

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION BRIEFING

SPECIFYING ENGLISH AS THE COMMON LANGUAGE IN THE
WORKPLACE: EVERY EMPLOYER'S RIGHT OR A VIOLATION OF
FEDERAL LAW?

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FRIDAY, DECEMBER 12, 2008

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The briefing convened in Room 540 at 624
Ninth Street, N.W., Washington, D.C., at 9:30 a.m.,
Abigail Thernstrom, Vice Chair, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES, Chief, Programs Coordination
Unit
DEBRA CARR, Associate Director
DEMITRIA DEAS
LATRICE FOSHEE
MAHA JWEIED
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
KIMBERLY TOLHURST
AUDREY WRIGHT
MICHELLE YORKMAN

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COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
RICHARD SCHMECKEL

PANELISTS:

RICHARD KIDMAN
TIMOTHY J. RIORDAN
K.C. McALPIN
REED RUSSELL
LINDA CHAVEZ

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

(9:39 a.m.)

INTRODUCTORY REMARKS BY THE VICE CHAIRMAN

VICE CHAIR THERNSTROM: Good morning. I am the Vice Chair, Abigail Thernstrom, and I welcome everybody here to this briefing on Specifying English As The Common Language in the Workplace: Every Employer's Right or a Violation of Federal Law?

This briefing will examine whether employers have the legal authority to specify English as the language of the workplace. Currently, businesses adopting such policies risk potential claims alleging discrimination based on national origin, a position often taken by the Equal Employment Opportunity Commission, that is the EEOC. And this briefing seeks to address competing viewpoints on the issue.

The record of this briefing will be open until January 12th, 2009, and public comments may be mailed to the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, 624 9th Street, N.W., Washington, D.C. 20425.

And before we begin, I would like to extend a sincere thank you to all of our panelists for taking their time today to help inform our discussion.

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1 These briefings are extremely important, usually very
2 informative, and part of a public record that I think
3 -- I, at least, have used the public records of the
4 Commission, made good use of them as a scholar myself,
5 and I know others have, and so again I thank you.

6 I would like to note for the record that
7 the Commission has made every effort to obtain a wide
8 variety of points of view on this topic. Besides the
9 individuals and organizations who have graciously
10 agreed to be with us today, we have also contacted a
11 wide range of other groups which were unavailable or
12 otherwise not able to participate. These include the
13 Mexican American Legal Defense Fund, MALDF. It has
14 expressed an interest in submitting a written
15 statement at a later date, and we welcome that
16 statement. The Asian American Legal Defense and
17 Education Fund, the League of United Latin American
18 Citizens, LULAC; the Lawyers Committee for Civil
19 Rights under Law, La Raza, the ACLU Immigrants Rights
20 Project, and Bill Purcell, the former mayor of
21 Nashville, Tennessee, and the current director of
22 Harvard's Institute of Politics of the John F. Kennedy
23 School of Government. Sir?

24 COMMISSIONER TAYLOR: Madam Vice Chair, I
25 wanted to ask the Staff Director if he could shed any

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1 additional light on the efforts that were made to put
2 the panel together?

3 STAFF DIRECTOR DANNENFELSER: Thank you
4 very much. Yes, there was outreach to people of
5 different points of view that, as well as we could
6 identify them, a great deal of searches to identify
7 people who have spoken out on this subject. And the
8 Vice Chair, I think, delineated the different groups
9 that we did reach out to, and we are hopeful of
10 receiving some written testimony. And then we have
11 two organizations, representatives withdrew last
12 evening, but they had submitted written statements, as
13 well, so we welcome those statements, and look forward
14 to all of the input we'll receive from the witnesses
15 who are here today.

16 COMMISSIONER TAYLOR: One more follow-up.
17 Since they aren't here today, do we have extra copies
18 of their statements?

19 STAFF DIRECTOR DANNENFELSER: Yes, we do.
20 I have some extra copies for the press or any members
21 of the public who are interested.

22 COMMISSIONER TAYLOR: Thank you.

23 COMMISSIONER YAKI: Point of information.
24 Who has withdrawn?

25 STAFF DIRECTOR DANNENFELSER: Kerry

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1 O'Brien from CASA de Maryland has withdrawn, and Laura
2 Brown, who's a managing attorney of the Legal Services
3 program at the D.C. Employment Justice Center.

4 VICE CHAIR THERNSTROM: And when did we
5 hear from -

6 STAFF DIRECTOR DANNENFELSER: They both
7 withdrew last evening.

8 COMMISSIONER YAKI: Did they give any
9 reasons for the withdrawal?

10 STAFF DIRECTOR DANNENFELSER: Laura Brown
11 just said she had to withdraw, but she wanted to have
12 her statement included in the record. Kerry O'Brien
13 indicated that she thought there were going to be more
14 viewpoints among the witnesses than she perceived on
15 the agenda, so she decided that she would withdraw.

16 VICE CHAIR THERNSTROM: Any other
17 questions about this? I mean, I must say, it would
18 have been more diversity of viewpoints had the two
19 absent people we expected shown up, of course. And I
20 very much regret that they didn't, because I'm a great
21 believer in diversity of viewpoints.

22 COMMISSIONER YAKI: Point of information.
23 If they had shown up, wasn't the ratio approximately
24 four witnesses, I guess one would say in favor of the
25 position of English-only rules being constitutional or

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1 legal, versus two who had issues with it. Would that
2 pretty much be how it broke down? You don't include
3 the EESE witness? I'm just talking about the non-
4 governmental -

5 COMMISSIONER GAZIANO: Why just talk about
6 that? That seems to me like there would be four on
7 one side, and three on another?

8 COMMISSIONER YAKI: Because I was asking
9 about the non-governmental witnesses. If we have an
10 issue with --

11 COMMISSIONER GAZIANO: I'm just asking you
12 why --

13 COMMISSIONER YAKI: Commissioner Gaziano,
14 we can get into this --

15 COMMISSIONER GAZIANO: We don't need to.
16 I'm just asking for clarification.

17 COMMISSIONER YAKI: But now that you have,
18 I think I will. I think one of the -- I would like
19 the question answered first by the Staff Director
20 without the -- and then if Commissioner Gaziano wishes
21 to put his own gloss on what the breakdown is, he can.
22 But in terms of the non-governmental witnesses, was it
23 -- is it accurate to say that it was apparently broken
24 down sort of four to two?

25 STAFF DIRECTOR DANNENFELSER: In terms of

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1 the people who accepted and agreed to come, it was
2 four to two. As the Vice Chair just pointed out,
3 there were eight other organizations or individuals
4 who were invited, all of whom were identified as
5 opponents of the idea of English in the workplace.
6 And we also reached out to all the Commissioners and
7 asked the Commissioners to recommend witnesses. And
8 then I believe the General Counsel made some other
9 individual outreaches to yourself and Commissioner
10 Melendez to once again request that you make
11 suggestions of witnesses.

12 COMMISSIONER YAKI: Well, the thing -- in
13 response to that, I was going to bring that up myself,
14 that I actually had some discussions with some of the
15 groups, and I think that the best way to describe it
16 was that they had no interest in appearing. Now, you
17 could take from that whatever you will, but I think
18 that one of the things that we have to face, and I
19 think if we track some of our briefings over the past
20 six months, it's becoming more and more apparent that
21 there are a number of organizations who used to, and
22 no longer wish to participate before our proceedings.

23 And I think that at some point we need to ask
24 ourselves a question why? What is it about we are
25 doing that is casting this chill on participation upon

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1 some groups who freely testified before Congress, the
2 Administration, and other legislative and judicial
3 bodies across this country, but not for the U.S.
4 Commission on Civil Rights? And I think it's
5 something that we need to look into. I'm not going to
6 cast any blame or aspersion as to why it is. But I
7 think that as we go forward, especially in the New
8 Year, and with the new administration, we need to take
9 a hard look at what it is that we're doing that is
10 causing a dearth of balance on some of these panels;
11 notwithstanding the fact that even if the two had
12 shown up, they still would have been outnumbered in
13 terms of interest or advocacy, or non-profit
14 organizations that would have appeared.

15 VICE CHAIR THERNSTROM: I have one thing
16 to say, and then Commissioner Kirsanow has -- I mean,
17 I can't think, Commissioner Yaki, of a single instance
18 in which we have been less than gracious, less than
19 completely engaged, interested in what witnesses
20 across the political spectrum have to say, so that if
21 there is, as you suggest, a kind of boycott going on
22 here, I do not think it is because any witness should
23 have felt unwelcome here. Commissioner Kirsanow?

24 COMMISSIONER KIRSANOW: I have a question
25 for the Staff Director. What is the ratio in terms of

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1 outreach to organizations that were either perceived
2 as being in favor of English-only policies and those
3 who would be opposed or skeptical of English-only
4 policies?

5 VICE CHAIR THERNSTROM: And if you want to
6 say that a lot of policies don't break down into this
7 bifurcated picture, it seems to me, that would be
8 legitimate, as well.

9 STAFF DIRECTOR DANNENFELSER: I believe
10 the ratio, as Commissioner Kirsanow asked, would be 10
11 individuals or organizations who were opposed to
12 English in the workplace, and four who were in favor.

13 The four that were invited who were in favor agreed
14 to participate; and, in fact, are participating.
15 Eight who were invited declined to participate, two
16 agreed to participate and then withdrew.

17 COMMISSIONER KIRSANOW: This outreach was
18 done by phone, or mail, or email, or how was it done?

19 STAFF DIRECTOR DANNENFELSER: It was a
20 combination of phone and email, primarily.

21 COMMISSIONER KIRSANOW: To your knowledge,
22 were there any statements made by the individuals
23 charged with making the outreach to these individuals
24 that would have chilled their desire to come here?
25 Was there any attempt to discourage their

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1 participation?

2 STAFF DIRECTOR DANNENFELSER: Not at all,
3 no. The Staff was very much trying to encourage their
4 participation.

5 VICE CHAIR THERNSTROM: Yes, Commissioner
6 Melendez.

7 COMMISSIONER MELENDEZ: Yes. I would
8 suggest in our business meeting that we address this
9 issue, and talk about ways we can enhance
10 participation, look at what we might think are
11 impediments to participation. There ought to be a
12 discussion since we're having a business meeting.

13 VICE CHAIR THERNSTROM: Well, why don't
14 you bring it up at business meeting as a possible item
15 for discussion? Commissioner Yaki?

16 COMMISSIONER YAKI: Yes. I just want to
17 follow-up a little bit about what Commissioner
18 Kirsanow said. And certainly in no way was I implying
19 that there's any discouragement of these people from
20 appearing. I think quite to the contrary. I think
21 that the staff was very diligent in trying to ask, and
22 earnestly so, these organizations to appear.

23 What I'm simply commenting on is the fact
24 that the willingness of these organizations to appear
25 empirically, and I don't know this for a fact. I'm

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1 always hesitant to use the word "boycott", but I would
2 simply say that empirically it appears that a number
3 of organizations who normally would appear and do so
4 in other proceedings have chosen not to do so here. I
5 suspect it has nothing to do, Madam Chair, with us
6 being anything less than gracious. I think that all
7 of us are respectful and open-minded during these
8 discussions. I think that at least from what I can
9 gather, is that it goes to one of the core questions
10 of these briefings to begin with; which is, what were
11 they intended to do, and what kind of product comes
12 out of them? And I think that -- I go back to my
13 original statement of about three years ago with then-
14 Commissioner Braceras, that briefings in many ways are
15 meant to raise issues, raise questions, and point the
16 way toward additional or further research or hearings,
17 because simply we don't have the time or the authority
18 in some instances to really get to all parts of the
19 issue in a very short period of time as we do here at
20 these briefings. And I think that's at least my
21 concern about the product of these meetings, may be,
22 and I cannot speak for any group, but my suspicion may
23 be that the product of these briefings having strayed
24 from that model into one more of drawing hard and fast
25 conclusions based on the limited amount of information

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1 that we do get from these hearings, is causing some
2 people -- may be causing some people to not be willing
3 to participate. But that's just speculation, and I
4 would second Commissioner Melendez' call that we, at
5 some point, delve into this a little bit deeper.

6 VICE CHAIR THERNSTROM: Commissioner
7 Kirsanow has something to say, but let me say, I do
8 think we shouldn't spend a lot more time on this at
9 this point. And we should bring it up this afternoon
10 at the business meeting. Yes?

11 COMMISSIONER KIRSANOW: Just a brief
12 comment, not based on speculation, but other than the
13 Vice Chair, I think I've got the longest tenure here.

14 During my tenure here, there was a time when we did
15 not have an avert rule that mandated balance. And, in
16 fact, many of the panels were imbalanced in favor of
17 one particular side. There were occasions in which we
18 even have another viewpoint to a particular side. And
19 I know the individuals from a certain perspective very
20 often voiced frustration that, in fact, the end
21 product veered in a certain direction. Nonetheless,
22 those organizations, some might consider them
23 conservative, appeared, and they testified.

24 We have gone out of our way and got the
25 record in several instances now, efforts by the

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1 Commission to reach out to organizations on a ratio
2 far greater sometimes than two to one in favor of a
3 particular viewpoint to make sure individuals
4 participated; and yet, on occasion, those individuals
5 chose not to participate, not on a lack of effort on
6 the part of Commission staff who typically do a
7 splendid job in bringing very erudite and qualified
8 people to come to testify, so the Commission has
9 changed. It has recognized need for balance. We
10 incorporated within our rules the need for balance,
11 and we've tried to discharge those rules, it appears
12 to me, in good faith.

13 VICE CHAIR THERNSTROM: Yes. Let me just
14 close this by saying I do not personally, and I speak
15 here just for myself, I do not personally want any
16 voices on a subject shortchanged. Moreover, I want a
17 recognition in our reports of the complexity of the
18 issues we deal with. I can't think of a single issue
19 that has come before us that is not complicated, and
20 we are not doing our job if that is not recognized in
21 the briefing reports. And I look forward to a
22 discussion of what we can do to convince people that
23 that is our commitment.

24 In any case, let us now move on to the
25 very patient Mr. Russell, who is our -- who occupies

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1 the first panel, has it to himself. He is the Legal
2 Counsel of the U.S. Equal Employment Opportunity
3 Commission. The Office of Legal Counsel serves as the
4 principal advisor to the EEOC on enforcement matters.

5 OLC represents the EEOC in defensive litigation, and
6 administrative hearings. It is involved in analyzing
7 and shaping policy on EEOC issues that affect
8 employers and employees across the country every day.

