The Commission convened via teleconference at 2:00 p.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
JENNIFER C. BRACERAS, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
MICHAEL YAKI, Commissioner
KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

CHRISTOPHER BYRNES, Attorney Advisor to the Office of the Staff Director
DEBRA CARR, ESQ., Associate Deputy Staff Director
PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
SOCK FOON MacDOUGALL
TINALOUISSE MARTIN, Director for Management
EMMA MONROIG, Solicitor/Parliamentarian
AONGAS ST. HILAIRE
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS
LISA NEUDER
KIMBERLY SCHULD
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CHAIRMAN REYNOLDS: Okay, let's start. This is Chairman Reynolds. We are having a telephonic meeting with all Commissioners participating from different locations. I will call the name of each Commission in order to determine if there is a quorum to hold a meeting.

Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: I'm here.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: Here.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Here.

CHAIRMAN REYNOLDS: Mr. Melendez?

COMMISSIONER MELENDEZ: Here.

CHAIRMAN REYNOLDS: Mr. Yaki?

(No response.)

CHAIRMAN REYNOLDS: Commissioner Taylor?

(No response.)

CHAIRMAN REYNOLDS: Is the Staff Director present?

MR. MARCUS: Yes, Mr. Chairman.

CHAIRMAN REYNOLDS: Is the Court Reporter on the line?
COURT REPORTER: Yes, Chairman.

CHAIRMAN REYNOLDS: Okay. Whenever a Commissioner wants to make a statement, I would ask that you please identify yourself first by name so that the transcriber can know who is talking. Also, please let's not speak at one time so that we can have a clear transcript.

Whenever it is necessary to take a vote, the following procedures will be followed. I will call out the name of each Commissioner. The Commissioner should then answer yes, no, or abstain. After the vote is concluded, I will read out each of you -- I will read out how each of you has voted in order to determine what the tally is.

I. Approval of Agenda

CHAIRMAN REYNOLDS: Okay, may I have a motion to approve the agenda?

VICE CHAIRMAN THERNSTROM: So moved.

CHAIRMAN REYNOLDS: Second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: Okay. Let's vote. All in favor, please vote in the affirmative -- oh, no. I'm sorry. Vice Chair Thernstrom, how do you vote?
VICE CHAIRMAN THERNSTROM: Mr. Chairman, I believe this will probably be unanimous and that we could just do an aye on this. We're just approving the agenda.

CHAIRMAN REYNOLDS: Well, I understand that. But --

VICE CHAIRMAN THERNSTROM: Okay. Aye.

CHAIRMAN REYNOLDS: Okay, Commissioner Braceras?

COMMISSIONER BRACERAS: Aye.

CHAIRMAN REYNOLDS: Mr. Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Okay. And let the record reflect that I, Chairman Reynolds, voted in favor of the agenda as proposed.

COMMISSIONER MELENDEZ: Melendez, aye.

CHAIRMAN REYNOLDS: Oh, I'm sorry. Okay. Okay.

II. Approval of Findings and Recommendations of the Campus Anti-Semitism Briefing

CHAIRMAN REYNOLDS: We have a motion to approve the findings and recommendations of the Campus Anti-Semitism Briefing, which was held in November 2005. It has been pending since the December meeting. The original findings and recommendation, which I will
refer to during the call as the December version, were circulated to call Commissioners in advance of the December meeting.

These findings and recommendations were made available on an expedited basis in December due to pending legislation. These findings and recommendations have been tabled since the December meeting.

In February of `06, a revised set of findings and recommendations, which I will refer to as the February version, was distributed together with a red-line version showing the differences between the original and the new version.

At the March 2006 meeting, Commissioner Braceras submitted a third version, which I will refer to as the Braceras version.

May I have a -- interesting -- may I have a motion to approve the Campus Anti-Semitism Findings and Recommendations? Let's start -- let's assume that we are talking about the February version. And that way we can get the conversation rolling.

VICE CHAIRMAN THERNSTROM: I would -- I think, Mr. Chairman, there may be more support for the Braceras version. And I would rather start with that.

CHAIRMAN REYNOLDS: Well, I don't know
what the support is at this point. So let's--

COMMISSIONER BRACERAS: I'd like to start
with the Braceras version as well.

COMMISSIONER YAKI: Hello.

CHAIRMAN REYNOLDS: Okay. Well, what I
want to do at this point is just start the discussion.

VICE CHAIRMAN THERNSTROM: All right. So
we can start arbitrarily any place. Why don't we
start with the Braceras version.

MR. MARCUS: Mr. Chairman, this is the
Staff Director speaking. I understand from the
operator that Commissioner Yaki may have joined us
now. But that Commissioner Taylor will be unavailable
to join us.

CHAIRMAN REYNOLDS: Commissioner Yaki,
hello? Have you joined us?

COMMISSIONER YAKI: Yes, I have.

CHAIRMAN REYNOLDS: Great.

COMMISSIONER YAKI: My life is complete.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: Well, that's
more than any of the rest of us can say about any
aspect of our life.

CHAIRMAN REYNOLDS: Okay. I'm going to
stick with the original -- my original recommendation.
Again, it is arbitrary. This will get the conversation going. And we can vote on it up or down and then if it doesn't have support, we can move on to the Braceras version or even the December version.

Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER BRACERAS: This is Braceras.

VICE CHAIRMAN THERNSTROM: No, this not the Braceras version.

COMMISSIONER BRACERAS: No, no, I'm identifying myself for the record before I speak.

