

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, MARCH 11, 2011

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The Commission convened in Room 540 at 624
Ninth Street, Northwest, Washington, D.C. at 10:30
a.m., ABIGAIL THERNSTROM, Vice Chairman, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman

ROBERTA ACHTENBERG, Commissioner

MARTIN R. CASTRO, Commissioner (elected Chairman
during the meeting)

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DINA TITUS, Commissioner

KIMBERLY TOLHURST:, Delegated the Authority of
the Staff Director

STAFF PRESENT:

CHRISTOPHER BYRNES

IVY DAVIS

DEMITRIA DEAS

LILLIAN DUNLAP

PAMELA A. DUNSTON, Chief, ASCD

ALFREDA GREENE

TinaLOUISE MARTIN, Director, OM

LENORE OSTROWSKY, Acting Chief, PAU

JOHN RATCLIFFE, Chief, Budget and Finance

MICHELLE RAMEY-YORKMAN

EILEEN RUDERT

DAVID SNYDER

VANESSA WILLIAMSON

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTON

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

ALISON SCHMAUCH

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

(10:30 a.m.)

ACTING CHAIR THERNSTROM: The meeting will come to order. This is a business meeting of the U.S. Commission on Civil Rights. We're starting a little late at 10:30 on March 11th, 2011.

This meeting is taking place at the Commission's headquarters located at 624 9th Street, Northwest, Washington, D.C.

I am Abigail Thernstrom. I am the Vice Chair. And I am temporarily chairing the meeting.

Commissioners who are present at this meeting are myself, Commissioner Gaziano, Commissioner Kirsanow, Commissioner Heriot, Commissioner Titus, Commissioner Achtenberg, and Commissioner Castro.

A quorum of the commissioners is present. Is the person delegate the authority of the Staff Director present?

DELEGATED THE AUTHORITY OF THE STAFF DIRECTOR TOLHURST: I am.

ACTING CHAIR THERNSTROM: Is the Court Reporter on this line?

THE REPORTER: The Court Reporter is present, Madam Chair.

ACTING CHAIR THERNSTROM: The Court

1 Reporter is present. And the meeting will come to
2 order.

3 I. APPROVAL OF AGENDA

4 ACTING CHAIR THERNSTROM: The first item
5 of business is the approval of the agenda. I suggest
6 that we take any motions to amend one by one, vote up
7 or down on each, and then vote to approve the amended
8 agenda.

9 If that procedure meets with Commission
10 approval, commissioners' approval, are there any
11 amendments to the agenda?

12 COMMISSIONER GAZIANO: I move to maybe
13 just bifurcate one item on the agenda. Under "Program
14 Planning," the first item, "Consideration of the new
15 statutory report topic," when we turn to that item, I
16 would propose after discussion that we vote first
17 whether to affirm or reject the current statutory
18 report topic before we proceed to consider
19 alternatives.

20 ACTING CHAIR THERNSTROM: Have I got a
21 second on that?

22 COMMISSIONER KIRSANOW: Second.

23 ACTING CHAIR THERNSTROM: Any discussion?

24 (No response.)

25 ACTING CHAIR THERNSTROM: Hearing none,

1 all in favor?

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

3 ACTING CHAIR THERNSTROM: I guess that is
4 a unanimous vote unless somebody abstained that I
5 didn't --

6 COMMISSIONER ACHTENBERG: I was going to
7 vote no, but --

8 (Laughter.)

9 COMMISSIONER GAZIANO: Hear her out.

10 ACTING CHAIR THERNSTROM: It's in my view
11 a whatever. I was attempted to vote no also.
12 Whatever.

13 Okay. Any other amendments to the agenda?

14 (No response.)

15 ACTING CHAIR THERNSTROM: Hearing none, we
16 have a motion to approve the revised --

17 COMMISSIONER CASTRO: So moved.

18 COMMISSIONER GAZIANO: Second.

19 ACTING CHAIR THERNSTROM: All in favor?

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

21 ACTING CHAIR THERNSTROM: That is a
22 unanimous vote. It has been approved.

23 II. WHITE HOUSE NOMINEES FOR

24 CHAIR, VICE CHAIR AND STAFF DIRECTOR

25 ACTING CHAIR THERNSTROM: Next on the

1 agenda, consideration of the White House nomination
2 for Commission Chair. As you all know, at this time
3 the White House has nominated a new Chair. We still
4 do not have a new Staff Director.

5 Before we discuss the nomination for
6 Chair, I would like to say a few things about what I
7 hope from our Chair and our eventual Staff Director.
8 And when I finish, perhaps other commissioners will
9 want to weigh in.

10 This Commission needs to support a strong
11 executive, the Staff Director, who is authorized to
12 run the agency with broad input by a majority vote
13 from the Commission. Regarding the authority of the
14 Staff Director, once the Commission affirms the new
15 Staff Director, only the White House obviously can
16 fire him or her.

17 I would like to add the following
18 expectations on my part. The Staff Director will not
19 permit the staff to be micromanaged by commissioners
20 and their assistants. Neither the Chair nor he
21 commissioners will micromanage the new Staff Director,
22 nor will they undercut the Staff Director's authority
23 over the staff.

24 Staff should look only to the Staff
25 Director for guidance, assignments, and evaluations.

1 The Staff Director has the sole authority to make
2 staff assignments and to evaluate the results of their
3 work.

4 The subcommittees authorized last year for
5 various projects should either be canceled if any are
6 still active or restructured so that the subcommittee
7 only reports to the committee of the whole; that is,
8 the entire Commission, which will then vote whether or
9 not to direct the Staff Director to implement the
10 subcommittees' recommendation.

11 Finally, I just want to affirm to the
12 Chair nominee the restrictions that our Administrative
13 Instruction 9-2 places upon commissioner-to-staff
14 contact and staff-to-commissioner contact.

15 And we were going to hand out copies of AI
16 9-2. Can you start with me? Do people need time to
17 look at these. They certainly can have it.

18 I also affirm to our nominee the portion
19 of our regulation which describes the function of the
20 Staff Director is the same language used in our
21 Administrative Instruction 1-2, section 3, paragraph
22 01. And that is the second page of your handout.

23 Do people need more time? Anybody who
24 needs more time raise their hand?

25 COMMISSIONER GAZIANO: What's the purpose

1 of sharing the marginally ultra vires administrative
2 instruction? What's the purpose?

3 ACTING CHAIR THERNSTROM: Well, I mean,
4 just to get our house in order from the very start and
5 get the procedural expectations clear.

6 COMMISSIONER GAZIANO: When you are done,
7 I will provide some thoughts on your thoughts.

8 ACTING CHAIR THERNSTROM: Well, I am done.
9 Of course, the next thing I am going to say is I am
10 pleased to announce the White House has nominated
11 Martin Castro as Chair. And obviously a majority of
12 the commissioners must vote. But so go ahead now.

13 COMMISSIONER GAZIANO: Could I proceed
14 before commenting on your comment, Madam Vice Chair?
15 I take your word in your e-mail communication from
16 your Special Assistant that the White House did, in
17 fact, nominate Commissioner Castro.

18 ACTING CHAIR THERNSTROM: Yes.

19 COMMISSIONER GAZIANO: And I take his word
20 that he has received such a nomination, but he
21 mentioned the letter to us before this meeting. Does
22 someone have it? Could we see a copy? Is it possible
23 that we can --

24 ACTING CHAIR THERNSTROM: Oh, there was an
25 e-mailed letter.

1 COMMISSIONER GAZIANO: I didn't receive a
2 copy. We can probably proceed just on you-all's word
3 that he's really -- but it would be kind of nice for
4 those of us who are asked to vote on this that we, in
5 fact, know that this isn't some elaborate trick and
6 that the White House has indeed nominated --

7 COMMISSIONER HERIOT: We're getting ahead
8 of ourselves here.

9 ACTING CHAIR THERNSTROM: Should we admit
10 it is an elaborate trick? Do you think?

11 COMMISSIONER GAZIANO: Does someone have
12 an e-mail that they can -- all right. Thank you.

13 TIM FAY: I would be glad to print out a
14 copy of the letter and bring it.

15 ACTING CHAIR THERNSTROM: But it is an
16 elaborate trick. Let's get copies all around.

17 DELEGATED THE AUTHORITY OF THE STAFF
18 DIRECTOR TOLHURST: Yes, I have a copy in my office.

19 COMMISSIONER CASTRO: Let's just get a
20 copy for everybody, why don't we, all the
21 commissioners?

22 COMMISSIONER GAZIANO: But we can proceed
23 to discuss.

24 ACTING CHAIR THERNSTROM: Okay. I was
25 wondering, could we --

1 COMMISSIONER GAZIANO: Yes, we can
2 proceed.

3 ACTING CHAIR THERNSTROM: -- proceed
4 without having the elaborate trick exposed. Go on,
5 Commissioner Heriot?

6 COMMISSIONER HERIOT: I just want to back
7 up to some of your earlier statements here and just
8 put on the record that just about everything you said
9 I disagreed with --

10 ACTING CHAIR THERNSTROM: I understand --
11 and that it's especially for you. Yes.

12 COMMISSIONER HERIOT: -- and that it's
13 especially for you.

14 ACTING CHAIR THERNSTROM: Yes.

15 COMMISSIONER HERIOT: It's important to me
16 not to suggest on the record that anybody but the Vice
17 Chair has this view of the Commission. The statute
18 says that the Commission consists of eight
19 commissioners. It does not consist of the staff. We
20 are not an advisory committee to the staff. And I
21 don't think we need to spend more time on that. Just
22 let me say I don't agree with any of that.

23 But I do agree that it is very, very
24 likely -- and I am going to vote that Marty Castro has
25 been nominated by the President of the United States.

1 So it would be nice, actually, to have, you know,
2 official notification of that, but I am going to go
3 with it.

4 COMMISSIONER GAZIANO: If we couldn't
5 produce the letter, I was willing to go with it, too.

6 COMMISSIONER CASTRO: I believe the letter
7 is coming.

8 COMMISSIONER GAZIANO: But, anyway, I
9 would like to turn to the discussions we had with the
10 Chair nominee in just a minute. But I do want to
11 explain part of my thoughts with regard to the Vice
12 Chair's statements.

13 First of all, with regard to our new
14 commissioners, administrative instructions are what
15 the Commission adopts to bind the staff, to instruct
16 the staff. And it is our sort of current
17 understanding amongst each other sometimes that they
18 are our procedures.

19 This particular administrative
20 instruction, 9-2, you know, dealt with some weird
21 goings-on -- by the way, it was adopted before I was
22 on the Commission. It related to some activities.
23 And to the extent that it is inconsistent with the
24 commissioners' statutory role, it's ultra vires. But
25 in general, of course, we can all agree that

1 commissioners ought not to micromanage anyone, but
2 commissioners should be running the Commission. And,
3 as far as I know, there was no breach of the policy or
4 principle of this. So I just wanted to get in on the
5 discussion.

6 But maybe we can now turn to the
7 discussion of the Chair.

8 COMMISSIONER ACHTENBERG: No. We're
9 waiting for the letter.

10 ACTING CHAIR THERNSTROM: No, we're not
11 waiting for the letter. They said to go on.

12 COMMISSIONER GAZIANO: We could go on in
13 the discussion as far as I'm concerned.

14 ACTING CHAIR THERNSTROM: Commissioner
15 Achtenberg?

16 COMMISSIONER ACHTENBERG: This is an
17 important moment. And while I appreciate the notion
18 that the Chair nominee should be up to date on the way
19 the Commission operates and to the extent that this is
20 the current embodiment of the way the Commission
21 operates, you know, the point being made is
22 well-taken.

23 But I would hate to lose the importance of
24 the opportunity, at least for me to say on the record
25 to my colleague what an honor it is to be asked by the

1 President of the United States not only to serve but
2 to lead the Commission, how thrilled I am that Marty's
3 selection has been made here.

4 I certainly intend to vote in the
5 affirmative. I appreciate very much the way actually
6 all of the commissioners have conducted themselves
7 since we have been appointed. And I want to give
8 particular thanks to Vice Chair Thernstrom for the way
9 she has introduced us to the Commission, worked with
10 us to make sure that we understand the Commission's
11 ways, and, you know, for her even-handed leadership
12 and having set a very good example that, you know, I
13 know we intend to follow and I'm certain Marty will
14 follow as he assumes the role of Chair.

15 I mean, these are serious issues. This is
16 an important body. And, you know, I think it is a
17 wonderful honor. So I just wanted to say that, Mr.
18 Castro, you will have my vote.

19 ACTING CHAIR THERNSTROM: And, of course,
20 I want to second that and to say for those of you who
21 have not had much experience with Marty Castro -- and
22 I have had in the last few weeks a certain amount of
23 experience with him -- I think you will find him a
24 fair man, a man of civility, a man of integrity. And
25 I am thrilled to have somebody with those qualities as

1 Chair. And, you know, I would always welcome a new
2 Chair, but I do so with a special enthusiasm for you.

3 And, with that, I am pleased to announce
4 that the White House has nominated Martin Castro as
5 Chair. And we need obviously to --

6 COMMISSIONER CASTRO: A motion, right?

7 ACTING CHAIR THERNSTROM: -- a motion to
8 vote.

9 COMMISSIONER ACHTENBERG: Where's the
10 letter?

11 ACTING CHAIR THERNSTROM: Oh, I'm sorry.
12 I'm terribly sorry. Thank you.

13 COMMISSIONER TITUS: I appreciate that. I
14 think we are running two things together. One was
15 Marty's nomination, and the second was the discussion
16 about the staff's independence. Now, both of these
17 were brought up by the other side. And I think they
18 both deserve to be addressed.

19 Now, whether in jest or not, they wanted
20 to see the letter. So I think we should get the
21 letter so they can see it. Now, we may pretend that
22 is a joke, but they want to see the letter. So let's
23 get the letter. And then we'll talk about Marty.

24 The second thing is they now don't think
25 that these rules apply, even though they apparently

1 have been in place for a long time. And I would like
2 to address that while we are waiting for the letter.

3 These rules seem to me to make the point
4 that the staff is independent and nonpartisan, as is
5 this Commission. The intent is for it to be
6 objective, for it to look fairly into issues, for us
7 to gather data from all sources at both ends of the
8 political spectrum, and then to consider them. When
9 we vote, it will be perhaps a vote that reflects our
10 own political ideologies or beliefs, but we have all
11 the data in front of us.

12 If the commissioners can go to the staff
13 independently to try to influence the information that
14 they gather, that seems to me to undercut our
15 objectives. So I think it is totally appropriate that
16 you have a Staff Director that keeps the staff
17 independent, does not subject it to any kind of
18 pressure from any individual on any side, and gets us
19 the best information possible.

20 So I would totally support keeping with
21 these administrative instructions. And I think it is
22 very appropriate that you brought them up at this
23 point.

24 Now, second, in relation to Marty with
25 this, now that we have the letter, I certainly

1 congratulate him and look forward to working with him.

2 And I think that the great work that you
3 have done, Madam Chairman, in helping this transition
4 is most important. Since I was first nominated in
5 December and you were kind enough to draw the staff
6 together and allow me to come over and meet you all
7 and provide me with information, I am most indebted to
8 you for doing that and for your direction of this
9 Commission in the time that you have served as its
10 Chair and in the long time that you have been a
11 member. And I look forward to continuing that
12 relationship.

13 ACTING CHAIR THERNSTROM: Well, thank you
14 very much. And thanks to Commissioner Achtenberg for
15 her kind words as well. They are more than welcome
16 after what has been a difficult time at the
17 Commission.

18 So, with that, I finally turn to needing a
19 motion to affirm the White House's nominee of Martin
20 Castro as our new Chair. I should add I'm not only
21 delighted to have Marty. I'm delighted to give up
22 this seat.

23 COMMISSIONER TITUS: So moved.

24 COMMISSIONER ACHTENBERG: Second.

25 ACTING CHAIR THERNSTROM: Anyway, I need

1 -- it's been seconded. Okay. Any discussion? Yes?

2 COMMISSIONER GAZIANO: I don't want to
3 hopefully misspeak for Commissioners Kirsanow and
4 Heriot, but those of us who are now in some respects
5 relieved to find ourselves in the minority, in some
6 respects, enjoyed our opportunity this morning to meet
7 with Commissioner Castro, soon to be our Chair. We
8 are very pleased with what we have seen of his
9 behavior so far but also some of the assurances.

10 The basic request that we asked of him
11 that we want to put on the record was the continuation
12 of certain rights that both the majority and the
13 minority we think are equally valuable but in our new
14 role we think are very important to us. And namely
15 they are the assurance that he will continue to
16 support the codification of the rules that we adopted
17 for commissioner statements, rebuttals, and the
18 possibility of surrebuttal if three commissioners
19 believe the rule allows it with the following
20 exception. With the exception for the upcoming
21 statutory report for 2011, we would understand that
22 the commissioner statements would follow a different
23 timing, namely a one week after adoption of the report
24 to submit initial statements; three weeks following
25 that for any rebuttal statement; and one week, if that

1 is necessary, for any sur-reply under the rule.

2 I think that Commissioners Heriot and
3 Kirsanow may want to talk about that, but is that
4 consistent with your --

5 COMMISSIONER CASTRO: That is consistent
6 and is an accurate representation of our conversation,
7 our agreement this morning. So I agree.

8 COMMISSIONER GAZIANO: Commissioner, do
9 you want to make a brief statement as to why you think
10 this is in everybody's interest or --

11 COMMISSIONER HERIOT: Why don't just move
12 on? Because we're happy right now, aren't we?

13 COMMISSIONER TITUS: May I make a
14 statement, Madam Chairman, --

15 ACTING CHAIR THERNSTROM: Of course.

16 COMMISSIONER TITUS: -- in response to
17 this? I will support that. And I realize that the
18 surrebuttal is kind of a new process, and I will
19 support that.

20 But you have asked for our assurance or
21 the Chairman's assurance that this would be
22 recognized. I would ask for the minority's assurance
23 that they will not use the surrebuttal process to drag
24 this out forever so that we never get to the point
25 where a report can be issued. If you will put that on

1 the record, I would appreciate that.

2 COMMISSIONER HERIOT: I'm happy to say
3 that it is certainly not our intention to abuse this
4 rule so that reports get dragged out. In the past, we
5 have not had to resort to surrebuttals because I think
6 the threat exists that that encourages people to get
7 their arguments in as a statement. It has worked
8 fine. I certainly do not intend to abuse that rule.
9 You know, I will use it only if it is necessary. And
10 I am hoping everybody remembers to put their arguments
11 in their initial statements.