9 Mr. Russell, please swear or affirm that the
10 information you provide, or you have provided is true
11 and accurate to the best of your knowledge and belief.

12 (Mr. Russell sworn.)

13 VICE CHAIR THERNSTROM: Okay. So, again,
14 I welcome you on behalf of the Commission. You will
15 speak for ten minutes, and the clock starts.

16 **SPEAKERS' PRESENTATIONS**

17 MR. RUSSELL: Good morning, Madam Vice
18 Chair and Commissioners. Thank you for this
19 opportunity to explain EEOC Commission, our views on
20 English-only policies.

21 EEOC has a longstanding position that
22 employers adoption of English-only policies can
23 implicate the prohibition against national origin
24 discrimination under Title VII of the Civil Rights Act
25 of 1964.

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1 COMMISSIONER GAZIANO: Point of order. Is
2 your statement being picked up by the microphone? Can
3 people in the back of the room hear the testimony?

4 VICE CHAIR THERNSTROM: Wait a minute.
5 Did I see some no voices? If you cannot hear, raise
6 your hand.

7 COMMISSIONER GAZIANO: It looks like they
8 can.

9 VICE CHAIR THERNSTROM: Okay.

10 COMMISSIONER GAZIANO: I'm sorry. I
11 didn't hear your voice reverberate. I'm sorry to
12 interrupt.

13 COMMISSIONER YAKI: I think that might be
14 the C-SPAN mic you just took off, which shouldn't be -
15 -

16 (Off the record comments.)

17 VICE CHAIR THERNSTROM: Okay. But that
18 works for C-SPAN, as well.

19 MR. RUSSELL: EEOC has a longstanding
20 position that employers' adoption of English-only
21 policies can implicate prohibition against national
22 origin discrimination under Title VII of the Civil
23 Rights Act of 1964. EEOC's position dates back to at
24 least the early 1970s, and was promulgated in
25 guidelines published in the Federal Register in 1980.

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1 English-only policies can arise in a wide
2 range of workplace situations. These policies
3 typically limit the circumstances under which
4 employees can speak foreign languages in the
5 workplace. For bilingual workers whose primary
6 language is not English, English-only policies can
7 limit their opportunity to speak in a language with
8 which they are most comfortable, and expose them to
9 discipline for inadvertently slipping into their
10 native language. For workers with limited or no
11 English skills, English-only rules can operate as a
12 bar to employment, preventing otherwise qualified
13 workers from being hired, or resulting in their
14 discipline and termination.

15 As with any other employment practice, an
16 English-only policy violates Title VII if it was
17 adopted for the purpose of discriminating against
18 employees based on national origin or another
19 protected category. For example, in a 10th Circuit
20 case, plaintiffs who worked for the City of Altus,
21 Oklahoma presented evidence that the city had adopted
22 an English-only policy in order to discriminate based
23 on national origin. The evidence presented by
24 plaintiffs showed that management was aware that the
25 policy would result in the taunting of Hispanic city

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1 employees, and that there were no substantial work-
2 related reasons for the policy, and that the mayor
3 referred to the Spanish language as garbage while he
4 was giving a news interview.

5 In other cases, an employer will adopt an
6 English-only policy for non-discriminatory reasons
7 without intent to limit the employment opportunities
8 of workers based on national origin. As explained by
9 the Supreme Court, however, Title VII prescribes not
10 only overt discrimination, but also practices that are
11 fair, informed, but discriminatory in operation.

12 Because of the obviously close
13 relationship between an individual's national origin
14 and primary language, English-only policies may result
15 in a disparate impact on employees of certain national
16 origins. For example, in a workplace where some
17 employees are native English speakers, and others are
18 native Spanish speakers, Hispanic workers with limited
19 English proficiency may be disproportionately excluded
20 from certain employment opportunities as a result of
21 an English-only policy.

22 If an employment practice challenged under
23 Title VII has been shown to cause a disparate impact
24 on the basis of national origin, or another protected
25 status, the practice is unlawful, unless the employer

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1 can demonstrate that the practice is job-related to
2 the position in question, and consistent with business
3 necessity.

4 EEOC takes the position that an English-
5 only policy is job-related and consistent with
6 business necessity if it is needed for the safe or
7 efficient operation of the employer's business. Thus,
8 employers with legitimate business needs for requiring
9 English-only policies are free to adopt them in a
10 variety of circumstances.

11 Similarly, if English fluency is required
12 for effective job performance, an employer is free to
13 reject job applicants who are not fluent in English,
14 even if workers of some national origin groups are
15 adversely impacted.

16 English-only policies are obviously
17 permissible for work-related communications with
18 customers, co-workers, or supervisors who only speak
19 English. Thus, a cashier in a retail store, a server
20 in a restaurant could be required to speak English
21 when serving English-speaking customers, or when
22 speaking with his fellow English-speaking employees
23 about work issues, or with his English-speaking
24 supervisor.

25 English-only policies also can be imposed

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1 for cooperative work assignments, where English is
2 needed to promote efficiency. Thus, for example, a
3 taxi cab company might require English when
4 communicating to the dispatcher's office. English-
5 only policies also might be required to enable a
6 supervisor to monitor work-related communications
7 between co-workers, or between an employee and a
8 customer. For example, at a coffee shop or a
9 restaurant, an English-only policy may be needed to
10 allow a supervisor to monitor the relaying of orders.
11 And, as mentioned, employers may impose an English-
12 only policy where it's needed for safety.

13 In one of EEOC's own Commission decisions
14 from the early 1980s, the Commission upheld a policy
15 in an oil refinery which required employees to speak
16 only English during emergencies, or while performing
17 work duties in the laboratory or processing areas
18 where there was risk of fires or explosions.

19 These are only examples, however, and
20 there will be other circumstances where English-only
21 policies will be consistent with business necessity,
22 and, therefore, lawful under Title VII, even if the
23 policies result in a disparate impact on a specific
24 national origin group in a particular workplace.

25 As can be seen by these examples, English-

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1 only policies should be limited in scope, and apply
2 only to employees when they are working in
3 circumstances where English is actually necessary for
4 the business to operate safely or efficiently. As a
5 result, an employer that adopts a blanket policy that
6 requires English at all times in the workplace, even
7 during lunch breaks, and in purely personal
8 conversations, will have more difficulty establishing
9 the business necessity than an employer that has
10 adopted a narrower policy.

11 English-only policies should not be
12 imposed merely because of co-worker or customer
13 preference. For example, English-only policies should
14 not be imposed merely because some non-Spanish-
15 speaking employees dislike eating lunch in the same
16 room with co-workers who engage in private
17 conversations in Spanish. However, employers may have
18 a duty to take appropriate corrective measures to
19 address workplace misconduct that involves a foreign
20 language, such as race or sex-based comments in
21 Spanish. Such misconduct often can be addressed under
22 the employer's standard disciplinary procedures, and,
23 therefore, will not justify broad English-only
24 policies.

25 For example, if employees are making

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1 derogatory remarks about co-workers in Spanish, they
2 can be individually disciplined. And if they are
3 repeat offenders, can be required to speak only in
4 English so that non-Spanish-speaking supervisors could
5 monitor their behavior.

6 Similarly, if there are isolated instances
7 of employees using foreign languages to insult or
8 intimidate English-speaking workers, the employer
9 probably could adequately address the misconduct under
10 an existing discipline policy.

11 However, as pointed out in the EEOC's
12 compliance manual section on national origin
13 discrimination, some courts have concluded that if
14 such misconduct is more widespread, that an employer
15 is justified in adopting an English-only policy.

16 To be effective in promoting the
17 employer's business needs, an English-only policy must
18 be clearly communicated to effected employees.
19 Employees are free to use any reasonable means of
20 providing notice, such as a meeting, email, or
21 posting. In some cases it may be necessary for an
22 employer to provide notice in English and in the other
23 native languages spoken by its workers. If an
24 employer does not provide adequate notice of an
25 English-only policy, it may face difficulty in

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1 justifying discipline taken for violations of the
2 policy. Pursuant to EEOC's English-only guidelines,
3 EEOC will consider the application of the policy in
4 such circumstances as evidence of national origin
5 discrimination.

6 Failure to provide adequate notice also
7 may belie an employer's assertion that an English-only
8 is necessary for safe or efficient business
9 operations. Nevertheless, EEOC guidelines on English-
10 only policies do not require that employers create
11 bilingual policies, or operate a bilingual workplace.
12 Nor do they promote bilingualism in the workplace
13 generally. Rather, EEOC's concern is to prevent
14 employers from imposing speak English only rules as
15 arbitrary and oppressive terms and conditions of
16 employment on people from non-English speaking
17 backgrounds in order to deprive them of an equal
18 employment opportunity for jobs they are otherwise
19 fully qualified to perform.

20 EEOC enforces Title VII's limits on
21 English-only policies primarily through the
22 administrative process in charges. During the past 10
23 years, EEOC received an average of about 180 charges
24 per year challenging English-only policies. This
25 constitutes only about two-tenths of 1 percent of the

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1 total charges filed with EEOC during the same time
2 period. EEOC also filed about two to three lawsuits
3 per year challenging English-only policies. I will
4 tell you that is a roughly similar percentage. There
5 are several hundred lawsuits filed each year, so two
6 to three is a very small percentage.

7 As with other employment practices, the
8 EEOC takes proactive measures to educate employers
9 about their obligations, and employees about their
10 rights. EEOC has applied the same legal analysis to
11 English-only policies for nearly 40 years, and I think
12 it's fair to presume at this point that most larger
13 employers are aware of their legal obligations under
14 Title VII.

15 Nevertheless, the issue does arise
16 relatively infrequently compared to other issues under
17 Title VII, and smaller employers may still be unaware
18 of their potential liability in adopting English-only
19 policies. However, under Title VII, employers of any
20 size that are covered cannot be liable for
21 compensatory and punitive damages for disparate impact
22 violations, and disparate impact is generally the
23 theory of law under which English-only policies are
24 challenged.

25 So, in summary, the EEOC's position on

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1 English-only policies reasonably balances the interest
2 of employers and employees by permitting those
3 policies that are consistent with business necessity,
4 while preserving Title VII's mandate of insuring equal
5 opportunities for non-native English-speaking
6 individuals who are able to effectively perform the
7 job functions. That's the end of my statement.

8 VICE CHAIR THERNSTROM: Well, you have set
9 a model for the rest of the panelists. You are
10 slightly under your ten minutes. Yes?

11 COMMISSIONER KIRSANOW: Questions?

12 VICE CHAIR THERNSTROM: No. We evidently
13 are not -- I didn't realize this, but I was just told
14 that we are leaving all questions until the end of all
15 panelists.

16 COMMISSIONER YAKI: Well, then we won't
17 have enough chairs.

18 STAFF DIRECTOR DANNENFELSER: We will.

19 COMMISSIONER YAKI: Okay.

20 MR. RUSSELL: However you prefer. I don't
21 care.

22 COMMISSIONER YAKI: Okay. That's cool.

23 VICE CHAIR THERNSTROM: I was informed
24 that we were doing this. This was not my decision.

25 COMMISSIONER KIRSANOW: It's not your

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1 decision? You've got the gavel.

2 VICE CHAIR THERNSTROM: I've got the
3 gavel.

4 COMMISSIONER KIRSANOW: Just go like this
5 and say it's my decision that this guy is going to
6 testify right now, and answer questions.

7 COMMISSIONER GAZIANO: I would prefer to
8 have the EEOC respond to some of the actual cases we
9 might hear, so I think that might be more productive
10 for all the witnesses.

11 VICE CHAIR THERNSTROM: Mr. Russell, it's
12 my understanding from the Staff is that you are
13 available to stay?

14 MR. RUSSELL: I made adjustments to my
15 calendar so I can be available for you today, so I'm
16 available.

17 VICE CHAIR THERNSTROM: Well, I thank you
18 very much, and can we just then go ahead with the
19 other panelists, unless somebody else has an
20 objection. Commissioner Yaki, you're not feeling
21 restless because you have an objection.

22 Okay. Thank you, Mr. Russell. And we
23 will go on to the panelists, and then have questions
24 afterwards. And I urge all panelists for the second
25 panel to follow his model in terms of his keeping to

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1 the time. I very much appreciated that. And then
2 we'll get to the questions faster. And I think there
3 will be probably a lot of questions.

4 The panelists on the second panel please
5 step forward. We have the following panelists, the
6 second panel of the morning. Timothy Riordan, who is
7 an attorney, primary focus has been litigation. He
8 has handled numerous matters before various
9 administrative agencies, including the EEOC and the
10 Illinois Department of Human Rights. Richard Kidman
11 of R.D.'s Drive-In in Page, Arizona is the defendant
12 in EEOC v. Kidman, in which the EEOC brought suit
13 under Title VII over an English-only policy governing
14 employees of the restaurant. Kerry O'Brien is
15 obviously not with us. I was about to introduce her.
16 K.C. McAlpin. Have I pronounced your name correctly?
17 I hope so. Has been the executive director of Pro-
18 English since 2000. Pro-English is a national non-
19 profit organization dedicated to preserving English as
20 the common language of the United States, and making
21 it the official language, indeed. And Linda Chavez is
22 the chair of the Center for Equal Opportunity, a non-
23 profit public research organization. She also writes
24 a weekly syndicated column that appears in newspaper
25 across the country, and is a political analyst for Fox

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1 News Channel. She is currently the chair of the
2 Commission's Virginia State Advisory Commission, and
3 in the early 1980s she was the staff director here at
4 the Commission, a time I remember well. And,
5 obviously, the last person on my list, Laura Brown,
6 has not been able to make it.

7 Please, all of you, swear or affirm that
8 the information you have provided is true and accurate
9 to the best of your knowledge and belief.

10 (Panel sworn.)

11 VICE CHAIR THERNSTROM: Again, I welcome
12 you, and I call on you in the order you've been given
13 for the record, so we start with Mr. Riordan, who will
14 speak for ten minutes.

15 MR. RIORDAN: Good morning. Thank you for
16 the invitation. I believe I've been invited to make a
17 presentation because of my involvement in one of the
18 cases that's cited in the EEOC compliance manual.

19 I'm an attorney primarily responsible for
20 counseling and defending Synchro-Start Products, Inc.,
21 a Chicago area company, in litigation which was
22 initiated by the EEOC. And, as I said, a case cited
23 in the EEOC's compliance manual. I might point out
24 that that case never went beyond the motion to dismiss
25 stage, and some discovery. I'll describe a little

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1 further our experience with the matter.