I guess I would start by saying that I was essentially on Board to support the original version which, I guess, is being called the December version, correct?

CHAIRMAN REYNOLDS: That's correct.

COMMISSIONER BRACERAS: And didn't like some of the changes that were made by the Chair in the February version but also understood some of his concerns. And so the reason I put together the third version, the Braceras version, was an attempt to do two things. Number one, just clean up some of the language. And number two, to try to create a compromise document that would address some of the
concerns that I believe the Chair had.

That being said, I'm not even happier with the third version than I was with the original version just because of the way the events unfolded. I think that deals with the facts on the ground, as they are right now.

So I intend to vote against all versions but this one, I suppose. All versions but the Braceras version.

CHAIRMAN REYNOLDS: Okay. Anyone else?

VICE CHAIRMAN THERNSTROM: I also -- this is Commissioner Thernstrom -- I also think that there is a -- that the Braceras version answers the concerns of the Chair as well as being just, you know, cleaner.

And I will support only that version.

CHAIRMAN REYNOLDS: Okay. Vice Chair Thernstrom, why do you think that it addresses my concerns?

VICE CHAIRMAN THERNSTROM: Well --

COMMISSIONER BRACERAS: Well, you know, can I speak to that --

CHAIRMAN REYNOLDS: Sure.

COMMISSIONER BRACERAS: -- since I was the one who crafted it. As I recall from our earlier discussion, the chair was concerned as to whether or
not we were accurately describing the position of the
Office for Civil Rights at the Department of
Education.

And there has been some back and forth
with OCR as to what their position is. And I think
that the version I put forward was an attempt to
classically disembroil ourselves from that debate. And
just take an independent position and to stake out the
Commission's position without reference to what other
government agencies might hold.

So I thought I was addressing the Chair's
concern that we may be inaccurately describing another
government agency's view.

To the extent that the Chair was concerned
with the substance of the findings, then I make no
claims to have done anything to address that because I
don't view this as particularly controversial. And,
in fact, I would go out on a limb by saying that I
find it rather appalling that we have taken this long
to put out a document condemning anti-Semitism on
college campuses. And I think it should be relatively
straightforward and have broad-based support.

But that said, I thought I was addressing
the procedural concern of the Chair.

CHAIRMAN REYNOLDS: Okay. I think that we
are all on the same page -- this is the Chairman -- I think we are all on the same page in terms of the substance. My concern is not the substance. My concern is our characterization of the Office for Civil Rights at the Department of Education, its jurisdiction.

We nor the Department of Education can expand or contract the jurisdictions that Congress has provided OCR. Now if we believe that it is a good idea that religion be covered by Title 6 then I think that that should be the recommendation that comes from the Commission.

But as of today, Congress has not seen fit to expand OCR's jurisdiction to include religion. We have played an interesting game here in terms of our language. I mean this is not about -- this is not nearly about anti-Semitism since anti-Semitism can take the form of conduct aimed at national origin or religion.

COMMISSIONER BRACERAS: Well, could I -- this is Braceras -- if I could just be heard. You said a couple of things that I think need responding to. The first is that the briefing we held was strictly about anti-Semitism on college campuses. And our findings and recommendations are appropriately
limited to that topic.

The broader question of whether religious discrimination should be prohibited by Title 6 is a much larger question and one which I don't think the Commission is ready to stake out a position on having not heard testimony on that broader issue.

CHAIRMAN REYNOLDS: I agree wholeheartedly.

COMMISSIONER BRACERAS: But so the findings and recommendations that we are voting on today deal exclusively with anti-Semitism. And as I see the purpose of them, the purpose of them is to clarify existing law, to explain essentially for the uninitiated that Judaism is an ethnicity. And that anti-Semitic conduct does, therefore, violate Title 6.

And I specifically --

CHAIRMAN REYNOLDS: Commissioner Braceras, would you entertain the possibility that someone would engage -- well, would harass a Jewish student solely on religious grounds? Say a Christian or a Christian arguing that the Jewish student will not or the Jewish student needs to accept Jesus as his or her savior.

COMMISSIONER BRACERAS: That's not harassment.

CHAIRMAN REYNOLDS: I agree.
COMMISSIONER BRACERAS: That is proselytizing.

CHAIRMAN REYNOLDS: Well, no. If a teacher were to again tell someone that they cannot participate in classroom discussion because they have not accepted Jesus Christ as his or her savior --

COMMISSIONER BRACERAS: Well, I wouldn't describe that as anti-Semitism per se. That may be intolerance of other sorts because certainly that would apply to ACS --

CHAIRMAN REYNOLDS: Commissioner Braceras, let me finish. In my view, that is rank anti-Semitism. However, it is a form of anti-Semitism that is not covered by Title 6 in my opinion.

Looking at how OCR has conducted its investigations, we don't have cases where OCR has asserted jurisdiction when an investigation reveals that the conduct, the harassing conduct was aimed solely at religion.

OCR doesn't do that. So if you are saying that there was change made in 2004 with a Dear Colleague letter, then I would say that that change has several problems.

COMMISSIONER BRACERAS: Well, no. Frankly two things. First of all, I specifically took out of
my version any reference to OCR so as not to get into this debate about what they did and when they did it. But putting that aside, it is clear to me that what OCR did do in 2004 was to clarify the law and not to change the law. Clearly only Congress can do that. They were clarifying their enforcement approach. And that seems to me to be absolutely appropriate that they did that. But that is not what I think we are here to debate today. We are an independent agency capable of analyzing the law and capable of coming to our own conclusions as to what that law intends to prohibit.