12 The replies are meant to be rebuttal. And
13 if someone puts an argument in the rebuttal that
14 should have been in the reply -- should have been in
15 their initial statement, only under those
16 circumstances should we resort to surrebuttal. And,
17 even then, if there is like a little, tiny argument in
18 a reply that really should have been made in a
19 statement, that is not necessarily going to cause
20 people to want to invoke the surrebuttals. We all
21 want to get these reports out on time.

22 COMMISSIONER TITUS: And, Commissioner,
23 are you speaking for your side or are you speaking for
24 yourself --

25 COMMISSIONER HERIOT: I can't say that I

1 am speaking for them.

2 COMMISSIONER GAZIANO: I can speak for
3 myself. No, I have never filed a surrebuttal. I
4 don't want to ever file a surrebuttal. I think its
5 existence keeps the process more fair, more honest. I
6 think that the --

7 COMMISSIONER KIRSANOW: I concur with
8 Commissioners Gaziano and Heriot on that. And I would
9 say, as I said to soon-to-be-Chair Castro a
10 surrebuttal, to my knowledge, has never been filed. I
11 don't anticipate one to be filed. But if anyone were
12 to file it, I would suspect it would be the majority.

13 This is something that I would suspect if
14 you give it some thought, you're the ones who are
15 going to want it the most. That has been our
16 experience. And that is the reason why it was put
17 into place.

18 The other reason it was put into place --
19 actually, there are a couple more -- is to prevent the
20 abuses that you are talking about. It acted as a
21 surrebuttal component, acted as a check against
22 anyone's desire to go off the reservation on a
23 statement or rebuttal and make ultra vires statements
24 or statements not contained in their original
25 statement.

1 So I think this is something that
2 modulates or moderates the commissioners here in terms
3 of the statements made on any given briefing or
4 report.

5 ACTING CHAIR THERNSTROM: Well, you don't
6 know that for a fact that it has acted that way
7 because nobody has ever said, without a surrebuttal
8 option, I would have done X or Y. I mean, it's
9 speculation on your part.

10 COMMISSIONER KIRSANOW: I think it's one
11 speculation.

12 COMMISSIONER GAZIANO: We had abuses
13 before we added the surrebuttal. We didn't have
14 abuses. And, by the way, I just want to reconfirm
15 that I think the last month's vote reflected that -- I
16 just want to reaffirm that -- applies to the special
17 exception we have made for if Commissioner Yaki is
18 reappointed, his statement would be limited to what he
19 would have originally been limited to and that if he
20 goes beyond that, that we would have that right
21 because otherwise someone could argue his is a
22 surrebuttal. Anyway, never mind.

23 ACTING CHAIR THERNSTROM: You do realize
24 that in the 11 years I have been on the Commission, in
25 the first place, almost that entire time, there have

1 been no surrebuttals allowed.

2 COMMISSIONER GAZIANO: Yes.

3 ACTING CHAIR THERNSTROM: And, therefore

4 --

5 COMMISSIONER HERIOT: No, no. Jerry
6 always said he would allow surrebuttals. That's why
7 we codified it.

8 ACTING CHAIR THERNSTROM: Okay.

9 COMMISSIONER GAZIANO: I thought you meant
10 we hadn't done them.

11 COMMISSIONER HERIOT: We hadn't done them
12 but no.

13 ACTING CHAIR THERNSTROM: Okay. Jerry
14 said on the record he would allow them. It was never
15 a part of our process. Mary Frances Berry made it
16 very clear she would not allow them, and she made it
17 --

18 COMMISSIONER HERIOT: I don't think you
19 want to use Mary Frances Berry as your --

20 ACTING CHAIR THERNSTROM: No. But the
21 point is, the point is, that -- in fact, I stated that
22 wrong. She wanted to allow surrebuttals. Christopher
23 Edley stopped her, and the rest of the Commission
24 stopped her from doing so.

25 It doesn't matter. We are not going to go

1 through this history. I think we should move on and
2 take a vote on Martin Castro as our new Chair. And is
3 there any discussion on that point before we do? Yes?

4 COMMISSIONER KIRSANOW: I just want to
5 reiterate what some of the other commissioners have
6 had to say. I have only had brief interaction with
7 Marty. The interaction I have had has been extremely
8 positive. I think he has developed or demonstrated an
9 interest in acting in good faith and in comity --
10 that's with i-t-y -- on this Commission very often --

11 (Laughter.)

12 COMMISSIONER KIRSANOW: -- and that I
13 think that he is going to be -- I am hopeful. And I
14 believe he is going to be a very good Chair, who is
15 going to protect the interests of all involved and be
16 open-minded and move the Commission forward in its
17 statutory mission.

18 ACTING CHAIR THERNSTROM: Any other
19 discussion?

20 (No response.)

21 ACTING CHAIR THERNSTROM: Well, I am
22 calling for a vote. All in favor?

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

24 VICE CHAIR THERNSTROM: I believe that is
25 a unanimous vote. Congratulations, Mr. Chair.

1 CHAIRMAN CASTRO: Thank you very much.

2 VICE CHAIR THERNSTROM: And you and I
3 should switch places.

4 CHAIRMAN CASTRO: Yes.

5 VICE CHAIR THERNSTROM: Only as a bag
6 lady, I've got to come in and collect my bags. Nobody
7 has ever been happier to get out of this chair than I
8 am.

9 CHAIRMAN CASTRO: Well, thank you. That
10 was easy.

11 VICE CHAIR THERNSTROM: The hard part
12 starts now.

13 CHAIRMAN CASTRO: First of all, I also
14 want to express my gratitude to our Vice Chair for the
15 stewardship that she has given to the Commission in
16 the interim period between the prior Commission's
17 Chairperson and my designation today very much
18 appreciate not only the stewardship of the Commission
19 but also the guidance that you have given me and as my
20 colleagues who are also new to the Commission, have
21 joined it. And all the commissioners who are
22 experienced appreciate the support and the guidance
23 and the historic references that you have given us
24 that are to acclimate ourselves.

25 As I said before when we had our last

1 meeting, it's a great honor or said here to be
2 nominated by the President to serve on this Commission
3 but then to have the President designate me to be the
4 Chair of the Commission. And to have you, all of my
5 colleagues, unanimously support that is something that
6 is very humbling.

7 I understand that I am the eighth
8 Commission Chair in the history of our Commission.
9 And I am, to my full knowledge, the first Latino Chair
10 of this Commission.

11 And I think that as I look at the work
12 that we have to do as a country, the work that we have
13 to do as a Commission, there is much work out there.
14 Discrimination and violations of voting rights are
15 there. They may be different, take different forms
16 than they have before. Some may be new and obvious.
17 Others may be less obvious. But it is the role of
18 this Commission I believe to be the nation's
19 conscience on issues of civil rights.

20 And I will look forward to working with
21 each of my commissioners and our staff to continue
22 forward on that mission. And I look forward to making
23 sure that as I lead this organization, this
24 Commission, that I seek to be fair because I know what
25 it is like to be in the minority, but I also have a

1 very strong passion and belief in issues. We all do.

2 We have different political perspectives, different
3 ideologies, which is why we are at this table.

4 That is why this Commission was
5 constructed as it was, to bring the different
6 perspectives that make up this country to the table.
7 It is how we bring those perspectives together and how
8 we move forward that is really the important aspects.

9 But what I want to make sure my
10 chairmanship is for you guys, I hope the hallmark of
11 it is that we will learn -- and I think we have today
12 -- how to work together, how to possibly agree and
13 when we can't agree to do it as we have done today.

14 So, again, thank you very much for this
15 great, great opportunity and this great honor to be
16 Chairperson of the U.S. Commission on Civil Rights.
17 Thank you.

18 (Applause.)

19 CHAIRMAN CASTRO: It is now my first duty
20 to move on with our next item on the agenda. And I
21 would ask our Staff Director to provide her report on
22 management and operations. Ms. Tolhurst?

23 DELEGATED THE AUTHORITY OF THE STAFF
24 DIRECTOR TOLHURST: All right. Thank you.

25 Two things to begin with. First, I want

1 to offer my congratulations as well.

2 In my third or fourth hat as Ethics
3 Officer, Marty and I had a very in-depth relationship,
4 let me say. And I feel like we have been through
5 trial by fire already in getting all of your forms
6 approved and in order.

7 CHAIRMAN CASTRO: There were no problems
8 with the forms.

9 (Laughter.)

10 DELEGATED THE AUTHORITY OF THE STAFF
11 DIRECTOR TOLHURST: No problems.

12 CHAIRMAN CASTRO: I was just involved in a
13 lot of nonprofit organizations.

14 DELEGATED THE AUTHORITY OF THE STAFF
15 DIRECTOR TOLHURST: There was a lot of activity.

16 CHAIRMAN CASTRO: And we had to go through
17 a list, just so the record is clear.

18 DELEGATED THE AUTHORITY OF THE STAFF
19 DIRECTOR TOLHURST: I will say that I felt that you
20 went out of your way to be incredibly scrupulous and
21 ethical in that process --

22 CHAIRMAN CASTRO: Thank you. Thank you.

23 DELEGATED THE AUTHORITY OF THE STAFF
24 DIRECTOR TOLHURST: -- and were a pleasure to work
25 with.

1 CHAIRMAN CASTRO: Thank you.

2 DELEGATED THE AUTHORITY OF THE STAFF

3 DIRECTOR TOLHURST: Secondly, before I start my
4 report, not to have an Al Haig "I'm in charge" moment,
5 but I just want to clarify regarding AIs that the
6 Staff Director being delegated the day-to-day work of
7 the Commission is on dry regs and AIs, at least at
8 present -- and you all can modify AIs by a majority
9 vote -- authorized through AIs without Commission
10 approval and has under the last two Republican Staff
11 Directors issued AIs on their own. They tend to give
12 them to the commissioners when they are of substantive
13 nature reports, et cetera, but it is presumed that you
14 all do not want to deal with an AI on sick leave, for
15 example.

16 So, even in my brief time as Acting Staff
17 Director, I have issued AIs. For example, OPM
18 required us to issue regulations on how to manage a
19 shutdown. And there was actually not time for a
20 Commission meeting to even comply with that request.

21 COMMISSIONER HERIOT: And it was too
22 boring for us.

23 COMMISSIONER GAZIANO: Actually, that
24 makes sense to me.

25 DELEGATED THE AUTHORITY OF THE STAFF

1 DIRECTOR TOLHURST: Okay.

2 COMMISSIONER GAZIANO: But that confirms
3 one of my points, which is that AIs are binding on the
4 staff and not necessarily binding on the Commission.
5 Sometimes some commissioners have acted confused about
6 that, that somehow the Commission can't change an AI
7 or can't make an exception to an AI, can't take a
8 position that is inconsistent.

9 If we take a position and vote that it is
10 inconsistent, we have amended or made an exception to
11 an AI, but we --

12 COMMISSIONER HERIOT: It's not an
13 instruction to the Commission. It's an instruction to
14 the staff. It may be binding on us because it's
15 federal law, but it's not binding on us because it is
16 an AI.

17 DELEGATED THE AUTHORITY OF THE STAFF
18 DIRECTOR TOLHURST: Correct. And I would say some AIs
19 commissioners by a majority vote have approved setting
20 up rules for themselves, in which case you would have
21 to by a majority vote repeal those rules.

22 And yes, some AIs are written in direct
23 response to federal law. And we are not going to want
24 to violate or try to repeal those. But the types of
25 sort of rote and banal AIs that need to make this

1 efficiently function are regularly done by the Staff
2 Director. And, as I said, I have issued them since I
3 have been here and copied you always. But I have not
4 come to you all for every administrative --

5 COMMISSIONER HERIOT: Thank you for not
6 coming to us --

7 DELEGATED THE AUTHORITY OF THE STAFF
8 DIRECTOR TOLHURST: -- instruction that you may not
9 want.

10 COMMISSIONER GAZIANO: They look good to
11 me.

12 DELEGATED THE AUTHORITY OF THE STAFF
13 DIRECTOR TOLHURST: So I just wanted to clarify that,
14 that it is, in fact, at some points issued directly by
15 the Staff Director.

16 III. MANAGEMENT AND OPERATIONS:

17 - STAFF DIRECTOR'S REPORT

18 DELEGATED THE AUTHORITY OF THE STAFF
19 DIRECTOR TOLHURST: So for my report, I am going to
20 depart from past practice unless you tell me
21 otherwise. In general, you have received the written
22 reports. Unless you want me to, I am not going to
23 read to you the number of library requests we received
24 and complaints we have received. They are at the
25 second tab in your report.

1 So generally what has been up in the last
2 month, we are still under a continuing resolution
3 through 3/18. Our 2012 budget justification was
4 submitted to Congress last month. And you all
5 received a copy of that.

6 The next opportunity for really meaningful
7 commissioner involvement under current plans would be
8 budget planning for the 2013 budget. And you all will
9 receive a proposed budget in June. And action has to
10 be taken on that by September.

11 I met, along with others, with our new --
12 we have a new OMB examiner. And I have had
13 conversations with your assistants and/or some
14 commissioners about the concerns, suggestions, et
15 cetera, of the new OMB examiner.

16 I am not going to go into those here while
17 we are in open session, but if you all have any
18 questions, please feel free to call me. I have spoken
19 with many of you about his main points. He seems
20 anxious to help and wanting to engage and learn more
21 about our work.

22 This week we had an ethics audit on
23 Monday. That went very well. They are hoping we can
24 turn our program around. At next month's meeting, I
25 will be speaking with you all about your upcoming 278

1 financial disclosure. I'll spare you that for now.

2 Just two more points. Again, I've met
3 with many of you and/or your assistants regarding
4 staffing concerns. And, again, I won't say much in
5 open session, but there is a fairly dire need to fill
6 all funded positions in the near future. We have
7 multiple staff members serving two and even three jobs
8 at the moment. And we have others stepping in to do
9 work well outside their day-to-day norm helping on a
10 variety of editorial and other program and
11 administrative tasks.

12 So, on that note, I also want to thank the
13 staff, especially those members who have really
14 stepped up during this rather awkward period of
15 transition, vacancies in multiple high-level jobs
16 here. And many of you have gone above and beyond in
17 making sure the agency keeps running and that work
18 continues in a timely and quality manner. I thank you
19 all for that. You all have been a great help to me.

20 CHAIRMAN CASTRO: Thank you, Ms. Tolhurst.

21 IV. PROGRAM PLANNING:

22 UPDATE AND DISCUSSION OF PROJECTS

23 - CONSIDERATION OF NEW STATUTORY REPORT TOPICS

24 FOR FY 2011

25 CHAIRMAN CASTRO: Next we will move on to

1 the agenda item on program planning, which also is a
2 report from Ms. Tolhurst. So we know we have got a
3 number of items. Actually, I should say it's not a --
4 sorry. I apologize. It's actually us that's going to
5 address a number of items.

6 The first topic, as we have talked about
7 earlier, is the consideration of a new statutory
8 report for this year. As you recall, at our last
9 meeting, there was a motion that was passed to suspend
10 the work on the fiscal year 2012 cy-près enforcement
11 report topic so that the commissioners could circulate
12 alternative topics.

13 Two proposals have been circulated. There
14 is a report concept that has been circulated that was
15 a paper that is drafted by Commissioners Achtenberg,
16 Titus, and myself, the working title of which is
17 "Inner Student Violence: The Impact of Discriminatory
18 Activity in Public Schools" and "The Role of the U.S.
19 Departments of Justice and Education in Eliminating
20 Harassment of Students Targeted Due to Race,
21 Ethnicity, and/or Sexual Orientation."

22 The other concept paper is a concept paper
23 circulated by Commissioner Kirsanow. And it is titled
24 "Assessing Civil Rights Enforcement in the Department
25 of Agriculture's Farm Services Agency Programs."

1 I know Commissioner Gaziano asked that we
2 bifurcate the consideration of this. So, with that,
3 Commissioner Achtenberg?

4 COMMISSIONER ACHTENBERG: So, Mr. Chair,
5 we amended the -- we are going to undertake a dealing
6 with the cy-près issue first. Is that correct?

7 COMMISSIONER GAZIANO: Can I explain why I
8 did that? And we might be able to dispense? Is that
9 all right?

10 CHAIRMAN CASTRO: Why don't you explain
11 it?

12 COMMISSIONER GAZIANO: Sure. I wanted to
13 talk about the procedure that we normally follow and
14 the procedure that we ought to follow if we are going
15 to change it. And I want to do that in the abstract,
16 rather than make it look like we are trying to apply
17 it just to one topic or the other. That's really why.

18 And if you want me to proceed with that,
19 now --

20 CHAIRMAN CASTRO: Yes. What I would like
21 to do is have a motion on the table so that we could
22 discuss whether that motion is a motion in particular
23 --

24 COMMISSIONER GAZIANO: I move to reaffirm
25 the cy-près topic. That would allow me, then, to

1 discuss.

2 COMMISSIONER HERIOT: Second.

3 CHAIRMAN CASTRO: Go ahead. What's your
4 topic?

5 COMMISSIONER GAZIANO: I could go through
6 the exact days and times that I have got in the notes
7 that John prepared for me, but I went over this a
8 little bit last time.

9 Prior to my arriving on the Commission,
10 the topic was chosen about two to three years in
11 advance of the Commission's calendar, in part to
12 reflect our Commission practices that allowed the SACs
13 to be informed a year ahead of time so that they could
14 adopt parallel investigations that they could then
15 publish before we even began our work. I thought that
16 was a little excessive.

17 For the past three years, we have had a
18 process that started in June prior to the beginning of
19 the fiscal year.

20 And, by the way, this is reflected in AI
21 1-6, if I have my number right. And it requires --
22 and this is one that the commissioners adopted. And
23 it requires in practice a request by the Staff
24 Director for possible topics. Then little blurbs were
25 written about them. Then commissioners could rank

1 order and vote on them.

2 And then we would discuss generally for
3 about a month or two or at least a month what the
4 topic -- the two that got the most votes, rather than
5 just have one or two concept papers.

6 Then concept papers were developed after
7 the topic was -- if the concept papers were circulated
8 in enough time, the commissioners could actually offer
9 amendments to them when the eventual concept paper was
10 adopted.