2 In that case, the EEOC filed suit on
3 behalf of a number of Synchro-Start employees whose
4 primary language was not English, alleging that
5 Synchro-Start intentionally violated Title VII by
6 requiring the employees to speak only English during
7 working hours. In 1997, Synchro-Start promulgated a
8 policy to its employees to speak only English while
9 working on the factory floor. The policy was a result
10 of complaints from a number of employees that other
11 employees were perceived to be harassing and insulting
12 them while speaking in their native language, which
13 could not be understood by the complaining employees.

14 The policy had been implemented to diffuse
15 what was developing into a serious morale problem, and
16 to avoid potential claims of harassment or
17 discrimination. The company was also concerned that
18 safety on the production line could be compromised if
19 the employees were not all speaking a common language.

20 Shortly after the policy was promulgated,
21 an employee filed a claim with the EEOC, and after an
22 investigation, the EEOC made a determination that
23 there was reasonable cause to believe that the
24 English-only policy discriminated against a
25 complaining employee and other employees whose native

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1 language was not English.

2 Thereafter, in response to the EEO's
3 invitation, the company, including myself, represented
4 by myself, engaged in good faith negotiations for
5 conciliation, and in April of 1998, the company and
6 the EEOC had basically agreed upon terms of a
7 settlement, including the posting of a notice to all
8 employees advising of the rescission of the English-only
9 policy, and execution of a conciliation agreement by
10 the company, the EEOC, and the original complaining
11 employee.

12 However, after the forms had been
13 negotiated, the complaining employee refused to sign
14 the documents. I was told by the EEOC investigator
15 that the employee had stated that he had no personal
16 interest in the matter, that he had not been damaged
17 in any way, that he simply wanted to bring the matter
18 to the EEOC's attention for investigation. And,
19 therefore, he refused to participate in the settlement
20 of the case by way of executing any of the documents.

21 Although we were frustrated by the
22 employee's refusal to participate in the settlement,
23 the company did offer to enter the settlement as
24 negotiated. And, in fact, the company rescinded the
25 policy in July of 1998. The EEOC then refused to

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1 enter into any agreement based on any of the prior
2 discussions. That was in July of 1998.

3 In October of 1998, the EEOC contacted our
4 office advising that the EEOC was going to file on
5 behalf of the employees if the matter was not settled
6 pursuant to an enclosed consent decree. The consent
7 decree was generally consistent with the settlement
8 terms that had been negotiated earlier; however, it
9 contained an additional requirement for payment of
10 \$50,000 to the complaining employee.

11 The company responded by indicating a
12 willingness to enter into the settlement agreement
13 with minor modifications, but refused to make any
14 monetary settlement. They were concerned, of course,
15 about a precedent, and money hadn't been mentioned
16 earlier, so the matter was not settled at that point.

17 The EEOC responded by filing suit,
18 notwithstanding that the policy had been rescinded,
19 and that the employee who had first complained
20 indicated had no interest in pursuing the matter.

21 Synchro-Start filed a motion to dismiss
22 the lawsuit, contending that its policy, which simply
23 required employees who were bilingual to speak English
24 while working did not constitute an unlawful
25 employment practice, and that the discrimination

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1 guidelines shifted the burden to the employer to
2 provide a business justification was invalid.

3 The District Court upheld the validity of
4 the challenged EEOC discrimination guidelines, and
5 denied the company's motion to dismiss based on a
6 finding that the EEOC's complaint comported with the
7 requirement for a viable Title VII claim.

8 The parties then engaged in extensive
9 discovery. That discovery disclosed generally the
10 following background. Synchro-Start was a
11 manufacturing company with approximately 200
12 employees. Substantially all of the company's
13 production personnel were first generation immigrants
14 of Polish, Hispanic, and Asian descent. They also had
15 numerous African American employees. Most of them
16 were women who worked at tables putting together
17 electronic pieces for various electronic products.

18 Although in most instances the employees'
19 native language was their primary language, all
20 employees, and the discovery showed this, spoke
21 English well enough to understand and follow
22 directions and instructions, and to perform their job
23 requirements safely and productively. Some of the
24 production supervisors, however, spoke only English,
25 and were not able to speak in all of the other

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1 languages.

2 On numerous occasions, individual
3 employees complained that other employees were
4 speaking in their native foreign languages, and using
5 their bilingual capabilities to harass and insult
6 other workers in a language they could not understand.

7 For example, one employee stated that Hispanic
8 employees had spoken in their native language, which
9 she could not understand. Then they looked at her,
10 laughed, rolled their eyes making her feel very
11 uncomfortable and intimidated. And this was a common
12 complaint from various sectors of the employee group.

13 On each occasion that the complaints were
14 made, the plant manager talked to the supervisor to
15 determine the validity of the complaints, and an
16 appropriate response. Supervisors then attempted to
17 deal with the issue by discussing the matter with the
18 group leaders and affected employees, suggesting that
19 they speak English while in the presence of other
20 employees who did not speak the same language so that
21 feelings would not be hurt, and to improve morale and
22 communications.

23 The plant manager was also contacted by a
24 representative of a temporary employment agency, which
25 provided the company with employees, who advised that

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1 two of the temporary employees refused to go back to
2 Synchro-Start because the Synchro-Start employees
3 intimidated them, made them feel uncomfortable by
4 speaking in their own language, which the temporary
5 employees could not understand.

6 In response to the continuing complaints
7 in September of `97, the company instituted a policy
8 that employees should speak only English while
9 working. The policy did not apply where employees
10 were on their own time, such as breaks and lunch. The
11 company believed it had no alterative but to initiate
12 this limited policy to avoid the conflicts, at least
13 while the employees were on the production line. The
14 company was also concerned that the safety on the
15 production line could be compromised, and it might
16 otherwise be exposed to claims by the complaining
17 employees if it failed to protect their rights.

18 It's also important to note that no
19 employee was ever disciplined in any way for violating
20 the policy while it was in existence.

21 Synchro-Start's claim that it had a
22 business necessity for adopting the policy was not
23 only factually supported, but consistent with the
24 EEOC's own compliance manual, where in the footnote it
25 was indicated that -- propositions were stated that,

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1 "Business reasons for an English-only rule may include
2 avoiding or lessening inter-personal conflicts,
3 preventing non-foreign language speaking individuals
4 from feeling that they are talked about in a language
5 they do not understand. An English-only policy may be
6 legitimate and necessary for business where adopted to
7 prevent employees from intentionally using their
8 fluency in Spanish to isolate and to intimidate
9 members of other ethnic groups."

10 During discovery, the EEOC failed to
11 produce any evidence to support its allegation that
12 Synchro-Start had intentionally engaged in
13 discriminatory practices, or that some of the Synchro-
14 Start employees were unable to comply with the policy
15 because they were unable to speak any English.
16 Notwithstanding the EEOC's inability to factually and
17 legally support its claim of discrimination, when it
18 offered Synchro-Start the opportunity to settle the
19 case for an amount less than the expected future costs
20 of defense, the company had no practical alternative
21 but to settle, which it did after almost two years of
22 litigation.

23 It should be clear from the above that my
24 client and I were frustrated with the EEOC's continued
25 pursuit of this case after the original complaining

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1 employee lost interest, the policy was rescinded, and
2 the facts became clear that there was no
3 discriminatory intent on the part of the company
4 promulgating this rule.

5 VICE CHAIR THERNSTROM: You are watching
6 the time. You're quite a bit over.

7 MR. RIORDAN: Oh, I'm sorry. Last
8 sentence.

9 VICE CHAIR THERNSTROM: Okay.

10 MR. RIORDAN: It is my belief that all
11 interests would have been better served if the EEOC
12 had devoted its resources to other remedial and
13 educational activities, rather than the pursuit of
14 punitive remedies against Synchro-Start, which had
15 acted in good faith with no intention to discriminate.

16 VICE CHAIR THERNSTROM: Thank you very
17 much, Mr. Riordan. And we move on to Mr. McAlpin.
18 You're the next, ten minutes.

19 MR. McALPIN: Good morning. Thank you for
20 the chance to comment on Language in the Workplace,
21 and the EEOC's policy of prosecuting employers with
22 English-on-the-job rules.

23 In a nutshell, we believe the EEOC is
24 acting illegally and abusing its statutory authority
25 by pursuing its policy. In doing so, the Agency is

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1 not only violating the rights of employers, it is also
2 violating the civil rights of employees. The view that
3 the EEOC is abusing its authority is not our's alone.
4 It is also the overwhelming view of the courts.

5 In 1980, the EEOC adopted new guidelines
6 saying they were going to start presuming that
7 employers English-on-the-job rules have a disparate
8 impact on the basis of national origin; and,
9 therefore, violate Title VII's ban on national origin
10 discrimination. They justified their action by
11 saying, in effect, that someone's native language is a
12 proxy for their national origin.

13 The Agency adopted its guidelines despite
14 a Federal Court decision in 1973 that defined national
15 origin as referring, "To the country where a person
16 was born, or more broadly, the country from which his
17 or her ancestors came." That definition is clear, and
18 it says nothing about language for very good reasons.

19 Common sense tells us that someone's national origin
20 and a native language are distinct and different
21 characteristics. Someone who speaks Spanish or French
22 as their native language, may have been born in dozens
23 of countries, and someone whose national origin is
24 Nigerian, could speak any one of dozens of different
25 languages as their native language.

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1 The EEOC's definition is so over and
2 under-inclusive that it's meaningless, which is
3 exactly what the courts have said. Almost as soon as
4 it was passed, the Agency's expanded definition of
5 national origin was rejected twice in cases before the
6 Fifth Circuit U.S. Court of Appeals.

7 In Garcia v. Gloor, in 1980 the Fifth
8 Circuit said, "National origin must not be confused
9 with ethnic or socio-cultural traits, and held that
10 the Equal Employment Opportunity Act does not support
11 the EEOC's interpretation." And in Vasquez v.
12 McAllen, the Fifth Circuit again rejected the EEOC's
13 interpretation in upholding an English-on-the-job rule
14 for truck drivers. The EEOC's assertion that there is
15 "a close connection between language and national
16 origin" is simply false. But despite common sense,
17 and over 20 court decisions that have explicitly
18 rejected the EEOC formulation, the EEOC continues to
19 prosecute employers with English language workplace
20 rules.

21 The Agency justifies its actions by
22 parsing and twisting the meaning of words, and by
23 creating expansive new definitions of national origin
24 out of thin air. For instance, on its website, the
25 EEOC said that, "It is illegal to discriminate against

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1 an individual because of birth place, ancestry, and
2 then it adds culture, or linguistic characteristics
3 common to a specific ethnic group." So with the stroke
4 of a pen, the EEOC adds the vague and incomprehensible
5 terms "culture", or "linguistic characteristics" to
6 the clear and well-defined meaning of national origin.
7 Now national origin is not what country you came from,
8 it is also culture and linguistic characteristics.
9 That's ridiculous. Is wearing a kilt, having a
10 cockney accent, or not eating pork now protected
11 national origin characteristics simply because the
12 EEOC says they are?

13 The guidelines say that English-on-the-job
14 rules "when applied at all times are a burdensome
15 condition of employment that constitutes national
16 origin discrimination. But since the definition the
17 EEOC uses is false, it makes no difference whether
18 such a rule is applied at all times, or only at
19 certain times. The EEOC had no basis to assert a
20 Title VII violation where language is concerned, and
21 less right to presume an English-on-the-job rule
22 violates the law.

23 The EEOC adds that even an English policy
24 is applied only at certain times, the employer must
25 still show that the rule is justified by "business

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1 necessity". That addition allows the Agency to
2 prosecute any English-on-the-job rule, and burdens the
3 employer with having to show business necessity in
4 court.

5 In 1992, in Garcia v. Spun Steak Company,
6 the Ninth Circuit joined the Fifth Circuit and ruled
7 the EEOC was acting ultra vires, that is outside the
8 scope of its statutory authority, by bringing these
9 lawsuits. But the EEOC appears to think it is co-
10 equal with the courts in interpreting the law.

11 In a letter to Colorado Congressman Tom
12 Tancredo dated January 21st, 2000, the EEOC said, "It
13 disagrees with the Ninth Circuit decision in Spun
14 Steak," and in effect says that it feels empowered to
15 make its own statutory interpretations.

16 Here's the bottom line. In 35 years of
17 court cases, there has not been a single ruling
18 supporting the EEOC's interpretation that was
19 ultimately upheld, or which is controlling, not one
20 that supports the EEOC's language equals national
21 origin formula. But there have been over 20 decisions
22 at the state, federal, and circuit court level where
23 courts have specifically rejected the EEOC definition.

24 I'm glad you're going to hear from Richard
25 Kidman, the owner of R.D.'s Drive-In. Richard and his

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1 wife, Shauna, were prosecuted by the EEOC because they
2 put an English-on-the-job rule in place to stop
3 harassment and cursing, and harassment including the
4 most rude kind of sexual harassment, I might add, in
5 the Navajo language that was driving off their
6 employees and customers, and threatening to destroy
7 their business.

8 You have to visit Page, Arizona and eat a
9 green chili cheeseburger at R.D.'s Drive-In to get a
10 feel for how over-the-top it was for the EEOC to file
11 a federal lawsuit against this small business owner
12 and his wife. Only lawyers blinded by ideology, or
13 obsessed with an agenda could have looked at the facts
14 and concluded that the Kidmans were discriminating
15 against their Navajo employees. But the EEOC didn't
16 just prosecute the Kidmans, it persecuted the Kidmans
17 by mounting a media campaign against them that
18 attacked their character, and accused them of unlawful
19 discrimination. The EEOC's conduct in dealing with the
20 Kidmans was so unethical that the judge in the case
21 denounced the EEOC in his court order.

22 What happened to the Kidmans was a
23 travesty. They tried to follow the EEOC guidelines,
24 but not being K Street lawyers, they didn't grasp the
25 significance of the words "when applied at all times".

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1 So when they wrote their policy, they didn't include
2 the specific exceptions for break times, et cetera,
3 that the EEOC presumes is facial evidence of
4 discrimination.

5 The Kidmans' case is, unfortunately,
6 typical of the way the EEOC operates. Even when an
7 employer goes to court and wins, they can't recover
8 their legal costs in most circumstances, so the EEOC
9 uses its superior resources to intimidate employers,
10 exhaust their resources, and force them to accept a
11 settlement that allows the EEOC to claim a public
12 relation victory. In reality, there are many
13 compelling reasons for an employer to have an English-
14 language workplace policy, including things such as
15 maintaining a safe, non-hostile work environment,
16 deterring theft and substance abuse, and insuring
17 compliance with company policies. But employers like
18 the Kidmans are caught in a Catch-22. If they fail to
19 take effective action to stop things like ethnic
20 slurs, and sexual harassment in languages other than
21 English, they can be sued under Title VII for
22 maintaining a hostile work environment. But if they
23 take the common sense step of creating an English-on-
24 the-job policy, they risk public attack and
25 prosecution by the EEOC.

