

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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Friday, May 10, 1996

The Commission convened in the Main Conference Room, on the Fifth Floor of 624 9th Street, N.W., Washington, D.C. at 9:30 a.m., Mary Frances Berry, Chairperson, presiding.

PRESENT:

MARY FRANCES BERRY, CHAIRPERSON

CRUZ REYNOSO, VICE CHAIRPERSON

CARL A. ANDERSON, COMMISSIONER

ROBERT P. GEORGE, COMMISSIONER

A. LEON HIGGINBOTHAM, JR., COMMISSIONER

CONSTANCE HORNER, COMMISSIONER

YVONNE Y. LEE, COMMISSIONER (via telephone)

RUSSELL G. REDENBAUGH, COMMISSIONER

MARY K. MATHEWS, STAFF DIRECTOR

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1 I have just found that those kinds of presentations
2 are much more effective.

3 If we have data, then we can have a real
4 dialogue. Otherwise, we're just the recipient of a
5 penetrating speech.

6 CHAIRPERSON BERRY: Okay. Yes, Vice
7 Chair?

8 VICE CHAIRPERSON REYNOSO: Sometimes, I
9 find that rather than having there be conflicting
10 views that the people who spend a lot of time on these
11 issues generally end up agreeing. But somehow it
12 doesn't get translated to public policy.

13 So, I'm not sure that we'll always find
14 contrasting views. In some areas, there might be
15 pretty uniform opinions by those who have spent a lot
16 of time studying these issues.

17 CHAIRPERSON BERRY: Yes. Okay, so we'll
18 do that on that question. All right, if there is no
19 objection, then we'll go to the next item on the
20 agenda, which is item number six, the Commission's
21 subpoena power, which we have visited and visited and
22 continue to visit, because it's an important issue.

23 And we have a memo from Commissioner
24 George. Commissioner George, would you like to --

25 COMMISSIONER GEORGE: Thank you, Madame

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1 Chairman.

2 CHAIRPERSON BERRY: -- comment and begin
3 the discussion?

4 COMMISSIONER GEORGE: I have not modified
5 my proposal since the last time I had it before you.
6 It was modified from the time before that, especially
7 in light of Commissioner Higginbotham's observations
8 and suggestions.

9 I hoped that what this proposal would do,
10 if enacted -- and it's in the form of a motion to
11 issue a policy directive to the Staff Director within
12 the administrative instructions -- would be to improve
13 the accountability of the -- in the use of our
14 subpoena power and the Commissioners' role and
15 accountability in the use of the power, and also to
16 avoid potential First Amendment problems having to do
17 with compelling opinion testimony, without harming or
18 restricting in any serious or damaging way the scope
19 of the subpoena -- of the Commission's subpoena power.

20 A broad scope, I think, is necessary to
21 accomplish the goals that we have, and our
22 responsibilities to fulfill them. But I don't think
23 that that means that we cannot improve accountability
24 and other aspects of our exercising the subpoena
25 power.

1 So, I'll simply recall that my proposal is
2 in two parts. One goes to the question of
3 distinguishing opinion, which I call perspective
4 testimony, from fact testimony.

5 And the second part has to do with
6 procedures for approval by the Commissioners,
7 subpoenas duces tecum.

8 CHAIRPERSON BERRY: Commissioner Lee, are
9 you there?

10 COMMISSIONER LEE: Yes, I'm still here.

11 CHAIRPERSON BERRY: I just want to make
12 sure we hadn't lost you.

13 COMMISSIONER GEORGE: I don't if --

14 CHAIRPERSON BERRY: Could you hear
15 Commissioner George?

16 COMMISSIONER LEE: Yes, I can hear him.

17 CHAIRPERSON BERRY: Okay. Okay.

18 COMMISSIONER GEORGE: I would be happy to
19 vote on my proposal today, but I don't want to force
20 this. I think this is an issue that we should work
21 out altogether.

22 And if people want still more time to
23 think about it or if people want to propose further
24 revisions in view of any thought they've been able to
25 give it in the meantime, I would be happy to do that

1 as well.

2 I hope that we will, sooner rather than
3 later, get around to some reform. And I'd be happy,
4 as I say, to do it today, but it doesn't absolutely
5 have to be done today from my point of view.

6 CHAIRPERSON BERRY: Does anyone -- just
7 point of information, Staff Director, do you know when
8 the Commission's reauthorization hearing, I guess it's
9 a hearing, is to take place?

10 STAFF DIRECTOR MATHEWS: Madame Chair, the
11 latest word I have is not definite. It's just
12 possible - thinking about the House Oversight
13 Subcommittee and the months that they are considering
14 holding a hearing for our reauthorization are possibly
15 June or July.

16 On the Senate side, we may or may not have
17 a hearing on reauthorization.

18 CHAIRPERSON BERRY: Okay.

19 COMMISSIONER GEORGE: Well, in view of
20 that, Madame Chairman, maybe it would be good to vote
21 on this today if we possibly could.

22 CHAIRPERSON BERRY: When is the June
23 meeting?

24 STAFF DIRECTOR MATHEWS: The June meeting
25 -- give me one second -- is June 14th.

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1 CHAIRPERSON BERRY: The fourteenth. I'll
2 give you a moment there, Staff Director, to see what
3 Mr. Cunningham has to --

4 COMMISSIONER GEORGE: Let me say in the
5 meantime, Madame Chairman, that I recognize that my
6 proposal is not perfect. I just have not been able to
7 come up with a way in my own mind to improve it still
8 further.

9 There's a particular issue that will, I
10 think, be a vexing one under my proposal, which is it
11 won't always be possible to distinguish very easily
12 between the two types of testimony that I've
13 designated fact and perspective in part one.

14 And I just think it's one of those areas
15 where we're going to have to do the best we can, and
16 hope by good will all around, we'll be able to muddle
17 through.

18 I think there will be, in most cases,
19 clear cases as to whether we're asking for somebody's
20 perspective and philosophical view or we're asking for
21 data.

22 But plainly, there will be cases where
23 it's difficult to try the line. I just don't know
24 what to do about them.

25 CHAIRPERSON BERRY: Did you have anything

1 to add on the reauthorization issue?

2 STAFF DIRECTOR MATHEWS: The Assistant
3 Staff Director for Congressional Affairs indicated to
4 me just a moment ago that in his latest discussion
5 with the Senate Staff, they have now indicated that
6 they will hold a hearing, but the date has not been
7 set.

8 CHAIRPERSON BERRY: Okay, Commissioner
9 Horner?

10 COMMISSIONER HORNER: Madame Chair, I
11 don't know what issues the Senate or the House are
12 planning to raise in the context of reauthorization,
13 and yet you're going to be asked to go up and testify,
14 perhaps as early as early June and before another
15 meeting of the Commission.

16 And since I don't know what the issues
17 are, I don't know that we are able to give you the
18 Commission's advice on how to testify with respect to
19 these issues.

20 And I'm wondering if you're planning
21 simply to react out of your own sense of what's
22 appropriate or if you have a -- in other words, what's
23 the Commission going to say through you when asked
24 about issues, whatever they are?

25 CHAIRPERSON BERRY: Well, if we have a

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1 hearing or when we have a hearing, I would hope, given
2 the fact that the Congress now has a majority from the
3 Republican party, that one -- at least one of the
4 Commissioners who is a Republican would be willing to
5 go to the hearing.

6 In the past, Commissioner Anderson has
7 gone. We've all been very grateful for that. If
8 Commissioner Horner, Mr. Anderson -- let's see, do we
9 have anybody else who's actually a Republican here?

10 So that it would be very helpful both to
11 give their perspectives, I mean your own perspective,
12 about whatever it is I'm saying or not saying, and
13 your own point of view, and also to show the
14 bipartisan nature of the Commission publicly.

15 We've always thought in the past that that
16 was important. When the Democrats controlled the
17 Congress and the Chair went up, who was a Republican,
18 often somebody from the Independent side or affiliated
19 with the Democrats would go up to show support and
20 that it was bipartisan.

21 So I would hope that the same thing would
22 happen.

23 COMMISSIONER HORNER: Madame Chair, if
24 anyone is going to do that, if we're not going to
25 attempt to achieve a consensus respecting any of the

1 issues relating to reauthorization, at least the
2 members of the Commission ought to know well in
3 advance what the members of the House and Senate
4 Committees think are issues. What are their plans and
5 proposals for us?

6 I don't know. And I would like to know as
7 soon as possible through the professional Legislative
8 Staff here or whatever.

9 CHAIRPERSON BERRY: Well, I would like to
10 know too, and don't. I have no idea. The last time
11 I had gone up to testify, no one told me anything was
12 an issue before I got there.

13 COMMISSIONER HORNER: That's dreadful.

14 (Laughter.)

15 COMMISSIONER HORNER: And frankly, we
16 need to remedy that within the week, I would think,
17 and fill in the gaps.

18 CHAIRPERSON BERRY: So to the extent that
19 staff can find out what the issues are, it would be
20 very helpful if we knew so that we could discuss them.

21 In the absence of a discussion, in the
22 absence of finding anything out, all I have done is do
23 what Chairs have done before, which is answer
24 consistent with what I think the Commission has
25 publicly done on the record, because that's about all

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1 I can do -- you know, unless I'm asked for my opinion.

2 And Commissioner Anderson, I guess he's
3 given what he thinks publicly as well as what his
4 opinion is. Is that pretty much the way it's been,
5 Commissioner Anderson?

6 COMMISSIONER ANDERSON: Yes.

7 COMMISSIONER HORNER: Well, that's a good
8 fall-back I suppose, but I don't think it's optimal.

9 CHAIRPERSON BERRY: I agree. Commissioner
10 George?

11 COMMISSIONER GEORGE: Well, I don't think
12 -- I think we know at least one thing they're going to
13 ask about, and that's the subpoena issue. I mean,
14 we're not completely in the dark.

15 CHAIRPERSON BERRY: Do we know this?

16 COMMISSIONER GEORGE: Well, I guess we
17 don't know it officially. But realistically, we know
18 that this is a concern -- that we have all sorts of
19 evidence that this is a concern up there and there are
20 people prepared to introduce proposals, perhaps have
21 already introduced proposals.

22 I've seen at least drafts of legislative
23 proposals that I think would be Draconian as far as
24 the Commission's subpoena power is concerned and go
25 much too far in the name of reform.

1 So that's -- frankly, I mean if it's not
2 clear to people, let me make it clear to people. It's
3 frankly one of the reasons I'm interested in our
4 taking some action on this.

5 I think we can -- we can deal better and
6 more sensitively with our own problem here than can
7 Congress.

8 And I think -- I'm hoping we'll be able to
9 persuade Congress that we have done something.

10 CHAIRPERSON BERRY: Staff Director, do you
11 know or does the Assistant Staff Director for
12 Legislation know, officially whether this issue is
13 going to be raised?

14 STAFF DIRECTOR MATHEWS: Madame Chair, I
15 do not know. I have not received any information
16 about issues that might be raised at a hearing. I
17 could ask the Assistant Staff Director for
18 Congressional Affairs if you would like.

19 CHAIRPERSON BERRY: Ask him, please.

20 STAFF DIRECTOR MATHEWS: Dr. Cunningham?

21 DR. CUNNINGHAM: Yes? I don't have any
22 official correspondence, but I know that in -- in
23 discussing this with staff, it is a very big concern
24 of theirs that the Committee Chairman does not have a
25 position on our subpoena power. But it is certainly

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1 an issue that is likely to be addressed by the
2 Committee in considering reauthorization and
3 legislation.

4 CHAIRPERSON BERRY: And while you're
5 standing there, has anybody suggested any other
6 issues?

7 DR. CUNNINGHAM: Not that I've heard of.
8 And obviously, it would be the term of our
9 reauthorization and whether we would be reauthorized
10 would be an issue.