And in my view, anti-Semitic harassment is prohibited by the statute as it currently reads.

CHAIRMAN REYNOLDS: The statute does not make reference to anti-Semitism. The statute makes reference to race, color --

COMMISSIONER BRACERAS: Yes, if I may finish --

CHAIRMAN REYNOLDS: And to the extent anti-Semitism falls within one of those three buckets, it is covered. To the extent anti-Semitism is directed to something outside those three categories, it is not covered.

COMMISSIONER BRACERAS: Right. And that
is why the findings and recommendations that I circulated that this is a clarification that needs to be communicated to students who may not know their rights. And the final recommendation that I included in my version says, "Congress should amend Title 6 to make clear that discrimination on the basis of Jewish heritage constitutes prohibited national origin discrimination."

CHAIRMAN REYNOLDS: Jewish heritage?

COMMISSIONER BRACERAS: Excuse me, let me finish -- lest there be any more confusion about this. Now all I can say to you, Chairman Reynolds, is that to me, and I believe to most Jews, ethnicity and religious belief are inseparable in this context, in this unique context.

CHAIRMAN REYNOLDS: Is that true for the atheist who is Jewish?

COMMISSIONER BRACERAS: Excuse me?

CHAIRMAN REYNOLDS: Is that true for the atheist who is Jewish?

COMMISSIONER BRACERAS: I don't know. I am sure there are many people we can ask about that. But yes, for the atheist who is Jewish, they are still Jewish. Absolutely. Absolutely.

CHAIRMAN REYNOLDS: Culturally you can be
a Jewish culturally. You can be a Jewish, in a religious sense.

COMMISSIONER BRACERAS: You can be a convert to Christianity and still be a Jew.

CHAIRMAN REYNOLDS: That's right. And that is why OCR investigates allegations of anti-Semitism to determine whether the conduct is covered.

COMMISSIONER BRACERAS: But let me clarify. You can be an atheist and be a Jew. And you can be a convert to Christianity and still be an ethnic Jew.

On the other hand, there can be harassment of somebody based on their religious beliefs --

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: -- in Judaism which is inseparable --

CHAIRMAN REYNOLDS: That's right.

COMMISSIONER BRACERAS: Let me finish please. Which is inseparable --

CHAIRMAN REYNOLDS: I'm agreeing with you.

COMMISSIONER BRACERAS: Excuse me. I am speaking. It is inseparable, the harassment -- religious harassment of a Jew is inseparable from ethnic harassment of that Jew. And I'm not sure that there -- I don't know of any Jews that would make that
distinction.

And so all I'm saying is that these findings and recommendations should not be controversial. We should take a firm stand against anti-Semitism on college campuses and inform students of their rights to file complaints if they are subject of such conduct.

COMMISSIONER KIRSANOW: This is Kirsanow. I'm perfectly willing to sign on to the proposition that anti-Semitism is a function of both ethnic heritage and religion. I am perfectly comfortable with clarifying at least where we stand on things. And I think it is imperative that we have a finding condemning anti-Semitism on campus.

The one question I have, and it is a concern is I'm not sure the briefing that we had addressed whether -- addressed to the point of being able to have a finding as to the marriage of ethnicity and religion as part of anti-Semitism.

COMMISSIONER BRACERAS: You know what? I don't -- I've got to be honest with you here. This is basic to me. I don't think there needs --

COMMISSIONER KIRSANOW: If you could hold on one second, I just have a question. I don't know. I've gone through the briefing materials -- maybe not
with a fine-tooth comb -- but the findings and recommendations should flow from what the testimony was --

COMMISSIONER BRACERAS: Yes, but Pete --

COMMISSIONER KIRSANOW: -- and everything else that was presented to us.

COMMISSIONER BRACERAS: But Pete, there are certain things that you can take judicial notice of. There doesn't have to be testimony on this particular point that Judaism is both an ethnicity and a religion. That is something that is a given.

COMMISSIONER KIRSANOW: But we are a fact-finding agency. I'm perfectly willing to do that. And I'm saying heck, if we have other people come testify, I'm perfectly willing -- I don't have an objection to that. But what we are doing there is simply opining or injecting our own set of facts into the discussion.

I think we have to be careful about that. I think we have to take what we have on the ground in terms of what people testified to. And I don't know. I'm just saying I don't recall -- and I don't recall after having reviewed the material there being any testimony as to the aspects of anti-Semitism that deal both with religion and ethnicity as being intertwined.
I don't recall that.

COMMISSIONER BRACERAS: But -- well, I'm not sure that that was explicitly stated. But it was inherent in the entire discussion.

VICE CHAIRMAN THERNSTROM: I mean it was a given. There weren't findings -- there wasn't testimony on that question simply because the question was not even raised. Nobody thought it was a question that was necessary to raise.

COMMISSIONER BRACERAS: It was an assumption. All of the panelists assumed basic knowledge.

COMMISSIONER KIRSANOW: See, I don't like making assumptions.

COMMISSIONER BRACERAS: Well, look --

COMMISSIONER KIRSANOW: I don't recall there being an assumption as to that. And I have no problems with coming to that conclusion if the question is asked and if there is testimony or other evidence on that particular issue.

COMMISSIONER BRACERAS: Look, all we are doing in these findings and recommendations is saying number one, we oppose anti-Semitism on campus, number two, it is prohibited by law and students should be made aware of their rights, and number three, to the
extent that there is a gray area where, you know, where certain conduct may be religious in nature but not ethnically based, we would like Congress to clarify and state specifically that Title 7 prohibits discrimination on the basis of Jewish heritage, be that Jewish faith or be that Jewish ethnicity.