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1 In the rare instances where an employer
2 has the resources and will to fight the EEOC in court,
3 they either win their case, or settle it on terms that
4 vindicate the employer's policy. Recently, for
5 example, the EEOC agreed to a settlement of its well-
6 publicized lawsuit against the Salvation Army that
7 left the Army's English-on-the-job policy completely
8 intact. But far more often, thanks to its vastly
9 superior resources, the EEOC prevails, especially in
10 actions against small employers, and imposes
11 burdensome and costly settlements on employers who, in
12 reality, are in full compliance with the Civil Rights
13 laws.

14 In effect, the EEOC is acting like a
15 multi-cultural police force, writing its own laws,
16 defying the courts, and using coercive tactics to
17 impose its agenda on law-abiding employers. In doing
18 so, it is not only violating the rights of employers,
19 it is also chilling and infringing the right of
20 employees to work in a safe, non-threatening work
21 environment.

22 In conclusion, we ask the Commissioners to
23 condemn the EEOC's unlawful conduct, which is
24 especially dangerous because it's being committed by
25 the very agency created by Congress to safeguard the

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1 civil rights of all employees. And thank you for the
2 opportunity to present these views.

3 VICE CHAIR THERNSTROM: Thank you very
4 much. Mr. Kidman, I somehow got this out of order,
5 but in a way, it appears to me, we benefitted from
6 that by your getting a very nice introduction.

7 MR. KIDMAN: Thank you.

8 VICE CHAIR THERNSTROM: Please, proceed.

9 MR. KIDMAN: All right. Yes, my name is
10 Richard Kidman. Since 1977, my wife and I have owned
11 and managed a small independent fast food restaurant
12 called R.D.'s Drive-In. It's located in Page,
13 Arizona.

14 For 31 years, we struggled to maintain
15 employee morale at our restaurant by requesting that
16 employees be courteous to one another. One issue that
17 kept causing problems was the use of a second language
18 that was understood only by some of our employees.
19 Some of our employees were bilingual, but many,
20 including my wife and myself, speak only English. All
21 of our employees, however, speak and understand
22 English fluently.

23 Approximately 10 years ago, we began
24 having a very difficult time recruiting new employees
25 and holding on to those we already had. In May 2000,

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1 one of our reliable employees gave me an emotional
2 verbal notice that she would no longer be working for
3 me. She explained that some workers were saying
4 terrible things to her on the job. We discovered that
5 some employees were being subjected to verbal and
6 sexual harassment even in our presence, because we
7 could not understand the language. Some of our
8 bilingual workers were using their ability to speak a
9 second language as a weapon.

10 We understood that our business was at
11 risk of being sued if we allowed this hostile
12 environment to continue. We knew we had to act. I
13 asked the employee who gave her notice to please stay
14 and give us a chance to fix the problem, and she
15 agreed. In order to stay in business, we had to
16 create a workplace policy that would stop the
17 harassment. My son searched the internet to find out
18 how to deal with language harassment issues, and
19 located the Equal Employment Opportunity Commission's
20 website. There he found guidelines of when an
21 English-on-the-job policy was permitted.

22 It reads that, "Such a rule is acceptable
23 if", and I quote, "an employer shows that the
24 requirement is necessary for conducting the business.
25 If the employer believes such a rule is necessary,

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1 employees must be informed when English is required,
2 and the consequences for violating that rule."

3 The guidelines fit our situation
4 perfectly. We followed the EEOC's guidelines, and in
5 June of 2000 we implemented an English-on-the-job
6 policy. We required all employees to read the policy
7 and sign to indicate they understood the policy, and
8 the consequences of violating it. Those individuals
9 who had been harassing other employees signed the
10 policy, and changed their behavior.

11 The work environment and employee morale
12 began to improve immediately. Four employees, three
13 were bilingual, and one who spoke English exclusively,
14 disagreed with the policy and left their jobs. They
15 applied for state unemployment benefits, but were
16 denied because the judge determined that they quite
17 R.D.'s without good cause, since they spoke English
18 fluently. The four then filed a complaint with the
19 EEOC.

20 In 2001, the EEOC launched what I consider
21 to be a phony investigation. Some of our employees
22 said they were contacted and encouraged by the EEOC to
23 join the lawsuit against us. Our lead cook turned
24 down such an invitation responding, "Why do I want to
25 sue the Kidmans? They treat me just fine." One

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1 employee felt so intimidated by the EEOC's conduct
2 that she left town and went to live with her parents
3 for over a year. Others were told they could earn a
4 lot of money by joining a lawsuit against us.

5 The lead investigator, Melanie Allison,
6 contacted me in August of 2001, informing me that she
7 had concluded that they were being racist, and had
8 violated Title VII of the Civil Rights Act, and that
9 fines and compensations would be approximately
10 \$30,000. I responded I would not accept that finding,
11 and would be contacting a lawyer.

12 We retained the service of David Seldon,
13 an employment lawyer in Phoenix. He offered to work
14 with the EEOC to make necessary changes that would be
15 acceptable to the EEOC. The EEOC refused to even
16 respond. A year after the EEOC investigation, we
17 learned from media reports that the EEOC had filed
18 suit against us. It was apparent to me from the very
19 beginning that the EEOC had no intention of going to a
20 jury trial. They wanted to either force us to settle
21 on their terms, or to bankrupt us. Either way, they
22 could declare victory.

23 The Director of the EEOC's Phoenix office,
24 Charles D. Burtner, sent a letter dated November 25th,
25 2002 to the Navajo Times, the primary newspaper of our

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1 customers, saying that our case involved, and I quote,
2 "an assault on employees who speak Navajo in the
3 workplace." This type of public relations warfare
4 hurt our business, and some readers called for a
5 boycott of our restaurant.

6 During the discovery phase of our legal
7 battle, we provided over 100 witnesses who were
8 willing to testify about our language in the workplace
9 problem. The EEOC provided no witnesses beyond the
10 court complainants. We learned that three of the
11 recorded interviews of key individuals taken during
12 the investigation were mysteriously lost by the EEOC.

13 We were surprised and dismayed that they would make a
14 determination against us based on paraphrased
15 statements provided by the investigator about those
16 two key interviews. Despite the testimony of
17 management and numerous employees that the language
18 issue was a serious problem, the EEOC still considered
19 our policy, which had conformed to their guidelines,
20 as discriminatory. It was obvious the EEOC had a
21 preconceived agenda.

22 Rather than scheduling a trial, U.S.
23 District Judge Stephen McNamee, ordered us to
24 participate in a series of settlement conferences with
25 a magistrate. The first two conferences failed to

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1 achieve anything. Instead of letting the case go to
2 trial, the judge ordered us to attend a third
3 settlement conference with a magistrate. By this
4 time, our legal fees had escalated well into six
5 figures. Fortunately, a national organization, Pro
6 English, helped us with legal expenses. Still we felt
7 pressured to try and reach a settlement because the
8 judge appeared determined to keep the case out of
9 court. We discussed numerous items, but reached no
10 agreement.

11 The next day when we reviewed the proposed
12 settlement draft as emailed to us by the EEOC, we
13 found that things had been added that had never been
14 discussed in conference, and in other cases the
15 wording had been changed in ways that would be
16 damaging to us. Our lawyer had left the country that
17 morning, and we refused to agree to and sign this
18 settlement without consulting with him. The EEOC
19 lawyers attempted to bully us into signing the
20 document immediately.

21 The EEOC was negotiating in bad faith, and
22 they were using deceit, thinly veiled threats, and
23 every under-handed tactic they could to get us to
24 agree to a settlement that would allow them to claim a
25 public relations victory, and continue to attack us in

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1 the media. Due to financial pressure, Mountain States
2 Legal Foundation agreed to take over the task of
3 representing us pro bono.

4 We could not agree on terms to repair the
5 settlement, so the EEOC filed a new lawsuit against us
6 to compel us to accept their version, claiming that we
7 had agreed to something we had not. We learned it is
8 a big mistake to attend a settlement conference with
9 the EEOC.

10 Judge McNamee rejected most of the EEOC's
11 demands, but determined that some key items had been
12 agreed to in the conference, and ordered a settlement
13 based on those items. From the last page of his order
14 regarding the EEOC's conduct, he states, and I quote:
15 "The Court must point out that this case does not
16 reach the high water mark of civility among lawyers.
17 The EEOC on more than one occasion attempted to put
18 terms in the agreement that clearly were not agreed
19 to. It is clear from the documents and witnesses
20 before the Court that certain terms were clearly
21 negotiated out of the settlement agreement, only to be
22 reinstated by the EEOC. Finally, the Court notes that
23 if counsel for the parties had not resorted to
24 unreasonable demands and ultimatums, and if counsel
25 for the EEOC had not continually reinserted terms that

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1 were specifically negotiated out of the agreement, the
2 parties would likely have concluded this matter in a
3 manner favorable to both parties."

4 In early 2007, the Ninth Circuit Court
5 upheld the Judge's order as binding. However, the
6 proceedings established that an English-on-the-job
7 policy was essential to protecting our employees and
8 customers from abuse and vital to running our
9 business. It also established that our willingness to
10 consider rescinding our English-on-the-job policy was
11 based on having the right to reissue it as part of a
12 comprehensive employment policy subject to the EEOC's
13 review.

14 In May 2007, a new policy was created, and
15 sent to the EEOC for review and comment. They
16 acknowledged receipt of the policy, but refused to
17 comment on it within the time frame allowed. To-date,
18 we have heard nothing from them regarding our policy.

19 After incurring over \$700,000 in costs, we
20 were denied our day in court by unethical and under-
21 handed manipulations of the EEOC. Were it not for the
22 generous help of attorneys, Mountain States Legal
23 Foundation, Pro English, and numerous individual
24 contributors, we would be out of business. The EEOC
25 must have spent an enormous amount of money in their

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1 effort to bully us.

2 We almost lost our family business simply
3 because we wanted to create a safe environment for our
4 employees by instituting an English-on-the-job policy
5 pursuant to the EEOC guidelines.

6 In closing, let me say as a small
7 businessman who strives to earn a living and do the
8 best I can for my family, my employees, and my
9 community, this experience has left me feeling very
10 mistreated, and extremely abused by an agency of my
11 own government. Thank you.

12 VICE CHAIR THERNSTROM: Thank you very
13 much. And last but not least, Linda Chavez.

14 MS. CHAVEZ: Thank you very much, Madam
15 Vice Chair. I am Linda Chavez, Chairman of the Center
16 for Equal Opportunity, and I want to thank you for
17 inviting me to attend. This is my first appearance
18 before the Civil Rights Commission since I left here
19 almost 25 years ago.

20 Before I get into my statement, though, I
21 do want to address some of the discussion that started
22 off this briefing having to do with the composition of
23 the panels. And I want to make it very clear that to
24 characterize me as someone who is in favor of English
25 in the workplace rules is inaccurate. I have never

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1 taken any such position. My organization does not take
2 such a position.

3 What we do favor is allowing employers to
4 make decisions on how best to run their businesses, so
5 long as that is consistent with our anti-
6 discrimination laws, and we are also in favor of
7 understanding discrimination in a way that is
8 consistent with the statutory language of our Civil
9 Rights laws. So let me just begin.

10 In our free market economic system, there
11 should be a strong presumption that employers are left
12 to run their businesses in the way they deem best.
13 The exceptions to this principle are, and ought to be,
14 limited. The exceptions, an argument that in
15 particular, a particular policy is simply unwise or
16 unfair ought therefore to be addressed to the
17 employer, and the decision about whether it is
18 persuasive or not left to the employer, or where a
19 collective bargaining agreement exists, ought to be
20 left to the employer and the union to negotiate.

21 The obvious possible exception to the
22 principle, and the matter we're discussing this
23 morning, involves discrimination on the basis of race
24 or ethnicity. There is a national consensus that
25 employers ought not to be allowed to engage in such

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1 discrimination. And, of course, that consensus is
2 reflected in our Civil Rights statutes, in particular,
3 Title VII of the 1964 Civil Rights Act.

4 Accordingly, the question we ought always
5 to keep before us when we are scrutinizing an
6 employer's language policy is whether that policy
7 discriminates against an employee because of his skin
8 color, or his ethnic group. If the answer is yes,
9 then there is a role for the EEOC. Otherwise, the
10 EEOC should back off.

11 Now, it is conceivable that an employer
12 might use language or language proficiency as a
13 pretext for discriminating on the basis of ethnicity.

14 For instance, if an employer in South Texas whose
15 business is grave digging, and who, in the past, has
16 expressed his reluctance to hire Mexican Americans,
17 one day announces that he will refuse to hire anyone
18 with a trace of a non-English accent; well, I'm
19 prepared to believe that his new policy is probably
20 designed to keep out Mexican Americans. And I would
21 support the EEOC investigating the employer, and if it
22 reached that conclusion, bringing a lawsuit. But the
23 overwhelming majority of employers who want their
24 employees to be able to speak English and speak it
25 intelligibly to their co-workers and customers, and

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1 who want it to be spoken in the workplace are not
2 doing so because they want to keep members of a
3 particular ethnic group out of the workplace, or
4 harass them once they are there. Instead, the
5 employer will have perfectly legitimate and non-
6 discriminatory reasons for the policy, of which there
7 are many.

8 For example, an employee might revert to a
9 language other than English to insult other employees
10 or customers, or to engage in insubordinate behavior,
11 and avoid detection by a supervisor. In one
12 California case on record, the Spanish-speaking
13 employee, a Spanish-speaking employee routinely used
14 Spanish to hurl vicious racial insults at African
15 American and Asian co-workers, but sued when her
16 employer attempted to enforce an English-on-the-job
17 rule. While an appellate court upheld the employer's
18 right to force employees to speak English on the job,
19 not all courts have come down the same way. And in at
20 least one case, the court's solution to an employer's
21 claim that English was needed to insure supervisor's
22 ability to monitor whether employees were hurling
23 racial insults was to force the employer to hire
24 bilingual supervisors, which, in effect, forced the
25 company to fire the existing black supervisors who did

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1 not speak Spanish.

2 Let me also say that even if the EEOC is
3 able to cobble together a disparate impact lawsuit
4 against a particular employer as a matter of its own
5 discretion, it should not sue the employer unless the
6 agency thinks it can prove a disparate treatment case.
7 I know that unfortunately Title VII allows for
8 disparate impact lawsuits, but this doesn't mean that
9 the EEOC has to bring one every time it can.