11 But frankly, whether we would be
12 reauthorized has not been discussed with the --

13 CHAIRPERSON BERRY: Okay.

14 DR. CUNNINGHAM: But the Chairman is --

15 CHAIRPERSON BERRY: So -- go right ahead.

16 COMMISSIONER HORNER: So as far as you
17 know, those are the only questions that would come up
18 that are substantial?

19 DR. CUNNINGHAM: Those matters --

20 COMMISSIONER HORNER: And would you be
21 able to -- or I should direct I guess to the Staff
22 Director. Would it be possible for us to have a short
23 memo that would lay out what you know officially,
24 unofficially, however you know it, about the point of
25 view of the Committee members so that anyone who goes

1 to the hearing doesn't go in completely ignorant of
2 who thinks what as far as we know.

3 I mean, they've written us, made comments
4 in other hearings, talked to the press, whatever your
5 source --

6 DR. CUNNINGHAM: That is our normal
7 procedure, and we would certainly --

8 COMMISSIONER HORNER: Okay.

9 DR. CUNNINGHAM: -- be prepared to prepare
10 that memo.

11 CHAIRPERSON BERRY: All right?

12 STAFF DIRECTOR MATHEWS: Madame Chair,
13 yes, I would add that for any hearing on this topic,
14 staff contacts the staff of the members of the
15 Subcommittee in advance of the hearing and tries to
16 glean this kind of information.

17 Sometimes it's forthcoming and sometimes
18 not. But we have consistently made an effort to get
19 this, and provide -- we will provide whatever
20 information comes out of those discussions?

21 CHAIRPERSON BERRY: Okay. I just thought
22 we needed to know this information. Let's proceed.
23 Does anyone have any -- I forgot to mention that
24 Commissioner Redenbaugh, who has forgotten already,
25 testified once in the past at a reauthorization

1 hearing when Fletcher was Chair. Do you remember
2 that?

3 COMMISSIONER REDENBAUGH: I do, yes.

4 (Laughter.)

5 COMMISSIONER REDENBAUGH: It's actually
6 coming back to me.

7 CHAIRPERSON BERRY: Okay.

8 COMMISSIONER GEORGE: So Madame Chairman,
9 the party that you and Russell and I belong to was
10 represented fully?

11 CHAIRPERSON BERRY: Yes.

12 (Laughter.)

13 CHAIRPERSON BERRY: Does anyone -- beg
14 your pardon?

15 COMMISSIONER REDENBAUGH: No, no, just
16 mumbling.

17 CHAIRPERSON BERRY: Does anyone have any
18 comment on Commissioner George's proposal or any other
19 matters related to the item number six, which is the
20 Commission's subpoena power? Yes, Commissioner
21 Higginbotham?

22 COMMISSIONER HIGGINBOTHAM: I have a
23 rather strong position in terms of never drafting
24 anything to satisfy a Congressional Committee's
25 hostility to a procedure so that they will not become

1 more Draconian if you think your position is
2 fundamentally right.

3 I just don't believe in capitulating. If
4 they want to take a position which I think is wrong,
5 I'd rather for them to do than to make a concession
6 which I think is inappropriate.

7 And that's my starting point. And so
8 therefore, I have to know, and I, the least
9 experienced Commissioner here, as to what is the
10 problem and why?

11 Now, there's one decisive fact to me which
12 is that of all of the federal independent commissions,
13 only two are required to seek enforcement through the
14 United States Attorney General.

15 So therefore, when someone talks about the
16 United States Commission on Civil Rights being sort of
17 potentially more pernicious, the fact is it can't be.
18 Because we have the least amount of power of all of
19 the agencies. So, that's my first point.

20 The second is that this system has been
21 working from the beginning. And the Republicans
22 stayed on its axis and its function.

23 So therefore, if someone wants to say
24 we've looked at your history for more than two decades
25 and how we want you to function differently than all

1 of the preceding commissions, I think it's their
2 burden to prove and not mine.

3 So that my position, flat out, is we don't
4 have to do anything to placate anyone if we think
5 they're wrong. And I'd rather meet it head-on, let
6 them propose the most Draconian things, rather than to
7 make a concession which they're not entitled.

8 CHAIRPERSON BERRY: So your reading of the
9 memos about what the other commissions do leads you to
10 believe that ours is the most restrictive?

11 COMMISSIONER HIGGINBOTHAM: I think so.
12 No one has made a suggestion in any document that the
13 Civil -- the United States Civil Rights -- the United
14 States Commission on Civil Rights is out of tandem
15 with what everyone else does, or that we are more
16 harsh or irresponsible or unfair.

17 So, I see no reason why we have to change.
18 Now, if -- if we get past the point where you've got
19 a majority's vote to change, then I can deal with the
20 language.

21 But I think there's a very real risk on
22 amending administrative instructions. All you do is
23 open litigation because there's nothing which an
24 adversary likes more than to say they haven't complied
25 with their own regulations, their own instructions.

1 So therefore, when we start to, as for
 2 example in paragraph two, set up a guideline that all
 3 of these things have to be done at least one week in
 4 advance of the Commission meeting, and someone does it
 5 six days in advance, or five days in advance, right
 6 away you get subject to litigation that you didn't do
 7 -- give it timely notice.

8 Now in view of the smallness of --
 9 relative smallness of our staff and in view of what I
 10 observed in my brief period of time, that they're
 11 always in a crunch to set up additional criteria, it
 12 seems to me, makes it much harder for the Staff to do
 13 the job because by the nature of our situation,
 14 there's always going to be a crunch.

15 CHAIRPERSON BERRY: Okay. Any other
 16 comments? Yes, Vice Chair?

17 VICE CHAIRPERSON REYNOSO: Well, Madame
 18 Chair, as Rob indicated, there are two parts to his
 19 suggestion. The second part, I'll direct my attention
 20 to that before -- as I see it, the real change in the
 21 suggested procedure would be basically that the
 22 regulations now say "subpoenas for the attendance and
 23 testimony of witnesses or the production of written or
 24 other matter, can be issued by the Commission over the
 25 signature of the Chairman and may be served on any

1 person designated by the Chairman."

2 And as I -- the principal difference in
3 paragraph two would be that on many occasions, that
4 the Commissioners would have to vote on the issuance
5 of that.

6 And I'm just -- again, I was struck -- and
7 I mentioned last time -- with how liberal several of
8 the other commissions are, sometimes even allowing
9 individual members of the commissions to enforce their
10 -- to sign and enforce their subpoenas.

11 I would just hate to be more restrictive
12 than is required by law. And the subpoena reg that I
13 just read, it seems to me, does put the statute --
14 have us do. So, I don't know that I'm in favor of
15 having us, as individual commissioners, vote on
16 subpoenas as they come up.

17 Because if we have a real question as to
18 the purpose of the hearing or the thrust of the
19 hearing, we, as commissioners can express that. I
20 just -- I just don't know that we need to have the
21 individual commissioner's vote.

22 On the first part, I agree that it's
23 sometimes hard to tell when a person is a witness
24 that's going to be a fact witness or a --

25 CHAIRPERSON BERRY: Perspective?

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1 VICE CHAIRPERSON REYNOSO: -- perspective
2 witness. Well, there's an element of confusion there.
3 My suggestion would be that we pick up, I think, on a
4 suggestion that you had, Rob, early on that if we have
5 a hearing, maybe we divide the hearing into two parts,
6 a hearing and a non-hearing.

7 For the hearing, we continue to issue
8 subpoenas. Then we could half a day or something of
9 that sort where we have people come and testify
10 without subpoenas on the broader philosophical,
11 historical, other issues, but have that be not really
12 be a hearing.

13 But the hearing itself sort of stick to
14 the procedures we've followed. And that way, even if
15 they get into testifying on facts, that's all right.

16 It's just the big difference is that we
17 haven't subpoenaed them. And I don't know if that
18 would be too confusing for the staff or not. But I
19 remember our discussing that, oh, two or three months
20 ago.

21 And rather than -- than changing the regs
22 on our -- on how we exercise our subpoena power,
23 because I think there is some danger to that, maybe we
24 take care of that in a different sort of way, it can
25 all happen together.

1 But for example, in one hearing -- well,
2 the hearing that we haven't had yet on affirmative
3 action, Connie was suggesting that she wanted some
4 folks who would just speak to the philosophical
5 aspects of affirmative action.

6 Presumably those would be what you would
7 call perspective witnesses. And if we have such a
8 hearing, maybe we have half a day of non-subpoenaed
9 witnesses that just speak to their own views and how
10 they view affirmative action historically and
11 philosophically.

12 And then when we get to the witnesses that
13 testify as to programs and all that, we would want
14 facts, that then we follow our normal procedure.

15 So, that was sort of my overall reaction
16 to the memo.

17 CHAIRPERSON BERRY: Yes.

18 COMMISSIONER LEE: Madame Chair?

19 CHAIRPERSON BERRY: Yes, Commissioner Lee?

20 COMMISSIONER LEE: Maybe I have not
21 attended any of the Commission hearings, but I just
22 don't see the urgency of this Commission to revise or
23 amend any of the power that the Commission has, which,
24 by reading all the records, from the Staff's report
25 and all the front line complications that --

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1 Commission -- fuel the Commission.

2 I think we have to -- subpoena power
3 already. And I think the Commission has operated very
4 well within the power that gives to the Commission.
5 And I agree. I don't see the need or the urgency to
6 voluntarily limit our current practice and our current
7 powers.

8 And if people want to do that, let them
9 come and tell us and let us see where it stands. But
10 I just don't see the need to do it now.

11 CHAIRPERSON BERRY: Commissioner George?

12 COMMISSIONER GEORGE: Yes, let me respond
13 to all three. First in response to Judge
14 Higginbotham's point, if I believed that our
15 Commission's procedures were not in need of reform,
16 then the threat of a more drastic -- of a drastic
17 action, I think would not be sufficient --

18 COMMISSIONER HIGGINBOTHAM: Sure.

19 COMMISSIONER GEORGE: -- as a ground for -
20 - for reform. So, I do want to make it clear that --
21 well, as I said earlier, one of my motives here is to
22 forestall what I fear will be Draconian action.

23 I want to make plain that when I say that,
24 I mean to share the view that we need reform, but to
25 say I think we can reform it better, more sensitively.

1 We know what our needs are. We know what
2 our experience is. We know what our problems have
3 been, at least those of us who think that there have
4 been at least some problems.

5 And I think we can do it with a scalpel.
6 I don't want a meat axe.

7 In response to Vice Chairman Reynoso, I
8 think, Cruz, that you're basically agreeing with what
9 I proposed in 1, which -- but I think your objection
10 is to 2.

11 VICE CHAIRPERSON REYNOSO: I'd like to get
12 away from the ambiguity, or my marginal note says,
13 "confusion in terms of what type of witness." And
14 that way if we could just have -- I don't know how
15 this will -- but if we could have a section in a
16 hearing, if in a hearing we decide it's important to
17 have some folk there who will keep presenting
18 philosophical or other non-factual bases, then simply
19 have that be as part of the proceedings but not part
20 of the full hearing.

21 COMMISSIONER GEORGE: Well, that's
22 precisely what I meant to do in 1(a). And if I failed
23 to, it's not my -- it's not a problem with my goal.
24 It's a problem with my language.

25 VICE CHAIRPERSON REYNOSO: Okay.

1 COMMISSIONER GEORGE: The idea here is
2 that fact witnesses testify at hearings; what I call
3 prospective witnesses do not. However, they could
4 testify at proceedings that are held in conjunction
5 with hearings, and their testimony could be taken into
6 account in hearing reports, noted in hearing reports,
7 and so forth.

8 So I think what I'm trying to do in 1 is
9 exactly what you think is a good idea and I think is
10 a good idea. And if I haven't done it, let's just
11 work over the language.