VICE CHAIRMAN THERNSTROM: Title 6 you mean.

COMMISSIONER BRACERAS: I'm sorry, what did I say?

VICE CHAIRMAN THERNSTROM: Title 7.

COMMISSIONER BRACERAS: Oh, yes. Of course I meant Title 6.

The point being that the Commission occupies a place of moral leadership or at least should. And we should be willing to stake out this position without having to, you know, make further investigation. I mean this is a simple thing. It is taking a moral stand against anti-Semitism.

I don't think it requires anything more than what we have already heard.

COMMISSIONER KIRSANOW: Kirsanow. I don't think anybody is objecting to taking a moral stand against anti-Semitism. I'm simply saying that the findings that we render should be based on what the
And not any assumptions. Otherwise we start -- and I don't have -- look, if we want to go out and solicit something from somebody -- if we want to reopen the record where someone then in a position of authority or a position of -- well, a position of authority, I suppose, being somebody who has some background in this says yes, it is both a function of ethnicity and of religion. That's fine. I don't have a problem with that.

COMMISSIONER BRACERAS: Well, I think if that is the case, all we have to do is reopen the record for a week. And I'm sure Susan Tuchman would be happy to submit a letter stating just that. I mean --

CHAIRMAN REYNOLDS: But what happens if someone else submits a letter and takes a different position?

VICE CHAIRMAN THERNSTROM: Look I would like to know from Commissioner Kirsanow exactly what sentence in these findings and recommendations he is staring at that poses a problem in this regard for him.

For instance, the last sentence of Finding No. 1 in the Braceras version is when severe
persistent or pervasive, this behavior may constitute a hostile environment for students in violation of Title 6 of the Civil Rights Act of 1964. May constitute a hostile environment.

COMMISSIONER BRACERAS: Right. We're not saying it automatically does.

VICE CHAIRMAN THERNSTROM: Right.

COMMISSIONER BRACERAS: It requires investigation by the fact-finding agency.

VICE CHAIRMAN THERNSTROM: Right. I want to know where the language is that you find objectionable here. This seems to me extremely cautiously written.

We are not going out on any legal limb here. And indeed the last recommendation is for further clarification from the legislative branch of government that is responsible for going out on legal limbs if they want to.

CHAIRMAN REYNOLDS: Okay. Well this is the Chairman and in response to that question, we can start with, I guess, it is my recommendation -- it is number ten but it is the first recommendation.

It says OCR should protect college students from anti-Semitic and other discriminatory harassments by vigorously enforcing Title --
VICE CHAIRMAN THERNSTROM: Wait a minute.

I'm looking only at the Braceras version. And my question to you was what in the Braceras version specifically do you still find offense or in any way troubling? And it was a question directed to Commissioner Kirsanow.

CHAIRMAN REYNOLDS: Well, I've taken the liberty to put in my two cents. And I am reading from the Braceras version.

VICE CHAIRMAN THERNSTROM: Well there is no recommendation six in what I've got in my Braceras version.

COMMISSIONER BRACERAS: Yes, there is --

VICE CHAIRMAN THERNSTROM: I mean there is no recommendation ten. The last one is six. Congress should amend Title 6 to make clear that discrimination --

CHAIRMAN REYNOLDS: Okay. Let me read it for you. It is the first one. OCR should protect college students from anti-Semitic --

VICE CHAIRMAN THERNSTROM: I thought you just said ten.

CHAIRMAN REYNOLDS: Yes, and I also pointed out that I believe that that is wrong.

COMMISSIONER BRACERAS: Okay. All right.
So go ahead, Gerry. The first recommendation, tell us what is troubling you.

CHAIRMAN REYNOLDS: What concerns me is the fact that it is not tethered to the statutory language, the magic language, race, color, national origin.

If it is tethered to those three categories, then it is clear, at least in my mind, it makes a distinction and it recognizes the fact that there will be an investigation to determine if the harassing behavior is aimed solely at religion. If it is a mixed question, then the investigation goes on.

That has been OCR's position all along. And that continues to be its position.

But if it is directed, the harassing conduct is directed solely at religion, then it is not covered. The investigation ends. The case is closed. And that has been OCR's position and it continues to be OCR's position.

COMMISSIONER BRACERAS: I don't think that --

CHAIRMAN REYNOLDS: Let me finish. The only thing I am asking for is that we tighten up the language so that it tracks the statute.

VICE CHAIRMAN THERNSTROM: Well, the
statute obviously has been open to a variety of interpretations. It seems to be -- I mean we have a declared OCR policy still on its website. That has not been changed.

CHAIRMAN REYNOLDS: Why do you pick what is on the website versus the recent letter from the Assistant Secretary from OCR?

VICE CHAIRMAN THERNSTROM: That letter was a private letter to us only. It wasn't in any sense a revision of policy that is being publicly issued.

CHAIRMAN REYNOLDS: And you believe that the 2004 letter is revision of policy. And because it was on the website that that trumps what --

VICE CHAIRMAN THERNSTROM: Well, I don't think it was a revision. I think it was a clarification. But in any case, a private letter to this agency only is not a policy statement.

