The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 1:30 p.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman
ROBERTA ACHTENBERG, Commissioner
TODD GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
DAVID KLANDNEY, Commissioner
MICHAEL YAKI, Commissioner (via telephone)

VANESSA EISEMANN, Parliamentarian (via telephone)
STAFF PRESENT:

TERESA BROOKS

MARGARET BUTLER, Acting Director, OCRE

PAMELA DUNSTON, Chief, ASCD

YASMIN ELHADY

ALFREDA GREENE

JENNIFER CRON HEPLER, Solicitor

TINALOUISE MARTIN, Director, OM

DAVID MUSSATT, Acting Director, RPCU (via telephone)

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

EILEEN RUDERT

MICHELE YORKMAN

JOHN RATCLIFFE, Chief, BFD

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTON

ALEC DEULL

JOHN MARTIN

CARISSA MULDER

ALISON SOMIN

MARLENE SALLO
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(1:38 p.m.)

CHAIRMAN CASTRO: Calling the meeting to order. This is a meeting of the U.S. Commission on Civil Rights. It is November 9th, 2012 at the hour of 1:38 p.m. This meeting is taking place at the Commission's headquarters located at 1331 Pennsylvania Avenue, N.W., in Washington, D.C.

I'm Chairman Marty Castro. Commissioners who are present with me are myself, Commissioner Kirsanow, Commissioner Heriot, Commissioner Gaziano, Commissioner Achtenberg, Commissioner Kladney, Commissioner Yaki is joining us by telephone. We also have Vanessa Eisemann who's on the phone who will be presenting a little later, so in terms of the Commissioners we have a quorum present. Is the court reporter present?

COURT REPORTER: Yes.

CHAIRMAN CASTRO: Yes, okay. So, the meeting shall now come to order. The first item is the Approval of the Agenda.

I. APPROVAL OF AGENDA

CHAIRMAN CASTRO: I move that we approve the agenda. Is there a second?

COMMISSIONER ACHTENBERG: Second.
CHAIRMAN CASTRO: Okay. That was a second from Commissioner Achtenberg. Are there any amendments?

(No response.)

CHAIRMAN CASTRO: So, we need to amend the agenda to anything?

COMMISSIONER GAZIANO: Are we going to take up the Texas SAC? I don't think that was circulated.

CHAIRMAN CASTRO: I don't think so.

COMMISSIONER HERIOT: I don't think we need to amend the agenda to not do something.

CHAIRMAN CASTRO: Yes, so we don't need an amendment then. Okay. Do we? Excuse me.

COMMISSIONER ACHTENBERG: It's listed but we're not going to bring it up.

CHAIRMAN CASTRO: Okay. That's fine. So, let's then move to approve the agenda. All those in favor say aye.

(Chorus of ayes.)

CHAIRMAN CASTRO: Any opposed? Any abstentions? Okay, the motion passes.

So, the first item up is the Program Planning Update.

II. PROGRAM PLANNING UPDATE

CHAIRMAN CASTRO: We're going to be
discussing the approval of a Discovery Plan for the 2013 Statutory Enforcement Report. I hope everyone has had a chance to review that. Vanessa disseminated it by email I believe yesterday, so do any Commissioners have questions or comments on the Discovery Plan for the Enforcement Report? I'm sorry, Commissioner Gaziano.

COMMISSIONER GAZIANO: Yes, I do. First, I want to thank Vanessa in two regards, first of all, for reaching out to Commissioners and for calling in on a day off. I had one or two minor suggestions. Again, thank you for already incorporating some of my thoughts.

(Off the record comments.)

The first is that --

CHAIRMAN CASTRO: Commissioner Yaki, you might want to mute your phone. We're hearing your other conversation.

COMMISSIONER YAKI: Huh?

CHAIRMAN CASTRO: You might want to mute your phone.

(Off the record comments.)

CHAIRMAN CASTRO: Commissioner Yaki, we're hearing your conversation. You might want to mute your other phone.
COMMISSIONER GAZIANO: Anyway, back to --
first of all, I also want to thank you for including
the draft interrogatories --

(Off the record comments.)

COMMISSIONER GAZIANO: And just for maybe
others on our staff. Normally, we adopt a Discovery
Plan and then we're shown the actual draft discovery.

(Off the record comments.)

COMMISSIONER GAZIANO: I'll try to speak
over, but it makes sense in this case that you did
both at once.