11 Then the AI requires after the concept,
12 amended concept, paper that is usually amended is
13 adopted, the next step is that staff prepares a
14 propjet, a project outline. And then the Commission
15 had an opportunity to comment on the project outline.

16 Then after the project outline is adopted, there is a
17 discovery plan and so on and so forth. And hopefully
18 those are done even before or about the time the
19 fiscal year is started.

20 If the Commission is going to change the
21 topic now, my concern is that commissioner input is
22 going to be nonexistent or almost nonexistent and that
23 I am not a fan of every jot and tittle of the way -- I
24 led the charge to not make it three years in advance.

25 I led the charge to be a little bit more nimble, but

1 I hope if we are going to change the topic, that we at
2 least try to incorporate some of the feedback elements
3 that allow all commissioners to have input on how the
4 new topic is developed.

5 And as someone in the minority, I expect
6 most of my input is going to be voted down. But I
7 hope to convince you of a few or I at least like the
8 input, like the opportunity to be voted down. So, for
9 example, I hope if we are going to vote down the
10 cy-près topic, we are going to consider another one --
11 I commend the person acting as the Staff Director for
12 making shells of discovery plans, but they are not
13 really discovery plans. And discovery plans aren't
14 supposed to even be drafted until the staff hears from
15 the commissioners concerns about the concept paper and
16 a project outline. So I again hope we don't have a
17 discovery plan.

18 And let me just mention one issue that
19 came up. In June of -- you know, it was the summer.
20 Maybe John will find me the exact month. What was the
21 month? Was it July? June of '08? Okay.

22 In June of '08, after I was on the
23 Commission for a number of months, I made a motion to
24 add to the agenda a discussion item of whether to
25 discuss changing the topic for the statutory report

1 that was going to begin in a few months hence, that
2 topic having been decided two years previous, before I
3 was on the Commission.

4 And the Vice Chair led an effort when
5 there were a few commissioners absent to vote down
6 even allowing a discussion to be placed on the agenda
7 to even discuss the possibility of changing the topic
8 two months before or three months before the statutory
9 report was -- and I thought that was wrong. And so I
10 am not going to make a big -- I don't think any of us
11 are going to make a big deal if you are going to
12 jettison the cy-près topic.

13 But I hope that you will not at least try
14 to modify whatever process we come up with so that
15 commissioner input can be meaningful and realistic for
16 the next topic.

17 That's all I wanted to say.

18 COMMISSIONER TITUS: Mr. Chairman?

19 COMMISSIONER KIRSANOW: Go ahead.

20 CHAIRMAN CASTRO: Commissioner Kirsanow?

21 COMMISSIONER KIRSANOW: I just want to
22 associate myself with the statements made by
23 Commissioner Gaziano. Just a couple of other things,
24 just some observations. In addition to being in the
25 minority, I suspect that if the majority feels

1 strongly about a particular topic, that I will get
2 voted down, but I think it bears some consideration of
3 that.

4 With respect to changing this particular
5 topic in midstream -- and I will tell you that I am
6 not particularly excited about cy-près, but I wasn't
7 particularly excited about a number of enforcement
8 topics that we have had in the past that you don't
9 have to be excited about a topic.

10 We only will have approximately six months
11 to get this particular -- if there is a change,
12 whatever it may be, whether it is mine or the one
13 that's been proposed by the majority, that is going to
14 be a prodigious undertaking.

15 A couple of things. One is we want to do
16 it right, whatever the project is. And I've got only
17 six months or so less seniority than Vice Chair
18 Thernstrom. In my ten years or so of experience here,
19 I can tell you that the statutory enforcement report
20 is something that takes some time to do, to do well,
21 especially if there are going to be commissioner
22 statements or rebuttals, but just doing the initial
23 report is something that poses some significant
24 challenges.

25 We are currently laboring with a skeletal

1 staff. Our last briefing reports and enforcement
2 reports have been a challenge for staff because of the
3 understaffing.

4 In addition, enforcement reports benefit
5 from being very narrowly defined or confined to a
6 very, very specific topic. I am not suggesting how
7 you want to construct a concept paper or how you want
8 to construct a particular briefing or enforcement
9 topic, but to the extent it is on one discrete topic,
10 it I think benefits from our ability to really flesh
11 out various facts and arguments related to that
12 particular topic and do credit to the Commission in
13 presenting a report to the Congress and the President.

14 I am not sure that the one currently on
15 the table -- cy-près is fairly narrowly defined. I
16 think it is extremely narrowly defined. The
17 intra-student violence one -- and I would like to hear
18 some discussion about it, but at first blush seems to
19 me to be a project that could be expansive. And that
20 is something we can incredibly get our arms around
21 within the short amount of time we have got right now.

22 Those are my observations. And I hope you
23 take those into consideration.

24 CHAIRMAN CASTRO: Madam Vice?

25 VICE CHAIR THERNSTROM: Well, just one

1 small note. There have been several references from
2 that side of the table to there being a minority and
3 there is a majority here. I do want to remind people
4 that I am a Republican. I remain a Republican.

5 So I believe there are four
6 conservatives/Republicans/Libertarians, whatever you
7 want to call yourselves, on this Commission. And the
8 Democrats at the moment are in numbers a minority.

9 So on the chance that anybody has any
10 illusions I have switched parties, I have not. And I
11 want that on the record.

12 Now, as for cy-près, as I understand it --
13 and, the Acting Staff Director, it is really a
14 question posed to her. As I understand it, there has
15 basically been no work to speak of that we are
16 throwing out if we change topics. We've got kind of
17 --

18 COMMISSIONER GAZIANO: How is that? Well,
19 we did all the work on the discovery plan. We had all
20 of the input of the commissioners. So that is work
21 that should not be ignored. But the staff sent out
22 interrogatories. We were supposed to get them back
23 except that our vote last week suspended the receipt
24 of --

25 COMMISSIONER HERIOT: Yes.

1 Interrogatories don't grow on trees. Somebody has to
2 draft them. They have to be carefully drafted. And
3 it takes a long time to get those interrogatories --

4 COMMISSIONER GAZIANO: The response is
5 waiting in a box, as I understand, in the Department
6 of Justice.

7 CHAIRMAN CASTRO: Let me just -- I said to
8 you I want to make sure I manage these meetings well.

9 So don't take this as an effort to cut you off, but
10 there was a question that was directed to our Acting
11 General Counsel, Acting Staff Director, which I would
12 like to hear an answer to.

13 Then we have another commissioner, who had
14 her hand up earlier.

15 COMMISSIONER GAZIANO: Right.

16 CHAIRMAN CASTRO: So I would like to give
17 her an opportunity. And then we can go back to yours.

18 DELEGATED THE AUTHORITY OF THE STAFF
19 DIRECTOR TOLHURST: Okay. Thank you.

20 Here is where cy-près stands. And first
21 let me say if we're talking about following AI, as it
22 currently stands, concepts are supposed to be assigned
23 by the Staff Director, assigned to staff to develop
24 project concepts. The Staff Director then approves
25 the project concept before it is submitted to

1 commissioners.

2 At present, our project concepts are
3 coming from commissioners. So if we are noting where
4 we are departing from the AI, we're departing from the
5 AI from the git-go. And I have been here four and a
6 half years, and we have never fully followed the AI.
7 I don't endorse that at all, but if we want to get
8 back to following it, we should all know there have
9 been in various years various points of departure from
10 the AI.

11 Regarding cy-près, interrogatories were
12 issued. As you all know and as you said at the last
13 meeting, work on that was suspended. At the time work
14 was suspended, we had an outstanding discovery request
15 to DOJ. I spoke with an attorney at DOJ in
16 consultation with Commissioner Heriot, who was on the
17 Discovery Subcommittee. And what we came to is an
18 understanding that if cy-près remained live after this
19 meeting, Justice would begin a rolling discovery
20 beginning in two weeks.

21 What we have now if that is the question
22 on the table is --

23 VICE CHAIR THERNSTROM: That was the
24 question.

25 DELEGATED THE AUTHORITY OF THE STAFF

1 DIRECTOR TOLHURST: -- a three-page memo from the
2 Justice Department listing some publicly available
3 cases. It's not meaningful discovery. Nothing has
4 been written on this report.

5 It is true that interrogatories have been
6 issued and we do have this guarantee that if we select
7 this topic today, we will begin receiving information
8 in two weeks.

9 CHAIRMAN CASTRO: Commissioner Titus?

10 COMMISSIONER TITUS: Thank you.

11 A couple of points that have already been
12 made. One of them was about the minority. And the
13 Vice Chair made that. I mean, I think I can count,
14 too. But I think the bigger point is we need to quit
15 focusing on who is in the minority, who is in the
16 majority, and start working together on some of these
17 topics.

18 Second, I have heard a lot of references
19 to the discovery plan. I think, too -- and one was
20 that it was done, it was an elaborate plan, a lot of
21 work has gone into it, and that the new plans that
22 were issued for the two potential topics that we'll
23 talk about today are skeletal.

24 Well, as I reviewed that, I believe they
25 are exact replicas of the discovery plan that was

1 issued for the cy-près report almost word for word in
2 the same length of time and space and all.

3 So I don't think one is skeletal and one
4 is not. I think they're both pretty minimal, a page
5 and a half --

6 COMMISSIONER HERIOT: Actually, they're --

7 COMMISSIONER TITUS: Excuse me. I'll let
8 you speak when I finish.

9 So let's be clear about that. And then
10 the third thing is if we have these AIs like 1.6 or
11 whatever it is that governs how we are supposed to
12 come up with topics and that we're not using it, I
13 think that we should put that on the agenda to review
14 and either have a process or not have a process but
15 not have a process that we don't follow. That makes
16 no sense to me at all. So I would just make that as a
17 suggestion.

18 CHAIRMAN CASTRO: Commissioner Gaziano?

19 COMMISSIONER GAZIANO: I'm glad for an
20 opportunity to educate on one of the exceptions we
21 made to the AIs on the record, which was that concept
22 papers could be initiated either by the staff, as the
23 AI structure, but we made an express vote that
24 commissioners could also write concept papers. And in
25 my practice, it's far superior. That was an exception

1 we voted on.

2 And, by the way, I welcome the new
3 commissioners to look through these. There's a lot of
4 good stuff in these AIs. And then there's some stuff
5 that we've wisely modified or abandoned. And maybe we
6 should recodify it.

7 But the advantage of the process, whether
8 it's skeletal or not, my principal concern was the
9 availability for input into the discovery plan.

10 The discovery plan, by the way, for the
11 first couple of statutory reports was very lengthy --
12 oh, I don't know -- ten pages long. And they came
13 after -- but the idea is that commissioners would get
14 this weeks in advance, we would have an opportunity to
15 circulate with each other a week or so before the
16 meeting what we intended to raise.

17 And if we're going to short-circuit that,
18 I hope -- well, I don't want to follow any AI. They
19 don't bind us every jot and tittle, but to the extent
20 that they have important principles I hope that we all
21 think are worthy, that we should try to follow these
22 important principles.

23 COMMISSIONER TITUS: Perhaps I
24 misunderstand what a discovery plan is. When I looked
25 at it -- and I am not an attorney -- it seemed to me

1 it was just like a little page that described kind of
2 what the schedule was going to be for how to pursue
3 whatever topic it was that didn't have a lot of real
4 substance to it. Is that correct, to the Staff
5 Director?

6 DELEGATED THE AUTHORITY OF THE STAFF
7 DIRECTOR TOLHURST: Sure. I would agree with
8 Commissioner Gaziano that in past years, particularly
9 where subjects were approved in August the year
10 before, which at least happened once since I have been
11 here, they have been more detailed for sure.

12 Your point is correct, though, that the
13 cy-près discovery plan is no more detailed than what
14 was issued on the other two. They are all skeletal.
15 They are not particularly meaningful. And I don't
16 like them. I'm not pretending I like them.

17 My concern as Staff Director is if staff
18 cannot produce something by deadline unless we are
19 able to issue interrogatories or follow up on the
20 existing ASAP. And that is why I insisted that
21 Justice agree to do the two-week -- back of the topic,
22 we're not going to give them another 30 days.

23 If one of the new topics, either the farm
24 or the school bullying, becomes it, "I want us to be
25 able to go" and unless you all decide that the

1 September 30th deadline is what we want to move, we
2 need to be able to go.

3 And it's not my preference at all. I'm
4 not a fan of it. I would rather have a lot of time to
5 become expert on these topics before engaging with
6 Justice Department, Department of Education, or
7 Department of Agriculture.

8 If you decide to change the subject, we
9 don't have the luxury of doing the type of plan we
10 would want to do. I would hope this year would be an
11 unusual brave exception. And if I'm asked later, I'm
12 going to talk about 2012 and how I would vehemently
13 ask you to approve a topic for 2012 by August at the
14 latest so this never happens again and you can get the
15 kind of quality background that you deserve and staff
16 can be respected and have the time they need to do
17 this reports.

18 But for this year, what I'm offering is a
19 way to get it done. Whether it's cy-près and I want
20 to go get everything we need in two weeks, whether
21 it's the farming or the school bullying, we need to
22 go. And that is what I am offering, albeit skeletal.

23 CHAIRMAN CASTRO: Commissioner Achtenberg?

24 COMMISSIONER ACHTENBERG: Mr. Chair, I
25 think what the Staff Director just expressed is at

1 this point in time -- I mean, we need to be serious
2 about this. That is precisely the point.

3 Let me just lay out my own view here. I
4 intend to vote down, to cast my vote not to make
5 cy-près the statutory report. On the merits, I think
6 it is the wrong topic that I would like to see the
7 Commission pursue.

8 And the fact that only a very small amount
9 of work has gone into it does matter to me. Had the
10 work been more extensive, that would have weighed on
11 the more, understanding how precious the staff is as a
12 resource. But as a commissioner, I just believe that
13 it is the wrong topic.

14 I intend to be a forceful proponent for
15 the school bullying topic. I think it is timely. I
16 think it is discrete. I think it is doable with the
17 descriptions, however, that any topic undertaken at
18 this point in time, including the cy-près, is going to
19 be under the same constraints that the director just
20 outlined.

21 So if we are going to meet the statutory
22 mandate this year within a reasonable time frame, any
23 one of these topics is going to have to be under the
24 same constraint. And we need to understand that and
25 respect that and, as Commissioner Kirsanow said, seek

1 to produce the highest quality work product that this
2 Commission can produce under the circumstances. That
3 is the situation that we are in.

4 Your points are well-taken. I did
5 consider your proposal, Commissioner Kirsanow, on the
6 merits. I find my own proposal to be superior to
7 yours, but that, of course, is a matter of judgment.

8 But I think we're talking about -- and I
9 don't mean to trivialize this discussion, far from it.

10 I think it is what we should be discussing, both the
11 procedure and the merits.

12 And so I just wanted to say that and just
13 put on the table where I intend to weigh in to take
14 the discussion further.

15 CHAIRMAN CASTRO: Commissioner Kirsanow
16 and Commissioner Heriot? Then I will say a few words.

17 Then we'll call for a vote on this.

18 COMMISSIONER KIRSANOW: Very briefly. I
19 respect what Commissioner Achtenberg had to say. I
20 expect, again, as the minority to get voted down.

21 And, by the way, I do believe we are a
22 minority, regardless of R, D, I, or anything like
23 that. Functionally we have been in the minority. The
24 Vice Chair has been voting with others rather than the
25 three of us for the last two years.

1 Nonetheless, I would urge you -- and,
2 again, I don't mean to be saying because I have got
3 seniority you should listen to our experience. I have
4 been in that position before where everyone was
5 telling me we had to do things a certain way. Just
6 because it has been done a certain way doesn't mean it
7 is the right way.

8 But in terms of the narrowness of the
9 scope, Commissioner Achtenberg, I would disagree with
10 you on that. In terms of the narrowness, I would put
11 cy-près first. I think that is an eminently doable
12 project. I don't mean to put a lot of pressure on the
13 Staff Director and the staff on this. I think it is
14 doable. Of the three, it is the most doable.

15 I then think that the farm project is
16 narrower than the project that you have proposed. And
17 the reason for that is -- we'll get into it in the
18 discussion. One of them is that we are talking about
19 violence in schools. And we're talking about tens of
20 thousands of schools.

21 Yes, we can get experts in here. I don't
22 know that data has been collated on this, but this
23 seems to be a gigantic, potentially a gigantic,
24 project that we were going to be trying to devote
25 resources to gathering data and I presume some

1 anecdotes about a particular topic that I think is
2 something that this Commission is ill-suited to do in
3 the span of just six months or so.

4 CHAIRMAN CASTRO: Commissioner Heriot?
5 Then I will say a few words. Then we will vote.

6 COMMISSIONER HERIOT: Okay. I just wanted
7 to say that, number one, I'm not in love with the
8 cy-près topic either. I don't think it's a topic that
9 I want deeply to have studied, but I thought it was a
10 good topic. And it was a good topic particularly
11 because, as Commissioner Kirsanow says, it's narrow.
12 It's something where we actually can study it, we can
13 actually make some authoritative on.

14 So that's why I supported it. In fact, I
15 think it was my idea.

16 COMMISSIONER GAZIANO: Yes.

17 COMMISSIONER HERIOT: But, again, it's not
18 --

19 COMMISSIONER GAZIANO: Don't abandon it.

20 COMMISSIONER HERIOT: No, I'm not
21 abandoning it. It might be about to be abandoned, but
22 it won't be abandoned by me.

23 On discovery plans, the point with the
24 cy-près topic is not that we had an elaborate
25 discovery plan. I don't even recall the discovery

1 plan in cy-près. We got all wrapped up with finishing
2 up New Black Panther.

3 But the point is that actual discovery has
4 been undertaken. Interrogatories have been formulated
5 and issued. And that is a lot of work to come up with
6 those interrogatories for the Department of Justice.
7 And I understand that we have the interrogatories for
8 the nonprofits as well. So that was work.

9 Number three, narrowness matters a lot.
10 And you're going to end up being surprised at how
11 important narrowness is to these topics. And the way
12 the bullying topic, bullying/violence topic, is now
13 formulated, it is not narrow. It is very, very, very
14 broad.

15 And, second -- oh, not second. Fourth on
16 my list here, discovery plans. A few years back, when
17 we did the religious liberties of prisoners, it was
18 early in my tenure. So I was not privy to the
19 discovery plan. And I wish I had been because I think
20 there were deep flaws in the methodology that was
21 adopted. And by the time the draft came out, it was
22 impossible to correct it.