COMMISSIONER BRACERAS: But again, I don't think it is necessary to have this discussion. I think the discussion should be about our own interpretation of Title 6. And what we are saying in recommendation number one is that OCR should protect students on college campuses from anti-Semitic harassment under Title 6. It is tethered to the statute.
And we don't say that all anti-Semitic conduct is necessarily a violation of the law. Or that all negative conduct towards a student who happens to be Jewish is necessarily a violation of the law. We simply want to make clear to Jewish students that they may have a right to redress under the statute. That they are included within the scope of the statute.

CHAIRMAN REYNOLDS: Yes, they are.

COMMISSIONER BRACERAS: And we want to make that clear.

CHAIRMAN REYNOLDS: Well, I mean there is a lot of consensus despite our going back and forth. I think that it is clear that everyone opposes anti-Semitism. For me the question comes down to jurisdiction.

I think that it is important that our passions and our beliefs are tethered to the law. And in this particular case, despite my personal feelings about anti-Semitism and anti-Semitism that is directed towards religion solely, despite my personal feelings about it, my personal feelings don't trump the law. It doesn't trump jurisdiction.

And to say that OCR's interpretation of its own rules don't matter, I don't understand that.
Why not?

COMMISSIONER BRACERAS: Well, first of all we are not -- I don't want to get into the debate of what the current head of that office happens to think right now as compared to the prior head of that office. That is irrelevant. We are an independent agency. We can come to our own conclusions.

CHAIRMAN REYNOLDS: What is the basis -- I mean what you have is a clear line of interpreting Title 6 in the fashion that I have laid out. You are hanging your hat on a single letter that is on the website.

COMMISSIONER BRACERAS: No, I'm not because, in fact, I care not either about the letter on the website or about the subsequent letter we received. I simply want to make our own statement irrespective of what OCR has said in the past.

I don't care about that. That is why my version takes out references to OCR policy.

CHAIRMAN REYNOLDS: Well, if we are not talking about Title 6 and we are not talking about jurisdiction, if we are just solely making a point -- if we are just registering our opposition to anti-Semitism on college campuses, that is easy.

But if we are talking about what the law
protects, if we are talking about jurisdiction --

COMMISSIONER BRACERAS: We are saying that
the -- look, I don't understand why there is a
jurisdictional problem. I really don't. If somebody
is harassing a Jewish student on campus, calling them
a stupid Jew or they can't participate in class
because they are Jewish, that is ethnic
discrimination. That has nothing to do with religion.

I mean they may also have something to do
with religion but it is ethnic discrimination. If in
your example a professor is proselytizing from the
podium and saying that unless you accept Jesus Christ
as your personal savior you can't participate in
class, that is not discrimination on the basis of
Jewish heritage or anything else.

That is discrimination against atheists
and Jews and a whole host of other people who may not
accept Jesus Christ as their personal savior. But I
agree with you that that would not, under the current
language of Title 6, classify as prohibited conduct.

Now I don't think we disagree about that.
But I simply am trying to clarify that when you are
singling out somebody because they are a Jew and even
if the religion -- I'm sorry -- even if the statement
appears to be based solely on that personal religion,
it is still ethnic origin discrimination.

If you are not singling out Jews per se and you are launching your attacks against Jews and atheists and Buddhists and all sorts of other people, then that is not discrimination on the basis of Jewish heritage. But any time you single out Jews as Jews, be it because of what they look like or what synagogue they go to, that is ethnic origin discrimination.

CHAIRMAN REYNOLDS: Well, let me take it from a somewhat different angle. Would you agree that no American regardless of religion is protected under Title 6 when it comes to religious harassment? So the Christian who is --

COMMISSIONER BRACERAS: No, they are not currently. I agree with you. That is not what the statute prohibits.

VICE CHAIRMAN THERNSTROM: Gerry, what language specifically in the first recommendation do you object to? We are saying -- or Jennifer is saying OCR should -- should protect college students from anti-Semitic and other discriminatory harassment. Do you object to that?

CHAIRMAN REYNOLDS: My objection -- my concern is the fact that the recommendation is not closely tied to the statute. It doesn't recite the
magic language. The way this is written now, anti-Semitic harassment is broad. It could be pointed to - -

COMMISSIONER BRACERAS: I guess my question is what type of anti-Semitic harassment do you think doesn't fall under Title 6?

CHAIRMAN REYNOLDS: I'm sorry. Please repeat that question.

COMMISSIONER BRACERAS: What type of anti-Semitic harassment -- and I'm not talking about the severe pervasive question or any of that -- but what type of anti-Semitic harassment would not be covered by Title 6.

CHAIRMAN REYNOLDS: The only thing that is not covered in my opinion by Title 6 is something --

COMMISSIONER BRACERAS: But give me an example because if you --

CHAIRMAN REYNOLDS: I'm trying to.

COMMISSIONER BRACERAS: -- if you draw swastikas all over a synagogue, that is anti-Semitic harassment on the basis of religion and race.

CHAIRMAN REYNOLDS: Are you going to answer your own question or are you going to allow me to answer it?

The only anti-Semitic conduct in my view
that is not covered by Title 6 is harassment that is
grounded solely in religion.

VICE CHAIRMAN THERNSTROM: And how would
you know that?

COMMISSIONER BRACERAS: And give me an
example of that kind of harassment.

VICE CHAIRMAN THERNSTROM: I can't imagine
it, Gerry. I don't know what you are talking about.

CHAIRMAN REYNOLDS: Well, OCR has a ton of
cases. They looked at, I believe, several hundred
cases in response to a FOIA request submitted by
Irvine and we can't do that now but there are -- there
have been instances where OCR has terminated an
investigation because it had gathered sufficient facts
to convince it that the conduct was aimed solely at
religion.