Now, with regard to the interrogatories,
one suggestion that I want to make that doesn't
require much discussion, and then the second might
invite just a little bit of discussion, is that in the
-- I'm trying to turn to the right page of the
interrogatories, you have what kind of looks like a
standard instruction if it were civil discovery. I
think here I've turned to it. It's C, and it said, "If
DOD should state the basis for any objection to
answering any discovery request. In the event that DOD
objects to only part of the discovery request, DOD is
required to furnish the other information." Again,
that sort of follows the civil litigation -- there
should be no objections. There aren't at least the
same objection -- there can't be the same objections to our request as in civil discovery. We are allowed to ask for things that might not even lead to the discovery of admissible evidence, so what I would suggest is that you substitute the sentence from our organic statute that requires all federal agencies to cooperate fully, to comply fully with the Commission's requests, but that we are eager to talk to any agency that receives our discovery request to resolve any issues, come to any compromises.

I also think that this doesn't -- the next thing I'm going to suggest doesn't necessarily need to be in the discovery itself in a cover letter, and maybe it probably is standard from the Office of General Counsel, but to ask for someone, since the Statutory Report time line is tight at this point, to ask someone to contact you immediately so that you could begin coordination with DOD. These requests seem to require responses from different people. You want probably a contact person. If that contact person doesn't call you back as requested, or contact you as requested, I would suggest you be very proactive in reaching out, and not wait for 30 days, or whatever to make sure that it's landed in the right office.

My more general suggestion, and you or
anyone else can respond to both, is that I worry -- as wonderfully exhaustive you were, worry that maybe this is just a bit too exhaustive. And my only concern there -- well, I suppose I have two-fold. One is, can we really make use of everything that we're requesting if we get it all. If we don't, then that's unfortunate. And, secondly, whether it might give the Department inadvertently, consciously, whatever a -- excuse is the wrong word because maybe that sounds like it's intentional, that they'll respond to certain things and not others which are more important. So, I think that some of our requests are more important than others, and some individual questions even require a great deal of discovery, but overall I applaud the thoroughness. I'm just raising the question whether it may be just a teeny bit too much.

CHAIRMAN CASTRO: Do you want to answer that Ms. Eisemann?

MS. EISEMANN: Yes. Would you like me to --

CHAIRMAN CASTRO: Wait, hold on a second.

Commissioner Kladney.

COMMISSIONER KLANDNEY: So, what would you take out, Commissioner?

COMMISSIONER GAZIANO: I mean, I have some thoughts but I don't necessarily -- I'm more raising a
question than necessarily feel strongly about it. If you think that we can really handle all the material and analyze all the material, and make use of it, and that it won't give the Department of Defense some argument about not complying with that which is the most important, then I'll defer.

COMMISSIONER KLADNEY: Well, I just think that if our staff interacts with them, they can define really what's necessary. I understand that there's one major database that I was asking about that's going to be provided, and it apparently includes most of the information that we need. Isn't that correct, Ms. Eisemann?

MS. EISEMANN: If the DOD does provide the database that they say that they have, we know that they at least have in part because their annual reports provide some of the information on a limited basis, then that would answer many of the statistical questions. I've heard different things from different people about whether this database is fully functioning, fully operational, whether it even has all the information prior years, so I don't have a firm definitive idea of all that is in it.

The DOD was supposed to by statute have gotten this database up and running a year ago, but as
of a year ago it wasn't fully functioning yet. It should be now, and if it is, then it should have all the statistical information that we're seeking with the exception of certain things, for example, I have an outstanding question to the Deputy Director of the SAPARO, the Sexual Assault Prevention and Response Office about whether they keep that data. It's not provided in the reports, but they may keep it anyway. I noted in the interrogatories items -- I'm sorry, actually in the Discovery Plan, I noted the items that I don't know for sure whether they keep it. If they don't keep the data, then they don't keep it, and there's nothing we can do about that. But most of it, I know that they do in some format.

COMMISSIONER KLADNEY: Commissioner Gaziano, the only reason I'm familiar with that is when we got the interrogatories, I went through and I wrote this whole elaborate interrogatory scheme of years from so and so to so and so, years from so and so to so and so, years from so and so, and then I was told most of it is in this database, so hopefully we get that.