23 I think it basically meant the report was
24 not worth very much. It was something, some useful
25 stuff in it. But the main point that the project

1 attempted it wasn't able to make. And I think that is
2 not going to be a unique circumstance.

3 The discovery plan will often help
4 glossing it. It will need commissioner input. And if
5 we go with discovery plans, like the quickie that we
6 got last night, you're going to end up being
7 disappointed because basically you're jettisoning your
8 ability to affect the discovery. And you're going to
9 find out that mistakes were made very late in the
10 process. And it's going to be hard to correct.

11 So this isn't simply a minority defense
12 work. This is majority defense work. You need to be
13 able to know exactly what the staff is doing because
14 you cannot assume that it is going to be what you
15 wanted.

16 COMMISSIONER GAZIANO: Could you yield?
17 Thirty seconds. And I promise 30 seconds.

18 CHAIRMAN CASTRO: Twenty-nine.

19 COMMISSIONER GAZIANO: Twenty-nine. If
20 the discovery plan for cy-près was weaker than the
21 others before us, it's because it wasn't necessary.
22 It was a normal topic. The topic that I think
23 Commissioner Achtenberg has proposed I think would
24 benefit greatly by a proper discovery plan.

25 CHAIRMAN CASTRO: Thank you. I appreciate

1 everyone's thoughtful comments. I just want to add I
2 could echo everything that Commissioner Achtenberg
3 said.

4 I also think that, at least from my
5 perspective, I do need to be excited about a topic
6 that we are going to cover. Our resources, as has
7 been discussed here, are limited. And, therefore, I
8 don't want to move forward on any topic given the
9 limited resources and the capacity that our staff is
10 -- you know, the overcapacity of our staff right now
11 in terms of their ability to do work that we would
12 move forward on any topic that we are excited with.

13 So I am excited about the topic that
14 myself and Commissioner Titus, Commissioner Achtenberg
15 have brought forward. And we have a timeline we put
16 forward. And we will discuss that, I'm sure, after we
17 vote on this motion.

18 I do think that this is an exceptional
19 circumstance as well. We have three new commissioners
20 that were not here when this topic was first chosen.
21 And we happen to arrive here in the middle of this
22 process. So this is not something we foresee
23 happening often in the future, if at all, but it is
24 the circumstance under which we find ourselves. And
25 it is a challenge that we are all going to meet,

1 whether it is the cy-près report, which, even though
2 it sounds like it might be a little bit ahead, is not
3 significantly so.

4 So those are my views. And this issue, in
5 particular, I am passionate about it. I saw a parent
6 just on the news yesterday talking about the fact that
7 their child was bullied and took his life. And to me
8 that is something I think is important for us to look
9 at.

10 So, having said that, I would like to call
11 the vote on this motion that Commissioner Gaziano has
12 put forward on affirming the cy-près. All those in
13 favor of affirming cy-près signify by saying, "Aye."

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

15 CHAIRMAN CASTRO: All those opposed to
16 cy-près' affirmance signify by saying, "Aye" or
17 "Opposed."

18 (Whereupon, there was a chorus of "Noes.")

19 CHAIRMAN CASTRO: Opposed, no, that's
20 four. Any abstentions?

21 (No response.)

22 CHAIRMAN CASTRO: No. So, in the opinion
23 of the Chair, the motion fails. Commissioners
24 Gaziano, Heriot, and Kirsanow voted in favor of the
25 motion. Commissioners Achtenberg, Titus, Thernstrom,

1 and Castro voted against the motion.

2 Is there another motion that is going to
3 be presented?

4 COMMISSIONER ACHTENBERG: Mr. Chairman, I
5 would like to move that we adopt the inner student
6 violence topic as our 2011 statutory report topic, but
7 before anybody gets too excited, I am doing this
8 because it seems to me that, as a matter of Robert's
9 Rules, we should have a substantive discussion on the
10 competing topics, if you will, to the Commission's
11 satisfaction before compelling the commissioners to
12 vote on either, but the proper way to do that, it
13 seems to me, is to begin by making a motion so that
14 the discussion that emanates there from is germane.

15 CHAIRMAN CASTRO: Is there a second on
16 that motion?

17 COMMISSIONER TITUS: Second.

18 COMMISSIONER GAZIANO: Might I ask the
19 indulgence of the Commission for a four-minute recess
20 if Commissioner Achtenberg -- would you mind if we
21 would allow a recess, if I could talk to you for about
22 four minutes?

23 COMMISSIONER ACHTENBERG: Sure.

24 CHAIRMAN CASTRO: It's going to be four
25 minutes.

1 VICE CHAIR THERNSTROM: Let's not turn it
2 into 20.

3 (Whereupon, the foregoing matter went off
4 the record at 11:39 a.m. and went back on the record
5 at 11:46 a.m.)

6 CHAIRMAN CASTRO: Commissioner Achtenberg?

7 COMMISSIONER ACHTENBERG: I made a motion,
8 did I not?

9 CHAIRMAN CASTRO: Yes, and it was seconded
10 by Commissioner Titus.

11 COMMISSIONER ACHTENBERG: Let me just say
12 that I think this is a serious topic. It's relevant
13 to our mission. It in my mind is quite urgent.
14 Violence in all of its forms can be on the rise. And
15 there is no question that there are many motivations
16 for this violence in our schools.

17 And this is not meant to suggest that
18 these two categories of student-on-student violence
19 are the only ones to be concerned about, but in the
20 interest of manageability, these seem to be the two
21 most pervasive and important and germane to our
22 mission. And this is why we crafted the topic the way
23 that we did.

24 There are multiple studies and information
25 out there, expert opinions, books, and treatises, from

1 which much information can be gleaned, which is not to
2 say that we know from the outset the answer to the
3 question, which is how pervasive, where is this
4 happening, why is it happening, and what can be done
5 to address it.

6 One of the important things that I will
7 point out with regard to what I am asserting is the
8 manageability of this as our statutory topic within
9 the time frame is that I have proposed two discrete
10 demographic classes to be investigated. And I have
11 proposed this in a way that focuses on the federal
12 involvement and response and specifically that of the
13 Department of Justice and the Department of Education.

14 And originally in the original concept
15 paper that I circulated a week ago, we suggested that
16 we might also look at the responses in the various
17 states, the response that our own SACs may have
18 unearthed in the process of doing their work,
19 ordinances and statutes that are being proposed
20 elsewhere than in the federal realm. And I have been
21 since persuaded that that exacerbates an existing
22 problem that you have properly identified, namely
23 making whatever topic we undertake manageable so that
24 we can do a quality job of research analysis and so
25 that our recommendations to the President and to the

1 Congress will mean something.

2 So let me restate that that is what I
3 believe and my fellow commissioners believe that we
4 have done here.

5 We have consulted the staff to determine
6 the manageability of producing any report within the
7 six months that we have. I believe that it is
8 manageable, although it won't be without great
9 difficulty, but that would be true of any topic that
10 we choose.

11 So unless we are going to forego our
12 statutory report, which I would not recommend, I would
13 respectfully suggest that and would ask for your
14 support in adopting this as the topic for the
15 statutory report for 2011.

16 CHAIRMAN CASTRO: Commissioner Kirsanow,
17 then Commissioner Gaziano?

18 COMMISSIONER KIRSANOW: Thank you, Mr.
19 Chair. I just have a question of Commissioner
20 Achtenberg.

21 There are two concept papers that were
22 issued that were somewhat similar, the first one being
23 the anti-gay bullying concept paper. And I'm
24 wondering in terms of for definitional purposes, are
25 we talking about an examination of inter-student

1 violence or is it bullying or what are we looking at
2 here or is it both?

3 COMMISSIONER ACHTENBERG: I'm sorry?
4 Which concept paper? Last Friday?

5 COMMISSIONER KIRSANOW: No. The one that
6 you recently introduced is inter-student violence --
7 that one is understood --

8 COMMISSIONER ACHTENBERG: Correct, yes.

9 COMMISSIONER KIRSANOW: -- amended by your
10 e-mails that came out I think last night or yesterday.

11 COMMISSIONER ACHTENBERG: Yes.

12 COMMISSIONER KIRSANOW: There was a
13 previous concept paper that dealt with -- and it's
14 entitled --

15 DELEGATED THE AUTHORITY OF THE STAFF
16 DIRECTOR TOLHURST: The confusion is that OGC, by pure
17 coincidence, had advanced an anti-bullying topic.

18 COMMISSIONER KIRSANOW: And I just want to
19 be sure as to what we are looking at here.

20 COMMISSIONER ACHTENBERG: We're talking
21 about the concept paper that the three commissioners
22 authored, the first version of which you received last
23 Friday, which involves race and ethnicity and sexual
24 minority status.

25 COMMISSIONER KIRSANOW: And is that

1 violence against? Interested in violence?

2 COMMISSIONER ACHTENBERG: Is interested in
3 violence, which also includes bullying.

4 COMMISSIONER KIRSANOW: Okay. And how do
5 you define bullying?

6 COMMISSIONER ACHTENBERG: It's defined in
7 the -- yes. I mean, it is one example of
8 inter-student violence. It's not the only example,
9 but it's --

10 COMMISSIONER HERIOT: But it's also a much
11 larger concept than violence. I mean, you can be
12 bullied in a way that isn't violence.

13 COMMISSIONER ACHTENBERG: Correct,
14 correct.

15 COMMISSIONER HERIOT: So are you including
16 all of bullying or just that which threatens violence?

17 COMMISSIONER ACHTENBERG: No. Bullying
18 and -- yes, I am including both in the concept paper.

19 COMMISSIONER KIRSANOW: That's I guess
20 what we want to kind of unpack is violence as I would
21 view it is some type of assault and/or battery between
22 and among students; whereas, bullying could take a
23 different degree of activity, such as threats,
24 intimidation, --

25 COMMISSIONER ACHTENBERG: Correct.

1 COMMISSIONER KIRSANOW: -- coercion,
2 harassment. Is touching, physical touching,
3 considered to be bullying, for example? So I guess
4 you're saying that oral threats, for example --
5 because I am just trying to get a sense for what we
6 are talking about here.

7 COMMISSIONER ACHTENBERG: Sure.

8 COMMISSIONER KIRSANOW: Oral threats,
9 intimidation, coercion, ridicule?

10 COMMISSIONER ACHTENBERG: Could be.

11 COMMISSIONER KIRSANOW: Okay. Ridicule it
12 could be. What else? I'm trying to get a sense of
13 the scope because, again, this goes to my previous
14 concern about what we are undertaking here.

15 I will take your word that there is data
16 out there. I am just unfamiliar with it. But when we
17 start to expand the definition, now we're getting into
18 a fairly large universe of potential topics or
19 potential offenses that we're going to be taking a
20 look at.

21 COMMISSIONER ACHTENBERG: Correct.

22 COMMISSIONER KIRSANOW: So if we could get
23 a sense for -- I've just laid out a few of them. Are
24 there any other things that fall within the
25 definition, as you understand it, of the bullying that

1 we are going to be undertaking to examine?

2 COMMISSIONER ACHTENBERG: There may be.
3 Once the staff can ascertain from the Department of
4 Justice and Department of Education what kinds of
5 complaints in this regard they are receiving, what
6 kinds of activities they have been called in to
7 undertake or have initiated legal processes pursuant
8 to, we will have greater clarity on which issues have
9 implications for the civil rights inquiry of the
10 Commission. That is, we need to understand how
11 pervasive and how extensive their activities have been
12 in addressing these varying levels of violence in
13 schools.

14 COMMISSIONER KIRSANOW: As I understand
15 it, OCR only has jurisdiction or only addresses those
16 things that rise to the level of the hostile
17 environment harassment, something that could be
18 readily equated to the kind of Farrager and Ellerth
19 types of standards in the employment law context. I
20 am not sure.

21 And, again, I am not sure that bullying,
22 broadly speaking, can be defined as narrowly as OCR
23 looks at it. If, in fact, that is the case, I am not
24 sure to what extent we would have jurisdiction to look
25 at those other things, too.

1 So, again, I am not sure in terms of
2 trying to cabin the scope of this, whether bullying as
3 broadly defined as to encompass intimidation,
4 harassment, threats, coercion that may be oral,
5 ridicule necessarily falls within our jurisdiction.

6 CHAIRMAN CASTRO: Commissioner Gaziano,
7 then Commissioner Heriot?

8 COMMISSIONER GAZIANO: Yes. I was going
9 to address part of that. I think this follows. If
10 this is the topic that is adopted, I would have
11 similar -- propose a similar process if this is
12 defeated and we go to the other topic.

13 I would then want to be able to be heard
14 on motions to amend the classes that are addressed and
15 the procedures that we are going to use going forward
16 so that there could be commissioner input on the
17 definition of bullying.

18 But I do want to begin right now with two
19 reasons why. Although I am very interested in this
20 topic of inter-school violence and the federal
21 government's relation to it, I just want to state for
22 the record that it is a better topic for a briefing
23 report for a variety of reasons or for us to determine
24 whether it really is suitable for an enforcement
25 report sometime down the line. And that partially is

1 tied to the jurisdictional.

2 In our enforcement report, our statute
3 said we were really going to be studying the federal
4 government, whether the federal government has
5 enforced properly its laws. Our briefing reports,
6 obviously we can look at state practices. We can look
7 at state conduct.

8 There are individual incidents in this
9 concept paper that are mentioned as examples. There
10 is no indication in the concept paper that any of
11 those, well, I think with the one exception were even
12 known to the school. There was an allegation in one
13 case that it somehow known to the school. But even if
14 there was one incident known to a particular school
15 and there's an allegation that the school didn't take
16 corrective action, that doesn't rise to the level of
17 what Commissioner Kirsanow was talking about as a sort
18 of pattern in practice. OCR and other agencies have
19 jurisdiction over sort of pattern and practice
20 failures. So it seems to me that this topic fits less
21 well as an enforcement report.

22 The other jurisdictional concern is
23 whether the LGBT discrimination also falls within this
24 Commission's jurisdiction. We don't have jurisdiction
25 under our statute to look at all types of

1 discrimination but only those under our organic
2 statute because of color, race, religion, sex, age,
3 disability, and national origin. And perhaps Congress
4 will amend our organic statute and expand it, but I
5 have some question about that.

6 Again, this is why it would be to me
7 either better as an enforcement report down the road,
8 where we could answer that question, or as a briefing
9 report, where we have a little bit, possibly a little
10 bit, more latitude in this regard.

11 And the final point just by comparison to
12 the farm study, if we are going to do bullying, I am
13 going to have motions to expand it into religion and
14 gender because I think it would be odd if this is our
15 national enforcement report not to cover gender and
16 the religion.

17 But that makes it even less manageable in
18 the time that we have; whereas, I think that the
19 topics that Commissioner Kirsanow suggested under the
20 farm are very discrete. We have billions of dollars
21 worth of damages owing to countless acts of
22 discrimination, as determined by the courts, at least.

23 And the discrete -- there are thousands of
24 pages of I think reports and pleadings that are
25 already on file. And the two discrete topics that

1 Commissioner Kirsanow asked that we study are what
2 steps have the relevant agency or agencies taken to
3 prevent that kind of discrimination in the future and
4 what kind of stuff we are taking to discipline the
5 individuals who were responsible.

6 So, for those reasons, I am very
7 interested in the student violence topic. And I wish
8 it could be done with justice.

9 CHAIRMAN CASTRO: Any comments? If not --

10 COMMISSIONER GAZIANO: I think
11 Commissioner Heriot --

12 COMMISSIONER HERIOT: I'm still in line
13 here.

14 CHAIRMAN CASTRO: I apologize. I'm sorry.
15 Go ahead.

16 COMMISSIONER HERIOT: -- I'm still
17 concerned about this notion of bullying, on the one
18 hand, and violence and threats of violence, on the
19 other hand. They overlap, but they are not the same.

20 There is a lot of violence that I wouldn't put into
21 the category of bullying, violence that I think is
22 better put under the category of gang violence.

23 Well, you don't really talk about that as
24 bullying. And I think to approach it as bullying
25 means that we are going to make mistakes. You know,

1 the dynamic going on with gang violence isn't just a
2 bullying thing. There is something much more going
3 on. And it is hard to deal with that in a report that
4 is more I think more you're thinking about bullying
5 than you are about gang violence.

6 At the same time, there is a lot of
7 bullying that isn't violence, you know, insults,
8 taunting. And I think most of the cases that are
9 getting a lot of play in the media aren't about
10 violence or threats of violence. They're about
11 bullying that is basically taunting.

12 And then we are going to have to get into
13 First Amendment issues. If we are going to deal with
14 nonviolent bullying, which is just nasty, mean
15 bullying, we are going to have a lot of legal issues
16 that we wouldn't otherwise have. And I don't see how
17 we are going to be able to do all of that, the gang
18 violence; the bullying violence; the bullying that
19 isn't violent but, nevertheless, can be very
20 destructive because, you know, we can't deal with that
21 without dealing with First Amendment questions.

22 So it just seems to me that this is
23 overwhelming. Is there some way you could limit this?

24 COMMISSIONER ACHTENBERG: I think the --

25 CHAIRMAN CASTRO: Yes? And then after you

1 respond, our Vice Chair is going to say a few words.

2 COMMISSIONER ACHTENBERG: The description
3 contained in the concept paper is workable. I think
4 Commissioner Kirsanow's likening it to the equivalent
5 of a hostile work environment is quite appropriate
6 because the notion here is these are the activities
7 being undertaken that then go on to deprive these --
8 this is in the context of students attending school,
9 right? It goes on to deprive the students of a
10 meaningful ability to enjoy their education.

11 So that is obviously the federal interest
12 and concern. That is the hook for the review by the
13 Commission, the U.S. Commission on Civil Rights. So
14 to the extent that these things rise to that effect,
15 then they are not protected speech within the context
16 of the First Amendment, but they are --

17 COMMISSIONER HERIOT: That's actually open
18 for dispute.

19 COMMISSIONER ACHTENBERG: Well, I mean,
20 that --

21 COMMISSIONER HERIOT: That issue is going
22 to flow in. You just have to recognize that. That
23 First Amendment issue is going to come in there.