VICE CHAIRMAN THERNSTROM: Well, talk
about things that were not on the record in our
briefing, that wasn't on the record. And it doesn't
seem to me -- I don't understand how you can find
objectionable the sentence OCR should protect college
students from anti-Semitic and other discriminatory
harassment by vigorously enforcing Title 6 against
recipients that deny equal educational opportunities
to all students? That seems to be boilerplate
language.

CHAIRMAN REYNOLDS: The only thing I am requesting is that it be tied to the statute. That's all.

COMMISSIONER BRACERAS: It is tied to the statute.

CHAIRMAN REYNOLDS: Color, national origin.

COMMISSIONER BRACERAS: Right. And my only point -- and I believe the point of the people who came to testify before us and the point of these findings and recommendations is that any harassment of Jews as Jews is harassment on the basis of ethnic origin. Even if it is aimed at a synagogue. That's the whole point.

If it is broad-based criticism of people who don't accept Jesus, that is not harassment of Jews as Jews. But any harassment of a Jew as a Jew is inherently ethnically based. And it may also be religiously based. But it is always ethnically based.

CHAIRMAN REYNOLDS: Well, that is not a position that has been -- that position has not been accepted by the agency that has been charged with enforcing Title 6.

VICE CHAIRMAN THERNSTROM: Well, that is a
COMMISSIONER BRACERAS: And we are saying that whether or not it has been accepted by OCR, it should be. And it is common sense that it should be. And it is outrageous that it hasn't been.

VICE CHAIRMAN THERNSTROM: And that distinction was not made, Gerry, at the briefing that we held nor did you raise the question at that briefing to my knowledge.

CHAIRMAN REYNOLDS: Much of the things that we have been discussing haven't been -- weren't discussed.

VICE CHAIRMAN THERNSTROM: All right but I just heard from Commissioner Kirsanow that he is uncomfortable with going beyond the briefing. You are going beyond the briefing, Gerry.

CHAIRMAN REYNOLDS: No, I'm not.

VICE CHAIRMAN THERNSTROM: This statement does not go beyond our briefing.

CHAIRMAN REYNOLDS: Vice Chairman Thernstrom, when you have the time, look at the transcript. You will see that my comments are directed -- well, they are made in response to a question.

VICE CHAIRMAN THERNSTROM: I'm sorry. You
comments at the time of the briefing -- what are you saying?

CHAIRMAN REYNOLDS: My comments, the comments now that you say don't fall within the ambit of the briefing, those comments were made in response to a question posed by either Commissioner Braceras or you.

You asked me a question, I answered it.

VICE CHAIRMAN THERNSTROM: I'm sorry. I still don't understand what you are saying but it doesn't matter. I still am back to the point that all we are doing here on this first recommendation is saying what OCR should do. It is so innocuous. It is so low level, as I said kind of a boilerplate statement of taking a moral stance. I can't understand your discomfort with it. I'm lost.

CHAIRMAN REYNOLDS: Well, let me see if I can help. If all we are doing is just registering our moral outrage at anti-Semitism in general, I am comfortable with that and I support it wholeheartedly.

But if we are talking about the jurisdiction of OCR, then we have a fundamental disagreement of --

VICE CHAIRMAN THERNSTROM: I don't think we are talking about its jurisdiction. We are saying
OCR should -- should -- protect all students --

CHAIRMAN REYNOLDS: I support that.

VICE CHAIRMAN THERNSTROM: Well, then you support this first sentence which is what you said you were having trouble with. I cannot figure out where you could be running into trouble on this first sentence. OCR should protect college students from anti-Semitic and other discriminatory harassment.

CHAIRMAN REYNOLDS: Let me -- well, if this statement is merely about registering our outrage at anti-Semitism, then with your clarification, I can accept that. But if that sentence is intended to describe the jurisdiction of OCR --

VICE CHAIRMAN THERNSTROM: It is a recommendation.

CHAIRMAN REYNOLDS: I'm sorry?

VICE CHAIRMAN THERNSTROM: It is a recommendation. It doesn't describe jurisdiction. It is a recommendation from this independent agency.

COMMISSIONER BRACERAS: And, Gerry, to the extent that OCR does not currently have that jurisdiction, which I disagree with, recommendation number 6 clearly says Congress should amend Title 6 to make sure that discrimination on the basis of Jewish heritage constitutes prohibited national origin
discrimination.

So we are saying, you know, we think that there is a good argument to be made that under the statute as it is currently written, anti-Semitic harassment is prohibited by Title 6. However, if we are wrong, Congress please act.

CHAIRMAN REYNOLDS: Well, when the issues are presented in that light, I think that we have a whole lot less disagreement. If we are saying the Congress should clarify this issue, I would support that recommendation.

VICE CHAIRMAN THERNSTROM: Well, but that is exactly --

COMMISSIONER BRACERAS: But we are saying we think it is clear but if we are wrong and we have been wrong before, Congress should take action.

CHAIRMAN REYNOLDS: Well --

COMMISSIONER BRACERAS: -- that is all we are saying.

CHAIRMAN REYNOLDS: -- if we are seeking a clarification for Congress, I support that. I don't think it is clear that --

COMMISSIONER BRACERAS: Well, that is why we wanted to start with the Braceras version because the Braceras version does ask for that at the end.
And we asked for it as a clarification by Congress because we believe that the statute already does just that.

But again, we put that provision in to, as a sort of safe harbor, if you will, in case we are wrong in our interpretation.

