be focused on holding
17 harmless those who act on behalf of the Corporation in good
18 faith and maybe not much more than that.

19 There's a certain overlap between "in good faith"
20 and "in a reasonable belief" that what you're doing will
21 benefit the Corporation. I think that the subjective
22 standard is broader and more protective than permitting a

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1 subsequent Board to decide what is, in fact, in the best
2 interests of the Corporation.

3 But I think that the indemnification for acts taken
4 in the name and for the benefit of the Corporation in good
5 faith ought to be pretty broad. And I have particular
6 trouble on (d) in excluding from indemnification good faith
7 actions that actually somebody determines are negligent.

8 Most board provisions I've seen on indemnification
9 indemnify directors for all actions other than gross
10 negligence or malfeasance. And we're really carving out an
11 exception that could come back to haunt us, I think, by
12 accepting acts of negligence from indemnification. We're all
13 human.

14 MS. FAIRBANKS-WILLIAMS: Especially if it's
15 hindsight after the thing has happened by a couple of years.
16 I don't like that.

17 MR. ASKEW: Let me make a comment. I hadn't
18 thought about this until we got here, so this is sort of off
19 the top of my head. I agree with Doug about the issue of the
20 plaintiffs. I think that's something we really should think
21 about and possibly eliminate.

22 I am concerned about two things in here. One, in

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1 (a) and (b), this "and in the manner he or she reasonably
2 believes to be in the best interests of the Corporation."

3 I think I tend to -- if some language like that has
4 to stay in, I think I tend to agree with what I think Linda
5 and Vic were saying about it may be easier to apply this
6 reasonable standard than to whatever a subsequent Board or
7 staff is going to interpret what was or was not in the best
8 interests of the Corporation two years before, five years
9 before, whatever.

10 MR. EAKELEY: You mean the reasonable belief
11 standard?

12 MR. ASKEW: Right. But perhaps that should be
13 dropped altogether and not have that second half of the
14 standard, just a good faith standard, or something that says
15 "consistent with current LSC policies and procedures."

16 I mean, if you were acting consistent with the
17 policies and procedures at the time and somebody comes back
18 later and says that they didn't agree with those policies and
19 procedures and, therefore, they're going to refuse to
20 indemnify you, then that's fundamentally unfair and
21 inappropriate.

22 In our case, the situation was a subsequent Board

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1 says, "What you were doing was not in the best interests of
2 the Corporation. We refuse to indemnify you." And it wasn't
3 a lawsuit. It was an investigation; you know, a GAO, FBI,
4 Senate committee investigation that required substantial
5 legal expense as former Corporation employees to defend what
6 the Board of the Corporation did at the time.

7 And the next Board says, "We don't agree with what
8 you were doing; therefore, we refuse to indemnify you." And
9 there was nothing we could do except to pay it. So that
10 raises the question in (c), "has been successful."

11 I mean, who's going to determine whether we were
12 successful or not? I mean, GAO came back and said, "You
13 know, there are differing interpretations here. What they
14 did may" -- and so we would take the position, "Well, we were
15 successful." The future Board says, "No, you weren't
16 successful. So, therefore, we have another reason for
17 refusing to indemnify you." So that's a little bit of a
18 vague situation there in the sense of --

19 MR. McCALPIN: We have got a lot of litigation over
20 "prevailing party."

21 MR. EAKELEY: Why do we need (c) at all if we have
22 just a good faith standard? If you've acted in good faith

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1 and not out of self-interest or were reckless or grossly
2 negligent, shouldn't you be entitled to indemnification
3 regardless of whether you prevail?

4 MR. ASKEW: I would say yes.

5 MR. EAKELEY: I would, too.

6 CHAIR BATTLE: I would think that part of the
7 problem grows out of potentially what Linda is saying about
8 the wording that we have got in Section (a) and (b),
9 "speaking to any person under any circumstances," which gives
10 rise to the prospect that it can be applied to both plaintiff
11 and defendant situations.

12 And the indemnification here is intended to assure
13 that directors or employees or officers or agents acting on
14 behalf of the Corporation in the Corporation's best
15 interests, given the time that they're defending an action,
16 would be comfortable with knowing that they have a right to
17 be indemnified for any expenses that they receive as a result
18 of that.

19 And maybe what we need to do is to have some
20 language that just clearly sets out that policy and strips
21 away the prospect that we're having some plaintiff sue us who
22 believes that they're doing it in their best interests, gets

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1 a judgement against us, and then gets indemnified by us for
2 attorney's fees and some other things, which is where this
3 language now could potentially lead us. Or at least it opens
4 the door for some litigation around that issue. And I don't
5 think we need to have the door open on that.

6 How we can accomplish that, given that it is now 12
7 o'clock by my clock --

8 MR. EAKELEY: May I just make one observation?
9 This committee and staff and CLASP and others have been
10 working extremely hard on this. Those efforts show. The
11 fact that we had asked for a presentation to the Board for
12 approval today to a certain extent is an arbitrary timetable.
13 If we can get it done, great.