12 Now, you have a real -- I think a real
13 objection on 2, and I think here we just have a
14 disagreement. And I think that Commissioner Lee's
15 objection is identical, so I can treat them both
16 together. I just want to stress that unless I'm,
17 again, failing in my goal, I am not attempting to
18 restrict the Commission's subpoena power. I don't
19 think that it has that effect at all. We still have
20 the same scope of subpoena power.

21 What I've tried to do is to improve
22 Commissioner accountability in the area of the
23 particular type of subpoena that we use -- the
24 subpoena duces tecum -- where documents are being
25 requested. So we might just have a philosophical

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1 disagreement about that, and I see any hope of a
2 majority kind of disappearing on me as we talk about
3 it.

4 But I still do think it would be better if
5 the Commissioners themselves passed on subpoena duces
6 tecum, except in the circumstances in which I think
7 that's stated here, that there would be an exception
8 rather than staying with the current system.

9 I respect the alternative view that
10 Commissioners Reynoso and Lee take. I just think it
11 would be better to do it the other way.

12 VICE CHAIRPERSON REYNOSO: I wonder if we
13 could have a discussion about -- you indicated to
14 Commissioner Higginbotham that, in fact, as I
15 understood it, though you didn't go into detail, that
16 maybe there are some things that we could improve. I
17 wonder if it would be helpful to have discussions, as
18 we've had some other times in the past, and then have
19 the General Counsel, who has implemented these
20 policies, then take those concerns into account.

21 That is, if there is something that we've
22 done that in your view is not the right thing to do,
23 we ought to have that discussion. And if there's sort
24 of a consensus around the table, then -- as I
25 understand it, then the staff has taken that into

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1 account in terms of how they implement the subpoenas.

2 For example, there was some question in
3 the subpoenas in Florida that there was a catch-all
4 phrase in some subpoenas duces tecum that said, "And
5 all other documents that you might have bearing on
6 this issue." If we have some qualms as to that type
7 of language, then we should express it maybe, and then
8 maybe have a response from the General Counsel in
9 terms of why that perhaps is normally done in all
10 subpoenas, why it's not done.

11 In other words, when something has
12 bothered us in the past, sometimes we have talked
13 about it and resolved it that way rather than with a
14 formal changing of regulations, and that sort of
15 thing.

16 COMMISSIONER GEORGE: Well, I think we
17 probably have a philosophical difference here. If my
18 proposal fails, then I hope an alternative proposal
19 would come onto the table that might remain closer to
20 the current system but provide some opportunity for
21 greater supervision of -- precisely of subpoenas duces
22 tecum.

23 My philosophical view is that this is an
24 area where we're getting into people's papers. We
25 often have very good reasons for it, but when we're

1 doing that I would very much like us to take
 2 responsibility and to be accountable as Commissioners
 3 directly. That's the philosophical position I hold.
 4 I think it's a good one. I think it's a matter of
 5 good government. But I understand and respect those
 6 who disagree.

7 CHAIRPERSON BERRY: Well, Commissioner
 8 Anderson I think had his hand up next.

9 COMMISSIONER ANDERSON: Right. Thank you.

10 Well, I think I've said on a number of
 11 occasions on issues like this that I favor greater
 12 Commission accountability and review, and I'm not sure
 13 we have a great deal of accountability as
 14 Commissioners over the subpoena power. So I think
 15 that Commissioner George ought to be commended, at
 16 least from my perspective, of advancing a proposal
 17 that raises this and focuses what I feel is a need for
 18 greater Commissioner accountability in this matter.

19 Now, as we talk about the Commission's
 20 power of subpoena, I think our scope is pretty broad.
 21 I don't see us as having a more restricted scope for
 22 subpoena than other Commissions. We may have a more
 23 restricted power of enforcement, having to go through
 24 the Justice Department.

25 But I would say when you're looking at a

1 small organization which may have, you know, on paper
 2 a husband and wife and three or four other people or
 3 10 people have started an organization and they're
 4 working, for a federal agency to come in with a
 5 subpoena demanding all of the papers or whatever, I
 6 mean, the chilling effect on a small organization is
 7 pretty heavy.

8 And I'm not sure that when they are told,
 9 "And, by the way, the Attorney General of the United
 10 States is going to enforce this subpoena," that they
 11 understand that to be a limitation on our subpoena
 12 power --

13 (Laughter.)

14 -- rather than amassing the entire power
 15 of the Department of Justice suddenly on our side. So
 16 I think it's a problem now.

17 I don't want to rehash the issues that
 18 were surrounding the Miami hearing, but I do think
 19 that the controversy in Miami suggested quite clearly
 20 that there is a potential for problems, and I don't
 21 think, frankly, that the committee -- and I have not
 22 talked to anyone on the committee or any of the staff
 23 of the committee about the reauthorization hearing,
 24 whether this is going to come up as an issue, but I
 25 think anybody who has been in this town for more than

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1 15 minutes. given what has happened, ought to see that
2 it probably is going to come up at the hearing. It's
3 probably going to be discussed in any markup on our
4 reauthorization bill.

5 I'm not sure that the committee just ought
6 to leave it alone and say, "Well, the Commissioners
7 are going to, you know, try to reach consensus on it."
8 If we try to take some kind of an action vis-a-vis our
9 internal administrative rules, I don't know whether
10 that's sufficient or not, but at least it indicates
11 that we see that we need greater accountability, or we
12 need greater input into the process.

13 I must say with Commissioner Higginbotham
14 that the more we start putting deadlines and dates and
15 everything, we're just -- we're in a sense creating
16 all sorts of grounds for litigation and objections and
17 defenses to enforcement of subpoenas, etcetera, which
18 I would, you know, think would be problematic. And so
19 maybe the whole effort that provides this with a
20 certain finesse is not going to work for a variety of
21 just sort of practical reasons.

22 But I think it's something that we ought
23 to look at, because I do believe that the subpoenas
24 for the production of documents holds with it a
25 potential of real chilling effect on some

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1 organizations. And I do think the issue of whether a
2 witness who we would like to appear before us, because
3 of his expertise and not necessarily because he is
4 cognizant of facts that basically only that witness
5 knows, and, therefore, we have to have, I think that's
6 a real issue -- that we compel somebody against their
7 desire to give us his opinion about something. I
8 think that's important.

9 Now, somehow I believe this Commission
10 ought to have more review and involvement in whether
11 or not we compel these people to do this, and I'm not
12 sure that we've found any formula that I'm -- the
13 current formula I'm not happy with. Let me put it
14 that way.

15 CHAIRPERSON BERRY: Commissioner
16 Redenbaugh, were you about to say something? Has Carl
17 said what you were about to say?

18 COMMISSIONER REDENBAUGH: He did.

19 CHAIRPERSON BERRY: Okay. Well, then I'll
20 go on to the next --

21 COMMISSIONER REDENBAUGH: However --

22 (Laughter.)

23 -- now that I've been reactivating my
24 memory --

25 (Laughter.)

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1 I would say that I join with Commissioners
 2 George and Anderson in saying that from my standpoint
 3 there is a problem, and it is a problem of
 4 insufficient Commissioner accountability. And I think
 5 there may be some defects in the George proposal,
 6 particularly as it specifies time rather rigidly, but
 7 I certainly -- I'm in favor of our -- us maintaining
 8 our independence by examining and modifying ourselves,
 9 rather than waiting until others do it. So I
 10 certainly support the proposal in its general
 11 orientation.

12 CHAIRPERSON BERRY: Yes, Commissioner
 13 Horner?

14 COMMISSIONER HORNER: I think that we have
 15 within the Commission a tremendous reservoir of
 16 potential very beneficial accountability in the
 17 presence of members of the Commission who are
 18 appointed by more than one President and members of
 19 Congress. I think that that reservoir of
 20 accountability ought to be used.

21 I think that we ought to affirmatively
 22 vote every subpoena of a witness and a document, take
 23 responsibility for it. And if we're not as a body --
 24 if a majority of us as a body is not willing to take
 25 accountability and responsibility for the use of such

1 great government power, then we shouldn't ask the
2 Congress to go on giving us that power.

3 It is an enormous power, and it can be
4 very, very easily abused. And I think that if we have
5 any -- are to have any standing as a Commission, we
6 ought to retain that power, but we ought to hold
7 ourselves accountable for its use. And, therefore, I
8 think I would join with Commissioner Higginbotham in
9 voting against this, but from a different perspective
10 entirely.

11 CHAIRPERSON BERRY: Let me try -- go
12 ahead, Vice Chair. Do you want to say something?

13 VICE CHAIRPERSON REYNOSO: I was just
14 going to say that I have not -- I thought this was
15 more meant to correct something that had gone awry.
16 I had not realized that it was more like a
17 philosophical approach in terms of the role of the
18 Commission. Though my position really doesn't change,
19 it seems to me that to set down the guidelines
20 included in Arabic 2, I still view as a limitation, so
21 I would still vote no on that. And I would go with
22 the understanding that Robbie has indicated I proposed
23 yes on Arabic 1.

24 CHAIRPERSON BERRY: Let me try this. It
25 seems to me from listening to the discussion this time

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1 and last time that either no one, or someone who
 2 hasn't said so, objects to the idea that we should not
 3 subpoena people who are not in possession of facts,
 4 who hold themselves out not to be in possession, and
 5 we don't think they're in possession of any facts.
 6 And that if a Commissioner recommends somebody as a
 7 witness that a Commissioner ought to be able to figure
 8 out whether they're recommending them to be a fact
 9 witness or a prospective witness.

10 I see Commissioner Horner shaking her
 11 head, so maybe the second --

12 (Laughter.)

13 -- is not true. But the first at least
 14 that -- the point I was going to make was that if
 15 there is consensus that for people who say they are
 16 philosophical, or you say they are when you recommend
 17 them, and we feel that their views would be
 18 interesting or informative, or whatever, we could have
 19 a consultation or a briefing or something in
 20 connection with the hearing to hear from these people,
 21 and that their views could, then, be taken into
 22 account in the reports, so long as they're identified
 23 as people who were not subpoenaed, who were there as
 24 prospective witnesses.

25 I sensed before I said that that most

1 people thought that there was nothing wrong with that.

2 Commissioner Horner, are you objecting to
3 that?

4 COMMISSIONER HORNER: Madame Chair, I'm
5 sorry that I can't join what seems to be otherwise a
6 consensus. I do not believe that the differentiation
7 between fact and prospective is a realistic one.

8 I believe, moreover, that to attempt to
9 make that distinction would relegate people who have
10 an informed lifetime of experience to bring to bear on
11 an issue, but no statistical data because they're not
12 social scientists but might be, for instance,
13 practitioners, that that would relegate their
14 testimony to a lesser status, that C-SPAN would close
15 up shop and go away, and, therefore, the public
16 education function those people would provide would be
17 lesser.

18 And I think it would subject the
19 Commission itself to endless squabbling over whether
20 a Department of Labor Deputy Assistant Secretary was
21 representing fact, i.e. the staff produced information
22 provided that that Deputy Assistant Secretary or
23 opinion as an appointee of a given administration. I
24 just don't think it can work in practice.

25 VICE CHAIRPERSON REYNOSO: Madame Chair?

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CHAIRPERSON BERRY: Yes?

VICE CHAIRPERSON REYNOSO: I find myself sort of in between and betwixt. I don't believe that it would work in practice from the point of view that a person would only give a point of view and not back it up with statistics or historical events, and so on. But procedurally, and I thought that's what we were trying to get to, the only difference is that the person would not be subpoenaed. Therefore, the person's presence would be completely voluntary.

Once present, still speaking a philosophical or -- in philosophical or historical terms, presumably that person would use all of the facts, etcetera, that the person had at his or her disposal, and we could take advantage of that. So I agree with Commissioner Horner that once the person is there, I find it very difficult to say, "This is only going to be philosophical and not factual."