24 COMMISSIONER ACHTENBERG: Well, I mean, we
25 have a -- there is not a clear line. I will grant you

1 that. But I think there is a discrete area of inquiry
2 that we can pursue. And it's my proposal that we do
3 pursue it, that this is a serious issue. And I
4 appreciate Commissioner Gaziano's concurrence in that
5 regard.

6 I think it is important that it be the
7 topic of the statutory report. I understand you're
8 differing on that. And I appreciate that as an honest
9 difference that we have.

10 CHAIRMAN CASTRO: Vice Chair Thernstrom?

11 VICE CHAIR THERNSTROM: Just a couple of
12 things. One, just to note as a statistical matter,
13 most gang violence takes place not in school but
14 outside a school.

15 Two, it seems to me, Commissioner Gaziano,
16 that one can't both complain about the scope of the
17 report -- and I agree that the scope is a problem.
18 You know, I am also concerned about that question, but
19 you can't complain that the scope is too large and
20 then add other possible categories.

21 COMMISSIONER GAZIANO: I'll try to
22 explain.

23 VICE CHAIR THERNSTROM: Pardon me?

24 COMMISSIONER GAZIANO: I'll try to explain
25 later --

1 VICE CHAIR THERNSTROM: Well, you know --

2 COMMISSIONER GAZIANO: -- and make my
3 motion.

4 VICE CHAIR THERNSTROM: -- religion,
5 whatever else you added in.

6 And, three, I would love to hear from the
7 Staff Director on the question of whether, in fact,
8 this should be a concern, whether this project as it
9 now stands is doable. And, of course, I should add we
10 can modify this, the scope of this project, as we go
11 along, I would assume. Commissioner Achtenberg, is
12 that not correct? I assume she would say yes.

13 But, anyway, I just said I wanted to hear
14 from the Staff Director on the question of the scope
15 and whether this is a doable topic.

16 But I also said -- and this is what I
17 directed my question to you -- we can modify if we
18 find this is not in some way, some aspects not
19 manageable. You know, we take one step at a time. We
20 can modify the scope as we go along. But, you know,
21 it's hard to predict anyway.

22 Acting Staff Director, I would love to
23 hear your view on -- it's actually not six months to
24 go.

25 DELEGATED THE AUTHORITY OF THE STAFF

1 DIRECTOR TOLHURST: No.

2 VICE CHAIR THERNSTROM: We've got five
3 months to go.

4 DELEGATED THE AUTHORITY OF THE STAFF

5 DIRECTOR TOLHURST: Yes, that's correct.

6 So two things as a threshold. If now
7 we're not using the existing report, any new topic,
8 any new topic, is going to require a Herculean effort
9 by the staff to get done by the deadline.

10 That said, on this topic, I was asked when
11 I saw the original proposal what I thought of it. I
12 suggested ways to narrow it: no state survey; very
13 limited exploration of best practices; one briefing,
14 in May, local, no field hearings; interrogatories; not
15 subpoenas issued ASAP, things like that.

16 Also -- and commissioners would have to
17 agree to this and vote on it, obviously, but staff
18 will be scrambling to get any topic done. Again, if
19 you choose the deadline is important, commissioners
20 would, similarly, have to make some sacrifices,
21 largely in the form of truncating some of their review
22 periods and/or comment periods.

23 So I am not saying it is doable at all
24 under our normal plan, but our normal plan went out
25 the window last August when we didn't select a report.

1 So I don't at all want to suggest this is
2 easy or going to have the level of depth that I would
3 want had I been working on any topic for the last
4 several months.

5 And there are breadth concerns. I think a
6 federal survey of the law, what is DOJ interpreting
7 under Title IX, that type of thing is something that
8 we can do, but we would want to talk about these First
9 Amendment concerns, other concerns, and how to most
10 focus the topic in a way that was manageable in a
11 legitimate way. We don't want to dip into subjects
12 that we don't have the time to treat adequately and
13 give an adequate analysis

14 I think if we can focus on federal
15 enforcement, what is DOJ doing, what is DOE doing, and
16 have strict limitations on how deep this examination
17 will be, that it is possible. But, again, every
18 single step of the process will be limited and not
19 match what we have conceived under the AI in the past
20 in terms of number of reviews, that type of thing.

21 Whether we choose the USDA issue,
22 inter-student violence, or someone magically comes up
23 with issue C that we can pick today, interrogatories
24 -- and this is why I offered these plans. They're not
25 good, but interrogatories have to go out really soon.

1 We can't wait until another meeting for folks to
2 vote.

3 That is a caveat I have in agreeing. If
4 you want my assessment that we could do any of it, the
5 doing has to start as soon as I leave this room.

6 Another concern I have for any topic is,
7 you know, usually the person acting as Staff Director
8 isn't writing papers. The ethics officer isn't
9 writing papers. And it wouldn't be alleviated by
10 assigning it to OCRE either because Chris Byrnes,
11 similarly, is doing two and three and four jobs.

12 So the situation we're in is that getting
13 reports done is contingent of one of about four people
14 not being sick or hit by a bus. So that is a problem,
15 right?

16 Whatever you pick, whichever, your topics
17 or another one, we will do something to the best of
18 our ability and have it done on deadline. And I will
19 work with you to come up with a schedule, but it will
20 not be easy. I will be giving comp time to people to
21 work on it extra. And it's not going to be pretty at
22 all, but I will and can do either topic on deadline
23 with the understanding it is not going to be at the
24 level of depth I would have preferred.

25 And so again I will urge you for 2012,

1 please pick a topic in August so we can give civil
2 rights issues the respect they deserve and get
3 something done really in-depth.

4 CHAIRMAN CASTRO: Okay. I'm going to call
5 the vote on the question. All those in favor of the
6 motion put forward by Commissioner Achtenberg to have
7 the inter-student violence concept paper be the 2011
8 statutory report signify by saying, "Aye."

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

10 CHAIRMAN CASTRO: All those opposed?

11 (Whereupon, there was a chorus of "Noes.")

12 CHAIRMAN CASTRO: Any abstentions?

13 (No response.)

14 CHAIRMAN CASTRO: In the opinion of the
15 Chair, the motion passes with the affirmative vote of
16 Commissioners Achtenberg, Titus, Castro, and our Vice
17 Chair Thernstrom. And those opposed are Commissioners
18 Gaziano, Heriot, and Kirsanow. And there are no
19 abstentions.

20 Do we have a motion on the discovery plan?

21 COMMISSIONER ACHTENBERG: Yes. I move the
22 discovery plan that was put forward by the Staff
23 Director so that discovery can proceed.

24 CHAIRMAN CASTRO: Do we have a second on
25 that?

1 COMMISSIONER TITUS: Second.

2 COMMISSIONER GAZIANO: I don't know if
3 it's out of order, but before we adopt the discovery
4 plan, I indicated earlier that I wanted to offer a few
5 motions on the scope. With the Chair's indulgence,
6 would it be all right if we talk about the scope
7 before we talk about the discovery plan?

8 CHAIRMAN CASTRO: Well, since the
9 discovery plan is so, as you indicted earlier, not
10 that broad, why don't we vote on the discovery plan?
11 Then we can go back and address any issues that you
12 have.

13 COMMISSIONER GAZIANO: If that's the way
14 that you prefer.

15 CHAIRMAN CASTRO: Is there any discussion
16 on the discovery plan other than what we had earlier?

17 COMMISSIONER GAZIANO: A few brief things.

18 CHAIRMAN CASTRO: Sure.

19 COMMISSIONER GAZIANO: I haven't read it.
20 As the Vice Chair, I looked at the beyond depth of
21 it. And I have heard about it from others. Our Vice
22 Chair has said that we shouldn't be voting on things
23 that we get late into the night.

24 I don't know if she is going to make an
25 exception in this case, but I think whatever truncated

1 schedule you adopt for this new topic, we ought to
2 allow more commissioner input.

3 Again, I know it was meant in good faith
4 that we just deal with the definition of bullying.
5 Once we get our discovery back from the Department of
6 Justice, that will tell us what the scope of our
7 enforcement report focus is.

8 I think that is a backward way of doing
9 it. We ought to do, however fast we have to work, the
10 hard work of figuring that out and nailing those
11 issues down as best we can so that then the
12 interrogatories that are issued are tightly written to
13 that.

14 So I would oppose adopting a discovery
15 plan until it has been rewritten to reflect our
16 discussion today, it has been rewritten to reflect
17 whatever changes in focus have been adopted.
18 Commissioners, I know we killed telephone meetings,
19 but I don't like them. But I am willing to go back to
20 one if the Commission really thinks that we need to
21 have input before the next meeting to give the staff
22 direction they need.

23 CHAIRMAN CASTRO: Vice Chair Thernstrom?

24 VICE CHAIR THERNSTROM: Commissioner
25 Gaziano is perfectly right that I have long objected

1 to getting material at the last moment. And that
2 became a regular process on this Commission. However,
3 this is a really extraordinary circumstance where we
4 have only five months left. It is unprecedented.

5 And so I sign onto the procedural
6 irregularity in this one instance, in spite of the
7 fact that I have had this long history of saying, can
8 we not do this to commissioners? I've got papers in
9 front of me. I haven't had a chance to read, to
10 digest, to think about.

11 And but, again, we are really short on
12 time here. And so I, you know, will go along with a
13 truncated schedule with the understanding this will
14 not be our usual practice.

15 CHAIRMAN CASTRO: Any other discussion?
16 If not -- oh, Commissioner Heriot?

17 COMMISSIONER HERIOT: I am Glinda, the
18 Good Witch of the North. And I could tell you why I
19 don't think this is going to work, but at this point
20 you won't believe me. So let's see what happens.

21 CHAIRMAN CASTRO: I thought you were going
22 to raise Klingons this time like last --

23 (Laughter.)

24 CHAIRMAN CASTRO: -- last month.

25 VICE CHAIR THERNSTROM: Can we address you

1 as such, Glinda?

2 COMMISSIONER GAZIANO: Can I ask for one
3 clarification? Sometimes the commissioners have seen
4 the interrogatories before they go out. Sometimes
5 that's been committed to subcommittees.

6 By the way, the idea that subcommittees
7 are not a good idea, I think that's insane, but
8 sometimes we can do a lot more work if we split it up
9 and have subcommittees.

10 Is there any opportunity? What
11 opportunity will commissioners have to look at the
12 discovery requests? We have never completely
13 delegated authority with this little discretion on
14 discovery for an enforcement report like this. What
15 other accommodation is possible?

16 CHAIRMAN CASTRO: I have every confidence
17 in our Acting General Counsel, frankly. In the very
18 limited time that I have worked with her over the last
19 couple of months, I have found her to be someone who
20 is a career person who, as she said today, honestly
21 this is what she believes. I have absolutely no
22 qualms personally with delegating authority to the
23 Office of the General Counsel under our Acting General
24 Counsel at this point.

25 We are also, as was said earlier, dealing

1 with an exceptional circumstance of time in order to
2 meet the September 30th deadline, which is something
3 that is not negotiable. We need to move forward as
4 quickly as possible. And commissioners tinkering with
5 interrogatories, they can best be put together by our
6 legal staff in this instance, I think is not
7 appropriate.

8 Commissioner Achtenberg?

9 COMMISSIONER ACHTENBERG: It also seems to
10 me that an extensive part of our April meeting could
11 be and probably should be devoted to a staff report on
12 how things are going; what kinds of problems, if any,
13 they are encountering; what kind of additional
14 guidance they can receive from this body. Is that not
15 a way that we can --

16 VICE CHAIR THERNSTROM: Absolutely.

17 COMMISSIONER GAZIANO: In part, what I
18 heard from the Acting Staff Director is that she
19 believes -- it makes perfect sense to me what she
20 believes, that she needs to send the interrogatories
21 out within weeks or days. By the way, I think it has
22 always been the practice that commissioners can look
23 at the interrogatories before.

24 So I would, at a minimum, move that we
25 have three days just to provide our -- and, by the

1 way, it doesn't violate any AI that we talk to the
2 Staff Director -- three --

3 DELEGATED THE AUTHORITY OF THE STAFF
4 DIRECTOR TOLHURST: Or the General Counsel.

5 (Laughter.)

6 COMMISSIONER GAZIANO: -- that we have --

7 CHAIRMAN CASTRO: Not at the same time.

8 (Laughter.)

9 COMMISSIONER GAZIANO: -- that we have
10 three days to provide you with our thoughts. I am not
11 sure that's an adequate substitute for Commission
12 decision-making, but I think it might help -

- is that

13 CHAIRMAN CASTRO: Commissioner Thernstrom?

14 VICE CHAIR THERNSTROM: Three days isn't
15 three days. You get three days. And then the Staff
16 Director/General Counsel has to respond. And then you
17 respond. And it ends up it's not three days. And, I
18 mean --

19 COMMISSIONER GAZIANO: I don't understand
20 that. The Staff Director/General Counsel can either
21 take such advice under --

22 VICE CHAIR THERNSTROM: Okay. As long as
23 you're not insisting on going back and forth here for
24 --

25 CHAIRMAN CASTRO: I don't think we have

1 the luxury, unfortunately.

2 VICE CHAIR THERNSTROM: I mean, we just
3 don't have the luxury to do that.

4 DELEGATED THE AUTHORITY OF THE STAFF
5 DIRECTOR TOLHURST: Can I say something as well?
6 Whatever you decide, discovery is not a one-time
7 thing. And, as people looked at what we issued,
8 which, of course, would be shared immediately and in
9 advance if at all possible, if we just come back and
10 say, "Why didn't you ask this or that?" or "We wish
11 you had defined this in a different way," we can issue
12 supplemental discovery, incorporating any input that
13 you have.

14 CHAIRMAN CASTRO: That's an excellent
15 point. I think that should satisfy any concerns.

16 Any other questions, discussion?

17 (No response.)

18 CHAIRMAN CASTRO: If not, shall we have a
19 vote on the discovery plan? All those in favor of the
20 discovery plan signify by saying, "Aye."

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

22 CHAIRMAN CASTRO: All those opposed to the
23 discovery plan please signify by indicating your
24 opposition by saying, "No."

25 (Whereupon, there was a chorus of "Noes.")

1 CHAIRMAN CASTRO: Any abstentions?

2 COMMISSIONER KIRSANOW: I abstain.

3 CHAIRMAN CASTRO: One abstention. So the
4 motion on the discovery plan passes with the
5 affirmative votes of Commissioners Achtenberg, Titus,
6 Thernstrom, Castro. Opposed to the motion were
7 Commissioners Gaziano and Heriot. And Commissioner
8 Kirsanow abstained from that vote. Okay.

9 COMMISSIONER GAZIANO: May I now offer
10 some motions on the --

11 CHAIRMAN CASTRO: Go ahead.

12 COMMISSIONER GAZIANO: If we are doing
13 this as a national enforcement report, there are three
14 classes identified in the most recent concept paper
15 that I looked at at about 12:30 last night, received
16 it about 10:00 in my in box. The three classes were
17 race, inter-student violence based on race, LGBT
18 status, and ethnicity to the extent that ethnicity was
19 foreign-born or language of proficient students.

20 It seems to me that it gives -- and the
21 examples that were used about the foreign-born
22 students really involved, it seemed to me,
23 discrimination against religious minorities. The fact
24 that they were born in foreign countries seemed to me
25 to be incidental to the claim.

1 And so my first motion is that if we are
2 going to study some religions, Sikhs, Islam, whatever,
3 that we open it up to any inter-student violence based
4 on religion generally. And I doubt if we are really
5 going to limit this to OCR or the Department of
6 Justice's enforcement, that that is really expanding
7 the scope very much. I think the scope is too big to
8 begin with, but I don't think it is expanding it very
9 much. It is just treating it in a little bit more
10 even-handed way.

11 CHAIRMAN CASTRO: How many motions do you
12 plan to have? Is it two? One?

13 COMMISSIONER GAZIANO: Three.

14 CHAIRMAN CASTRO: Three? Is there any way
15 we can put them all into one motion just for --

16 COMMISSIONER GAZIANO: Someone might agree
17 to one. For example, would you adopt that as a
18 friendly amendment?

19 COMMISSIONER ACHTENBERG: Yes, I would.

20 COMMISSIONER GAZIANO: Okay. And I don't
21 know whether the others --

22 COMMISSIONER HERIOT: Yes. I think we
23 have to do them one by one. Otherwise they could be
24 voted down for --

25 CHAIRMAN CASTRO: So let's proceed with

1 your motion.

2 COMMISSIONER GAZIANO: It looks like the
3 author or the sponsor has accepted that one.

4 COMMISSIONER HERIOT: Could you clarify
5 that one for me?

6 COMMISSIONER GAZIANO: Yes.

7 COMMISSIONER HERIOT: What has just been
8 accepted?

9 COMMISSIONER GAZIANO: We're going to look
10 at all bullying or however we define it later ore
11 inter-student violence on the basis of any religion --

12 CHAIRMAN CASTRO: A friendly amendment to
13 --

14 COMMISSIONER ACHTENBERG: Can I say why I
15 concurred in that? I thought the commissioner made a
16 very good point. To the extent that one of the things
17 that was very -- in fact, the example was suggested
18 that it was with regard to anti-Muslim animus. It
19 seemed to me to be correct. Then Commissioner Gaziano
20 brought to my attention what about students being
21 bullied because of their Christian beliefs or what
22 about --

23 COMMISSIONER GAZIANO: Orthodox Jews in
24 some schools.

25 COMMISSIONER ACHTENBERG: -- or bring

1 bullied because of their Jewish religion. So he asked
2 if I would view this as a modest but friendly
3 expansion. And I said yes.

4 Obviously I don't have the authority to
5 speak for the other commissioners who concur in the
6 paper in chief, but that was his proposal. And that
7 was my rationale.

8 CHAIRMAN CASTRO: Vice Chair Thernstrom?

9 VICE CHAIR THERNSTROM: Well, I mean, I
10 don't have an objection to expanding it. I suspect
11 that there are no data to speak of, you know, in terms
12 of harassment of Jewish students. And so I don't have
13 an objection to expanding it.

14 To the extent to which we can, I would
15 like to proceed on the basis of data, rather than some
16 anecdotes here and there.