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: I'm afraid I have more fundamental differences with the Discovery Plan.
We have a tendency when we do these enforcement reports to basically ask for a giant document but never really think clearly about what question that's actually in dispute that we're trying to resolve. And it seems to me that the fundamental issue where you're getting disagreement these days is that some people on the inside are arguing that the military has overreacted to this issue, and are therefore sometimes prosecuting people or acting on things that are not as significant as they should be for the reaction that they're getting, while others are arguing that the military continues to not give sufficient attention to this area.

They might both be right, and maybe neither of them are right, but what we should be trying to accomplish here is to at least bring some new evidence that bears on that question. It seems to me that this plan is not designed to really address that issue, and yet I think that's the fundamental issue before us.

I think we need something that will allow us to say look, we're doing more than just going to the military and asking for all of the stuff they've got in their file on this issue already, because that's already basically -- that's already there.
We're not adding to the sum total of human knowledge on this if we simply ask them to dump on us all the information as they already keep it.

It's not clear to me what question we're trying to answer. It's not clear to me how we think we're adding something to what's already known on this issue.

The military gets hauled before Congress, you know, often on this issue. They come, I'm sure, armed with lots of information, and they will give us lots of information. But to what degree is it different than the information that they've already supplied to Congress, or were prepared to supply to Congress. It just seems to me we're missing the fundamental issue here. I am not wedded to any particular way of addressing that, but I do want to see some effort to address it, and I don't see it here.

CHAIRMAN CASTRO: Commissioner Kladney, do you want to respond?

COMMISSIONER KLADENY: I would say that actually getting this information would be important, because it's actually looking into the information and seeing the difference in ranks, how they're treated, whether -- I mean, the question I still have is
whether those convicted of sexual assault in the military go on the sexual offender list. I actually understand that's not -- that there's no requirement that they do that. Sometimes officers are imprisoned.

The definition of sexual assault in the military is very broad, sexual crimes, and I think that this type of discussion will -- and this type of information will be able to be looked at in a different way.

I mean, if we look at it from those points of view among many others that the information is contained that we'll actually be able to discern a lot more things than just Congress. I mean --

COMMISSIONER HERIOT: Well, there are many people who are suggesting that the military overreacts sometimes to these issues. To what extent do you see this Discovery Plan as helping to answer that question?

COMMISSIONER KLANDNEY: Well, I think the -- it's not the Discovery Plan itself. I mean, we get information from discovery, and like in any kind of litigation then you go through it and discern what it says and what it doesn't say. I mean, the Discovery Plan itself doesn't draw a conclusion --

COMMISSIONER HERIOT: What would you envision that could answer that question the way
you've asked for information here? I mean, you don't want to conduct just a general fishing expedition on anything related to sexual assault. What -- how have you tried to address that question about whether the military may have at least in some instances overreacted?

CHAIRMAN CASTRO: Commissioner Kladney, might not some of the witnesses we invite be able to answer those questions?

COMMISSIONER KLADNEY: Well, I mean, hopefully yes. Hopefully, that's what your witnesses will do. I mean we're supposed to --

COMMISSIONER HERIOT: How could witnesses do anything other than just --

COMMISSIONER KLADNEY: Can I finish my statement? Commissioner, is it all right if I finish?

COMMISSIONER HERIOT: Well, if you answer, yes.

COMMISSIONER KLADNEY: I couldn't get two words out. We're going to invite witnesses from a varied and assorted background. We want JAGs who have prosecuted cases, JAGs who have defended cases. We'd like the approach as to whether it would be overburdensome at this point, whether they're looking at everything, whether they're prosecuting everything, or
how the system works. I don't know how the JAG system works. I've never been a JAG. I've never been in the military, the JAG Corps. I was only a soldier.

CHAIRMAN CASTRO: Well, I don't know if we have an impasse here or maybe we can move forward on a motion?

COMMISSIONER GAZIANO: Let me ask one other quick question that Commissioner Kladney two statements ago raised. I didn't see a definition at least in the interrogatories for sexual assault. There was one in the Concept Paper that I know was from the DOD, but I'm not sure it's from the UCMJ. And I would at least -- I don't know what the right definition is, but I would like to say unless otherwise indicated when use the term sexual assault, we mean X. And I would prefer it to be a term that's -- and this is where I haven't spent enough time, but I would think one from the UCMJ, even if it is broader than in the civilian context to be used so that at some later date we can at least be trying to compare apples to apples. Sexual harassment is somewhat different, and might be a different military crime, but --

MS. EISEMANN: Can I just ask for clarification?