But I was focusing more on how you'd get the person there, and the import was that such a person who will be giving, if you will, a philosophical view based on facts, etcetera, we would not exercise or power of subpoena. So it's how you get them there rather than what happens after they get there.

1 CHAIRPERSON BERRY: Well, having been
2 reminded that there's no consensus about --

3 (Laughter.)

4 VICE CHAIRPERSON REYNOSO: Oh.

5 CHAIRPERSON BERRY: Consensus means
6 Commissioner Horner didn't agree.

7 (Laughter.)

8 COMMISSIONER HIGGINBOTHAM: Commissioner
9 George, again, you have tackled an important and
10 difficult problem, and I thank you for it. I am
11 inclined --

12 VICE CHAIRPERSON REYNOSO: On with which
13 everybody agrees, I would say.

14 (Laughter.)

15 COMMISSIONER GEORGE: -- brought you all
16 together.

17 (Laughter.)

18 COMMISSIONER HIGGINBOTHAM: The
19 hypothetical I was going to ask you -- and I just
20 don't know how this Commission would look at it -- you
21 have John Jones, a claims agent for insurance
22 company X, which specializes in insuring churches, and
23 he has investigated 20 claims in state A, B, and C,
24 where the members of the congregation are African-
25 American, or a synagogue, where the people are Jewish.

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1 Now, he has put all of these things
2 together. We want to know, what does he see in the
3 totality about these? Now, is he a fact witness or a
4 prospective witness?

5 COMMISSIONER GEORGE: You're not going to
6 have any difficulty, Leon, in identifying hard cases,
7 cases that are going to be very -- I said that at the
8 beginning, and you've just proven it, although I'll
9 give you my opinion on this one.

10 COMMISSIONER HIGGINBOTHAM: All right.
11 Well, what you're asking --

12 COMMISSIONER GEORGE: On this one, he's a
13 fact witness.

14 CHAIRPERSON BERRY: Yes, absolutely.

15 COMMISSIONER HIGGINBOTHAM: He's a fact
16 witness.

17 COMMISSIONER GEORGE: He's a fact witness.

18 CHAIRPERSON BERRY: He's a fact witness.

19 COMMISSIONER GEORGE: Yeah.

20 CHAIRPERSON BERRY: He has facts,
21 information that he is -- excuse me. Oh, that's --

22 COMMISSIONER HIGGINBOTHAM: But at the end
23 he has to --

24 (Laughter.)

25 COMMISSIONER GEORGE: Mrs. Berry, co-

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1 counsel.

2 (Laughter.)

3 CHAIRPERSON BERRY: Go ahead, Counsel.

4 (Laughter.)

5 COMMISSIONER GEORGE: Well, no, I -- of
6 course, everything is a --

7 (Laughter.)

8 CHAIRPERSON BERRY: Yes, Commissioner
9 Higginbotham?

10 COMMISSIONER HIGGINBOTHAM: He has
11 investigated all of these claims. Your last question
12 is, do you believe that these bombings of synagogues
13 and black Baptist churches have anything to do with
14 anti-semitism or anti-race?

15 CHAIRPERSON BERRY: Based upon --

16 VICE CHAIRPERSON REYNOSO: Madame Chair,
17 I have been called as a witness, a fact witness.

18 (Laughter.)

19 I refuse to give that information.

20 (Laughter.)

21 CHAIRPERSON BERRY: Counsel, do you want
22 to answer that?

23 COMMISSIONER GEORGE: Well, I mean, I'll
24 take -- I mean, it was an amusing line. I mean, I
25 think that if the witness made that objection, I think

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1 I would honor it and say, no, we won't compel you
2 under the subpoena power to answer that question,
3 although I think it would be appropriate for the
4 person, the claims examiner, to render an opinion on
5 that based on his very close acquaintance with the
6 data.

7 Now, I have a different case in mind of --
8 at least I want to give a clear -- what would be to me
9 a clear case. Say, we have the affirmative action
10 hearing, and we invite Cornell West to come and give
11 his opinion, and William Bradford Reynolds to come and
12 give his opinion on whether affirmative action
13 policies, at least this or that affirmative action
14 policy is --

15 VICE CHAIRPERSON REYNOSO: Clearly, that
16 wouldn't be based on fact.

17 (Laughter.)

18 COMMISSIONER GEORGE: So in that case, you
19 know, I don't think either of them should be
20 testifying under compulsion. I mean, they would agree
21 on the -- we'd say, "Well, here is what we've learned
22 about how the program works at Davis or at Texas," or
23 whatever it is. "Here is what they do. Here is the
24 procedures." Now, is that just, unjust,
25 constitutional, fair, good?

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1 CHAIRPERSON BERRY: From your perspective.

2 COMMISSIONER GEORGE: From your
3 perspective, exactly.

4 CHAIRPERSON BERRY: And the answer to your
5 first question, if I may interject, Commissioner
6 Higginbotham, is that the insurance examiner, in the
7 context of the way Commission hearings are conducted,
8 could be asked whether he found any indications in his
9 investigation that would lead him to believe that
10 there was a connection between the burnings, or
11 whatever they were, targeted on particular groups.

12 That is, if he saw anti-semitic graffiti
13 or something like that, without reaching a conclusion
14 as to the meaning, unless he meant to, which is a
15 question of fact. Did he find anything that had
16 anything to do with this? He could be asked that.

17 COMMISSIONER HIGGINBOTHAM: Is it the
18 position that an expert -- is it the position that we
19 can't subpoena anyone who is an expert?

20 CHAIRPERSON BERRY: We can subpoena anyone
21 we want to.

22 COMMISSIONER GEORGE: The claims examiner
23 is an expert. I mean, he --

24 COMMISSIONER HIGGINBOTHAM: Well, from
25 your prospective witness I'm using expert in the sense

1 of --

2 CHAIRPERSON BERRY: Oh, you mean get back
3 to --

4 COMMISSIONER GEORGE: Yeah. If it's
5 purely a prospective witness, then I don't think we
6 should be using the subpoena power there.

7 Now, I have anticipated the case where,
8 you know, we have a -- where we have what I'm calling
9 a fact witness, but since we've got him here we're
10 going to ask his opinion. That's Cruz's case. We
11 might ask more broad -- even a more broad
12 philosophical question, and I have no objection to
13 that person answering that question. I'm just saying
14 if a person doesn't want to answer that question we
15 should honor that. We would --

16 CHAIRPERSON BERRY: But before we get
17 hopelessly confused and muddled here, or before I do,
18 the situation as it exists now and has since 1957 is
19 that the Commission subpoenas witnesses for hearings.

20 COMMISSIONER GEORGE: Every single one.

21 CHAIRPERSON BERRY: And the Commission
22 made a policy of subpoenaing all of the witnesses for
23 hearings, and the Commission made that policy because
24 the Commission, 1) wanted to make sure that people
25 showed up, and there were people from whom they wanted

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1 to get information who wouldn't come, and also other
2 people who wanted to be protected by the subpoena to
3 show up.

4 And instead of drawing all of these
5 distinctions, they made a general rule that for a
6 hearing you have the subpoena power, you subpoena
7 people for hearings. And that has been honored, and
8 I think there's one mayor somewhere who wasn't
9 subpoenaed one time. But that has been honored for
10 those purposes, and that's the situation now. You can
11 subpoena anybody you want to subpoena for a hearing.

12 What we're talking about is, are there
13 changes that need to be made for whatever reasons
14 people think changes need to be made?

15 Commissioner Anderson?

16 COMMISSIONER ANDERSON: Thank you.

17 CHAIRPERSON BERRY: I'll recognize you
18 next, Cruz.

19 COMMISSIONER ANDERSON: I've listened to
20 the discussion here, and I have a lot of questions in
21 my own mind as to who would be a fact witness, who
22 would be a prospective witness or an expert witness.

23 It seems to me the only clear person who
24 would be a fact witness would be a government official
25 called on to testify specifically as to what the

1 agency or department is doing. But regardless of
2 whether the eight of us can decide in our minds that's
3 clearly a fact witness, that's clearly an expert
4 witness, what to me is determinative is the fact that
5 you give almost everyone who is not a government
6 official the opportunity say, "No, I'm not a fact
7 witness. I'm a prospective witness."

8 Now, they may have a strong case or a weak
9 case, but you potentially put into jeopardy almost
10 everybody from the private sector you are calling as
11 a witness, because unless we're going to ask them only
12 a series of questions related to facts and no
13 opinions, they can all argue the purposes of avoiding
14 and forcing enforcement of the subpoena, or at least
15 the procedure to enforce the subpoena, that they're
16 really being called for their perspective on the
17 issue.

18 And so, therefore, I think it's -- as I
19 hear the discussion going on and on, and how unclear
20 we are on certain hard cases, which I think are a
21 limited number of categories, but nonetheless almost
22 all of our witnesses may fit in those categories, it
23 convinces me that maybe we cannot make that kind of a
24 distinction.

25 At some point months ago, if I had not put

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1 it on the record I had thought it pretty strongly, and
2 that is I think we probably ought to just vote on
3 every subpoena. I hadn't thought about that for a
4 while, but I think the more I hear the discussion
5 maybe that's how we resolve this.

6 But in any event, the question of expert
7 witness versus fact witness I think is a morass that
8 opens up a very large problem for us.

9 CHAIRPERSON BERRY: Vice Chair? And I'll
10 get you next, Commissioner Redenbaugh.

11 VICE CHAIRPERSON REYNOSO: But as I hear
12 the discussion, I confess to becoming a little bit
13 more iffy, even about Arabic 1, because the complaints
14 that I've had are witnesses that are friendly,
15 actually, to the Commission, but had a hard time
16 setting that time aside, etcetera. And probably if
17 they didn't want to appear, they would say, "Wait a
18 minute. I've read your regulations, and I think I'm
19 an opinion witness, not a fact witness."

20 I was just looking at the proposal that we
21 have for the mini-hearing. Mayor Reardon, I'm sure,
22 is a very busy person, and if he by chance doesn't
23 want to appear, he'll say, "I've got nothing but
24 opinions to give you. And how dare you to call me
25 when your own regulations say that." So I can see

1 that there might be some problems.

2 CHAIRPERSON BERRY: Commissioner
3 Redenbaugh?

4 COMMISSIONER REDENBAUGH: I think that the
5 thing I remain troubled by -- and I think my
6 colleagues across the room do, too -- by the following
7 -- that -- and there has been no, really, response to
8 this point. I don't think we should compel, under
9 threat of enforcement of a subpoena, private citizens
10 to come and testify when we know that what we are
11 asking them -- we know that we're asking for their
12 opinions and not because they are in possession of
13 evidence.

14 And I think it is very different when we
15 want a police chief to come and testify on the conduct
16 of his office. I could understand why he would not
17 want to come. But I think he has placed himself by
18 being in the public office in a position where he --
19 this is one of his reasonable duties.

20 And we are sort of dancing around this
21 issue by calling them fact versus opinion witness, but
22 for me I'm against compelling private citizens to come
23 and give their opinion.

24 CHAIRPERSON BERRY: Commissioner
25 Redenbaugh, this is one of those that if you think

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1 about it very carefully I bet you're going to change
2 your mind.

3 COMMISSIONER REDENBAUGH: I hope I've got
4 a lot of things like that.

5 CHAIRPERSON BERRY: If, in fact, we did
6 not -- were not able to subpoena private citizens, we
7 wouldn't be able to find out anything that's going on
8 in any industry, whether it's Wall Street or brokerage
9 houses. We wouldn't be able to find out any
10 information.