14 But if we can't, we can have a dovetailing Ad Hoc
15 Committee on Governance report and Bylaws Committee report
16 come together for the March meeting in a way that would give
17 this committee the interim meeting to figure out how to
18 implement the bylaws if they're approved.

19 I hold that open as a possibility -- I mean, that's
20 for you to consider. I'm not trying to suggest anything
21 other than that may be an option if you want to avail
22 yourself of it.

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1 CHAIR BATTLE: Well, I know that Bill has worked
2 real hard and had as his goal having the bylaws behind us in
3 this meeting.

4 MR. EAKELEY: I think we would all like to see them
5 behind us.

6 CHAIR BATTLE: But this particular provision still
7 needs some work. I think all of the other provisions we have
8 gone over we can resolve and we can get editing changes done
9 to get the committee comfortable with them. This one may
10 need some additional work around the issues that we have
11 discussed.

12 MR. EAKELEY: And the way we have got the Board
13 meetings scheduled, we are planning to resume tomorrow
14 morning with the -- I don't anticipate we're going to get
15 done with everything this afternoon as a Board, so that we
16 will be coming back in the morning to deal with the reports
17 of the committees.

18 So if an overnight would permit focusing on this
19 language and a reconvening, perhaps, of the committee or a
20 comparing of notes so that the committee has a consensus on
21 the wording, we can do that and schedule the bylaws for a
22 vote tomorrow morning.

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1 MR. McCALPIN: I think that they are on the agenda
2 for tomorrow, in any event. I am not optimistic about being
3 able to work our way through this, because I'm not sure we
4 have come to closure yet on precisely what it is we want to
5 do. And until we do that, we can't very well reflect it in
6 draft language.

7 In the interest of fuller discussion, let me tell
8 you what I did with respect to (d) and the second paragraph
9 of (d), which I understood to be essentially the problem
10 encountered by people in the past. It is that either the
11 Board didn't make that determination, or they were irrational
12 about it.

13 So what I suggested was at the end of (d), we might
14 add language along these lines -- and I don't know whether
15 it's worth taking down or not. But "Any person aggrieved by
16 such action may seek relief through binding arbitration or a
17 judicial declaration of the propriety thereof.

18 "If the Board or disinterested directors fail to
19 act, that affected party or parties may seek relief through
20 binding arbitration or in a judicial proceeding. In either
21 case, such a person who prevails in such action shall be
22 indemnified against expenses, including attorney's fees,

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1 actually and reasonably incurred in connection therewith."

2 So basically, what I've done is -- if you all were
3 at the mercy of the prior Board through their inaction or
4 their arbitrary action, I have tried to give some way out of
5 that. This isn't the end of it, but if we're going to have a
6 look at the whole thing, I thought that I ought to put that
7 possibility on the table.

8 CHAIR BATTLE: On the table. I really think that
9 this section is going to need some more work. I think that
10 we do have several issues that we have raised that really
11 need to be clarified. And because indemnification language
12 tends to be written for lawyers to read, as this section is,
13 that it also needs editing so that it is clear, as well.

14 And that's a lot of work to leave to be done
15 overnight. So to the extent that we have all the other
16 provisions pretty much in order, what I think we need to do
17 is to get a draft, if we can, of all those other provisions
18 with indemnification still left to be completed. And we can
19 report on our status tomorrow.

20 MR. McCALPIN: And I would point out that we
21 apparently are going to meet in February. And we will have
22 an opportunity to review the indemnification provision at

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1 that meeting in February.

2 MR. ASKEW: So what you would do is just leave the
3 language alone until February or leave the current language
4 in place?

5 MR. McCALPIN: Yes. We would not have any action
6 on the bylaws at this meeting.

7 CHAIR BATTLE: We will simply bring the Board up to
8 date that we have gone through and made some changes. And
9 then, we'll act in March. But we will meet as a committee in
10 February, and we will have an opportunity to reexamine the
11 language in "indemnification" and to make the changes that we
12 see may be appropriate at that time.

13 Is that a comfortable way to handle it? Members of
14 the committee? I'm sorry. John?

15 MR. BRODERICK: I think that's the way we should.
16 I have a feeling that there's going to be needed some
17 research as to the meaning of "indemnification bylaws" in
18 relation to the applicability of plaintiff or defendant.
19 There's a lot of history in the law books on these
20 indemnification provisions. And I would hesitate to try to
21 rush through a quicky redrafting without checking some of the
22 literature on the subject.

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1 MR. McCALPIN: I think it's important to see if we
2 can restate at least in the very broadest generality what
3 we're thinking about. As I see it, what we think is that if
4 a person is cast as a defendant, either by the Corporation or
5 by somebody else as a result of a position held or action
6 taken in connection with it, then we think that there ought
7 to be full indemnification, expenses, judgements, fines,
8 settlement amounts, whatever.