17 COMMISSIONER GAZIANO: I think we all
18 would. That's one of the reasons I wish we could have
19 postponed this.

20 COMMISSIONER HERIOT: Uncovering the fact
21 that there is no data is useful in itself if that were
22 to be the case.

23 VICE CHAIR THERNSTROM: Yes, if that were
24 to be true, but, you know, the sense is there are
25 religious questions. I mean, that is generally kind

1 of off the --

2 COMMISSIONER HERIOT: Yes. Putting that
3 in the report that we have no way of knowing how many
4 of --

5 VICE CHAIR THERNSTROM: Okay. Done. I
6 don't have an objection to that.

7 COMMISSIONER HERIOT: Todd, did you have
8 more?

9 COMMISSIONER GAZIANO: Do we want to vote
10 on this or is this --

11 CHAIRMAN CASTRO: Do we have acceptance of
12 the amendment?

13 VICE CHAIR THERNSTROM: We have an
14 acceptance of the amendment.

15 CHAIRMAN CASTRO: Does the seconder agree?
16 Does the seconder need to agree on it?

17 VICE CHAIR THERNSTROM: I'll second it.

18 CHAIRMAN CASTRO: Okay. All those in
19 favor --

20 COMMISSIONER KIRSANOW: Can we have a
21 short discussion on that because I'm not sure what
22 other motions you've got. This may be superfluous,
23 but I think it might make sense to also include -- and
24 I don't want to expand this. Actually, my concern,
25 Commissioner Achtenberg, was not so much with respect

1 to the categories but with respect to the scope of the
2 offense.

3 COMMISSIONER ACHTENBERG: Understood.

4 COMMISSIONER KIRSANOW: Our organic
5 statute talks about a lot of things, but, in any
6 event, I would think that possibly we would want to
7 also look at the violence or harassment or bullying
8 directed at disabled or those perceived to be
9 disabled.

10 CHAIRMAN CASTRO: In fact, Commissioner
11 Titus -- and I'll give you a second to talk about that
12 as well. We had these conversations as we were trying
13 to limit the scope of this. And, in fact, folks may
14 not have seen it, but on page 2 of the concept paper,
15 in footnote 2, we indicated that it is also
16 appropriate to leave open the possibility of
17 exploration of how inter-student violence affects
18 other categories of students as the work on this
19 project unfolds with the view that issues such as the
20 one that Commissioner Gaziano raised and issues such
21 as Commissioner Titus has highlighted for us and you
22 have just now, that we are precluding ourselves from
23 looking at those.

24 And, in fact, in the course of this
25 project, we have no doubt that some of those are going

1 to come up. And we don't want to ignore those.

2 So that was our effort to to at least
3 provide the opportunity for that to occur while at the
4 same time balancing the concerns that had been raised
5 about manageability and the staff resources.

6 So I don't know if that would be
7 sufficient for folks, but I know, Commissioner Titus,
8 you want to speak to the issue of special needs.

9 COMMISSIONER TITUS: Well, I agree. I
10 mentioned that on several occasions that we need to
11 look at children with special needs because often they
12 may be the subject of bullying and wanted to include
13 that in here but agreeing that we didn't have the
14 resources of the time, but I thought that it would be
15 covered under this amendment that when it came across
16 those cases, we would look at them.

17 But if we are going to amend the study to
18 include all of the categories that are covered by our
19 statute and state that specifically, I would have to
20 say I want to see that stated in there specifically,
21 just like religion, just like gender, or these other
22 things. So if we are going to open that door, I would
23 like to see that written, spelled out specifically.

24 CHAIRMAN CASTRO: Commissioner Gaziano?

25 COMMISSIONER GAZIANO: The reason I think

1 we should go through this process is if the
2 interrogatories are going to be written, we need to
3 make that kind of decision. And if we are really
4 focus on what has DOJ done, what has OCR done, then it
5 is broadening it a little bit but not very much.

6 But if we don't ask for certain categories
7 in the interrogatories, we're not going to get --
8 we're on a short time frame. So that's why I think we
9 -- so that's a good second.

10 My third was going to be gender because I
11 think it also certainly is more explicitly within our
12 jurisdiction. Then the LGBT harassment -- and it's a
13 little bit odd to be focusing on -- you know, not
14 focusing on gender.

15 CHAIRMAN CASTRO: So let's vote on the
16 religion amendment. And then we'll have a formal
17 motion put forward by Commissioners Titus and Kirsanow
18 on special needs. And then we'll move on to the next
19 topic. So let's vote on this. We've got a motion
20 that's been amended, and the amendment has been
21 seconded. So all of those in favor of adding religion
22 signify by saying, "Aye."

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

24 CHAIRMAN CASTRO: All those opposed?

25 (No response.)

1 CHAIRMAN CASTRO: Any abstentions?

2 (No response.)

3 CHAIRMAN CASTRO: It passes unanimously.

4 Which of the two commissioners would like
5 to raise the next motion?

6 COMMISSIONER KIRSANOW: Go ahead.

7 COMMISSIONER TITUS: I would move that we
8 include people with disabilities in our study.

9 COMMISSIONER KIRSANOW: I would include
10 just a slight amendment to that: perceived
11 disabilities also.

12 COMMISSIONER TITUS: Yes.

13 CHAIRMAN CASTRO: Okay.

14 DELEGATED THE AUTHORITY OF THE STAFF
15 DIRECTOR TOLHURST: Before you vote, can I make a
16 quick point?

17 CHAIRMAN CASTRO: Oh, sure.

18 DELEGATED THE AUTHORITY OF THE STAFF
19 DIRECTOR TOLHURST: If we're adding all of these, on
20 the one hand, I would withdraw my assessment that this
21 is doable with this caveat. And I agree with
22 Commissioner Gaziano. As you approve these, these are
23 all going to need to go to interrogatories. And that
24 we can do: collect and analyze data on any groups
25 that you ask us for.

1 What you won't get -- I mean, there is a
2 rich history. And you can go back through years and
3 years of law of students facing bullying and violence
4 because of their religion. You're not going to get a
5 rich legal background on any of these individual
6 issues.

7 You will get the forward-looking. You
8 will get the analysis of what DOJ is doing. But in
9 terms of expectations of if you were to include
10 everything, you are not going to get the analysis I
11 would like to give you had I had a year on in terms of
12 setting the stage of legal protections very broadly
13 for all of these groups.

14 CHAIRMAN CASTRO: We understand that. We
15 appreciate it.

16 DELEGATED THE AUTHORITY OF THE STAFF
17 DIRECTOR TOLHURST: But the interrogatories, yes, I
18 totally agree we need to be really clear today so we
19 include anything you want in the data that we get.

20 CHAIRMAN CASTRO: Okay. Fair enough if
21 that's agreeable.

22 So we have a motion that has been seconded
23 on the issue of students with disabilities or
24 perceived disabilities All those in favor signify by
25 saying, "Aye."

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

2 CHAIRMAN CASTRO: Any opposed?

3 (No response.)

4 CHAIRMAN CASTRO: Any abstentions?

5 (No response.)

6 CHAIRMAN CASTRO: It passes unanimously.

7 Commissioner Gaziano, did you have another
8 motion?

9 COMMISSIONER GAZIANO: I move that we ask
10 the same types of questions of the Department of
11 Justice, Department of Education or any other federal
12 regarding their enforcement of federal statutes that
13 prohibit bullying or however it is defined as we
14 ultimately define it on the basis of gender.

15 CHAIRMAN CASTRO: Okay. Do we have a
16 second on that?

17 COMMISSIONER KIRSANOW: Second.

18 CHAIRMAN CASTRO: Any additional
19 discussion on that motion? Vice Chair?

20 VICE CHAIR THERNSTROM: I'm sorry. I'm
21 being a little stupid or something on this. What does
22 bullying on the basis of gender look like
23 specifically?

24 COMMISSIONER GAZIANO: There's some notion
25 in the concept paper. We also had some teachers

1 testify last month about obviously sometimes boys pick
2 on girls and sometimes girls pick on other girls
3 because they see them as sexual threats. It was very
4 interesting testimony.

5 VICE CHAIR THERNSTROM: The girls picking
6 on girls, I have seen that a lot, but you are
7 including that?

8 COMMISSIONER GAZIANO: Yes, in fact, I
9 think that was raised as the most prevalent level of
10 violence.

11 VICE CHAIR THERNSTROM: Yes, I'm sure.
12 Girls are horrible to each other in grade school,
13 middle school mainly.

14 CHAIRMAN CASTRO: Do we have a second on
15 that motion, by the way? Yes, we did, right?

16 Commissioner Heriot?

17 COMMISSIONER HERIOT: Let me just back up
18 a little bit. This does have to do with this motion.

19 But one of the things about this report is that it
20 deals basically with sexual orientation as a topic.
21 And it's not clear that that is within our
22 jurisdiction.

23 We might bolster our jurisdictional
24 argument a little bit better if we include gender
25 here, but one thing I would like is an opinion from

1 the General Counsel's office about whether or not we
2 can study sexual orientation issues. That would make
3 me feel a lot more comfortable on the jurisdictional
4 issue.

5 DELEGATED THE AUTHORITY OF THE STAFF
6 DIRECTOR TOLHURST: Do you want an opinion right now?

7 COMMISSIONER HERIOT: I want a --

8 COMMISSIONER GAZIANO: No. I'd rather,
9 you know --

10 COMMISSIONER HERIOT: Actually, I would
11 like to know a bottom line, but I would also like, you
12 know, some argument.

13 DELEGATED THE AUTHORITY OF THE STAFF
14 DIRECTOR TOLHURST: Yes. I mean, going back to your
15 AI, what should happen with all concept papers is
16 before we even talk about them, they would go to the
17 General Counsel, who would write a opinion about
18 jurisdiction and foundation. That hasn't happened in
19 a while.

20 I can tell you that the previous General
21 Counsel was asked the question. I've not been asked
22 it until now and he believed that it was within our
23 jurisdiction.

24 I think that what we would look at would
25 be what other federal agencies are doing, including

1 the Department of Justice, who is explicitly at the
2 moment including sexual orientation under their DOMA
3 protections.

4 I would also harken back to a time before
5 disability was under our jurisdiction, when we
6 considered disability in helping to frame the laws
7 that were being created to protect people. So there
8 is a question of whether under our administration of
9 justice statute we should as a Commission be looking
10 or you should be looking at is it part of our role to
11 write in quotes "advocating for a group to become or
12 not become a protected class" and something that the
13 Commission should look at. And should the Commission
14 have a role in thinking about that, even before it's
15 under our jurisdiction?

16 But I would prefer to have a day to think
17 about this and give you something in writing that was
18 a more sophisticated --

19 COMMISSIONER HERIOT: Yes. I would
20 appreciate getting something in writing.

21 COMMISSIONER GAZIANO: I would, too. And
22 I did note the authority cited in the concept paper
23 that certainly it is very relevant that the
24 administration is interpreting Title IX in a certain
25 way. But if you could address the other authorities

1 because we need to make an independent determination
2 of our jurisdiction.

3 CHAIRMAN CASTRO: Yes, Commissioner
4 Achtenberg?

5 COMMISSIONER ACHTENBERG: My question, our
6 enabling statute and the fact that we have purview
7 under the administration of justice and the fact that
8 the Commission in its history has shed light on
9 emerging issues, even before they were part of
10 enumerated classes, is that a fair characterization of
11 some of the activities that the Commission has
12 undertaken in the past? What is the legal
13 significance, if any, Mr. Chairman, of the guidance
14 that has been asked for by the Office of General
15 Counsel, as compared to essentially a vote of this
16 body that we are going to undertake in the particular
17 -- I mean, is it mad to suggest there is a difference
18 between that and the vote of this body or is it merely
19 to elucidate the issue of jurisdiction?

20 CHAIRMAN CASTRO: In my view -- and I
21 can't give you a legal opinion because this is the job
22 our counsel here. But we, a majority of our
23 Commission, has already voted on this concept paper
24 that includes as one of the topics the subject areas
25 that we are going to look at as LGBT students. And it

1 is not the only topic we voted to look at. In fact,
2 we just added a few more.

3 So I believe in putting forward this
4 concept paper, believe that we have the authority
5 through, as you said, our administration of justice as
6 well as the fact that we are looking at a federal
7 agency which is currently looking at that class of
8 individuals in the context of the topic that we have
9 chosen.

10 So I would view the report that is being
11 requested from our General Counsel as elucidating to
12 these commissioners who voted against it anyway.

13 So I would not view that as something that
14 would prevent us from going forward and looking at
15 that additional class of individual. And that is my
16 personal view of the effect of this.

17 COMMISSIONER GAZIANO: I have the same
18 view, but it might depending on the legal analysis be
19 something we would raise at another meeting but maybe
20 not.

21 And your point about the administration of
22 justice, that's always been subject to interpretation
23 of our jurisdiction. I think it is a fair point. And
24 it is a fair point that we ought not to interpret
25 unreasonably narrowly either.

1 CHAIRMAN CASTRO: So we have a motion.
2 And it has been seconded on the issue of addition to
3 the report, that concept paper of gender. Unless
4 there is any further discussion, shall we have a vote?
5 All those in favor of adding gender please signify by
6 saying, "Aye.a"

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

8 CHAIRMAN CASTRO: All those opposed?

9 (No response.)

10 CHAIRMAN CASTRO: Any abstentions?

11 (No response.)

12 CHAIRMAN CASTRO: The motion passes
13 unanimously.

14 Any other motions on that? You're done?

15 So now we will move on to a consideration
16 of briefing and hearing topics for fiscal year 2011 --

17 COMMISSIONER GAZIANO: Just before we
18 close out this. I'm very sorry, but will we will ask
19 -- the Chair working with the Staff Director to
20 circulate a proposed time frame, under our prior plan,
21 which I think has to be abandoned, you get the first
22 draft of the enforcement report in May. I don't think
23 that's going to possible, but I would like -- by the
24 way, I am again speaking as -- what did you say you
25 were, Glinda? I'm --

1 COMMISSIONER HERIOT: Glinda, the good
2 witch of the North.

3 COMMISSIONER GAZIANO: Yes. I'm the
4 warlock. I think everybody will be --

5 (Laughter.)

6 COMMISSIONER GAZIANO: -- well-served -- I
7 don't need it today but well-served if you allow
8 yourselves time to look at drafts and have changes
9 incorporated. So is that something that unless you
10 have an alternative proposal that you would circulate
11 to us for consideration, what the proposed schedule
12 should be for this report?

13 CHAIRMAN CASTRO: I believe there is a
14 timeline that has been prepared for this. Has there
15 not, Commissioner Achtenberg?

16 COMMISSIONER ACHTENBERG: Indeed, yes.

17 CHAIRMAN CASTRO: And we can circulate a
18 copy of that? We have it. Is it in final form?

19 DELEGATED THE AUTHORITY OF THE STAFF
20 DIRECTOR TOLHURST: I would prepare to conform it more
21 to what commissioners are use to in terms of a
22 timeline if that is all right.

23 CHAIRMAN CASTRO: Okay.

24 DELEGATED THE AUTHORITY OF THE STAFF
25 DIRECTOR TOLHURST: We can circulate that on Monday.

1 CHAIRMAN CASTRO: Yes. Okay. Good.
2 Okay.

3 - CONSIDERATION OF BRIEFING/HEARING TOPIC(S)
4 FOR FY 2011

5 CHAIRMAN CASTRO: As you know, at our
6 February 11th hearing, there was a motion by
7 Commissioner Gaziano that we all agreed that the
8 eminent domain briefing would be conducted within six
9 months, which would be sometime before the end of
10 August.

11 We have been discussing here I think today
12 a lot of issues as to staff capacity and whether or
13 not we have the capability of performing what we voted
14 to perform. And what I wanted to do was have a
15 discussion as to whether or not we have room for other
16 topics at this point in 2011 assuming we're going to
17 move forward with imminent domain, as we have agreed
18 to do within a six-month time period.

19 So I wanted to ask our General Counsel,
20 our Acting General Counsel, do you think there is room
21 to do another hearing on another topic?

22 VICE CHAIR THERNSTROM: That is on top of
23 --

24 CHAIRMAN CASTRO: On top of eminent
25 domain.

1 VICE CHAIR THERNSTROM: -- eminent domain.
2 It's not a hearing, a briefing.

3 DELEGATED THE AUTHORITY OF THE STAFF
4 DIRECTOR TOLHURST: A briefing?

5 CHAIRMAN CASTRO: A briefing.

6 DELEGATED THE AUTHORITY OF THE STAFF
7 DIRECTOR TOLHURST: Not before October. Well, a
8 couple of things. For eminent domain, I knew you were
9 going to ask me about that. That is a ready-to-go
10 briefing. OGC had done all of the background work.
11 We have briefing binders for commissioners. We have
12 identified speakers. So for imminent domain, it is a
13 really pull the trigger and let's pull a good fix to
14 make sure that briefing happens with the caveat that
15 what I have just committed David Snyder and myself to
16 that we would need OCRE to assist with the logistics
17 of that briefing.

18 For another briefing, I think I would need
19 to confer with Chris Byrnes as to OCRE's workload
20 because that briefing would most certainly have to
21 come out of OCRE given what the General Counsel's
22 office is committed to.

23 CHAIRMAN CASTRO: And here's the reason
24 for my question, because I know Commissioner Kirsanow
25 has put forward as a statutory topic, which did not

1 end up being chosen as the USDA. I don't know if he
2 wants to go forward for us to look at that as a
3 briefing topic.

4 And if so, what I'm trying to have an idea
5 of is we have already got eminent domain out there.
6 Do we have the capacity to look at something else
7 right now or do we need to wait and see how we play
8 out with what we approve today in terms of the new
9 statutory report? So, you know, that's what I'm
10 trying to get an idea of.

11 Commissioner Kirsanow, I don't know if you
12 wanted to move this forward today as a
13 hearing/briefing topic or not.

14 COMMISSIONER KIRSANOW: Yes, I think I
15 would. I appreciate your consideration of it. I do
16 think -- and I will reiterate what I said before. I
17 think this topic is one that is kind of a ready-made
18 project.

19 I don't want to presume what the staff
20 would do on this or to truncate what they would do,
21 but I do think that we are looking at only two
22 discrete areas of inquiry with respect to the topic.

23 I think all the data has already been
24 adduced. There's been litigation on this. There's
25 been a settlement. And it would be a very discrete

1 inquiry as to what USDA is doing or has done to remedy
2 what precipitated what appears to be fairly rampant
3 discrimination that at least in one case, the Pigford
4 case, affected 94,000 individuals and in the Eagles --
5 I can't remember the name of the other litigation but
6 the ones that affected Hispanic farmers and female
7 farmers. There's another fairly sizeable cohort. But
8 I think that investigative work has been done pursuant
9 to litigation. And we simply -- that would be kind of
10 background material to see what USDA has done to
11 remedy that situation.