11 When we're setting up the consumer racism
12 and sexism briefing, I'm told by the Staff Director
13 that some people don't want to come who have
14 information in the industry, because it's not a
15 subpoena and they -- it's not that they only have
16 facts; they just think it's not in their best interest
17 to --

18 COMMISSIONER REDENBAUGH: Yes, and I think
19 that is a different case, because we are subpoenaing
20 information about -- for which they have knowledge and
21 about the conduct of themselves or their industries or
22 their companies.

23 CHAIRPERSON BERRY: Right.

24 COMMISSIONER REDENBAUGH: That's very
25 different than asking Cornell West to come and talk to

1 us.

2 CHAIRPERSON BERRY: Well, Cornell West --
3 first of all, I meant by private -- I meant non-
4 governmental entities, which is what I thought you
5 were going to rethink. Because the point is that Wall
6 Street is not a governmental entity. You know that.

7 COMMISSIONER REDENBAUGH: Yes, I --

8 CHAIRPERSON BERRY: And neither are these
9 people who run the laundry industry, who don't want to
10 charge me less money to iron my blouse. But --

11 (Laughter.)

12 -- in point of fact, these people -- and
13 over the years, the Commissioners found that people
14 who are non-governmental people for whom the
15 Commission needs information to be able to do an
16 adequate job are reluctant to come, especially if they
17 think that the information is going to put them in a
18 bad light.

19 COMMISSIONER REDENBAUGH: I'm not
20 objecting to subpoenaing that person.

21 CHAIRPERSON BERRY: Oh, you're not.

22 COMMISSIONER REDENBAUGH: No.

23 COMMISSIONER GEORGE: Madame Chair?

24 CHAIRPERSON BERRY: Yes?

25 COMMISSIONER GEORGE: I'm interpreting

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1 Commissioner Redenbaugh as simply agreeing with
2 number 1. Well --

3 COMMISSIONER REDENBAUGH: Yes.

4 COMMISSIONER GEORGE: -- Arabic 1 here,
5 which --

6 CHAIRPERSON BERRY: Oh, you're agreeing
7 with 1.

8 COMMISSIONER GEORGE: -- which would
9 permit us to subpoena. The distinction between
10 federal, state, and local employees and private
11 parties comes in 2, not in 1. I want to be very clear
12 about this. And this goes to the question -- I'm
13 going to make one more plea. Connie, I think I'm not
14 going to be able to convince you, so I'm not pleading
15 with you here. I --

16 (Laughter.)

17 I'm pleading with the judges and with
18 Commissioner Lee on the ground that I am not
19 restricting -- my proposal does not restrict the scope
20 of the subpoena power, that every subpoena we now
21 issue we can still issue, same scope, that we're not
22 limiting how broad the scope can be. We're just
23 taking responsibility for that scope when we establish
24 it.

25 The same is true here. Anybody we can now

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1 subpoena we'll be able to subpoena under 1, if we're
2 going to ask them questions about facts. I mean, even
3 Cornell might have some facts. We might compel him to
4 testify as to that. But if we're going to not ask for
5 facts but for opinions, then, you know, we've given up
6 that right to subpoena that person.

7 CHAIRPERSON BERRY: I want to be clear
8 that I misunderstood you, Russell. If Robbie's
9 interpretation of what you said is correct, I
10 misunderstood you.

11 COMMISSIONER REDENBAUGH: Okay.

12 CHAIRPERSON BERRY: You were talking about
13 1(a) --

14 COMMISSIONER REDENBAUGH: Yes.

15 CHAIRPERSON BERRY: -- which is the one
16 about the prospective/fact --

17 COMMISSIONER REDENBAUGH: Yes.

18 CHAIRPERSON BERRY: I thought you meant
19 that under no circumstances --

20 COMMISSIONER REDENBAUGH: Oh.

21 CHAIRPERSON BERRY: -- would the
22 Commission subpoena anybody --

23 COMMISSIONER REDENBAUGH: No, no.

24 CHAIRPERSON BERRY: -- who wasn't a
25 government official.

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1 COMMISSIONER REDENBAUGH: No, no.

2 CHAIRPERSON BERRY: Okay. Good.

3 COMMISSIONER GEORGE: No, that would be a
4 different -- the government/non-government would be a
5 different distinction, and I'm not proposing that at
6 all.

7 CHAIRPERSON BERRY: I see.

8 COMMISSIONER GEORGE: My distinction is
9 fact and prospective.

10 COMMISSIONER HORNER: I'm still confused
11 about Commissioner Redenbaugh's point of view on this.
12 Could you just restate it? What are you for, and what
13 are you against?

14 COMMISSIONER REDENBAUGH: I'm for -- let
15 me recompile this, then. I am for all of us as
16 Commissioners voting on each subpoena.

17 COMMISSIONER HORNER: Voting what?

18 COMMISSIONER REDENBAUGH: On each
19 subpoena.

20 COMMISSIONER HORNER: Okay.

21 COMMISSIONER REDENBAUGH: I myself --

22 COMMISSIONER HORNER: Witness or
23 documents.

24 COMMISSIONER REDENBAUGH: Yes.

25 COMMISSIONER GEORGE: Well, let me just

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1 interrupt there. Then, that goes further --

2 COMMISSIONER HORNER: Than you --

3 COMMISSIONER GEORGE: -- than I'm going
4 here.

5 COMMISSIONER REDENBAUGH: Well, that's
6 fine.

7 CHAIRPERSON BERRY: Commissioner Lee, are
8 you there?

9 COMMISSIONER LEE: Yes, I'm here.

10 CHAIRPERSON BERRY: Okay, good.

11 COMMISSIONER REDENBAUGH: And, Connie, I
12 want to also stipulate that I would not support the
13 compelling of opinions from private citizens.

14 COMMISSIONER HORNER: Okay. Okay. Fine.
15 I understand that. Thank you.

16 CHAIRPERSON BERRY: Now, the other point
17 that I was going to make about the lack of consensus,
18 total agreement in consensus, was that in my own view
19 it is practically impossible and unrealistic for the
20 Commission to say that we would vote on every subpoena
21 ever issued by the Commission, and if we intend to
22 have hearings.

23 Why is that practically impossible? Given
24 the schedules of Commissioners -- and I'm not just
25 talking about this Commission but all of the ones I've

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1 served on of this Civil Rights Commission -- given
2 peoples' schedules, their involvements, and the way
3 hearings are put together, and the time constraints on
4 the staff and everything else, to say that before any
5 subpoena could be issued every Commissioner has to
6 vote -- now, if you wanted to say something different,
7 which was that once you got the witness list, or the
8 documents witness list, if any Commissioner objected
9 to somebody being subpoenaed, they could inform the
10 Staff Director and Commissioners might be polled.
11 That's a whole different issue.

12 But to say that every time we have a list
13 of documents or subpoenas, everybody has to vote on
14 each item before we can go ahead and prepare a
15 hearing, that is just logistically -- this is not
16 ideology speaking. This is practically speaking.
17 That is totally unworkable, given the schedules that
18 people have, their involvements, what people are
19 doing, the timing on trying to get it done. If we
20 held one hearing in three years we'd be very lucky.

21 I'm just telling you that. That is the
22 case, and that's my view of it. And so I'll leave it
23 at that.

24 Commissioner Horner?

25 COMMISSIONER HORNER: I'll just respond

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1 very briefly. I think that it should be entirely
 2 possible at the meeting preceding a hearing -- that
 3 is, typically a month in advance -- or let us say two
 4 meetings preceding a hearing, typically six weeks in
 5 advance of a hearing, that the Staff Director could
 6 present to the Commission a list of every individual
 7 the Staff Director wishes to subpoena, and every
 8 document the Staff Director wishes to subpoena, and
 9 the language of those subpoenas, for the Commission to
 10 vote up or down on.

11 Typically, the outcome of that would be a
 12 very rare exception -- that is, a discussion -- very
 13 rarely on one individual or one kind of document or
 14 documents. And it seems to me that it gets to the
 15 administration of the Commission's business that we
 16 don't have 30 days or 40 days before a hearing full
 17 knowledge of what we intend to do at a hearing. That
 18 is the one of the reasons we are ill-prepared when we
 19 go into the hearings, because the staff has not given
 20 us 30 days in advance a full list of people.

21 Now, over the course of the succeeding
 22 period, the staff might drop someone, but ought not at
 23 that point, it seems to me, to be adding someone.

24 CHAIRPERSON BERRY: The nightmares that go
 25 on around this place within two months of a hearing

1 are unbelievable -- the 24 hours a day people put in,
 2 the smallness of the staff, the fact that we try to do
 3 two or three hearings, which is, you know, like a
 4 nightmare, the people who can't show up, the somebody
 5 who got sick, the this that happened, or the that that
 6 happened, or whatever. I mean, it is just incredible.

7 And then I'll make one last point, and
 8 then I'll recognize whoever's hand was up. I think
 9 it's Commissioner Higginbotham.

10 No one has addressed, really, the point
 11 that while the scope of who we may subpoena is very
 12 broad, the point that someone made here about the
 13 restrictions on what we do, and I don't think these
 14 are to be taken lightly. I mean, all of these federal
 15 agencies -- I read that long document. I mean, there
 16 are places where Commissioners subpoena people. Staff
 17 members subpoena people.

18 We can't make anybody come, and we can't
 19 tell anybody that the Attorney General is going to
 20 enforce the subpoena because we don't know if the
 21 Attorney General is or not. It's up to the Attorney
 22 General to decide that. And over the years there
 23 haven't been that many. I mean, we have a check on
 24 what we do. There haven't been that many times
 25 anybody has asked anybody to enforce a subpoena or

1 that they have enforced it.

2 And so when you read the plethora of
3 approaches to doing this in all of the other agencies
4 and then look at what we do, we have more restrictions
5 on us than anybody.

6 I, too, wanted to say before I recognize
7 Commissioner Higginbotham, I very much appreciate what
8 you've done, Commissioner George. This is a tough
9 problem, and you've given careful thought to it, and
10 I thought this fact/prospective thing was going to be
11 a winner here. It turned out I was wrong.

12 But I just -- you know, I just want to
13 commend you for taking a crack at it, and we'll
14 continue with the discussion.

15 Yes, Commissioner Higginbotham?

16 COMMISSIONER HIGGINBOTHAM: Well, Oliver
17 Wendall Holmes said a page of history is worth a
18 volume of logic. We've had 39 years. Before I'd
19 throw out 39 years to make any significant
20 modification I've got to have some compelling logic to
21 throw it out.

22 Now, if you talk to any U.S. Attorney in
23 the country, and you told him that on every major case
24 he or she has to be ready 45 days before, 60 days
25 before, they would look at us as if we were mad.

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1 The way litigation works is sometimes
2 you're doing very -- you know, Sadie Smith is supposed
3 to testify, and we know that, and 60 days in advance.
4 But then Sadie Smith has a baby, and then you want to
5 find out, well, who is going to replace Sadie Smith?
6 And that's Jacqueline Jones, who is out of the state.
7 And this becomes critical.

8 I mean, we are acting with blinders on in
9 terms of the way litigation works. If we have so much
10 trouble getting together with just the seven of us,
11 who are sort of --

12 CHAIRPERSON BERRY: Eight.

13 COMMISSIONER HIGGINBOTHAM: Eight. Well,
14 seven plus the Chair.

15 (Laughter.)

16 I presume the Chair is flawless.

17 (Laughter.)

18 CHAIRPERSON BERRY: Oh, okay. All right.

19 (Laughter.)

20 COMMISSIONER GEORGE: He'd make rather a
21 good lawyer, wouldn't he?

22 (Laughter.)

23 COMMISSIONER HIGGINBOTHAM: I think if we
24 get an abuse -- I think the staff has gotten a signal.
25 If we get a specific abuse, in view of that abuse we

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1 should let everyone know that we want to have as much
2 order and fairness as possible, but I think it's tough
3 to put a prophylactic rule in. And I guess that's
4 where I am.