10 In this language area, in particular, the
11 EEOC's limited time and resources are better spent
12 going after real discrimination. Unlike race, gender,
13 or national origin, language is not immutable but
14 learned. Discriminating against someone because she
15 is a woman, or black, or because she or her parents
16 were born in another country is different from
17 insisting that she learn to type before she's hired as
18 a secretary, or learn to speak English before being
19 hired to take orders in a fast food restaurant. And
20 would we support a disparate impact claim if a firm
21 that primarily does business in Latin America refused
22 to hire a sales representative who did not speak
23 Spanish, even if such a rule was more likely to
24 exclude white or black employees born and raised in
25 the United States?

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1 I would favor, by the way, legislation
2 that would bar the EEOC from bringing these language-
3 based lawsuits, and certainly where the EEOC can
4 assert only a disparate impact. I would urge the
5 Commission to urge Congress to pass such legislation.

6 Senator Alexander, as you all know, has
7 played a leading role in supporting a bill like this.
8 I'm not a lawyer, so I don't want to dwell further on
9 the legal analysis here this morning. I'm, instead,
10 attaching two legal analyses that while somewhat dated
11 are, I think, nonetheless, helpful. And I would ask
12 that they be inserted into the record along with my
13 full statement.

14 What I want to stress, instead, is why as
15 a matter of policy it is a very bad idea for the
16 federal government to be doing anything that
17 discourages English acquisition. America has always
18 been a multi-ethnic society, and it is becoming more
19 so. We have always been a national of immigrants.
20 That is a great strength, but for such a society to
21 work, we must celebrate our unity, as well as our
22 diversity. We must cultivate our common bonds, and we
23 must be able to communicate with one another. Our
24 common language is the most important social glue that
25 helps keep us together.

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1 It does immigrants no favor to remove
2 incentives for their mastering English, forcing
3 employers to run their workplaces on a multi-lingual
4 basis is not only dubious, as a matter of law, and
5 costly in its economic effect, it is disastrous as a
6 matter of national policy. The workplace has always
7 played an important role in assimilating new
8 immigrants into American society. It should be
9 encouraged, not discouraged, in playing that role.

10 We have urged Congress to provide tax
11 credits and other incentives to employers to teach
12 English to their employees. It would be very odd for
13 the federal government on the one hand to urge
14 employers to teach their employees English, while on
15 the other hand prosecuting them, or other employees
16 when for non-discriminatory reasons they adopt
17 policies that English be spoken. The overwhelming
18 majority of immigrants expect that they must learn
19 English, and are eager to do so.

20 Thank you again, Madam Vice Chair, for the
21 opportunity to testify today, and I look forward to
22 any questions you might have.

23 VICE CHAIR THERNSTROM: And I thank you,
24 Ms. Chavez, and thank Mr. Russell for waiting. And
25 please do come back up to the table so that we can

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1 address questions to you, as well.

2 We are ready to start questions, and I see
3 that Commissioner Kirsanow has his hand up.

4 **QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR**

5 COMMISSIONER KIRSANOW: Yes. First of
6 all, I want to thank again the Staff in putting
7 together, as usual, a splendid panel, and thank all of
8 the witnesses who gave very interesting testimony.

9 Just a few quick questions, kind of
10 housekeeping questions, for Mr. Russell based on some
11 of the testimony I heard, and also what you said. I
12 think there were approximately 180 English-only based
13 charges brought by the Commission per year on average?

14 MR. RUSSELL: Not to be picky, the
15 Commission generally doesn't bring charges at all.

16 COMMISSIONER KIRSANOW: I'm sorry.

17 MR. RUSSELL: The charge is filed with the
18 Commission.

19 COMMISSIONER KIRSANOW: Understood. What
20 I meant by that is, how many of those go to
21 complaints?

22 MR. RUSSELL: Very, very small number. I
23 have the data here somewhere. I can pull it out for
24 you.

25 COMMISSIONER KIRSANOW: Approximately 180

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1 charges have been filed by alleged discriminatees.

2 MR. RUSSELL: Right, on average over the
3 last 10 years.

4 COMMISSIONER KIRSANOW: Do you have any
5 sense for what percentage of those have gone to jury
6 trial?

7 MR. RUSSELL: Let me just consult my data.

8 COMMISSIONER KIRSANOW: Sure. Go ahead.

9 MR. RUSSELL: If you will permit me,
10 because I do have it. I was just looking at it a
11 minute ago. Well, let me just -- let me answer it
12 this way. We, on average, litigate, the EEOC chooses
13 to litigate approximately two or three English-only
14 cases per year. So out of the average 180, roughly
15 two or three will go to -- will be litigated. And
16 they could be dismissed at the motion to dismiss
17 stage, dismissed at summary judgment stage, settled,
18 or go to trial. I don't know of one in recent memory,
19 very recent memory where the case has gone all the way
20 through trial to a judgment, but that could be the
21 case. There are a number, however, sir, that are
22 resolved during the administrative process, so you
23 have the charge filed, an investigation is conducted,
24 many are administratively closed, many are issued a
25 no-cause finding. And in those where a reasonable

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1 cause to believe that discrimination has occurred, has
2 been found, moved to the next phase where the
3 Commission attempts to conciliate those claims. And I
4 was just looking at the data a little while ago. I
5 think that it ranges anywhere from 30 up to 100. It
6 depends on the year, because each claim is different.
7 The conciliation will either result in a settlement,
8 or no conciliation. And then the Commission has to
9 decide, rather the General Counsel, decide whether
10 that case despite conciliation failing is worthy of
11 the time and resources to take to litigation.

12 COMMISSIONER KIRSANOW: Okay. Second
13 question is, are you aware of any cases in this body
14 of jurisprudence in which there has been a finding by
15 a court that an English-only rule was promulgated with
16 an intent to discriminate?

17 MR. RUSSELL: I think the Maldonado case
18 that I mentioned in my opening statement in the Tenth
19 Circuit, the decision is a little bit murky, to be
20 perfectly honest. But I think in that case, there was
21 evidence, at least, that the English-only policy was
22 promulgated for the purpose of -- for intentional
23 discrimination. That's the one, and that's a fairly
24 recent case. We filed an Amicus brief, Maldonado v.
25 City of Altus.

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1 COMMISSIONER KIRSANOW: And one more
2 question along these lines. The EEOC guidelines, at
3 least I think it was Mr. Riordan, testified that among
4 the criteria that are set forth in terms of the
5 definition of national origin discrimination is
6 culture or linguistic characteristics common to a
7 specific ethnic group. Generally speaking, agencies
8 under the Chevron decision have got the ability to
9 kind of interpret what their authorizing statute
10 means, but they don't have license to amend or graft
11 onto the statute a meaning different from that
12 legislated by Congress. Do you know whether or not
13 that particular clause, "cultural or linguistic
14 characteristic common to a specific ethnic group" has
15 been litigated in any of the cases related to English-
16 only?

17 MR. RUSSELL: If I may, what I have in
18 front of me are the guidelines that say "cultural or
19 linguistic characteristics of a national origin
20 group", which ties into a protected category under the
21 statute. What I also know is that a number of a cases
22 either have assumed or found that primary language is
23 tied to national origin, that includes the Gutierrez
24 case. Even the Spun Steak case which ruled against
25 EEOC, accepted the premise an English-only policy

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1 would have a disparate impact on individuals who did
2 not speak English. So, the only way it could have a
3 disparate impact under Title VII would be if it
4 infringed on a protected category under Title VII.

5 COMMISSIONER KIRSANOW: Right.

6 MR. RUSSELL: So they've had to accept
7 that idea.

8 COMMISSIONER KIRSANOW: What circuit is
9 Gutierrez?

10 MR. RUSSELL: I'm sorry. One second, I'll
11 get that for you. I think it's the Tenth Circuit.

12 COMMISSIONER KIRSANOW: And, also, in all
13 of the other categories set forth in Title VII, Ninth
14 Circuit case -- in all the other categories set forth
15 in Title VII, I think Ms. Chavez had alluded to, which
16 I think are race, sex, national origin, color, we're
17 generally talking about, with one exception, that is
18 an exception that is enshrined in the Constitution,
19 religion. All the others are immutable
20 characteristics. In disparate impact cases, it is
21 obviously easier to ascribe a disparate impact where
22 you've got a huge characteristics. Here we've got one
23 that could vanish, frankly vanish over a period of
24 months.

25 My father didn't speak English, but

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1 learned it quite quickly because he wanted a job, and
2 do it well. How is it, or is there any litigation
3 that you're aware of that sets forth a corollary or
4 shows a correspondence between language and national
5 origin? Because I think as one of the witnesses
6 testified, there are a number of languages, for
7 example, if you speak Portugese, your national origin
8 might be Brazil, or could be Portugal. If you speak
9 Russian, it could be dozens of countries that may have
10 been part of the former Soviet Union. And Spanish,
11 scores of countries. Do you know of any litigation
12 that says that national origin - I'm sorry - that
13 language has a correspondence to national origin in a
14 way that legitimately could be tied to a disparate
15 impact theory?

16 MR. RUSSELL: Well, I don't know if they
17 phrase it that way. But, again, even in Spun Steak,
18 and in Gutierrez, they took the position that an
19 English-only policy that had an adverse impact on
20 Hispanic-speaking employees would adversely affect
21 them, or have a disparate impact. So they accepted
22 that theory, even if they didn't articulate it as well
23 as you have.

24 COMMISSIONER KIRSANOW: One final one.
25 Have there been any cases that you're aware of that --

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1 for example, in my practice, and I've been doing
2 Labor and Employment Law for about 30 years, a number
3 of workplaces are workplaces where the majority of the
4 workforce speaks languages other than English, could
5 be Chinese, Korean, Spanish, Russian, you name it.
6 Have there been any cases litigated where the EEOC has
7 brought a lawsuit, or brought complaint against an
8 employer that maintained an other-than-English
9 workplace policy?

10 MR. RUSSELL: I don't know of any off the
11 top of my head. I will certainly look into it, but
12 the guidelines do provide that you could have a
13 challenge - not the guidelines, the compliance manual
14 to inform the claim. And if the standard is met, I
15 think to get back to just the basics, the question is,
16 is there a disparate -- if you assume, and I
17 understand that it may be in dispute in your view, if
18 you assume that a linguistic characteristic is tied to
19 national origin, several courts have assumed, have
20 agreed with that, many commentators have agreed with
21 that. If you take that as true, then the question is,
22 is there a disparate impact on a group of a particular
23 national origin? It could be the case that you could
24 have the situation you posit, where a non-English
25 speaking workplace discriminates under a disparate

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1 impact theory against English-speaking employees,
2 because it's the same analysis under Title VII.

3 COMMISSIONER KIRSANOW: Right. I
4 understand you don't have the figures at your
5 fingertips, but you're not aware of any cases where
6 EEOC has brought complaint against an English, or non-
7 English workplace rule.

8 MR. RUSSELL: I don't know any cases.

9 COMMISSIONER KIRSANOW: Mr. McAlpin?

10 MR. McALPIN: I would like just to say
11 that, first of all, by its own standards, the EEOC is
12 discriminating because its Spanish language policies
13 are not -- Spanish-only policies, whatever you want to
14 call it, is not a violation. Any other language is
15 not a violation, it's only English that's a violation.
16 That's very clear that they say that.

17 COMMISSIONER KIRSANOW: What's the example
18 in your -

19 MR. McALPIN: In Garcia v. Spun Steak, the
20 fact that the company had English-on-the-job rule
21 during its day shift was a violation. The fact that
22 it had Spanish as the official language, or the
23 language of the workplace in the night shift, was not
24 a violation for the EEOC.

25 I also want to say that in Garcia v. Spun

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1 Steak, the EEOC is citing from the minority opinion
2 about the fact that there's a correlation between
3 national origin and language. And the majority
4 opinion in Spun Steak was that the EEOC was acting
5 outside the scope of its statutory authority in
6 bringing these cases, that language equals national
7 origin is invalid. In my testimony I attached a list
8 of 21 cases that have been adjudicated at the state,
9 federal, and the Circuit Court level that have all
10 gone against the EEOC. There's only been two cases
11 that I'm aware of in which there was an initial ruling
12 for the EEOC's position, that was the District Judge
13 in Spun Steak. It was overturned at the Ninth Circuit
14 level. And then in Premier Operator, there was a
15 decision that supported the general proposition that
16 the EEOC is advancing, but that's not controlling in
17 the Fifth Circuit because of Garcia v. Gloor.

18 I'm not a lawyer, but the legal basis, and
19 I have been working with this for several years, the
20 legal basis that the EEOC is acting on is incredibly -
21 - it's like a thin reed. It's like they extract from
22 even decisions that go against them to try to justify
23 their position, and ignore Circuit Court decisions
24 that basically say you're acting illegitimately in
25 bringing these cases.

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1 MS. CHAVEZ: Commissioner Kirsanow, as I
2 mentioned in the case where the employer was forced by
3 the court to hire bilingual supervisors, and they were
4 accepting the disparate impact theory, and accepting
5 the case, and finding in favor of the plaintiffs, they
6 then seemed to ignore the disparate impact theory in
7 essentially forcing the employer to get rid of the
8 existing African American supervisors. African
9 Americans, by and large, are not Spanish speakers. It
10 would have a disparate impact on that population if
11 you forced bilingual translators, or bilingual
12 speakers, rather, to be hired. So that is one case
13 where, whether it was EEOC or the court, the court did
14 find in favor of a language other than English to be
15 used on the job.

16 COMMISSIONER KIRSANOW: Thank you.

17 MR. RUSSELL: May I make just a point of
18 clarification? In this case, the English-only policy
19 falls within the adverse effects -- disproportionately
20 those of Hispanic origin. But this is not an idea I
21 plucked from a single dissenting judge, and I picked
22 Spun Steak simply to point out this is a case where
23 the court ruled against the EEOC on a fairly narrow
24 point, that there was no adverse impact with respect
25 to truly bilingual employees.