12 CHAIRMAN CASTRO: Sorry. Vice Chair
13 Thernstrom?

14 VICE CHAIR THERNSTROM: Commissioner
15 Kirsanow, I wonder if just out of pity for the staff,
16 as it were, whether you would be willing to have that
17 delayed until October. We don't have --

18 CHAIRMAN CASTRO: A discussion about it.
19 I mean, are you talking about a discussion about it or
20 vote on it?

21 VICE CHAIR THERNSTROM: Well, just --

22 COMMISSIONER KIRSANOW: The briefing?

23 VICE CHAIR THERNSTROM: Yes, have the
24 motion not contemplate any kind of briefing before the
25 staff gets on its feet again; that is, not until

1 October.

2 CHAIRMAN CASTRO: As I understand, I think
3 what I am asking to clarify is before we even have a
4 motion on something like that, I want to make sure
5 that there is a capacity for the staff, not
6 necessarily vote on a topic today, whether it's --

7 VICE CHAIR THERNSTROM: Right.

8 CHAIRMAN CASTRO: -- this and then say,
9 "Well, just do it in October." I want to make sure I
10 have an understanding from the staff that they have
11 the capability to do something else beyond the eminent
12 domain or I don't know if folks wanted to swap eminent
13 domain out. I'm not suggesting that, but do we have
14 the capacity for one more item or are we at capacity
15 now?

16 DELEGATED THE AUTHORITY OF THE STAFF
17 DIRECTOR TOLHURST: That item if you did another one
18 would have to come out of OCRE. So we'll need to get
19 Chris to be able to weigh in. And I see that on our
20 discussion, it looks like Title IX with this other
21 discussion. So probably he can't answer unless he
22 knows what you all want to do with Title IX and what
23 the timeline is for getting any report on Title XI out
24 because that is certainly occupying their time.

25 CHAIRMAN CASTRO: Maybe what I could

1 suggest if it's amenable is that we put off a
2 discussion of this topic as the briefing topic until
3 next month's meeting so that in the interim, staff can
4 consult with one another and come back and inform us
5 as to their capacity to take on anything else, in
6 addition to what's already on --

7 COMMISSIONER KIRSANOW: That's agreeable
8 to me.

9 CHAIRMAN CASTRO: Does that work for --

10 VICE CHAIR THERNSTROM: That is the right
11 thing to do here.

12 CHAIRMAN CASTRO: And that was the USDA
13 topic.

14 I'm sorry. Commissioner Titus?

15 COMMISSIONER TITUS: One quick question.
16 You mentioned how things are underway and from the
17 eminent domain, from the eminent domain briefing. Did
18 you expand the invited guests who are going to come to
19 testify or is it still just that limited number that
20 was someone who is connected to the staff?

21 DELEGATED THE AUTHORITY OF THE STAFF

22 DIRECTOR TOLHURST: What we had locked in were two
23 people that are committed. We had other people we
24 were speaking with at the time we were asked to stop
25 work on it. So there are other people on our list.

1 They had not committed before the trigger was pulled
2 on work.

3 VICE CHAIR THERNSTROM: But we can go back
4 to them on --

5 CHAIRMAN CASTRO: We can add folks.

6 DELEGATED THE AUTHORITY OF THE STAFF

7 DIRECTOR TOLHURST: We can go back.

8 CHAIRMAN CASTRO: We can add folks.

9 VICE CHAIR THERNSTROM: Yes, of course.

10 CHAIRMAN CASTRO: Okay. Great.

11 DELEGATED THE AUTHORITY OF THE STAFF

12 DIRECTOR TOLHURST: Do we need to talk about we need
13 everything to happen, the eminent domain?

14 VICE CHAIR THERNSTROM: Yes. When are you
15 rescheduling the eminent domain briefing for?

16 CHAIRMAN CASTRO: We voted at the last
17 meeting that we would conduct it within six months
18 from that date, which would be by the end of August.
19 So we haven't set a date for it, but maybe what we
20 ought to do is at the next meeting, we could talk
21 about whether or not the capacity is for anything new.

22 You may want to look at that point as to when we want
23 to set this hearing.

24 VICE CHAIR THERNSTROM: That's fine.

25 CHAIRMAN CASTRO: That will also -- I

1 think the day that this happens will dictated, in
2 large measure, by the staff's ability to move forward
3 on the other thing.

4 VICE CHAIR THERNSTROM: That's fine.

5 - TITLE IX - SEX DISCRIMINATION IN
6 LIBERAL ARTS COLLEGE ADMISSIONS

7 CHAIRMAN CASTRO: Okay. Now we're moving
8 on to Title IX, sex discrimination in liberal arts
9 project. Mr. Byrnes, I believe you have a staff
10 report on this project.

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

13 I did prepare an update on the status of
14 the project that our Acting Staff Director distributed
15 to you all yesterday. I was hoping that would
16 streamline discussion, especially because many aspects
17 of this investigation should be discussed in closed
18 session.

19 I don't know if anyone has had a chance to
20 read that. I would be happy to take any questions for
21 those who have. Okay. Well, I will try to discuss
22 the status as gingerly as I can without having to
23 force us into closed session.

24 As I mentioned previously, three schools
25 are working with us to analyze their data subject to a

1 Commission-drafted research protocol. Two of the
2 schools have expressed concerns about the Commission's
3 use of certain intermediate data outputs.

4 This isn't the logistic regression
5 analysis. It's not the final analysis. But we had
6 asked them to generate differences in median SAT
7 scores for men and women across applicants, admitees,
8 and enrollees. And they have requested an assurance
9 from us as to how we would use and publish this data
10 and what sorts of inferences we could draw on that.

11 We have offered to include a disclaimer in
12 the report that our analyses do not perfectly model or
13 represent any one college's admission process.

14 With the third school, the ball is in our
15 court. We distributed Part 1 of the protocol to them
16 and received the requested listings of values of their
17 data in return but determined that the school's
18 variables needed special recoding.

19 Before we distribute the next step for the
20 protocol, staff must first resolve how to handle their
21 high school GPA, which contains data on various
22 different scales.

23 So that's where we stand with the three
24 holdout schools. For the rest of the schools, staff
25 is developing tables of data showing the proportions

1 of applicants, admitees, and enrollees by gender,
2 sex-specific admissions rates, and median SAT scores.

3 These represent the intermediate data outputs that
4 concern the two holdout schools. These are mostly
5 complete and proofread for 14 schools.

6 CHAIRMAN CASTRO: Okay. Thank you, Mr.
7 Byrnes.

8 MR. BYRNES: Any questions?

9 CHAIRMAN CASTRO: Any questions? Any
10 motions?

11 COMMISSIONER TITUS: Mr. Chairman?

12 CHAIRMAN CASTRO: Yes? Yes, Commissioner
13 Titus?

14 COMMISSIONER TITUS: As I look through
15 this update, I thank Mr. Byrnes for preparing this for
16 us.

17 MR. BYRNES: Sure.

18 COMMISSIONER TITUS: It seems to me if I
19 can just kind of sum it up, some of the schools have
20 not been forthcoming and for various reasons. And
21 those that have been forthcoming have also some -- or
22 we should have some concerns about the data that they
23 have been providing.

24 As you see, the quality of the data varies
25 from school to school. Some of it is missing for

1 legitimate reasons. Different schools don't want to
2 provide this because maybe they don't have it.

3 Other quality data issues arise from the
4 manner in which they code the people who are admitted
5 or rejected so you're comparing apples to oranges.
6 The list just kind of goes on.

7 So I would say that since the material is
8 incomplete and potentially unhelpful because of the
9 quality of the material and the inconsistency of it.
10 And also another problem, as I understand it -- and
11 correct me, Mr. Byrnes -- is since it's collected by
12 subpoena, we would have to have another hearing to
13 deal with that information?

14 MR. BYRNES: I conferred with the previous
15 General Counsel. It was his opinion that we would
16 need a hearing to enter the data into the record and
17 then publish the results of that analysis.

18 COMMISSIONER TITUS: Okay.

19 MR. BYRNES: But that would be a very pro
20 forma matter from my understanding. It would be ten
21 minutes, all of ten minutes, to swear it in. It
22 wouldn't be sort of the traditional hearing, we're,
23 you know, all the bells and whistle and --

24 COMMISSIONER TITUS: And debriefing.
25 Well, for whatever, maybe that is not as big a problem

1 as the nature of the data. I would say that at this
2 point, having heard that report and concerns with the
3 data, we don't want to put out something based on
4 faulty or incomplete data. I would just move that we
5 suspend this study and move forward with other things.

6 CHAIRMAN CASTRO: Is there a second to
7 that motion?

8 COMMISSIONER ACHTENBERG: Second.

9 CHAIRMAN CASTRO: Any discussion?
10 Commissioner Gaziano?

11 COMMISSIONER GAZIANO: I will yield to
12 Commissioner Heriot.

13 CHAIRMAN CASTRO: Commissioner Heriot?

14 COMMISSIONER HERIOT: I would oppose that
15 motion. I think we have potentially valuable
16 information here. And to cut it off would be a
17 travesty. I don't think we are in a position to say
18 that we have worthless data. I think it is going to
19 be very useful. And the amount of work that is
20 necessary at this point is really quite small.

21 CHAIRMAN CASTRO: Commissioner Gaziano?

22 COMMISSIONER GAZIANO: Yes. Reading I
23 would ask the acting head of OCRE, who used to be a
24 different acting head -- but, anyway, to comment on
25 this. There are always inconsistencies in the way

1 data sets are sent by different institutions. It is a
2 function of statisticians in your office and other
3 offices to try to make sense of that.

4 That is not, certainly, as I understand
5 it, a rare instance. It is a rare instance when
6 different institutions keep their data in exactly the
7 same way.

8 But I also understand that analysis of
9 certain institutions is further along -- I'd like a
10 little bit more information on that -- and that
11 information on even a few institutions could be
12 potentially very valuable.

13 I want to say one other point, but I want
14 to get your answer first.

15 MR. BYRNES: I think for that, we would
16 have to go into closed session if we start discussing
17 particular institutions. I don't want to sort of --

18 COMMISSIONER GAZIANO: No. I just meant,
19 without naming them, are there certain institutions
20 that the data has been analyzed?

21 MR. BYRNES: Yes.

22 COMMISSIONER GAZIANO: Okay. So --

23 MR. BYRNES: Along different statistical
24 models, as I laid out in this update.

25 COMMISSIONER GAZIANO: I read your summary

1 briefly. How many institutions is there whatever
2 stage it is, whether it is robust, final, words you
3 all use? How many institutions have you done a basic
4 analysis of?

5 MR. BYRNES: Eleven.

6 COMMISSIONER GAZIANO: Eleven. Okay.

7 MR. BYRNES: And this is for the logistic
8 regression analysis model. This is for the ratios.

9 COMMISSIONER GAZIANO: Yes, yes. Even if
10 major further work on this is going to be suspended, I
11 would have a very strong objection to essentially
12 burying the work that the Commission has done. That
13 would be a terrible waste of the Commission's time,
14 the Commission's money.

15 I would want this -- even if we are not
16 going to stand behind it in some form, that we publish
17 or release or something, the data, even if we are not
18 going to finish the analysis in the way that we
19 originally so that other scholars can make what use of
20 it they want.

21 Now, I would hope that we actually
22 complete the job and that we actually publish a report
23 or data sets that we are comfortable with. But if we
24 are not going to do that, then I don't want this
25 buried.

1 CHAIRMAN CASTRO: Any others?
2 Commissioner Achtenberg?

3 COMMISSIONER ACHTENBERG: Thank you, Mr.
4 Chair.

5 I was wondering, Mr. Byrnes, what do you
6 make, if anything, of the criticism of our study that
7 the sample size was too small for results could
8 significant?

9 And if you could answer that question as
10 well with regard to the criticism of our study that
11 the geography that we had utilized because of the -- I
12 assume it's because we can only, our subpoena can
13 only, extend so far -- that the geographical isolation
14 has on the validity of the statistical findings.

15 MR. BYRNES: I wasn't on board for the
16 project when we did select the schools. I will say
17 that the schools that we are seeking data from, some
18 18-19 schools, 2 represent a very wide variety of
19 schools, moderately selective, highly selective,
20 HBCUs, non-HBCOs, public, private, some institutions
21 with a religious affiliation. I think it's a good
22 cross-section.

23 Again, I am not a statistician. Bear in
24 mind that, even though the number of schools might be
25 small, we are looking at thousands of applicants. So

1 I think that does give us a very large sample size
2 from which to analyze data.

3 COMMISSIONER TITUS: So you're saying that
4 diversity of the kinds of schools overcomes the
5 geographical isolation issue or is that a --

6 MR. BYRNES: Again, I'm not a
7 statistician, but I think it would tend to make up for
8 that, tend to mitigate that concern.

9 CHAIRMAN CASTRO: Vice Chair, do you have
10 a question?

11 VICE CHAIR THERNSTROM: Well, yes. And I
12 thank Mr. Byrnes for this. I mean, I, frankly, am
13 reading it. I've never been in favor of this project,
14 but reading this I -- you know, my heart sank some.
15 And I just feel there are so many problems here with
16 the data.

17 I started out with a basic problem of
18 looking at private schools, which I don't think we
19 should be doing. I think private schools should be
20 free to set whatever admissions criteria they want.
21 And you have just added frosting to that cake, as it
22 were.

23 And I thank you for the honesty of this
24 report.

25 CHAIRMAN CASTRO: Commissioner Heriot?

1 COMMISSIONER HERIOT: I just wanted to
2 address the issue of geographic isolation here. It is
3 true that all of these schools are within what,
4 100-mile radius of Washington. I don't think that
5 presents a problem for us at all. We don't have to
6 say from whatever results we get that this means that
7 discrimination is going on across the country or that
8 it's not going on across the country.

9 It would be a useful thing to say it's
10 going on within 100 miles of Washington. People can
11 make their own conclusions about whether or not it is
12 going on in Oregon, too. I mean, if they find it is
13 not here, or they find it is here, then I think, you
14 know, that will then mean that, you know if there is
15 such discrimination, we may want to study it more
16 broadly.

17 But to cut it off, saying we haven't
18 studied enough schools, if you would prefer to think
19 of this as a pilot study to see whether we should do a
20 further study later. You know, that's fine, but, yes,
21 it is very useful to know whether or not there is
22 gender discrimination going on here, here within 100
23 miles of Washington.

24 And we may well want to go further or some
25 other entity may want to study it further as to

1 geography, but I don't think we have any problem with
2 sample size here.

3 As for the individual schools, it's not a
4 sample at all. We're looking at all of their
5 admissions, not some of their admissions. So
6 conclusions can be drawn about particular schools if
7 we find the data does draw us there, but it's not a
8 question of sample size. I don't think we're going to
9 have any problem with that.

10 As for whether or not private schools
11 should be permitted to discriminate on the basis of
12 gender, maybe they should be, but that is not what
13 this study is about. This study is about whether or
14 not they are discriminating, not whether they should
15 have that authority.

16 CHAIRMAN CASTRO: Commissioner Gaziano?
17 And then we'll vote on this.

18 COMMISSIONER GAZIANO: Just to clarify,
19 our beloved former head of OCRE died in the middle of
20 this process. And, by the way, I was looking for the
21 plaque. We designated a conference room in Bob
22 Lerner's name. So someone needs to tell me if we've
23 put the plaque up. There's no plaque. I would asking
24 the person acting as Staff Director to see if we can
25 put a plaque commemorating the conference room that we

1 named --

2 CHAIRMAN CASTRO: He said it's up.

3 COMMISSIONER GAZIANO: Oh, it is?

4 COMMISSIONER HERIOT: It wasn't in the
5 room we saw.

6 COMMISSIONER GAZIANO: I missed it.

7 COMMISSIONER HERIOT: Where is it?

8 COMMISSIONER GAZIANO: Okay. Let me take
9 that back -- okay. I didn't see. Let me take that
10 back. But, anyway, it was my opinion -- just I have
11 to state this for the record -- that our subpoena for
12 written documents and not compelling testimony does
13 extend beyond 100 miles.

14 It was also my opinion at the time that
15 through our field offices, we could extend our
16 jurisdiction. But I went along with this because Mr.
17 Lerner opined that the schools within our 100
18 jurisdiction -- in case some school raised an
19 objection, in case I was wrong, he opined that the
20 schools would be provided actually a pretty good
21 reasonable sample.

22 But I would concur with what Commissioner
23 Heriot said, that I don't think we need to say that.
24 We could let others draw their conclusion whether the
25 sample that we have obtained means anything about the

1 rest of the country.

2 I think it would be valuable to know
3 whether certain of these institutions -- whether the
4 sample that we have chosen, any conclusions can be
5 drawn from.

6 CHAIRMAN CASTRO: Thank you.

7 COMMISSIONER TITUS: Can I ask --

8 CHAIRMAN CASTRO: Sure, Commissioner
9 Titus?

10 COMMISSIONER TITUS: I'd be the last
11 person to want to bury a study on sex discrimination.

12 I mean, I think it is very important. I think it
13 still exists out there. I think it could be something
14 to study. But if you look at your very own words,
15 "The quality of the data we have received varies from
16 school to school." And then you go on to say, "Our
17 biggest concerns arise from extensive missing data and
18 insufficient information."

19 And then here's another line. These are
20 your words. "At least 1 of 15 schools that provided
21 data have issues that may preclude any analysis.
22 Staff is still determining whether we can fix and
23 analyze the data in several other schools."

24 What worries me is that using this data to
25 come up with some kind of report I think will lead to

1 misleading conclusions. And that is the last thing
2 that we want to do.

3 As for the sample size, I don't think
4 there's any question about that fact that the schools
5 surrounding Washington are not representative of the
6 entire country, I mean, if you label the title that
7 very specifically, but that is not what the title is.

8 And you cannot tell me that this is not a subset that
9 is different from the deep South or the far West or
10 Las Vegas or other places, too.

11 So I say that we put a stop to this
12 because we don't want to risk putting out there
13 misleading conclusions based on what we have admitted
14 up front is inadequate or perhaps faulty data.

15 MR. BYRNES: I do want to speak just
16 really briefly to the possibility of putting out
17 misleading data. Certainly this project does not
18 preclude the possibility of multiple rounds of going
19 back to the schools to say, "Is this data complete?"