5 CHAIRPERSON BERRY: Okay. Commissioner
6 George?

7 COMMISSIONER GEORGE: Perhaps I could wrap
8 it up. I'll try not to provoke any further comment,
9 but just say a final word in defense of my proposal.

10 CHAIRPERSON BERRY: This is not your
11 final --

12 COMMISSIONER GEORGE: What's that?

13 CHAIRPERSON BERRY: This is not your final
14 word. You may have to go back to the drawing board.
15 But anyway, go ahead.

16 (Laughter.)

17 COMMISSIONER GEORGE: I have a feeling
18 about that, but --

19 (Laughter.)

20 I just want to be very clear, since in the
21 discussion of my proposal other possibilities that I
22 am not proposing have been raised, which would much
23 more dramatically alter the policy. So if there is
24 anybody who hasn't decided how he's going to vote yet,
25 and trying to make up a mind, do have in mind the

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1 particular modest, sensible --

2 (Laughter.)

3 -- moderate proposal that I have put on
4 the table here, both in terms of one -- the common-
5 sensical proposal that I have put on the table.

6 So I will formally move this, and I will
7 ask possibly Russell if he would favor me with a
8 second and --

9 CHAIRPERSON BERRY: No, no, no. Let's not
10 move it --

11 COMMISSIONER GEORGE: No?

12 CHAIRPERSON BERRY: -- please.

13 COMMISSIONER REDENBAUGH: I think we ought
14 to come back.

15 CHAIRPERSON BERRY: I think we ought to
16 come back. Russell agrees. I think this discussion
17 -- each time we discuss this I learn more myself. And
18 you're making progress. It may not seem like it.

19 (Laughter.)

20 But why don't we, you know, go back and
21 rethink, and ask your colleagues -- and I ask all of
22 you -- think about this some more, and consult with
23 Commissioner George, and I don't want your proposal
24 voted down. You've made a good effort here, and it
25 has lots of interesting possibilities, and maybe there

1 are changes that could be made in it that could
2 command a majority. But I don't want your proposal
3 voted down.

4 Why don't we leave it for consideration,
5 since it wasn't -- you know, we don't really have to
6 vote on it. Nobody has moved officially to do that.
7 And let's continue to discuss it, unless you're just
8 so totally fed up that you --

9 COMMISSIONER GEORGE: No, I'm not fed up.

10 (Laughter.)

11 No, I am not fed up, and I appreciate all
12 of the kind words that you and Judge Higginbotham and
13 the others have said about my efforts here. But I do
14 get the sense that I am in a position where altering
15 things in one direction is going to lose me some
16 people who might support me. Altering things in the
17 other direction might lose other people who might
18 support me.

19 I don't know if there is anybody who
20 supports me. It's entirely unclear to me, based on a
21 lengthy discussion. Usually, I can tell how people
22 are going to vote. I know how some of you are going
23 to vote. But my sense is that I don't know what else
24 I can do which will either -- I think whatever I do is
25 going to lose me possible support on one side or the

1 other, and I don't see the support there for my
2 proposal.

3 COMMISSIONER HORNER: I'll second your
4 proposal in order to call the --

5 COMMISSIONER GEORGE: Well, I don't want
6 to -- if people don't want to vote, I don't want to
7 ram it down their throats. But --

8 CHAIRPERSON BERRY: But, Commissioner
9 George, you've heard possibilities here about
10 modifying timelines that some people think are too
11 rigid. You've heard suggestions here about changing
12 the modus operandi in terms of the voting that you're
13 requiring. There have been all sorts of suggestions
14 that have been made here for improvement of your
15 proposal.

16 COMMISSIONER GEORGE: But, Madame Chair,
17 if I go in one direction, modifying it, it may
18 alienate some people. I can try, but --

19 CHAIRPERSON BERRY: Well, I mean --

20 COMMISSIONER GEORGE: -- I don't --

21 CHAIRPERSON BERRY: -- I would appreciate
22 it if you tried. I mean, you could always vote it
23 down the next time, I mean, if you really are in the
24 mood for --

25 (Laughter.)

1 COMMISSIONER HIGGINBOTHAM: That's
2 something that is cruel and unusual punishment.

3 CHAIRPERSON BERRY: If that's what you'd
4 want. I'm trying to --

5 (Laughter.)

6 COMMISSIONER GEORGE: Let me get some --
7 I don't know what's appropriate here, Madame Chairman.
8 Rule me out of order, if I go out of order. But can
9 I get some sense of --

10 CHAIRPERSON BERRY: How people are
11 feeling?

12 COMMISSIONER GEORGE: -- how -- is there
13 anybody who thinks that the perspective -- just to
14 start with number 1, the prospective/fact distinction
15 is not hopeless?

16 COMMISSIONER HIGGINBOTHAM: Yes, it's not
17 hopeless.

18 CHAIRPERSON BERRY: We're not actually
19 going to vote on --

20 COMMISSIONER GEORGE: There are four of us
21 who think it's not hopeless.

22 CHAIRPERSON BERRY: The rest think it's
23 hopeless? Okay.

24 COMMISSIONER GEORGE: Yeah. Well, no, and
25 I understand that, as I said. I mean, you're not

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1 going to have any difficulty coming up with hard cases
2 here, and I'm not claiming infallibility on this or
3 anything.

4 CHAIRPERSON BERRY: Yes, Pope John.

5 (Laughter.)

6 COMMISSIONER GEORGE: Claiming
7 infallibility for him, but not for --

8 (Laughter.)

9 Now, on number 2 -- now, remember, I am
10 not proposing that we vote on every subpoena. I know
11 that there are some Commissioners who would prefer
12 that, but that is not what I am proposing. I am
13 proposing the modest, moderate, sensible step of
14 voting on subpoenas duces tecum when those are issued
15 to non-governmental parties.

16 Can I get a reading of who thinks that is
17 not hopeless?

18 CHAIRPERSON BERRY: The way he puts it --
19 hopeless.

20 COMMISSIONER GEORGE: Well, I've got four
21 -- well, I don't have a majority on either.

22 COMMISSIONER HORNER: You got your vote.

23 (Laughter.)

24 COMMISSIONER GEORGE: Yeah, I don't see
25 how I can win. I mean, and any amendment I make --

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1 CHAIRPERSON BERRY: Commissioner Anderson
2 wants to say something. Shall we let him?
3 Commissioner Anderson?

4 COMMISSIONER ANDERSON: Well, I have one
5 question, and then something to say perhaps. Is there
6 a motion on the floor?

7 CHAIRPERSON BERRY: No, we're just --

8 COMMISSIONER HIGGINBOTHAM: Yes, I thought
9 there was.

10 CHAIRPERSON BERRY: No, no, no, no.

11 COMMISSIONER HIGGINBOTHAM: Didn't we
12 second it?

13 CHAIRPERSON BERRY: No. The item was put
14 on for discussion. Then, Commissioner George said he
15 was going to move it and asked Redenbaugh to second
16 it, and I asked him if he would hold that and not move
17 it.

18 COMMISSIONER HIGGINBOTHAM: But what did
19 Commissioner Horner say?

20 COMMISSIONER HORNER: I'm sorry. I
21 thought he had moved it.

22 CHAIRPERSON BERRY: No, I asked him to
23 hold it.

24 COMMISSIONER HIGGINBOTHAM: Okay.

25 CHAIRPERSON BERRY: So then he --

1 COMMISSIONER HORNER: I was seconding
2 nothing.

3 (Laughter.)

4 CHAIRPERSON BERRY: She was seconding --

5 COMMISSIONER REDENBAUGH: But she did
6 exceptionally well at it.

7 (Laughter.)

8 CHAIRPERSON BERRY: Now, Commissioner
9 Anderson?

10 COMMISSIONER ANDERSON: Well, I think it
11 would be worthwhile to reach consensus on what could
12 be reached, either in a negative sense or a positive
13 sense. What I would like to do, if Commissioner
14 George does not move his entire proposal, I for one
15 would like to move an amended form. And I hesitate to
16 say this before we move on yours, because I don't want
17 it to be seen as undercutting the proposal, but I
18 think there is a sense that the proposal, as it's
19 drafted now, will not be adopted in the next few
20 minutes.

21 (Laughter.)

22 CHAIRPERSON BERRY: Commissioner Lee, are
23 you there?

24 COMMISSIONER LEE: Yes. I'm still here.

25 CHAIRPERSON BERRY: Okay.

1 COMMISSIONER ANDERSON: So, I mean, in my
2 view, I would move the adoption of what we are now
3 referring to as Arabic 2, amended to strike the second
4 sentence in the third paragraph, which is paragraph
5 (b)(2), so that it would then read, "Subpoenas duces
6 tecum will be issued only in connection with a
7 documents hearing, except as described below."

8 Strike the next part of the sentence, so
9 that it would then continue, "Commission staff will
10 present the Commissioners with a list of all persons,"
11 etcetera, so that we would not be confined or
12 constrained by an arbitrary time limit, which then
13 gives rise to the difficulty of what both the Chair
14 and Commissioner Higginbotham have indicated.

15 Now, that may not be a perfect -- that may
16 not be perfect, but I think it represents a baseline
17 of what I think should be done. And so if we're not
18 going to move Commissioner George's full proposal --
19 and he has no objection -- then I would move this, as
20 I've just amended it.

21 CHAIRPERSON BERRY: All of Section 2, with
22 the exception of that one sentence.

23 COMMISSIONER ANDERSON: Right.

24 COMMISSIONER GEORGE: Well, it's --

25 COMMISSIONER ANDERSON: Right.

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1 COMMISSIONER GEORGE: -- it's not a
2 complete sentence. In other words, the second half of
3 the sentence remains.

4 COMMISSIONER HORNER: Yeah.

5 COMMISSIONER GEORGE: So it begins,
6 "Commission staff will present the Commissioners
7 . . ." you know, and so forth.

8 COMMISSIONER HORNER: May we have two
9 minutes of silent time?

10 CHAIRPERSON BERRY: Two minutes of silent
11 time?

12 COMMISSIONER HORNER: To read it.

13 CHAIRPERSON BERRY: Oh, sure.

14 COMMISSIONER HORNER: Read all of
15 Section 2.

16 CHAIRPERSON BERRY: Sure. We'll take two
17 minutes to read Section 2.

18 COMMISSIONER ANDERSON: The intention here
19 is to get us out from under an arbitrary time limit
20 that causes those problems.

21 CHAIRPERSON BERRY: But people need
22 silence to read this --

23 COMMISSIONER LEE: Yes.

24 CHAIRPERSON BERRY: -- Commissioner
25 Anderson, so we know what we're --

1 Did you get that point, Commissioner Lee?

2 COMMISSIONER LEE: Yes, I'm reading it,
3 too.

4 CHAIRPERSON BERRY: Okay. Has it been two
5 minutes? I don't know. It's been two minutes. Let's
6 see, you moved your -- and somebody seconded it. And
7 I've forgotten who it was.

8 COMMISSIONER GEORGE: Well, maybe --

9 CHAIRPERSON BERRY: Well, you moved it.
10 Because I need to ask a question about the proposal.
11 What is the status of it? You moved it, Commissioner
12 Anderson.

13 COMMISSIONER ANDERSON: I moved it. I
14 don't think I have yet received a second.

15 CHAIRPERSON BERRY: You haven't received
16 a second. Okay.

17 COMMISSIONER HIGGINBOTHAM: But if you
18 don't have a second --

19 CHAIRPERSON BERRY: You'd better ask for
20 a second.

21 COMMISSIONER HORNER: Second.

22 CHAIRPERSON BERRY: Okay. Now, is there
23 any discussion?

24 COMMISSIONER HORNER: Without prejudice to
25 my vote.

1 CHAIRPERSON BERRY: Let me ask a question
2 of Commissioner George, who wrote this originally.

3 COMMISSIONER GEORGE: Yes, ma'am.

4 CHAIRPERSON BERRY: So he knows what all
5 the rest of it means. Could you explain -- this
6 proposal under B, which is what we're looking at? The
7 only time we'll issue a subpoena duces tecum is if
8 there is a documents hearing, except -- with the rest
9 of the stuff that's after that.