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1 I will stipulate for my friends here that
2 EEOC's position on truly bilingual employees is
3 controversial, and may not have garnered consensus.
4 But even the Spun Steak court found that there would
5 be adverse impact on employees who spoke no English,
6 or very little English. And buried within that
7 comment is the assumption that primary language is
8 linked to national origin. And that's all I'm saying,
9 so it may be true, ultimately, if the Supreme Court
10 rules that language is not tied to national origin,
11 EEOC will revise its policy, and come into compliance
12 with the Supreme Court's decision, but that has not
13 happened. And, in fact, several courts have either
14 assumed or said that primary language, or accent, or
15 language is a component of national origin. And our
16 guidelines leave some wiggle room for the
17 circumstances that you posit, of the individual who
18 may be from a different national origin, and says
19 often, not always. It says often a component of
20 national origin. So I apologize, I do not mean to be
21 contentious, but I think we need to speak with
22 precision about what EEOC's position is. I think we
23 need to speak with precision about what the court
24 cases hold, and we need to speak with precision about
25 what the state of the law is.

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1 I think it serves the debate much better
2 than hurling accusations at the agency of bad faith,
3 of persecution, of being completely at odds with the
4 law. Thank you, ma'am.

5 VICE CHAIR THERNSTROM: Well, this
6 reinforces the point that diversity of views on this
7 panel is absolutely essential, and I thank you for
8 that intervention. Yes?

9 COMMISSIONER GAZIANO: I'd like to, first
10 of all, thank the Staff again for the wonderful
11 briefing that they've set up, and thank all of the
12 witnesses, those who have appeared today, and those
13 who we have their written statement.

14 If I'm allowed a second question, I might
15 want to ask Mr. Kidman some questions, but I would
16 like to focus, at least initially, on a couple of
17 questions between the presumption that Linda Chavez
18 talked about, and that appears in the EEOC's
19 regulations. Thank you by the way, Linda, for coming.
20 You were not introduced as the living legend that
21 you've been recognized by elsewhere, but you're one of
22 my heros and living legends.

23 Clearly, a lot of policies, almost any
24 policy a company can have, you can look at the
25 statistics and say it has a disparate impact. Your

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1 own -- the EEOC's own regulations recognize that some
2 English-only policies may be justified, so the
3 question is, where do you -- what presumption you use
4 in initiating an investigation, or conducting an
5 investigation? And I just want to establish a couple
6 of quick things.

7 In your Regulation 1606.7, you have two
8 subparts, A and B. You pretend there's some
9 difference between them, and there is in some
10 respects. A covers when the English-only language is
11 applied at all times; B is when that rule is applied
12 only at certain times, but it seems to me that the
13 presumption you use applies equally in either case.
14 And let me just run through that.

15 Subpart B, when applied only at certain
16 times, you phrase it in a different way, but you said
17 an employer may have a rule only in English at certain
18 times where the employee can show that the rule is
19 justified by business necessity. If you're
20 investigating such a claim, and the company says I
21 have a business necessity. Is that -

22 MR. RUSSELL: Do you want me to answer
23 now?

24 COMMISSIONER GAZIANO: Yes.

25 MR. RUSSELL: No, sir.

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1 COMMISSIONER GAZIANO: Okay. So, in other
2 words, they have to prove, they have to establish this
3 business necessity to your satisfaction.

4 MR. RUSSELL: May I?

5 COMMISSIONER GAZIANO: Yes.

6 MR. RUSSELL: Okay. I'd be happy to -- I
7 do think there's a meaningful distinction between the
8 two subparts, if I may. What is the same -

9 COMMISSIONER GAZIANO: If you don't mind,
10 answer the question posed, they have to prove it to
11 your satisfaction, or you're going to -

12 MR. RUSSELL: Well, to the satisfaction of
13 what we understand the jurisprudence to be on the
14 establishment of the business necessity defense, yes.

15 COMMISSIONER GAZIANO: Okay. So we have
16 Linda Chavez saying there should be a -- by the way,
17 these are employers. I'm going to, for the sake of my
18 question, take off the table serious evidence of
19 intent.

20 MR. RUSSELL: Right.

21 COMMISSIONER GAZIANO: All you have is
22 disparate -- this is -- by the way, we're not in a --
23 this a rule applied to existing workforces,
24 presumably by employers who have blocks of non-
25 English-speaking primary workers, so there isn't a

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1 strong evidence anyway that they're -- this is a rule
2 that they are imposing to manage the workforce, not to
3 keep people from being hired in the future.

4 MR. RUSSELL: I don't know if that's true
5 in every case, or in some cases.

6 COMMISSIONER GAZIANO: Not necessarily in
7 every case.

8 MR. RUSSELL: I don't know.

9 COMMISSIONER GAZIANO: It's, again, where
10 the presumption is. Now, continue with your answer.

11 MR. RUSSELL: The presumption is one of an
12 establishment of disparate impact. That is in
13 Subsection A, and Subsection B. So, in other words,
14 EEOC has taken the position historically that because
15 of its view, that primary language is linked to
16 national origin, that a policy that requires you to
17 speak English only, or English at all times at work,
18 there will be a disparate impact as an enforcement
19 position.

20 COMMISSIONER GAZIANO: Understand.

21 MR. RUSSELL: The difference between A and
22 B is that if the English-only policy is truly English-
23 only; in other words, you are not permitted to speak
24 other than English while at work period, including
25 during breaks, lunch, on personal time, EEOC, as an

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1 enforcement position, believes it will be virtually
2 impossible, or very difficult, at least, to establish
3 a business necessity for that policy, in which case it
4 says in Subsection A, "The Commission will presume
5 that the rule violates Title VII." So what it's
6 saying is, (A) it will presume there's a disparate
7 impact; and (B) it will presume at the investigation
8 stage that there is no business necessity
9 justification, because the rule is so broad. But I
10 think it's important to point out, it says, "and will
11 closely scrutinize". In other words, an investigation
12 will occur. The investigation has to occur, and then
13 a determination must be made to either find reasonable
14 cause to believe that discrimination occurred, or not.
15 That is not automatic, even under Subsection A.

16 COMMISSIONER GAZIANO: I understand that.
17 What you're saying is that there's some slim chance
18 under A or B, at least some slim chance under A or B
19 that an employer could convince you that they need to
20 do that.

21 MR. RUSSELL: I would say there's some
22 slim chance under A. I would say there's a perfectly
23 good chance under B.

24 COMMISSIONER GAZIANO: But there's a
25 presumption.

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1 MR. RUSSELL: A presumption of disparate
2 impact.

3 COMMISSIONER GAZIANO: There's a
4 presumption, and a presumption that you will -- you
5 have the opportunity to file suit if you're not
6 satisfied with the business necessity justification
7 when you make a disparate impact finding.

8 MR. RUSSELL: If the evidence shows that
9 there's no business necessity justification, then a
10 determination will be made at that point whether we
11 would file suit.

12 COMMISSIONER GAZIANO: Okay. Let me give
13 you a hypothetical under A, but just to close out
14 this. I think it was then-Chairman Specter of the
15 Judiciary Committee who tried to establish that
16 certain things are super duper precedents. As I read
17 it, as any lawyer who might be counseling a client
18 would read it, if your English-only is just during
19 emergencies, the EEOC will presume that you're
20 violating Title VII. Under A, there's a super duper
21 presumption, at least that's the way I read it. But I
22 want to go with a hypothetical under A. Are there any
23 places in the -

24 COMMISSIONER YAKI: Has any court used the
25 word "super duper"? I was just wondering.

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1 COMMISSIONER GAZIANO: I haven't seen that
2 yet. Okay. Is there any -- is the break room a sex
3 harassment free zone? Is there any place under the
4 employer's control where sexual harassment can take
5 place, and the employer has no liability?

6 MR. RUSSELL: Not that I'm aware of.

7 COMMISSIONER GAZIANO: Okay. So the lunch
8 room, the break room, sexual harassment can occur
9 nowhere and at no time under the employer's control.
10 Is that the case?

11 MR. RUSSELL: That would be the best
12 approach.

13 COMMISSIONER GAZIANO: Okay. Now, I
14 remember a Fifth Circuit case, and I remember several
15 other cases where women were being integrated into a
16 particular shop environment where there weren't a lot
17 of women, and the sexist atmosphere, at least the
18 allegation was, was pretty -- by the way, bathrooms in
19 that case were one of the sex -- bathrooms are not
20 sexual harassment free zones either. Right?

21 MR. RUSSELL: Right.

22 COMMISSIONER GAZIANO: You've got a
23 situation where the employee brings to the employer's
24 attention that most of the men, there's a pervasive
25 atmosphere of sexual harassment. Is there any way to

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1 come up with a -- and this is being, let's assume in
2 the hypothetical, that it's being done through
3 language that the supervisors don't understand. Is
4 there any logical way to try to shut that down by
5 making it just certain parts of the shop floor during
6 certain hours? If you're advising the client who's
7 worried about a hostile work environment claim, can
8 you think of a way to limit it to just certain times
9 during the day, or certain places in that plant?

10 MR. RUSSELL: No.

11 COMMISSIONER GAZIANO: Does anyone else on
12 the panel want to comment on what are employers
13 supposed to do in that situation?

14 MR. RUSSELL: Well, I guess I don't
15 understand what that has to do with English-only. And
16 I haven't heard anything that you've said that ties it
17 in any way to English-only, unless the presumption is
18 that people who don't speak English engage in sexual
19 harassment.

20 COMMISSIONER GAZIANO: The allegation is
21 that the language that the supervisors don't
22 understand is being used in my hypothetical.

23 MR. RUSSELL: Pervasively?

24 COMMISSIONER GAZIANO: I see, Linda,
25 nodding your head. Do you -

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1 MS. CHAVEZ: Well, I think what
2 Commissioner Gaziano is referring to is a case in
3 which you had employees -- perhaps it's a poultry
4 plant, and you've got lots and lots of Spanish
5 speakers. And during the break room, the company
6 finds out that the female employees are being harassed
7 in the break room in Spanish, and most of the
8 supervisors are English speakers, so they may be in
9 the break room but don't understand what's going on.
10 And in those circumstances, it would seem to make
11 perfect sense for the employer, in order to avoid
12 being charged with sexual harassment, to have a
13 English-in-the-workplace rule that applies to the
14 break room and to breaks. I mean, I would see that as
15 very different, for example, to a policy that says we
16 allow employees to make phone calls home during
17 emergencies. But, oh by the way, they all have to be
18 in English. That, to me, might be more suspect, but
19 the kind of rule that Commissioner Gaziano is talking
20 about would seem, to me, quite reasonable under
21 certain circumstances.

22 MR. RUSSELL: I'd like to thank Ms. Chavez
23 for clarifying that. She certainly helped me out.

24 COMMISSIONER GAZIANO: Sure.

25 MR. RUSSELL: But what I would say to you

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1 is you're using an elephant gun to shoot a fly,
2 because what you could do in that circumstance,
3 perhaps, given the facts as you've posited them is
4 say, we have to have English-only in the break room.
5 But that doesn't mean you need it on the shop line,
6 because under your example, all the harassment was
7 occurring in the break room, so you say you have to
8 speak English only in the break room, because that's
9 where we have this pervasive, overwhelming problem.
10 And so supervisors have to be able to monitor it. And
11 I think that circumstance is posited in my statement
12 this morning, is consistent with our existing
13 guidance. It's consistent with court cases that we've
14 identified in our guidance that say if the problem is
15 pervasive, sure. The question is, do you need then to
16 go out and say you cannot speak other than English
17 here because we have a problem in one particular part
18 of the shop.

19 COMMISSIONER GAZIANO: Let me clarify my -
20 - thank you very much for making my question a little
21 bit more clear. But the evidence is that the
22 complainant just says it's happening all the time.
23 There was something written in the -- and this is an
24 actual case, but not with the language twist. There
25 was something written about me in the bathroom. There

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1 was something on the shop -

2 COMMISSIONER YAKI: I'm sorry. What do you
3 mean it was actual case without the language twist?
4 So this was not actually -

5 COMMISSIONER GAZIANO: It was a sexual
6 harassment claim. And when sexual harassment is
7 occurring, it's generally not just in the break room,
8 or just on the shop floor, or just in the bathrooms.

9 COMMISSIONER YAKI: Right.

10 (Simultaneous speakers.)

11 COMMISSIONER GAZIANO: It can occur
12 anywhere, so if you tell employees -

13 COMMISSIONER YAKI: That would seem to -

14 COMMISSIONER GAZIANO: Let me ask the
15 question, please.

16 COMMISSIONER YAKI: Okay. Well, I just
17 want to object to the hypothetical as you're giving it
18 right now.

19 COMMISSIONER GAZIANO: The employee said
20 there was something written about me in the bathroom,
21 and there was another incident on the shop floor. And
22 during our breaks, there was a -- now, once an
23 employer is on notice that someone feels like there is
24 a hostile work environment, and there are different
25 incidences in different places, different times during

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1 the day, aren't they in serious jeopardy if they don't
2 do something pretty comprehensive to stop it?

3 MR. RUSSELL: They should do whatever they
4 need to do to stop that sexually harassing conduct,
5 yes. If the only way to do it were an English-only
6 policy, I think the evidence would bear that out. But
7 even if an employer presents a business necessity
8 justification, the plaintiff is allowed under the
9 statute to come forward and say there were other
10 equally effective alternatives that the employer
11 refused to adopt. So I guess what I would advise my
12 client if he said I think the way that I'm going to
13 deal with this pervasive sexual harassment problem
14 that apparently is only being engaged in by people who
15 speak languages other than English is to impose an
16 English-only policy, I would say well, is there
17 anything else you'd consider? Maybe you can monitor
18 break rooms with video tape, maybe lawful, maybe not
19 under the particular state statute. Maybe you can
20 conduct an investigation and interrogate the person
21 who you believe is the offending individual or
22 individuals, and if or she refuses to respond to
23 questions. You say did you say X, what does X mean in
24 English? And if he refuses to answer you, of course,
25 could terminate them for refusing to participate in an

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1 investigation. So my point is simply that I don't
2 think that the reaction should automatically be,
3 assuming that hypothetical that you posited exists,
4 that you then institute an English-only policy as the
5 way to resolve it.

6 COMMISSIONER GAZIANO: I'm sure it's not
7 the first thing that most people would come to, but -

8 MR. RUSSELL: It's not even -- they don't
9 even know what -

10 COMMISSIONER GAZIANO: -- the legal
11 jeopardy, after you've been told, the first complaint,
12 the legal jeopardy is great if any subsequent
13 incidents occur. So something pretty comprehensive
14 has to be done, whether it's English-only, would only
15 fit in one circumstance.