9 If, however, a person is a plaintiff in an action
10 against the Corporation or against a person who acted for the
11 Corporation, then we're not willing to be so magnanimous with
12 respect to our indemnification.

13 And maybe we would require that the person bring
14 the action in good faith, that the person prevail in that
15 action, and that we would only indemnify expenses and not
16 judgements, fines, and settlement amounts. Because we would
17 no longer have to pay twice. Is that essentially where we
18 are?

19 CHAIR BATTLE: Well, your suggestion as to how to
20 handle the plaintiff is still, to me, potentially too broad,
21 given the example that I've posed, which is you have someone
22 sue the Corporation as a plaintiff who is someone who fits

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1 into this "any person" designation under (a) and prevails in
2 that lawsuit.

3 However, the Corporation, in taking its posture in
4 that litigation, defends and says that they don't believe
5 these actions are in the best interests, but you've got a
6 person who prevails. Are we then bound to not only pay the
7 judgement but also to indemnify them for all of their costs
8 and expenses, as well? We're going to have to work and look
9 at that, it seems to me, before we can clarify.

10 MR. EAKELEY: I don't understand the circumstances
11 under which the Corporation would want to indemnify somebody
12 suing the Corporation.

13 CHAIR BATTLE: I don't either. But I think based
14 on the way that Bill structured his statement with regard to
15 indemnification for plaintiffs, that a case such as that
16 could fall within those parameters. So I'm suggesting that
17 what we do is rethink that, look solely at where our
18 potential good faith responsibility lies with regard to
19 indemnification of plaintiffs, and carve out a provision that
20 only meets that criteria for plaintiffs and rewrite it.

21 MR. BRODERICK: For example, when McCalpin brought
22 a suit against the Board back in the olden days, should he be

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1 indemnified?

2 MR. McCALPIN: Fortunately, there was nothing to
3 indemnify because it was all done pro bono.

4 CHAIR BATTLE: But that's a good example. But in
5 theory, you've got the same instance that has to flow through
6 how we put together the section on indemnification.

7 MR. EAKELEY: Mr. Wilkinson's suite?

8 MR. McCALPIN: We clearly were not successful.

9 CHAIR BATTLE: You were not successful as a
10 plaintiff.

11 MR. BRODERICK: But should you, nevertheless, be
12 indemnified because you did it in good faith, believing it to
13 be in the best interests of the Corporation?

14 MR. McCALPIN: And to take up some of the tort
15 reform things, should we have been required to pay the
16 Corporation's fees and expenses since we did not prevail?

17 CHAIR BATTLE: That's for the court to answer.

18 MR. BRODERICK: I think that may be the answer. We
19 just have to leave that phase of it to the court.

20 CHAIR BATTLE: Yes. Those are some of the tough
21 questions I think that still remain with regard to
22 indemnification.

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1 So with that, the very last section is on
2 amendments. Are there any questions about that?

3 (No response.)

4 CHAIR BATTLE: If not, the only section we have
5 outstanding is the section that relates to indemnification.
6 We'll look at a redraft of all the other provisions. We'll
7 take up indemnification at our next meeting in February.

8 And I will entertain at this time a motion to
9 recess the meeting of the Ops and Regs Committee. We are
10 going to resume following the Board meeting our meeting and
11 continue with the agenda that is printed and has been adopted
12 by this committee today.

13 Before taking that motion, I would like to just say
14 thanks again to Bill and to Laurie and to Vic and to Linda
15 and to everyone that offered, John and Ernestine and Bucky,
16 for offering your very careful thoughts and deliberations on
17 these bylaws.

18 It's not an easy task to redo or to do bylaws, and
19 my hat is generally off to those lawyers who make that their
20 mainstay in practice to do these kinds of things with
21 corporations. And I think we have done a good job of pulling
22 them together. So thank you to all of you.

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1 MR. McCALPIN: But let's adopt a rule that
2 henceforth, we consider no amendments except with respect to
3 Article X. It's a proposed rule on another amendment.

4 (Laughter.)

5 MS. TARANTOWICZ: I'll vote for that.

6 MR. BRODERICK: If you make that motion, Mr.
7 McCalpin, I think it should be seconded and voted. And I so
8 second.

9 CHAIR BATTLE: Well, here we are. We have got the
10 indemnification provision as the only one before us for our
11 next meeting.

12 I'll entertain a motion for recess.

13 M O T I O N

14 MR. McCALPIN: So moved.

15 MS. WATLINGTON: Second.

16 MR. BRODERICK: Second.

17 CHAIR BATTLE: It has been properly seconded. All
18 in favor?

19 (Chorus of ayes.)

20 CHAIR BATTLE: All opposed?

21 (No response.)

22 CHAIR BATTLE: We are now in recess.

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