10 COMMISSIONER GEORGE: Right.

11 CHAIRPERSON BERRY: Is that correct? Am
12 I reading it right? It says, "Will be issued only in
13 connection with a documents hearing, except" -- oh,
14 you don't have one.

15 COMMISSIONER GEORGE: No, I've got it.
16 I've got it. Yes, okay, "except as described below."

17 CHAIRPERSON BERRY: Right. And so any
18 time it's not a documents hearing, we follow these
19 procedures below. Is that correct? It says except --

20 COMMISSIONER GEORGE: No, no. Here is --
21 I think here is the idea that we will sometimes obtain
22 documents even when we're not having a documents
23 hearing.

24 CHAIRPERSON BERRY: Right.

25 COMMISSIONER GEORGE: Okay? Those will be

1 circumstances in which people are prepared to make
2 available to the staff, through the Commission,
3 documents that they don't mind us having and they
4 think would be useful to our deliberations, whatever
5 they are.

6 CHAIRPERSON BERRY: All right. But what
7 I'm trying to understand is, "A subpoena duces tecum
8 will be issued only in connection with document
9 hearings, except as described below." In other words,
10 we follow the procedures after that paren. closed, if
11 it's not a documents hearing, is that right?

12 COMMISSIONER GEORGE: Yes. Bill Saunders
13 has just called my attention to the relevant reference
14 there. If you go down two more paragraphs, "The
15 Commission may also request" -- it's on page 2, the
16 penultimate paragraph, "The Commission may also
17 request and obtain documents relevant to a Commission
18 hearing a report to a request on the record during the
19 hearing. A subpoena duces tecum may be issued only
20 after a failure to comply with this request."

21 I had recalled -- I think in part, Madame
22 Chairman, this also comes from a conversation that I
23 had with you about the usefulness of situations in
24 which we've had a witness before us, and suddenly that
25 witness makes reference to a document that we didn't

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1 even know about. And we have very often said, "Well,
2 would you be kind enough to make a copy of that
3 available to the staff?"

4 Usually not in connection with the
5 proceeding that we're in, because they might not have
6 it there to hand, but then they'll ship something to
7 Mary Mathews, or whomever, the -- Stephanie or whoever
8 the appropriate person is, and we've acquired it that
9 way. I don't want that to be somehow a violation of
10 our procedures.

11 COMMISSIONER HORNER: In other words, no
12 one could be compelled to produce documents pursuant
13 to a --

14 COMMISSIONER GEORGE: Right.

15 COMMISSIONER HORNER: -- during the
16 Commission without a subsequent vote of the --

17 COMMISSIONER GEORGE: That's right.

18 COMMISSIONER HORNER: -- Commissioners.

19 COMMISSIONER GEORGE: Now, let's say we
20 find out that there is some very important document --
21 let's say that we find out there is a very important
22 document, and in connection with this discovery for
23 some reason what popped into my mind is -- what is his
24 name? His name is Butterfield, all of a sudden said
25 we have these tapes of the -- those might be of some

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1 relevance.

2 But if we all of a sudden have a discovery
3 that there is an important document out there, we can
4 request that, and the other person might say, "Well,
5 I can't turn that over to you, because that contains
6 sensitive information." At that point, we might want
7 to have a documents hearing and issue a subpoena duces
8 tecum to compel.

9 VICE CHAIRPERSON REYNOSO: I'm not really
10 acquainted with --

11 CHAIRPERSON BERRY: Speak up a little.

12 VICE CHAIRPERSON REYNOSO: I'm not really
13 acquainted with the term "documents hearing."
14 Normally, you subpoena a person and then ask that
15 person to bring the documents. You can subpoena the
16 documents, too.

17 CHAIRPERSON BERRY: They mean like the one
18 we had on Wall Street, where all we did was documents,
19 I think.

20 VICE CHAIRPERSON REYNOSO: Well, but you
21 still subpoena a person to bring the documents.

22 CHAIRPERSON BERRY: To bring them, yes.

23 VICE CHAIRPERSON REYNOSO: Is that what
24 you mean?

25 COMMISSIONER HIGGINBOTHAM: A document

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1 doesn't arrive on its own.

2 (Laughter.)

3 CHAIRPERSON BERRY: The custodian of the
4 documents.

5 COMMISSIONER GEORGE: I don't know. Isn't
6 that room in the White House where they suddenly
7 appear?

8 (Laughter.)

9 CHAIRPERSON BERRY: Let the record show
10 that I objected rather strenuously to that.

11 (Laughter.)

12 Now, let's proceed.

13 (Laughter.)

14 COMMISSIONER GEORGE: Yeah, that's, Cruz,
15 what I had in mind. And I think that that is a term
16 that we do use. I don't know if it's in the
17 administrative instructions now, but it's a term that
18 we have used. I think it would be well understood by
19 the staff.

20 VICE CHAIRPERSON REYNOSO: Good.

21 CHAIRPERSON BERRY: Commissioner
22 Higginbotham, are you sighing or speaking?

23 COMMISSIONER HIGGINBOTHAM: Well, both.

24 (Laughter.)

25 This is a fundamental, profound change in

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1 the 39-year history when you end up, when you say a
2 majority of all Commissioners must vote to approve the
3 issue of a subpoena duces tecum. And I -- I know that
4 there is no division among this Commission. But in
5 the future --

6 (Laughter.)

7 -- in the future, there may be Commissions
8 which are evenly divided.

9 (Laughter.)

10 And if you want to really put the
11 Commission on dead center, all you have to do is to
12 have four people to not vote for the issuance of a
13 subpoena, and the Commission becomes absolutely
14 ineffective. And I think it can bring in a whole lot
15 of implications.

16 You look at the statute, and the statute
17 doesn't require it. When you look at all of the other
18 -- of the terrific analysis of the other agencies,
19 that isn't required. And what it means to me is that
20 if you want to make the United States Commission on
21 Civil Rights impotent, that's all you need, because if
22 they don't have to produce -- if they don't have to
23 produce the document, you can't have a comprehensive
24 enough hearing. And I think that that could be a
25 very, very significant impediment.

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1 And my final thing is, why is it that for
2 almost four decades this Commission has been able to
3 function without a scandal in this area, and now it
4 has reached such a cause celebre that we have to get
5 to this point.

6 CHAIRPERSON BERRY: Commissioner Horner?

7 COMMISSIONER HORNER: I think it would not
8 have the effect of making the Commission impotent. It
9 would have the effect of making the Staff Director
10 unable to make decisions of extreme sensitivity
11 unilaterally in the face of the Commission's
12 impotence.

13 I think it would make the Commission
14 potent and responsible, and if that were to lay bear
15 the sometimes reality that there is great division in
16 these issues, that might well suggest that given such
17 division the government in the part of the -- on the
18 part of the staff ought not to be demanding the
19 presence and testimony and documents of private
20 citizens.

21 CHAIRPERSON BERRY: Please --

22 COMMISSIONER HIGGINBOTHAM: May I respond?

23 CHAIRPERSON BERRY: Let her finish,
24 please.

25 COMMISSIONER HIGGINBOTHAM: Oh, I thought

1 she had finished. I'm sorry.

2 CHAIRPERSON BERRY: She was only saying
3 "ah."

4 COMMISSIONER HORNER: That's all right.
5 And I had some other major point to make, which has
6 now escaped my mind, so --

7 (Laughter.)

8 -- if I may, I'll come back --

9 CHAIRPERSON BERRY: Let me -- before you
10 speak, Commissioner Higginbotham, and while
11 Commissioner Horner tries to recall --

12 COMMISSIONER HORNER: It's hopeless.

13 CHAIRPERSON BERRY: -- let me just say
14 that -- remind those who have been on the Commission
15 that the Commission approves a hearing, the Commission
16 votes to approve a hearing. That has to be done by a
17 majority. The Commission votes a proposal for a
18 hearing, which says what the hearing is going to be
19 about and all that sort of stuff, by a majority.

20 The Commission even reviews, as we did
21 today for the mini-hearing, the agenda for the
22 hearing. The Commission recommends witnesses for the
23 hearing. My only point is it's not that the
24 Commission is totally uninvolved in the process and
25 has no points at which it can say to people, "Listen,

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1 either we shouldn't do this, or if we're going to do
2 it we should have this kind of witness and not that
3 kind of witness." That would be totally
4 irresponsible.

5 What we're really talking about is what do
6 you do in the run-up to the hearing itself,
7 procedurally, and trying to get the witnesses, get the
8 materials, and so on. And if we have a documents
9 hearing, the Commission votes to have a documents
10 hearing, not that the staff just goes ahead and has
11 one. So those have all been the points, the levers by
12 which the Commission operated to exercise its
13 influence in the past.

14 Your query is, is there something that has
15 happened after 39 years that means that the Commission
16 ought to exercise greater leverage in the record of 39
17 years? And I guess that's what your question is.

18 COMMISSIONER HIGGINBOTHAM: Not greater
19 leverage, greater preclusion.

20 CHAIRPERSON BERRY: Preclusion.

21 COMMISSIONER HIGGINBOTHAM: Preclusion is
22 the issue here.

23 CHAIRPERSON BERRY: Okay.

24 COMMISSIONER HIGGINBOTHAM: It's not
25 leverage.

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CHAIRPERSON BERRY: Yeah, okay.

COMMISSIONER HIGGINBOTHAM: Now, what it means, as a practical matter, is suppose a subpoena duces tecum was issued. What is the worst which could happen? The person testifies, and suppose the four people who would not have voted to approve the subpoena duces tecum, they have full latitude to comment on whether the subpoena should have been issued. They've got full latitude to comment on the evidence.

When you preclude testimony, you preclude the public from knowing what the person would have said, and that's what I'm concerned about.

CHAIRPERSON BERRY: Also --

COMMISSIONER HIGGINBOTHAM: And you are making it, as a Commissioner, within an adequate record. That's the terrible thing about this suggestion. You are precluding the issuance of a testimony -- of testimony when you don't know enough facts, you don't know as much as the staff. And that's the reason why practically no one has this rule.

CHAIRPERSON BERRY: It's also true, Commissioner Higginbotham, that, if the Commission wants to enforce a subpoena, you need five votes at

1 least.

2 COMMISSIONER HIGGINBOTHAM: Sure.

3 CHAIRPERSON BERRY: You can't enforce it
4 if you don't have a majority. You can't even ask --
5 you can't get it enforced anyway unless the attorney
6 decides to. But you can't even ask them to unless a
7 majority of the Commissioners agree to do that.

8 COMMISSIONER REDENBAUGH: That's the way
9 it is now?

10 CHAIRPERSON BERRY: Yes. You can't ask
11 the Justice Department to enforce a subpoena unless a
12 majority of the Commissioners agree to do it. And the
13 U.S. Attorney can even decide then not to enforce it,
14 but you've got to have five votes in order to do that.
15 The Chair can't do it. Four Commissioners can't do
16 it. The Staff Director can't do it. That's the way
17 it's done. It has been done that way.

18 Commissioner Horner, did you remember what
19 you were going to say?

20 COMMISSIONER HORNER: Yes, I did, Madame
21 Chair, and I'll make my point very briefly. Judge
22 Higginbotham asked what has changed over 39 years to
23 make the Commission advise now not to allow the staff
24 to subpoena American citizens at will.

25 I think what has changed is an increased

1 -- as the power of the Federal Government has
2 dramatically increased over that period of time,
3 ordinary citizens have felt a greater sense of threat,
4 and in my view somewhat legitimately so, although one
5 doesn't wish to be carried away on this subject.