16 VICE CHAIR THERNSTROM: Commissioner
17 Gaziano, we need to -

18 COMMISSIONER YAKI: I just want to ask
19 him, just follow-up. I mean, am I incorrect in that
20 in the panoply of responses there are, indeed, a
21 panoply of response to this kind of conduct. That
22 does not necessarily result in the consequence of
23 imposing an English-only rule. I believe in the
24 instance of sexual harassment, there are a number of
25 other steps you can and should be able to take to

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1 respond to it, rather than simply adopting an English-
2 only rule. That's why I could not understand this
3 reduction argument that went toward that in that
4 particular instance, given the hypothetical you had.
5 Because surely, in that hypothetical there were -- the
6 court, or whoever, was told, instructed, or advised to
7 follow certain steps to respond to it?

8 COMMISSIONER GAZIANO: Without going into
9 the details of that case, but my question really is on
10 where the presumption should lie when an employer
11 believes that is what is necessary to address the
12 discrimination. And it seems to me, the EEOC's policy
13 has the wrong kind of presumption.

14 MR. RUSSELL: May I?

15 VICE CHAIR THERNSTROM: Of course.

16 MR. RUSSELL: I would just make the point,
17 if you're talking about sexual harassment, there's a
18 very ample body of case law that talks about the
19 employer's obligations, and when it can be held liable
20 and when it cannot. And it's did it know, or should
21 it have known, if it's a co-worker to co-worker
22 harassment situation, and if it's a supervisor, is
23 there an effective policy, and did they investigate,
24 et cetera. If the fact is that because of a language
25 difference that impedes its knowledge or its ability

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1 to investigate, I think that's part of the analysis.
2 I think that's separate and apart from English-only.
3 English-only is simply, or primarily a disparate
4 impact theory of discrimination that arises out of the
5 jurisprudence with Griggs v. Duke Power, that says
6 that policies which are fair in form, but
7 discriminatory in operation, must be justified because
8 of job relatedness and consistency with business
9 necessity. EEOC didn't make that stuff up. That's
10 just the law that we're enforcing. And not only is
11 that the law as stated by the Supreme Court, Congress
12 saw fit 20 years later to adopt it in statutory form,
13 and the President signed it. So we're just enforcing
14 that law.

15 VICE CHAIR THERNSTROM: Yes, Commissioner
16 Melendez.

17 COMMISSIONER MELENDEZ: Yes. Again, I
18 want to thank the panel for being here today. You
19 know, it's unfortunate that there's only one person
20 here representing the EEOC. I would sure like to have
21 heard from the people who basically are using the EEOC
22 for their -- the poor people that were in the
23 establishment, I believe in Page, Arizona. It would
24 be nice to hear their position on why the EEOC is
25 representing them.

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1 I think there's a certain amount of
2 sensitivity, I think, in this whole issue on how we
3 implement policies across the board. And what you
4 have to have considered, too, is from the foundation
5 of this country, language is -- there's the Native
6 Americans, we understand that there's a language
7 passed by Congress in 1990 that basically enhances
8 languages as part of our culture, so to try to
9 separate those out, I would be in disagreement with
10 that issue on whether or not language is tied to our
11 origin and all those different things. But let me
12 also point out that when a prohibition of languages in
13 the boarding schools back in the early parts of this
14 country, there's still a certain amount in Navajo, or
15 any of these tribes - if you try to come back today
16 and try to implement anything that has to do with
17 prohibition of languages, well, you already know the
18 history of this country, so the only point I'm making,
19 there's a certain amount of sensitivity in how you
20 implement -- if you put up on a wall no Navajo
21 allowed, for example, well, we know the history of
22 this country that said that no dogs allowed, no
23 Indians allowed in a restaurant, so the sensitivity
24 is, if you ever try to put a sign of no Navajo allowed
25 in your workplace, well, you know where that's

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1 leading. So I'd just like your response as to
2 implementation, as far as sensitivity to the issue.
3 Does anybody want to respond to that?

4 MR. KIDMAN: I have a first-hand
5 experience with that, because I have 25 employees, and
6 23 of them were Navajo. The majority of them spoke
7 just English, the younger people hadn't picked up on
8 the Navajo language. But my problem was, the ones
9 that wanted to further the cause of speaking Navajo,
10 took up that case, that movement in my workplace to
11 the point where they would -- two Navajo employees
12 that were waiting on a non-Navajo speaking customer
13 would speak Navajo to each other, and then look at the
14 customer and giggle or laugh. And the customer would
15 leave my store and never come back. And I have that
16 on testimony in deposition, that they'd just make them
17 totally sick.

18 Another Navajo man, quite a traditional
19 man with the bun, he came in, ordered his food, and
20 then he heard this terrible language going on. And I
21 was there at the same time, but I didn't know what
22 they were talking about. And they were talking -- the
23 cook was talking in a terrible language in Navajo, and
24 cussing and swearing, and things with some of the
25 others. And in the Navajo culture, they believe that

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1 if a person is preparing food and has a bad attitude
2 or speaks badly, that is passed through the food to
3 the individual that's eating it. And I was losing
4 customers right and left, and I didn't know why. They
5 just would leave. And somebody will say well, why
6 didn't you know? What's the matter? Well, because in
7 the Navajo culture, it's very, very taboo for one
8 Navajo to speak badly about another Navajo person to a
9 white person. Well, I'm the white person. My
10 employees are not going to say bad about -- complain
11 about this person talking Navajo. They won't say
12 anything bad to me, and so what do they do to rectify
13 their problem, they just leave? They leave my employ.

14 And I was losing employees, I was having 50 percent
15 turnover back six years ago. Today, in 2008, I have
16 zero turnover, because they all have a common
17 language, and they're very happy with it. All those
18 that can speak Navajo, no problem. They speak English
19 on the job, and they've very happy.

20 COMMISSIONER MELENDEZ: And my second
21 question was having to do with, it almost sounds as if
22 -- because in English we have all these personnel
23 problems within the workplace, and it almost sounds
24 like we have to have somebody that is there all the
25 time. And, as we know, incidents that happen in a

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1 workplace usually happen second-hand. In other words,
2 somebody will say somebody said something about me,
3 then it's not that, because a supervisor was there as
4 a monitor listening, and he's hoping to catch somebody
5 saying something. That's not going to happen.
6 Usually what happens is somebody will complain that
7 somebody said something about me. So if you have a
8 predominantly -- say there's all Hispanic, 90 percent,
9 or they're all Native American, you would think that
10 your supervisors would be trained to pick up multiple
11 languages, and be able to know whether or not people
12 are being harassed in the workplace, either by second-
13 hand, people telling them that's happening, and that
14 you would actually take the disciplinary action by
15 whoever your lead supervisors are, that hopefully
16 you'd hire some that know both languages, and can
17 basically know what's happening in the workplace. So
18 it sounds like those -- is that part of the issue,
19 that you don't think that you can address the
20 personnel issues through --

21 MR. KIDMAN: We did it constantly over
22 years, we had this difficulty, being rude. They were
23 just being rude, and we would talk with them, meet
24 with them, counsel with them, and so forth, but it
25 just got really, really heated when four or five of

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1 the employees decided they were going to just strictly
2 talk in another language, and they were not going to
3 communicate with any of the other employees in
4 English. They were just going to stay in that
5 language, and it demoralized the other employees. And
6 they ended up walking off the job, and I couldn't hire
7 any new ones because the word got around town that
8 hey, you don't want to be hired on at R.D.'s. You're
9 going to be treated rudely by these people, if you
10 can't speak their language, if you can only speak
11 English. So they wouldn't come in and apply. I was
12 in a mess.

13 VICE CHAIR THERNSTROM: Mr. Russell, how
14 distinctive are the facts in that case? Would you say
15 that's an outlier?

16 MR. RUSSELL: In the R.D.'s case?

17 VICE CHAIR THERNSTROM: Yes.

18 MR. RUSSELL: I haven't reviewed the whole
19 file, Madam Vice Chair. I didn't litigate the case,
20 and I would be very uncomfortable engaging on the
21 individuals facts of the case. I did read the
22 District Court and the Appellate Court decision with
23 respect to the enforcement of the settlement
24 agreement, but I have not read the file. So it may be
25 an outlier. These cases are very individual. You

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1 have individual charging parties filing them. You
2 have an investigation that goes where it goes. The
3 evidence is going to vary case-to-case.

4 I would just return to the point that,
5 again, EEOC, it litigates two or three of these a year
6 out of several hundred cases. And out of 80 to 90,000
7 charges that we receive, 80 to 90,000, maybe this year
8 100,000, English-only charges represent a de minimus
9 amount. I'm not saying that for the people who are
10 filing those charges it's not a problem, but this is
11 not something where there's just mountains of --
12 there's 15,000 ADA charges, 30,000 retaliation
13 charges. This is not where EEOC is spending the bulk
14 of its time.

15 COMMISSIONER MELENDEZ: Just one for my
16 closing comment. It would have been nice to have one
17 of the Navajo four people here to testify at this
18 hearing, so that we could hear the perspective as to
19 why they used the EEOC. I just think it's important
20 to hear the other side of the -

21 VICE CHAIR THERNSTROM: Did you make an
22 effort to make sure that one of the Navajo people,
23 indeed -

24 COMMISSIONER MELENDEZ: No, I didn't have
25 the time to actually do that. I don't know who -

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1 VICE CHAIR THERNSTROM: I mean, because
2 that's an obvious contribution you could have made,
3 that I would have liked to have.

4 COMMISSIONER MELENDEZ: I wish we would
5 have.

6 VICE CHAIR THERNSTROM: Pardon me?

7 COMMISSIONER MELENDEZ: I wish we would
8 have. I didn't know that we were going to have
9 individual - I thought mostly it was organizations.
10 But it would have been nice to have that.

11 VICE CHAIR THERNSTROM: Commissioner
12 Taylor.

13 COMMISSIONER TAYLOR: Thank you. And I,
14 too, would have welcomed the involvement of the
15 plaintiffs in the case. And I'm sorry they're not
16 here. I'm concerned that we're losing sight of those
17 voices, and I'm pleased that, frankly, we have written
18 testimony from both CASA and from the Legal Services
19 Managing Attorney for the D.C. Employment Justice
20 Center here to flesh out the record. And they raised
21 some of those points I think that would be raised by
22 the plaintiffs if they were here. And their broad
23 point, to me, as I read their testimony, appears to be
24 that there is a broad effort being made by employers
25 across the country to institute these English-only

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1 policies as a -- and I'm reading now from the written
2 testimony from Kerry O'Brien, the Legal Program Senior
3 Manager for CASA de Maryland, in terms of an anti-
4 immigration policy. And that strikes me as
5 inconsistent with the numbers I just heard from the
6 EEOC, so I would -- in that respect, I would give you
7 back your chair in the hot seat, to explain, if you
8 could, what appears to be two ships passing in the
9 night. We have written testimony from these two
10 groups, and they say this is widespread across the
11 country, from their perspective, at least. And I'm
12 glad their perspective is represented in the record,
13 but I just wanted to hear your thoughts as to your
14 numbers, and their perspective. How do you square
15 that?

16 MR. RUSSELL: Well, Commissioner, what I
17 try to do as a lawyer is to reconcile conflicts. And
18 what I would say to you is what I read in her
19 testimony, and I just read it last night very quickly,
20 she was talking about implementation of policies. And
21 it may be as widespread as she suggests. I'm not
22 saying it's not. What I am referring to are charges
23 of discrimination, where someone who is subject to a
24 policy has had an adverse action, in their view, taken
25 against them, and they have chosen to initiate the

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1 administrative process by filing a charge with the
2 EEOC. There could be ubiquitous policies, and still
3 only be several hundred charges per year.

4 I don't think there's a conflict between
5 what she's saying, and what I'm saying. There could
6 be any number -- people choose to file or not file
7 charges for any number of reasons, so it's not -- I
8 don't want to suggest that her testimony is
9 inaccurate. I do not know. I don't think there's
10 necessarily a conflict between that, and what I'm
11 saying with respect to charges being filed. And I'm
12 sorry if I gave the wrong impression.

13 COMMISSIONER TAYLOR: Not at all. Yes,
14 ma'am?.

15 MS. CHAVEZ: Commissioner Taylor, I would
16 take issue with that allegation, and for those who
17 don't know me well, those who do, are quite aware that
18 I have been very active on the immigration issue, and
19 have been very supportive of changes in immigration
20 law to allow all people to come here legally, as well
21 as to support a path toward legalization for those who
22 are illegally here. So I am not at odds with CASA de
23 Maryland on some of those issues. And I would say
24 that quite to the contrary, that certainly in large
25 sectors, which I am familiar with, because I happen to

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1 sit on some corporate boards that employ large numbers
2 of foreign-born persons, that there is a frustration
3 on the part of many employers that Congress has not
4 moved to, in fact, enact comprehensive immigration
5 reform, because they are desperate for workers, many
6 of whom don't speak English, and many of whom were
7 born outside the United States. So this idea that
8 there is this large scale move, I don't think is
9 accurate. That's not to say that in many communities
10 there are groups that are advocating crackdowns on
11 illegal immigration, and are enacting in many places
12 punitive measures aimed at persons whom they perceive
13 to be here illegally, and the effect of some of those
14 procedures is to discourage employers from hiring
15 people who may be members of certain ethnic groups, or
16 may be foreign-born. But I just don't think that it's
17 accurate to suggest that there is this large-scale
18 move to enact English in the workplace rules in order
19 to drive out non-English-speaking workers. I just
20 don't see any evidence of that.

21 VICE CHAIR THERNSTROM: Yes, Mr. McAlpin.

22 MR. McALPIN: Can I just say a couple of
23 things. One is that it's quite -- it should be
24 apparent to everybody that one of the reasons they
25 were having these problems frequently with language in

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1 the workplace is because of the large-scale
2 immigration that's occurred in the last four years,
3 much of which has been non-English-speaking. So I
4 think that employers are trying to make rational
5 responses to try to deal with the problems that those
6 kinds of conditions create. It's not an immigrant
7 kind of impetus. I mean, employers are in business to
8 make money and survive, and they mostly tend to like
9 their workforce, those are the people they've hired
10 and given employment to.

11 And I just also want to say to the EEOC
12 here that I have attached 21 cases that have been
13 adjudicated on this issue, and they include quotes
14 from court after court, after court, up to the Circuit
15 Court level, that basically say the EEOC's idea that
16 language is closely associated with national origin,
17 it's just wrong. It's flatly wrong. And I'd like to
18 ask the EEOC that if they accept -- if we accept that
19 proposition, why is it that they would - I mean, as
20 far as I'm concerned, if an employer chose to have
21 Spanish as the language of the workplace, that should
22 be their right to do that, because that's the language
23 that they understand, and they need to supervise. Why
24 is that not a national origin discrimination case as
25 far as EEOC is concerned, but if they choose English,

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1 it is?