CHAIRMAN REYNOLDS: Okay. I mean we are within our -- we are well within our rights to ask Congress to amend the jurisdiction --

COMMISSIONER BRACERAS: I'm not asking them to do that. I'm saying look, that's why -- you know, we need to look at the document and you can either support the document or not support the document. But the document speaks for itself.

CHAIRMAN REYNOLDS: Well --

VICE CHAIRMAN THERNSTROM: I mean if you go through the recommendations, Jerry, the six recommendations here ending with Congress should amend Title 6 to make clear that discrimination on the basis of Jewish heritage constitute prohibited national origin discrimination.

If you go through these recommendations, I just can't -- I mean it seems to me you are not disagreeing with them. There is nothing here that is in any way -- should in any way make you
uncomfortable.

CHAIRMAN REYNOLDS: Well, obviously there is something that does.

VICE CHAIRMAN THERNSTROM: Well, I still haven't been able to pin it down since, you know, I read you the first sentence I think now three times and I have asked you what actually is wrong with that very innocuous statement. OCR should protect college students -- should OCR not protect college students?

CHAIRMAN REYNOLDS: Let me -- OCR should do what it is permitted to do under the law.

VICE CHAIRMAN THERNSTROM: Right.

CHAIRMAN REYNOLDS: And it can't do anything more.

COMMISSIONER BRACERAS: And you agree that anti-Semitic harassment, when it is found to constitute national origin discrimination violates the statute. We agree about that. So --

CHAIRMAN REYNOLDS: It is the import and should be investigated.

COMMISSIONER BRACERAS: Right. And so the only place we differ is in my statements to you that discrimination on the basis of Judaism is almost always national origin discrimination. It seems to me that that is the only place -- that that is the place
where we disagree.

VICE CHAIRMAN THERNSTROM: And we do not enter into that -- or Jennifer did not enter into that dispute in these recommendations.

CHAIRMAN REYNOLDS: It is implicit -- it is a collapsing of categories. It is collapsing religion and national origin. That is my concern. And just by way of background, there are -- I mean there is a concerted effort to collapse the concept of religion -- Judaism with national origin.

There are advocates who are pushing that position. And I think that they are well within their right to do that in their capacity as advocates. But in my capacity, in terms of describing the extent of the law, the extent of jurisdiction as it exists today as opposed to what I want it to be or as opposed to what I feel that it should be, I just don't think that -- I just can't support the collapse of these two concepts.

COMMISSIONER BRACERAS: But, Gerry, we are not describing what the law -- we are making a recommendation about enforcement. We are not -- we are making a recommendation. And to the extent that the law doesn't currently today support that position, we are asking that the law be changed.
VICE CHAIRMAN THERNSTROM: Yes, and we are also -- certainly we are within our right as an independent agency --

CHAIRMAN REYNOLDS: May I --

VICE CHAIRMAN THERNSTROM: -- to say --

CHAIRMAN REYNOLDS: -- finish?

VICE CHAIRMAN THERNSTROM: -- what we recommend.

CHAIRMAN REYNOLDS: May I finish my thoughts?

VICE CHAIRMAN THERNSTROM: All right.

CHAIRMAN REYNOLDS: Okay. Language. Language is important. And what I see is language that is ambiguous. For example, the use of the term -- the phrase Jewish heritage, the statute is more specific.

VICE CHAIRMAN THERNSTROM: What recommendation or finding are you looking at?

COMMISSIONER BRACERAS: The one I added, number six.

VICE CHAIRMAN THERNSTROM: Six, okay.

CHAIRMAN REYNOLDS: The statute is more specific. The statute is more precise. The statute -- the precision contained in the statute suggests strongly to me that they -- or that Congress did not
want to include religion.

VICE CHAIRMAN THERNSTROM: So but this is a recommendation that if it doesn't, that if there is a collapsing of categories here, that Congress should amend the act to make clear that discrimination on the basis of Jewish heritage. It doesn't say that that is what is clearly in Title 6 today. It simply says, as Jennifer has said, if it is not in Title 6, then Congress should amend the law. That's all it says.

CHAIRMAN REYNOLDS: Could we amend it slightly then? Just ask Congress to decide whether -- ask for a resolution -- asking --

COMMISSIONER BRACERAS: No, we don't want them to decide. We think there is a moral clarity to this issue. We think we know what the right answer is. I don't --

CHAIRMAN REYNOLDS: No, no, no, no, the issue that I am referring to is jurisdiction. I agree with you --

COMMISSIONER BRACERAS: I don't want them to decide anything. I want them to state that OCR has jurisdiction to address claims of discrimination on the basis of Jewish heritage. And frankly I think Jewish heritage is the best way to say it because you could be a practicing Jew or a non-practicing Jew but
you still have Jewish heritage.

CHAIRMAN REYNOLDS: Yes but if the conduct -- I mean the focus is on the conduct and the intent of the harasser. If the harasser's intent is to harass solely based on religion, then once OCR obtains sufficient facts to make that conclusion, the investigation should end.

COMMISSIONER BRACERAS: You know what? There is only one circumstance where I can see that ever happening. And that is in the case of somebody who may not have been born Jewish but converted to Judaism. That is the only case where I can see that happening.

Anybody who is born Jewish, any harassment against them whether it is based on their religion or what they look like is ethnic origin harassment because their religion is their ethnicity. That's the whole point.

CHAIRMAN REYNOLDS: I mean Ashkenazi, Sephardic --

COMMISSIONER BRACERAS: It makes no difference.