CHAIRMAN CASTRO: Yes, go ahead.
MS. EISEMANN: In the instructions, Instruction C, the term sexual harass -- I'm sorry, the term sexual assault is -- it says means as define in the Uniform Code of Military Justice.

COMMISSIONER GAZIANO: I'm sorry, where is that?

MS. EISEMANN: And that is a very -- well, initially it's broken down into many levels from groping to rape and forcible sodomy. But what I've tried to do is within the interrogatories, or if it's produced in the database that would be preferable, break it down into each of those types of sexual assault. But I just wanted to be clear about what you have in mind, if that's not the definition that you think we should be using for purposes of the interrogatories.

COMMISSIONER GAZIANO: As long as you've defined it, you've partially answered. I don't know that I have the right -- I had a different version, I think, of the interrogatories, and I didn't see that definition.

COMMISSIONER KLADEY: So, may I make a motion to approve this Discovery Plan?

CHAIRMAN CASTRO: We have a motion from Commissioner Kladney. Is there a second?
COMMISSIONER ACHTENBERG: Second.

CHAIRMAN CASTRO: A second from Commissioner Achtenberg. Any additional discussion?

COMMISSIONER GAZIANO: I do want to at least -- maybe it doesn't go to the interrogatories, or it's exclusively the interrogatories. I want to support the kind of inquiry though that Commissioner Heriot spoke about, and I'd like our staff to pursue that. And I pass this on through my special assistant, as well. There is a question added about comparisons that DOD may have, and I know that they're imperfect, where we're asking for DOD to produce them.

But I hope through both our own research and our own witnesses, and probably it's more important to do so through experts, we really drill down on experts who can -- even if we're not going to get new data. Maybe our data analysis will produce something that is unique.

But beyond that, I am particularly interested in being able to say whether the rate of sexual assaults, whether increasing, decreasing is especially problematic compared to whatever the relevant populations. And the truth is, of course, there is no other population that's exactly like the U.S. military, whether foreign militaries, whether
college campuses are arguably analogous or not, I'd like at least a fair amount of attention.

CHAIRMAN CASTRO: Thanks. So, we'll call the question. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: No.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: No.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Let me pass.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KladNEY: Yes.

CHAIRMAN CASTRO: And I vote yes, so we have one, two, three, four yeses, two nos, and a pass.

COMMISSIONER GAZIANO: I'll --

CHAIRMAN CASTRO: Oh, come on, join the dark side, vote yes.
COMMISSIONER GAZIANO: I'll say yes with again the understanding that both Commissioners and staff will work to make this as meaningful an investigation as possible. And with that, I'd like as regular and thorough reports as we are -- we only have a couple of months before January. Maybe we shouldn't wait until -- I don't think we should probably wait until the next meeting to get some sort of update on what the DOD is likely to give us.

CHAIRMAN CASTRO: Fair enough. Okay, thank you. We're now moving on to the State Advisory Committee issues.

III. APPROVAL OF STATE ADVISORY COMMITTEE SLATES

CHAIRMAN CASTRO: We have two things up, the agenda for approving the Massachusetts slate, and then also the appointment of a new chair for Nebraska. So, the first item is the Massachusetts State Advisory Committee. I move that the Commission recharter the Massachusetts State Advisory Committee under this motion. Actually, let me hold off here for a second.

Did the Subcommittee address the Unified Charter issue yet?
COMMISSIONER ACHTENBERG: No.

CHAIRMAN CASTRO: Okay. Then we'll just move forward on this. The first item, as I said, the approval of the Massachusetts Advisory Committee, so moving that the Commission recharter the Massachusetts State Advisory Committee. Under this motion, the Commission appoints the following individuals to that committee based upon the recommendations of our SAC Subcommittee; David J. Harris, Karen M. Blum, Gregory D. Cote, Martha F. Davis, Charles L. Glenn, Wendy Kaminer, Ronald G. Marlow, Eva M. Millona, Allison W. Phinney, III, Elbert L. Robertson, John S. Sivolella, Siobhan M. Sweeney, Greer T. Swiston.

Pursuant to this motion, the Commission appoints Mr. David J. Harris as Chair of this rechartered Massachusetts State Advisory Committee. These members will serve as uncompensated government employees. Under this motion, the Commission authorizes the SAC Subcommittee to execute the appropriate paperwork for the appointment. Is there a second?