2 VICE CHAIR THERNSTROM: Mr. Russell, do
3 you want to answer that? Or Commissioner Yaki also
4 has a question, but would you like to answer that?

5 MR. RUSSELL: I said earlier, it goes to
6 the same -- I'm not saying that you wouldn't. I
7 understand that EEOC issued in the late 1970s and
8 1980s a guideline for English-only. They have not --
9 we have not seen fit to issue a later guideline that
10 says and also fill in the blank only, including
11 Spanish-only, Chinese-only, French-only, German-only.
12 But under the Title VII analysis, if you had a
13 disparate impact based on a Spanish-only policy, and
14 there were no business justification for it under the
15 standards that have been enunciated in the statute,
16 and by the courts, then there would be, assuming a
17 charge was filed. But as far as I know -

18 VICE CHAIR THERNSTROM: No charges.

19 MR. RUSSELL: -- there may be charges, but
20 maybe they were meritless.

21 VICE CHAIR THERNSTROM: Yes. But you
22 don't know.

23 MR. RUSSELL: Maybe they were
24 administratively closed. I just don't know the case.

25 MR. McALPIN: We do have a case -- there

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1 have been a number of people, and I have a file on
2 this, who have filed complaints with EEOC, or asked
3 the EEOC where they have been discriminated against
4 because they spoke English alone in the workplace.
5 The EEOC's typical response is to issue them a right
6 to sue letter, and then they go away. They never do
7 an investigation, never follow-up and pursue those
8 cases like they do with complaints against English-on-
9 the-job policies.

10 MR. RUSSELL: Madam Vice Chair, may I
11 speak?

12 VICE CHAIR THERNSTROM: Absolutely. And
13 then Mr. Riordan wants to speak, as well. Go ahead.

14 MR. RUSSELL: EEOC issues right to sue
15 letters in the overwhelming majority of cases. I
16 dispute, absent specific evidence, that we have failed
17 to investigate charges filed by a charging party. The
18 investigators take each charge seriously. They
19 investigate it based on competing priorities under the
20 statutes and the guidelines that EEOC has issued, and
21 in conjunction with discussions with their supervisor,
22 and maybe a regional attorney, decide whether to
23 pursue that investigation forward because they believe
24 there's reasonable cause to believe discrimination
25 occurred, or to issue, in effect, a no-cause finding,

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1 and to allow the person to go have their rights in
2 court. Again, 80 to 90,000 charges a year. If there
3 have been -- let's assume that all 200, which is a
4 slight overstatement of the charges were non-English-
5 only, they were effectively reversed, English-only
6 discrimination cases, that would still be less than
7 about two-tenths of 1 percent of the charge volume.
8 I'm not sure that can reasonably be construed as
9 widespread charges that are being ignored by the EEOC.

10 VICE CHAIR THERNSTROM: Yes. This is
11 extremely useful, of course. Mr. Riordan.

12 MR. RIORDAN: Just a couple of things. I
13 think I was asked to come here to give some insight
14 into how you handle a lawsuit, or when this comes up,
15 how a company deals with it. And, unfortunately, I
16 was in a situation, I had to defend a policy that I
17 had something to do with putting into place.

18 We were asked to counsel the client when
19 these problems arose, and we did the research. And at
20 that time, there was the -- it was a Ninth Circuit
21 case that held that the EEOC guidelines were invalid.
22 Now, we advised the client at that time that that
23 wasn't a final decision, that it wasn't binding in our
24 jurisdiction, and we talked about the practicalities
25 of going forward. I can assure this panel that there

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1 was no global issue that was discussed at that time
2 about anti-immigration or any such thing. We had a
3 very diverse employment group, and it was simply an
4 attempt on management's part to deal with what was
5 perceived to be an extremely serious problem in its
6 workplace.

7 I would agree with Ms. Chavez that there
8 should be a pretty high level of proof, if you will,
9 or burden before management's prerogatives are taken
10 away. And I'm not sure that the current regulations
11 and the enforcement efforts of the EEOC give enough
12 weight to that.

13 The other thing is from a litigation
14 standpoint, I think the burden of proof that is now
15 shifted to the employer proving a business necessity
16 is something that gives the EEOC too heavy a hammer in
17 its enforcement.

18 In fact, I'm surprised. Our client was
19 sued by the EEOC. This was not an individual case, so
20 we were one of one or two a year where the EEOC came
21 after my client for having this policy. In
22 retrospect, I know we were chagrined a couple of times
23 that the EEOC put out press releases about our case,
24 and the press releases may not have been exactly what
25 the EEOC had told the press, but they were factually

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1 incorrect in a number of respects.

2 And in a second, for example, when the
3 motion to dismiss was denied, which was basically just
4 saying the EEOC had drafted a complaint that satisfied
5 the minimum pleading requirements, and that this
6 District Court Judge held that the EEOC standards were
7 valid, the complaint or the case could go forward, the
8 EEOC put out a press release, I don't know exactly
9 what it was to be honest with you, but the press
10 report of that motion to dismiss resolution was, in
11 effect, saying that the EEOC won, and that our client
12 had been shown to have been discriminating by English-
13 only policy.

14 So I think I agree that each case is very,
15 very fact intensive, but I think the burdens that
16 these regulations put on employers to prove their
17 case, rather than having the EEOC prove that there was
18 no business necessity is an unfair burden.

19 VICE CHAIR THERNSTROM: I want to turn to
20 Commissioner Yaki.

21 COMMISSIONER YAKI: Thank you very much,
22 Madam Chair.

23 My concern about this briefing hasn't gone
24 away. I want to say that I appreciate, and thank all
25 of you for coming here, and giving us your insight.

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1 But I think that what, to me, becomes more and more
2 clear is that there's a severe deficiency in this
3 briefing. And I guess to go on to the metaphor
4 started by my colleague, Commissioner Gaziano, we may
5 be making mountains out of molehills, and not seeing
6 the real mountains of issues that we really need to
7 take a look at. And I think that it bears stressing
8 about the small percentage that these claims comprise
9 of the entire EEOC docket, how many of them actually
10 do get dismissed, how many of them actually go to a
11 full suit.

12 Now, does that diminish anything that Mr.
13 Kidman has to say? Of course not. And we're not here
14 to pass judgment or way or another. Certainly, his
15 story is very compelling, but as Commissioner Melendez
16 said, there are always two sides to the story.
17 Nevertheless, certainly, I think people can sympathize
18 with some of the issues faced by Mr. Kidman.

19 But the concern I have is that it's one
20 thing -- and maybe we sort of danced around it, but
21 it's clear, at least from what I understand, is that
22 the vast majority, if not, indeed, the overwhelming
23 majority of cases that are brought forward, or that
24 are filed deal with Spanish-speaking claimants, number
25 one.

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1 Number two, that when we deal with this
2 issue, we haven't really certainly dug around to see
3 sort of is -- I asked off-line, Mr. Russell, if
4 there's any correlation between where these claims
5 come from and geography, just for my own curiosity.
6 The reason I ask these questions is because - and this
7 is something where I'm very sympathetic with what Ms.
8 Chavez has said - and that is, how this issue gets
9 conflated with the whole anti-immigrant, I don't want
10 to say movement, but mood that some -- movement, or
11 activities, or organizations that are conducted around
12 this country. And we look at Arizona, Texas, and
13 other parts -- well, two young Latino men were jumped
14 and beaten rather severely in New York just over the
15 past, I think last month, by folks who identified
16 themselves with an anti-immigrant type of group.

17 And here we are talking about an issue
18 that at least so far, unless we have better materials
19 in which to deal with, I'm afraid that we are
20 statistically incompetent to propound upon after this
21 type of briefing, because we don't know, we really
22 don't know what we really do need to look at in terms
23 of what these cases really mean, how they really
24 impact employers.

25 I mean, for me, one question I have is,

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1 maybe the number of cases is actually too low. And
2 why is it too low? Is it because employers are
3 intimidating low-wage Spanish-speaking workers who are
4 in those sort of jobs. You just don't know these
5 kinds of things. I'm not going to say that as
6 happening, but I will say that it is something that
7 certainly should be part of any analysis that goes on
8 into the input of what we come out here to take a look
9 at, because we have one or two outputs here with Mr.
10 Kidman and Mr. Riordan, but we don't have as many --
11 much knowledge on the input side about what's coming
12 in, why is it coming in, what's not coming in. And
13 maybe in the case of CASA and EJC, they have more
14 specific knowledge of people who are afraid to come
15 forward and avail themselves of the system because of
16 worries about their immigrant status, or the immigrant
17 status of their families, what have you.

18 So I just want to say that I appreciate
19 everything that you have said, certainly everything
20 that you say, you speak to from your own experience,
21 and we can't argue with that. But there are other
22 measures out there with regard to this type of a
23 briefing that really need to come to the floor in
24 order for us to have any real competence to opine,
25 find facts, and find principles upon which to go

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1 further on.

2 And that goes back to my initial point,
3 which is we need to do something. We need to change
4 something, and I don't know what it is, to bring
5 people into the Commission who, for reasons that I
6 don't know, and I'm not going to speculate, are no
7 longer coming in to talk about these issues. Because,
8 normally, this is a kind of thing that you would
9 expect groups like MALDF and others to come forward
10 and talk about, because they have a lot of experience
11 on this, as well.

12 That's really all I have to say, and I
13 have to say, I apologize, but I have a meeting back on
14 the west coast I have to go to, so I have to leave.

15 VICE CHAIR THERNSTROM: Hold on one
16 second. Let me just ask you a question. Is it my
17 correct understanding that you -- two things. One is
18 that you've asked for a great deal of case data from
19 the -- are you going to get -- your very legitimate
20 request, are we going to get some of the information
21 that you would like to see? And the second thing is,
22 Commissioner Yaki, I mean, I don't think I am less
23 concerned than you are with a balance on these panels.

24 COMMISSIONER YAKI: I didn't imply -

25 VICE CHAIR THERNSTROM: I know you didn't,

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1 but I think we need some help from you on this,
2 because this is -- I agree, this is awful not to have
3 the people -- not to have a really balanced group, and
4 not to have had the people who we expect would show
5 up.

6 COMMISSIONER YAKI: Madam Chair, I would
7 say that we should devote the rest of the time with
8 these folks. That's a conversation we should have.
9 But I just wanted to say, unfortunately, because I
10 have to catch an earlier flight than I normally would,
11 because I have a business meeting back on the west
12 coast, I would ask that if we can have this
13 discussion, we have it at the next meeting, not -

14 VICE CHAIR THERNSTROM: Not this
15 afternoon. Okay. That's fine with me, if the other
16 Commissioners would go along. Just on the first
17 question, are we at your request -- is it your
18 understanding that we are going to get some data that
19 would be helpful?

20 COMMISSIONER GAZIANO: I think we've
21 already asked the Commission. The Commission has
22 already given us some data, and they're going to give
23 us more. Is that not correct?

24 STAFF DIRECTOR DANNENFELSER: We have
25 gotten some data, and I believe that Mr. Russell is

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1 going to try to have some additional data. Is that -

2 MR. RUSSELL: Well, I don't know where you
3 are in terms of the paper flowing through your system
4 to get to you. I know that I sent you a statement,
5 and the statement has a little data.

6 VICE CHAIR THERNSTROM: Right. But are we
7 expecting more?

8 MR. RUSSELL: I sent you some statistical
9 data a few days later.

10 COMMISSIONER YAKI: I would say that there
11 are a couple of questions that we asked about with
12 regard to the number of claims filed, how many were
13 dismissed, sustained, what have you. But, again,
14 there's some questions for which they simply will not
15 be able to answer, which goes to my point of what's
16 not going into the system, and why is it not? You can
17 answer what percentage of these are in terms of the
18 total claims that EEOC receives. We can go into that
19 kind of percentage breakdown. And if you could do
20 that, that would be great, but I am concerned as much
21 about maybe why and where are these complaints coming
22 from, as well as what complaints may or may not
23 actually be coming in. And those can only be answered
24 by people who work with a lot of these organizations,
25 or individuals who may be concerned that filing a

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1 complaint would lead to retaliation, things like that
2 that we can't speculate on. And I would be loathe to
3 speculate, is or is not actually occurring.

4 VICE CHAIR THERNSTROM: Well, there is
5 precedent, plenty of precedent for having additional
6 material inserted into the record. And I would
7 certainly welcome that from you.

8 COMMISSIONER YAKI: I will ask. But,
9 again, the -- I will ask that of groups that, like I
10 said, have not been here as much as they used to. So
11 I do not know if they will be as responsive, for
12 whatever reason. I mean, that's sort of the conundrum
13 that we're in, that we need to discuss off-line,
14 rather than take away time from these people who have
15 taken their time and energy to appear here.

16 VICE CHAIR THERNSTROM: All right. Well,
17 I'm very sorry you're not going to be -

18 COMMISSIONER YAKI: I really -- I actually
19 believe I actually ate at your place.

20 MR. KIDMAN: I hope it was pleasurable.

21 COMMISSIONER YAKI: Oh, it was very good.
22 I did -- well, I'll tell about it later, but I'm
23 pretty sure when you mentioned bacon chili
24 cheeseburger, I was like, yes. And I remember
25 thinking I didn't want to go -- I was in Page. I

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1 didn't want to go one of the chains. I deliberately
2 wanted to find something that -

3 MR. KIDMAN: We're the only other ones,
4 yes.

5 COMMISSIONER YAKI: So is the -- what does
6 the D stand for?

7 MR. KIDMAN: It was a former partner.

8 COMMISSIONER YAKI: Okay.

9 MR. KIDMAN: His name was Dean, Richard
10 and Dean.

11 COMMISSIONER YAKI: Got it.

12 VICE CHAIR THERNSTROM: Well, I'm very
13 sorry you're not going to be here for the business
14 meeting, as I said.

15 COMMISSIONER GAZIANO: Madam Chair?

16 VICE CHAIR THERNSTROM: Yes.

17 COMMISSIONER GAZIANO: Do we have time for
18 me to ask another question, or do we need to dismiss
19 the panel?

20 **ADJOURN**

21 VICE CHAIR THERNSTROM: I think we need to
22 dismiss the panel, because we've got a peculiar -- and
23 thank the panelists very much. We've got a peculiar
24 schedule, in which we need to accommodate the Chair.
25 We need to have a very partial business meeting, a

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1 personnel matter, and then we're going to stand for
2 lunch, and then we're going to come back for our
3 regular meeting.

4 So let's take a five-minute break, and
5 please, Commissioners, please come back.

6 (Whereupon, the above-entitled matter went
7 off the record at 12:03 p.m.)

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