CHAIRMAN REYNOLDS: How they look. I'm not sure that I can look at someone and conclude that they are Jewish. I don't have that skill.
VICE CHAIRMAN THERNSTROM: Yes, but people who harass --

COMMISSIONER BRACERAS: But people who harass are basing their harassment on stereotypes. There was testimony about just that. That you have comments being made on the basis of someone's, you know, the size of their nose, or the color of their hair, or the color of their eyes. I mean there are stereotypes. But clearly Jews come in all colors --

VICE CHAIRMAN THERNSTROM: Or the way they talk, the way, you know, whatever.

COMMISSIONER BRACERAS: But that's not the point --

VICE CHAIRMAN THERNSTROM: Their manner, their personality.

CHAIRMAN REYNOLDS: But the bottom line -- and I think that we should get around to voting on this, the bottom line for me is it is a rule of law question. Either we are going to respect the limits placed on federal agencies by Congress or we won't. Either we are going to try to expand jurisdiction through regulatory actions and hope that a court doesn't strike it down or we are not.

VICE CHAIRMAN THERNSTROM: Where is the disrespect here?
COMMISSIONER BRACERAS: Look, you know what, we are never going to come to terms on this. I can see that. And it's fine. I respect your right to disagree and to see it in the light that you see it in, Gerry. But I disagree. And you are right. I think we should just vote.

CHAIRMAN REYNOLDS: Okay. Well then --

COMMISSIONER BRACERAS: But I think that the version that is currently on the table is not the version I wish to support. So you can call the question on that and then I'll make a motion to put the Braceras version forward.

CHAIRMAN REYNOLDS: Okay. Well, why don't we do that now. I mean after this motion.

COMMISSIONER BRACERAS: Go ahead.

CHAIRMAN REYNOLDS: I move to vote on the Braceras motion.

COMMISSIONER BRACERAS: Well, you guys --

VICE CHAIRMAN THERNSTROM: Are you withdrawing the previous motion?

CHAIRMAN REYNOLDS: Yes.

VICE CHAIRMAN THERNSTROM: All right. You need to state that as such.

CHAIRMAN REYNOLDS: Yes, the idea is to withdraw the -- I believe the February version and
replace it with the Braceras version. Is there a second?

VICE CHAIRMAN THERNSTROM: I second that.

CHAIRMAN REYNOLDS: Okay. Brief discussion. Commissioners Yaki and Melendez and -- we haven't heard from you. Do you have a position that you would like to make?

COMMISSIONER MELENDEZ: This is Commissioner Melendez. You know my main, I guess, is the discrimination in anti-Semitism. I know that this issue on jurisdiction is not real clear to me. But you know my main point is that we, you know, support the issue broadly. And so I don't have a problem with the Braceras -- I guess the version. So that is just my comment.

CHAIRMAN REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: I just will say that from the testimony that we have heard, there is an issue out there on our university and college campuses --

CHAIRMAN REYNOLDS: Yes, there is.

COMMISSIONER YAKI: -- that must be addressed. And I believe that the Braceras version sends a strong signal from the committee that it
should be dealt with.

     CHAIRMAN REYNOLDS: Okay. And did Commissioner Taylor join us?

     VICE CHAIRMAN THERNSTROM: No, he can't join us.

     CHAIRMAN REYNOLDS: Okay. All right. All in favor? I'm sorry. Let me go down the list here. Bear with me. Vice Chair Thernstrom?

     VICE CHAIRMAN THERNSTROM: Yes. This is yes I support the Braceras version. I am voting for the Braceras version.

     CHAIRMAN REYNOLDS: Commissioner Braceras, should I assume that you support your version?

     VICE CHAIRMAN THERNSTROM: Yes, I vote in favor of my own version.

     CHAIRMAN REYNOLDS: Okay. Commissioner Kirsanow? Commissioner Kirsanow?

     (No response.)

     CHAIRMAN REYNOLDS: Okay. Commissioner Melendez?

     COMMISSIONER MELENDEZ: Yes, I vote yes.

     CHAIRMAN REYNOLDS: Commissioner Yaki?

     COMMISSIONER YAKI: Aye.

     CHAIRMAN REYNOLDS: Okay. And I vote against it. Not on the merits. Strictly on the
jurisdictional concerns that I have.

Commissioner Kirsanow?

(No response.)

CHAIRMAN REYNOLDS: Okay. I guess we have lost Pete.

Okay, that being the only issue that we were going to discuss --

VICE CHAIRMAN THERNSTROM: I think you should announce the total vote.

COMMISSIONER BRACERAS: So the motion carries?

CHAIRMAN REYNOLDS: Oh, I'm sorry, yes. The motion carries with Vice Chair Thernstrom, Commissioners Braceras, Thernstrom, Melendez, and Yaki voting in favor. The Chairman voting against, and Commissioner Kirsanow not voting. Apparently we have lost Mr. Kirsanow.

VICE CHAIRMAN THERNSTROM: Well, he's not present.

CHAIRMAN REYNOLDS: So the motion carries.

Is there any other business?

VICE CHAIRMAN THERNSTROM: I move to adjourn the meeting.

CHAIRMAN REYNOLDS: Second?

COMMISSIONER BRACERAS: Second.
CHAIRMAN REYNOLDS: All in favor?

(Chorus of ayes.)

CHAIRMAN REYNOLDS: All right. No objections? We conclude this meeting.

(Whereupon, the above-entitled Commission meeting was concluded at 2:56 p.m.)