COMMISSIONER ACHTENBERG: Second.

CHAIRMAN CASTRO: Second. Any discussion? Hearing none, I'll call the question. Commissioner Kirsanow, how do you vote
COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADNEY: I abstain.

CHAIRMAN CASTRO: Abstain, okay. And I vote yes, so it passes.

The next item is the Interim Nebraska SAC Chair. I move that the Commission approve the appointment of Dr. Edmund T. Hamann as Interim Chair of the Nebraska State Advisory Committee based upon the recommendation of our SAC Subcommittee. This member will serve as an uncompensated government employee. Under this motion, the Commission also
authorizes the SAC Subcommittee to execute the appropriate paperwork for the appointment. Is there a second?

COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: Okay, any discussion?

COMMISSIONER HERIOT: Could I just make a comment?

CHAIRMAN CASTRO: Sure.

COMMISSIONER HERIOT: My understanding is that the SAC itself took a vote on this, and I just want to establish that it is not the SAC that elects its own chairman, it is the Commission that appoints Chairmen, and that we have to make sure that everyone understands that. That said, this guy is fine.


COMMISSIONER GAZIANO: Maybe this is a question to the SAC Chair that I should have addressed prior to this morning, but it wasn't until I focused on it last night. I voted against the slate because I thought it was very ideologically unbalanced.

CHAIRMAN CASTRO: Is this the Nebraska slate?

COMMISSIONER GAZIANO: Yes, the Nebraska slate.
CHAIRMAN CASTRO: Okay.

COMMISSIONER GAZIANO: There were a couple of people who identified themselves as Republican, but in almost every case but the previous Chairman, I saw no indication that they were Conservative, or Libertarian. Maybe one or two of them were, but it was a very unbalanced slate for Nebraska. And I voted against it, notwithstanding the only member of the State Advisory Committee who seemed to be somewhat Conservative was the Chair. So, in replacing an unbalanced slate this becomes more ideologically imbalanced, so I'm a little uncomfortable in making it more so. With that -- but I do want to say for the record I think that the person nominated to be Chair looks fully qualified and to be a fine individual. I would have just preferred maybe to review the slate and add three or four, six or ten, whatever --

COMMISSIONER HERIOT: Given that it's a two-year charter --

COMMISSIONER GAZIANO: We'll get the chance.

COMMISSIONER HERIOT: Yes, it will come soon.

COMMISSIONER GAZIANO: Okay.

CHAIRMAN CASTRO: So, shall we take a vote?
Okay. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Okay. Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: I'm sorry, on approving the Nebraska Interim Chair?

CHAIRMAN CASTRO: That's correct.

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Okay. Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADENEY: Abstain.

CHAIRMAN CASTRO: Abstain, okay. And I vote yes, so the motion passes. And let me just say that despite the news accounts there is bipartisanship here in Washington, at least here at the Civil Rights Commission, so thank you all.
IV. ADJOURN MEETING

CHAIRMAN CASTRO: Now, I move to adjourn.

Is there a second?

COMMISSIONER KLADNEY: You got it.

CHAIRMAN CASTRO: All right. Thank you.

COMMISSIONER YAKI: Mr. Chair?

CHAIRMAN CASTRO: Yes, Commissioner Yaki.

COMMISSIONER YAKI: Yes, I just want to say, again, I'm sorry I couldn't be there today, but I just wanted to put out there that at some point I want to bring up an issue that we had started, I thought came out rather starkly in this last election, and it's one where I'd like to at some point for us to think about investigating and talking about the idea of whether or not elections involving the Presidents, and perhaps maybe all federal elections should be -- the mechanisms of it should be federalized and not left to the whims of state and local authorities given the kinds of problems that were had with early voting, issues of voter purges, et cetera.

I'm currently convinced that having a single federal standard with monitoring oversight or something along those lines may be one way to prevent the kinds of political shenanigans that go on on both sides, on both Democrat and Republican sides, when it
comes to partisan appointed local elected officials. I just want to put that out there. I think it's a non-partisan way to look at elections, and one where the Civil Rights Commission is uniquely qualified to take a look at.

CHAIRMAN CASTRO: Thank you, Commissioner. All right, we're adjourned. Thank you.

(Whereupon, the proceedings went off the record at 2:08 p.m.)