20 We tried to do that in several instances.

21 They would have the opportunity to do so in an
22 affected agency review. So certainly if there were
23 large enough gaps, we would obviously take that
24 concern into account. The investigation does not
25 preclude sort of ongoing verification with the

1 schools.

2 Staff has done their best in the meantime
3 to sort of figure out the significance of missing
4 data, whether it is sort of deliberate omission, they
5 just don't keep the data.

6 COMMISSIONER TITUS: Oh, I was not in any
7 way suggesting it was the staff's fault. I want to
8 make that clear. I think you all do the very best you
9 can. I am amazed how well you do with so few
10 resources. So I don't blame the staff on this data
11 problem at all. I think it's the source of the data
12 and the inability to get it and their unwillingness to
13 give it to us. So I want to be very clear about that.

14 CHAIRMAN CASTRO: All right. Commissioner
15 Heriot? And then we are going to vote on this because
16 I know this is a topic that was proposed by you. So I
17 will give you the last word before we vote.

18 COMMISSIONER HERIOT: I would like to say,
19 number one, that if we were to cancel this project on
20 the ground that we have missing data and we have some
21 data collection problems. We have never had a study
22 ever...We always have data collection problems. There
23 are always difficulties in getting facts.

24 And if this one is canceled when it is
25 almost done on that basis, then we had better cancel

1 every project we are ever going to do and might as
2 well just go home. You are going to have problems
3 like this in any report you ever look at.

4 Nowhere in Mr. Byrnes' paper does he tell
5 us that none of the data is adequate. And so the
6 notion of we're going to cancel it because some of the
7 schools may be a problem seems to me just silly.

8 And, you know, we very much ought to
9 continue this project. There is useful information
10 here. And we shouldn't throw it away.

11 CHAIRMAN CASTRO: Okay. We're going to
12 call the question. All those in favor of Commissioner
13 Titus' motion to suspend the Title XI sex
14 discrimination in liberal arts college admissions
15 programs signify by saying, "Aye."

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

17 CHAIRMAN CASTRO: All those opposed
18 signify by saying, "No."

19 (Whereupon, there was a chorus of "Noes.")

20 CHAIRMAN CASTRO: Any abstentions?

21 (No response.)

22 CHAIRMAN CASTRO: In the opinion of the
23 Chair, the ayes have it with the votes, affirmative
24 votes, in favor of the motion, Commissioners
25 Achtenberg, Titus, Vice Chair Thernstrom, Commissioner

1 Castro; the opposition from Commissioners Gaziano,
2 Heriot, and Kirsanow.

3 The next item on the agenda --

4 COMMISSIONER GAZIANO: I had an alternate
5 motion. I'm sorry. If it is going to be killed, I
6 move that the data, be released for other scholars to
7 make of it what they will with such exceptions as this
8 Commission may determine, but that which can be
9 released without our imprimatur, that that will be
10 released for other scholars to study so that the money
11 and time aren't wasted.

12 COMMISSIONER HERIOT: Second.

13 CHAIRMAN CASTRO: Do we have any
14 discussion on that motion?

15 COMMISSIONER TITUS: What about the people
16 who provided us that information? Do they have any
17 problem with that? Is that something that we can do?

18 MR. BYRNES: I'd have to see, I guess,
19 their permission, their input on what, you know, the
20 limitations would be on the release of the data. They
21 might challenge it.

22 COMMISSIONER TITUS: That's what I would
23 think.

24 CHAIRMAN CASTRO: And you have already got
25 an opinion that says we'd have to conduct a hearing

1 anyway, right?

2 MR. BYRNES: To enter into data and I
3 think for us to publish it.

4 CHAIRMAN CASTRO: So it seems to me it's
5 the same problem.

6 COMMISSIONER HERIOT: It's still there. I
7 mean, let's --

8 MR. BYRNES: We would have to swear in the
9 data. That would be very pro forma.

10 CHAIRMAN CASTRO: Okay. Any other
11 questions on this? Otherwise we'll vote on it.

12 (No response.)

13 CHAIRMAN CASTRO: All those in favor of
14 Commissioner Gaziano's motion to release the
15 information?

16 COMMISSIONER GAZIANO: Release such data
17 as we feel that we can reasonably release. And
18 obviously pursuant to law, but I don't think that this
19 Commission should be pretending that we have to seek
20 permission.

21 Now, if we made an agreement, if we made a
22 promise, then I am concerned about that, but short of
23 a promise we made to an institution, I think it is
24 damaging to this Commission to suggest that we need
25 potential discriminator's permission to release their

1 data.

2 CHAIRMAN CASTRO: I just wanted you to
3 rephrase your motion so that we knew what we were
4 voting on. I add to the fact that it is reasonable
5 such a subjective issue here.

6 Let's vote on the motion. All those in
7 favor of Commissioner Gaziano's motion signify by
8 saying, "Aye."

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

10 CHAIRMAN CASTRO: All those opposed
11 signify by saying, "No."

12 (Whereupon, there was a chorus of "Noes.")

13 CHAIRMAN CASTRO: Any abstentions?

14 (No response.)

15 CHAIRMAN CASTRO: In the opinion of the
16 Chair, the motion fails. The majority of the folks
17 who voted voted against, and those are Commissioner
18 Achtenberg, Commissioner Titus, Vice Chair Thernstrom,
19 Commissioner Castro. Those who voted in favor of the
20 motion are Commissioner Gaziano, Commissioner Heriot,
21 and Commissioner Kirsanow.

22 - ENGLISH ONLY IN THE WORKPLACE REPORT

23 CHAIRMAN CASTRO: We will now move on to
24 the next top on the agenda, which is the English only
25 in the workplace report. And that was a report that

1 was approved near the end of the previous calendar
2 year. I understand it is currently awaiting
3 commissioner statements and rebuttals.

4 Some of us were not members of the
5 Commission at that time. And I understand that there
6 is a motion that wants to be made.

7 COMMISSIONER ACHTENBERG: Mr. Chairman, I
8 would like to move that we have a discussion regarding
9 a possibility that we permit a democratic statement to
10 be included as part of the report.

11 CHAIRMAN CASTRO: So your motion is to
12 include a democratic statement of the English only
13 report. Do we have a second for that?

14 COMMISSIONER TITUS: Second.

15 CHAIRMAN CASTRO: Any discussion?

16 COMMISSIONER HERIOT: Is there no
17 democratic statement now?

18 CHAIRMAN CASTRO: No.

19 VICE CHAIR THERNSTROM: No, no. There was
20 none.

21 COMMISSIONER GAZIANO: I would probably
22 support that. I'm curious. Now, I know that the
23 timing was extended for various -- maybe possibly even
24 for this reason since I don't know anyone on our side
25 who requested that.

1 We haven't had any statements yet. Is
2 that correct?

3 DELEGATED THE AUTHORITY OF THE STAFF
4 DIRECTOR TOLHURST: Correct. And they're due on the
5 15th of this month.

6 COMMISSIONER GAZIANO: Okay.

7 CHAIRMAN CASTRO: We would submit it on
8 the 15th. We're not asking for additional time. Just
9 leave the file.

10 COMMISSIONER HERIOT: Who would? Is this
11 a motion of Commissioner Yaki because he was here at
12 the time?

13 CHAIRMAN CASTRO: No. Commissioners
14 Castro, Titus, and Achtenberg.

15 COMMISSIONER HERIOT: Okay. Okay.

16 CHAIRMAN CASTRO: Only existing
17 commissioners.

18 VICE CHAIR THERNSTROM: I have questions.

19 CHAIRMAN CASTRO: Commissioner Thernstrom?

20 VICE CHAIR THERNSTROM: So you're assuming
21 the three of you want to submit one statement --

22 CHAIRMAN CASTRO: Yes.

23 VICE CHAIR THERNSTROM: -- desire to have
24 --

25 COMMISSIONER ACHTENBERG: Concurrences?

1 VICE CHAIR THERNSTROM: -- individual
2 statements.

3 CHAIRMAN CASTRO: We feel strongly about
4 this issue. And we just feel that it is important to
5 stay --

6 VICE CHAIR THERNSTROM: And you are all on
7 precisely the same page, in other words?

8 CHAIRMAN CASTRO: Yes.

9 COMMISSIONER TITUS: Yes.

10 CHAIRMAN CASTRO: We are going to submit a
11 joint --

12 COMMISSIONER HERIOT: Okay.

13 CHAIRMAN CASTRO: -- democratic statement.

14 COMMISSIONER GAZIANO: I would leave that
15 to you all.

16 CHAIRMAN CASTRO: We just wanted to make
17 sure that it --

18 COMMISSIONER HERIOT: It's right to have a
19 motion, I think.

20 CHAIRMAN CASTRO: So we have a motion,
21 yes.

22 COMMISSIONER KIRSANOW: You have a motion.
23 And I would just simply note that I would generally
24 object to the inclusion of any statements, whether
25 it's anybody here, by commissioners who were not part

1 of the Commission at the time the report was drafted.

2 COMMISSIONER HERIOT: Approved.

3 COMMISSIONER KIRSANOW: Right.

4 COMMISSIONER HERIOT: The time it was
5 approved.

6 COMMISSIONER KIRSANOW: Right, exactly. I
7 appreciate you have a strong opinion on this. I look
8 forward to reading that opinion. But I think it is
9 essential for purposes of procedure and the integrity
10 of a report, frankly, that only those commissioners
11 who were physically part of the Commission, were
12 authorized to be part of the Commission at the time
13 that the report was approved be permitted to draft
14 statements related to such report.

15 CHAIRMAN CASTRO: Any other discussion?

16 COMMISSIONER HERIOT: Unless in this
17 situation there would otherwise be no representation
18 of a particular party.

19 COMMISSIONER KIRSANOW: Well, for example,
20 I would not have any objection to Commissioner Yaki.
21 I mean, I would have some objection, but --

22 (Laughter.)

23 COMMISSIONER KIRSANOW: -- if Commissioner
24 Yaki upon his reappointment and if it were within the
25 time frame decided he wanted to submit a statement --

1 CHAIRMAN CASTRO: That's not what we're
2 asking for.

3 COMMISSIONER KIRSANOW: Right. I
4 understand that.

5 CHAIRMAN CASTRO: Okay. Any other
6 discussion?

7 (No response.)

8 CHAIRMAN CASTRO: If not, all those in
9 favor of the motion signify by saying, "Aye."

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

11 CHAIRMAN CASTRO: All those opposed?

12 COMMISSIONER KIRSANOW: Opposed.

13 CHAIRMAN CASTRO: So in the opinion of the
14 Chair, the motion passes with the support of all the
15 commissioners with the exception of Commissioner
16 Kirsanow, who opposed the motion.

17 - HEALTHCARE DISPARITIES REPORT

18 CHAIRMAN CASTRO: Then we have on the
19 agenda the healthcare disparities report. My
20 understanding is that there were some questions the
21 commissioners had on that but they have since been
22 resolved. I don't believe we have anything on the
23 healthcare disparities report in addition to that.
24 No.

25 So we will move on to the State Advisory

1 Committee issues.

2 DELEGATED THE AUTHORITY OF THE STAFF
3 DIRECTOR TOLHURST: I would remind you that rebuttals
4 on healthcare are due on the 15th as well.

5 CHAIRMAN CASTRO: Okay.

6 V. STATE ADVISORY COMMITTEE ISSUES

7 - RE-CHARTERING THE NORTH DAKOTA SAC

8 CHAIRMAN CASTRO: So, as Chair, I move
9 that the Commission re-charter the North Dakota State
10 Advisory Committee. Under this motion, the Commission
11 appoints the following individuals to that committee
12 based upon the recommendation of our Staff Director:
13 Dawn Marie Charging --

14 VICE CHAIR THERNSTROM: Okay. Good.

15 CHAIRMAN CASTRO: -- Mark Castalustone,
16 Crystal Duker, Carol E. Goodbear, Cheryl Ann
17 Longfeather, David A. Myer, Fahill Padilla, Cheryl
18 Bergian, Thomas Fibigger, Dr. Robert Stanley Heron,
19 Constance L. Nelson, Jordan T. Schultz, Stephanie
20 Wise. Pursuant to this motion, the Commission
21 appoints Dawn Marie Charging as Chair of this
22 re-chartered North Dakota Advisory Committee.

23 These members will serve as uncompensated
24 government employees under this motion. The
25 Commission authorizes the Staff Director to execute

1 the appropriate paperwork for the appointment.

2 Is there a second?

3 COMMISSIONER TITUS: Second.

4 CHAIRMAN CASTRO: Is there any discussion?

5 (No response.)

6 CHAIRMAN CASTRO: None? Hearing none,

7 then all in favor signify by saying, "Aye."

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

9 CHAIRMAN CASTRO: Any opposed?

10 (No response.)

11 CHAIRMAN CASTRO: Any abstentions?

12 (Whereupon, there was a chorus of "I

13 abstain.")

14 CHAIRMAN CASTRO: In the opinion of the

15 Chair, the motion passes with the affirmative vote of

16 Commissioners Achtenberg, Titus, Thernstrom, and

17 Castro and the opposition of Commissioners Gaziano,

18 Heriot, and Kirsanow. I'm sorry. Abstained.

19 Commissioner Kirsanow abstained. I apologize.

20 COMMISSIONER HERIOT: We all --

21 CHAIRMAN CASTRO: Yes. You all abstained.

22 COMMISSIONER KIRSANOW: And I would like

23 just to note for the record the purpose of my

24 abstention has nothing. It's not a reflection on the

25 merit or integrity of any of the individuals. It's

1 simply that I like to devote a lot of attention to
2 determining who these individuals are. My schedule
3 precluded me from doing that.

4 CHAIRMAN CASTRO: Understood. Okay. So
5 that was an abstention. The record reflected that.

6 - RE-CHARTERING THE MONTANA SAC

7 CHAIRMAN CASTRO: Next we are moving on to
8 re-charter the Montana State Advisory Committee. I
9 move that the Commission re-charter the Montana State
10 Advisory Committee. Under this motion, the Commission
11 appoints the following individuals to that committee
12 based upon the recommendation of our Staff Director:
13 Norma Bixby, Jean Bearicrane, Kyle Graham, Joan Hoff,
14 Gwendolyn McNeill Kursher, Nancy Noff, Dr. David
15 Lopez, David S. Morales, Doug L. Betters, Timothy C.
16 Fox, Dr. Linda Frey, Marilyn M. Kramer, Rev. Denise L.
17 Rogers, Edward Stafman. Pursuant to this motion, the
18 Commission appoints Norma Bixby as Chair of this
19 re-chartered Montana Advisory Committee.

20 These members will serve as uncompensated
21 government employees under this motion. The
22 Commission authorizes the Staff Director to execute
23 the appropriate paperwork for the appointment.

24 Is there a second?

25 COMMISSIONER TITUS: Second.

1 CHAIRMAN CASTRO: Any discussion?

2 (No response.)

3 CHAIRMAN CASTRO: Hearing none, let us
4 vote. All those in favor of the motion signify by
5 saying, "Aye."

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

7 CHAIRMAN CASTRO: Any opposition?

8 (No response.)

9 CHAIRMAN CASTRO: Any abstentions?

10 (Whereupon, there was a chorus of "I
11 abstain.")

12 COMMISSIONER KIRSANOW: I abstain for the
13 same reasons, although I really regret not be able to
14 vote in favor of somebody named Bearicrane.

15 CHAIRMAN CASTRO: In the opinion of the
16 Chair, the motion passes with the affirmative vote of
17 Commissioners Achtenberg, Titus, Thernstrom, and
18 Castro. And the following commissioners abstained:
19 Commissioner Gaziano, Commissioner Heriot, and
20 Commissioner Kirsanow.

21 VI. APPROVAL OF FEB. 11, 2011 MEETING MINUTES

22 CHAIRMAN CASTRO: We now move on to the
23 approval of the February 11th, 2011 meeting minutes.
24 I move that we approve those minutes for the February
25 11th, 2011 meeting. Is there a second?

1 COMMISSIONER TITUS: Second.

2 CHAIRMAN CASTRO: Second? Okay. Any
3 changes, discussions, or questions regarding the
4 minutes of February 11th?

5 (No response.)

6 CHAIRMAN CASTRO: Hearing none, let's vote
7 on that. All those in favor of the motion signify by
8 saying, "Aye."

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

10 CHAIRMAN CASTRO: Any opposed?

11 (No response.)

12 CHAIRMAN CASTRO: Any abstentions?

13 VICE CHAIR THERNSTROM: I abstain because
14 I forgot to read them. I'm sorry.

15 CHAIRMAN CASTRO: Okay.

16 COMMISSIONER KIRSANOW: Abstain also.

17 CHAIRMAN CASTRO: Okay. So the motion
18 passes with the vote affirmatively of Commissioners
19 Achtenberg, Titus, Castro, Gaziano, Heriot, and the
20 abstention of Commissioners Kirsanow and Thernstrom.

21 VII. ANNOUNCEMENTS

22 CHAIRMAN CASTRO: Do we have any
23 announcements?

24 (No response.)

25 CHAIRMAN CASTRO: Hearing none -- I'm

1 sorry?

2 VICE CHAIR THERNSTROM: Well, I would just
3 like to ask a question about the plaque that is
4 already up for Bob Lerner. Has Althea Lerner been
5 notified so that she could --

6 DELEGATED THE AUTHORITY OF THE STAFF
7 DIRECTOR TOLHURST: The answer is yes.

8 VICE CHAIR THERNSTROM: She has been
9 notified? Good. Thank you very much.

10 CHAIRMAN CASTRO: Okay. Hearing no other
11 announcements, I would move to adjourn the meeting.
12 Is there a second?

13 COMMISSIONER ACHTENBERG: Second.

14 CHAIRMAN CASTRO: A second? Okay.

15 COMMISSIONER ACHTENBERG: Indeed.

16 (Laughter.)

17 CHAIRMAN CASTRO: All those in favor say,
18 "Aye."

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

20 CHAIRMAN CASTRO: Opposed or abstentions?

21 (No response.)

22 CHAIRMAN CASTRO: Another unanimous vote.
23 Great. Thank you, everyone. I appreciate it.

24 (Whereupon, the foregoing matter was
25 concluded at 1:18 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

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Before: n/a

Date: 03-11-11

Place: Washington, DC

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