6 But to the degree that there is legitimate
7 concern, and to the degree that there is concern which
8 perhaps not legitimate is nonetheless felt, I think
9 it's incumbent upon the Federal Government now to
10 change its ways, to modify its ways, and to be more
11 sensitive to both the perception and the reality of
12 federal intervention in the lives of private citizens,
13 especially on issues of great religious, political,
14 and other kinds of sensitivity.

15 I recognize the perspective you're
16 bringing to bear on this. It's entirely admirable.
17 But I am reacting to my perception of what the
18 condition of the country demands now. It's a judgment
19 call.

20 COMMISSIONER LEE: Madame Chair?

21 CHAIRPERSON BERRY: Yes, Commissioner Lee,
22 I'll recognize you then.

23 COMMISSIONER LEE: It's my understanding
24 that the staff really does not subpoena potential
25 witnesses at will. As I recall, the staff report

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1 mentioned it was a very small percentage of witnesses
2 that needs to be subpoenaed. Isn't that right?

3 CHAIRPERSON BERRY: We subpoena everybody
4 who is going to be a witness at a hearing.

5 COMMISSIONER LEE: Right.

6 CHAIRPERSON BERRY: Right.

7 VICE CHAIRPERSON REYNOSO: But that's a
8 small percentage.

9 CHAIRPERSON BERRY: If they are within
10 subpoena range.

11 COMMISSIONER LEE: Right.

12 VICE CHAIRPERSON REYNOSO: But that's a
13 small percentage, generally, of the potential
14 witnesses that are interviewed by the staff maybe.

15 COMMISSIONER LEE: Right.

16 VICE CHAIRPERSON REYNOSO: Yeah.

17 CHAIRPERSON BERRY: That's right. They
18 interview a lot of people.

19 VICE CHAIRPERSON REYNOSO: Yeah.

20 CHAIRPERSON BERRY: Right.

21 VICE CHAIRPERSON REYNOSO: Right.

22 CHAIRPERSON BERRY: That's true.

23 COMMISSIONER LEE: I really think that if
24 we changed the rule now by making it a majority of the
25 Commission having to approve any kind of a subpoena,

1 I agree with the Judge. You know, how about the
2 potential witnesses who go -- whose opinions we need
3 to know we'll never know, because they would not want
4 to come forward to these cases.

5 And, again, if ain't broken, if it hasn't
6 been broken for 39 years, I just don't see why we have
7 to voluntarily redo this to meet -- it's pressure.
8 It's not a power. It's a very pressured pull to carry
9 out the Commission's position.

10 CHAIRPERSON BERRY: Did I hear you say, in
11 the words of friendly Peter Dooley, if it's not broke
12 don't fix it, or if it ain't broke don't fix it?

13 COMMISSIONER LEE: Well, I just don't
14 think that --

15 CHAIRPERSON BERRY: Oh.

16 (Laughter.)

17 Okay. Commissioner Anderson?

18 COMMISSIONER ANDERSON: I listened very
19 closely to what Commissioner Higginbotham was saying,
20 and I must say that much of it convinced me of the
21 rightness of my amendment, although I'm sure you
22 didn't intend that effect on my part.

23 There is the issue -- I mean, the point
24 you make is well taken, that by requiring a majority
25 to agree to the subpoena we do put certain power in

1 four Commissioners to thwart moving forward. But I
2 think there are two things to keep in mind -- that not
3 every Commission has had the complexion of this
4 Commission and not everyone will in the future.

5 The first, in my mind, is if you require
6 five votes, you're required on both sides, and we've
7 got a number of witnesses that are suggested by all
8 sorts of Commissioners and all sorts of groups of
9 Commissioners. So that I don't think the requirement
10 for five votes necessarily cuts the same way.

11 The second thing is that I think we should
12 put procedures in play that require us to move on the
13 basis of consensus, and to be very candid about it,
14 and not on the basis of, say, half the Commission
15 being opposed but being unable always to find a fifth
16 vote. And, therefore, the division on the Commission
17 gets deeper.

18 I think we ought to look at a procedure
19 that requires consensus up front, rather than going
20 through a long process and then finding at the end of
21 the process -- that is, when the report is being
22 written, the recommendations being made -- a deep
23 division on the part of the Commission that detracts
24 from the effectiveness of the report and the impact of
25 the report.

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And so, therefore, I think that in looking at how we set up the hearing, if we're going to have Commission approval of all of these steps, it is not such a profound leap to require Commission approval for this intermediate step. If we're going to require five votes to go to the Justice Department to enforce a subpoena, then I don't think it's such a large step to require five votes up front to issue the subpoena to begin with.

So I think that, as I reflect on what has been said and thinking about this for several months, that the more we can try to move toward consensus among the Commissioners earlier in the process the better off we are in getting a product that the Commission as a whole can support. And, therefore, I think I'd like to go forward with this proposal.

CHAIRPERSON BERRY: Commissioner George, do you want to say something?

COMMISSIONER GEORGE: Yes, I just wanted to say in response to Leon's point that we are exercising a very significant power over people, and the power to do good is the power to do evil, and I think it's very good even for good governments to be very meticulous about procedural protections of people against possible abuse.

1 And what my proposal is aimed at doing is
2 offering that kind of protection, and it does seem to
3 me -- and it might just be a difference of philosophy
4 here -- it does seem to me that we shouldn't exercise
5 this power over private parties of getting into their
6 papers if we don't have a majority, if there aren't
7 five Commissioners who are prepared to take
8 responsibility and be accountable for that.

9 I suspect that the way it works, the way
10 it would work in practice, is the staff could propose
11 a particular subpoena duces tecum of a particular
12 breadth, and some Commissioners might object to any
13 subpoena duces tecum being proposed. More often, I
14 suspect, some Commissioners will be prepared to agree
15 to a subpoena duces tecum, but will want the breadth
16 to be narrowed somewhat, and that that would be the
17 practical protective effect.

18 Where a majority was unwarranted, a four-
19 person group were unwarrantedly preventing the
20 Commission from getting access to crucial materials,
21 that would be done on the public record. And they
22 would be accountable for that and I would suspect
23 would be held accountable publicly and in the media
24 for that.

25 CHAIRPERSON BERRY: I just wanted to say

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 2 offering that kind of protection, and it does seem to
 3 me -- and it might just be a difference of philosophy
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 19 person group were unwarrantedly preventing the
 20 Commission from getting access to crucial materials,
 21 that would be done on the public record. And they
 22 would be accountable for that and I would suspect
 23 would be held accountable publicly and in the media
 24 for that.

25 CHAIRPERSON BERRY: I just wanted to say

1 that there is nothing in the record that indicates
2 that the Commission has subpoenaed materials and
3 papers from private parties who are unrelated to any
4 organization, any cause, or any other matter that the
5 Commission was interested in.

6 In other words, the Commission -- there's
7 nothing in the history of this Commission, either
8 recently or since 1957, that indicates that the
9 Commission went about subpoenaing materials from
10 private citizens who, in fact, were not involved in
11 some kind of organization or entity or function that
12 the Commission was seeking information about.

13 So I just wanted to say that, as a matter
14 of fact, that is the case. Yes, they have been non-
15 governmental people, but it has been in their capacity
16 of being related to some cause, some organization,
17 some something, that the Commission wanted something
18 about. So I think that's fair to say.

19 I think the other thing is the more I
20 listen to this discussion, the more I sense that what
21 is intended by changing this clause on the discussion
22 about the majority voting to approve subpoenas duces
23 tecum could be accomplished simply by informing people
24 who are to produce materials that no subpoenas can be
25 enforced unless a majority of the Commission agrees to

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1 do so.

2 In fact, if they knew that, and they
3 didn't want to submit the materials and felt that they
4 could command a majority -- they could not -- we could
5 not command a majority, and it was split four to four,
6 to have them present the materials, they could simply
7 not present them. And the Commission, unless a
8 majority agreed to ask the U.S. Attorney to enforce it
9 -- I mean, I can see where somebody who doesn't know
10 that may have a different view.

11 But if we informed all people who were
12 asked for materials that subpoenas can only be
13 enforced if a majority of the Commission agrees, then
14 they, in fact, know that that is the case. And you
15 could accomplish that without making any change in the
16 rules. I just pointed that out -- that probably is
17 totally unsatisfactory; but I thought I would point it
18 out.

19 COMMISSIONER GEORGE: Well, let me just
20 say why it's unsatisfactory. I mean, I think if we
21 issue a subpoena we ought to enforce it.

22 COMMISSIONER HIGGINBOTHAM: We don't have
23 that option.

24 COMMISSIONER GEORGE: We don't?

25 CHAIRPERSON BERRY: Yes, we do.

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1 COMMISSIONER HIGGINBOTHAM: I mean, the
2 Attorney General is --

3 COMMISSIONER GEORGE: Oh, I understand,
4 Judge. But, I mean, if we issue a subpoena, we should
5 seek its enforcement. We should go to the Attorney
6 General, and I would hope ordinarily united. I mean,
7 I can certainly anticipate many situations -- I mean,
8 it would be -- I would be loathe ever to vote against
9 enforcing a subpoena that we had issued as a
10 Commission, even if I were personally opposed to that
11 subpoena being issued.

12 There are some circumstances, I'm sure,
13 that would be extreme enough in my own view that I
14 would be compelled to do that, but I can imagine many
15 circumstances in which I might think a particular
16 subpoena is overbroad, and I would have voted against
17 it and would vote against issuing that subpoena.

18 But then when it -- if someone resisted
19 our subpoena, it would be very important to me that
20 the Commission subpoenas be enforced, and so I would
21 vote for enforcement.

22 CHAIRPERSON BERRY: Just so you all know
23 this, in the past the Commission has subpoenaed
24 materials and witnesses. And when they were not
25 forthcoming, even though the Commission unanimously

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1 agreed to do this, the Commission has decided not to
2 enforce a subpoena.

3 Why did the Commission decide not to
4 enforce it? Because given the circumstances of the
5 conduct of the hearing, given efficiency and use of
6 resources, given what the Commission was involved in,
7 they decided that it was a better part of valor to in
8 that particular instance.

9 So I'm just saying that it's not that
10 every time they agreed to do it they went ahead and
11 enforced it. They made a new judgment each time.

12 COMMISSIONER GEORGE: I understand that,
13 and there can be very good reasons that we become
14 aware of for not enforcing it. But I guess I'd like
15 to, to the extent possible, depoliticize it at that
16 stage. If we have reasons for not enforcing it, well,
17 that's fine. Or if it makes sense for the Commission,
18 we can accomplish our goal, we've learned we can
19 accomplish our goals without it, that's fine, too.

20 But if we're going to have a philosophical
21 or a political dispute about whether a subpoena --
22 whether someone should be compelled, I would very much
23 like to have it at the stage where we're deciding
24 whether to issue the subpoena and taking
25 responsibility for it there, rather than down the line

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1 on the enforcement issue.

2 CHAIRPERSON BERRY: The last point I'll
3 make is in the history of the Commission -- and this
4 is in the history books about the Commission -- the
5 Commission was more vehemently attacked for being part
6 of an oppressive Federal Government in its early years
7 than it has even been in recent years, or that the
8 Federal Government has been in recent years. In fact,
9 Commissioners were almost run out of the State of
10 Mississippi.

11 Commissioners had great difficulty trying
12 to maintain the power of the Commission to do its
13 work, to use its enforcement power. Commissioners and
14 staff were called all sorts of names about people as
15 representatives of the heavy-handed Federal
16 Government.

17 I'm just pointing this out so that you
18 will know that the history of this organization, and
19 the history of the Federal Government, is replete with
20 even more heated and virulent controversies than
21 attend what goes on in the public today. And the
22 Commissioners every time have stood up and said, "Hey,
23 you know, this is what we have to do, and this is what
24 we have to maintain."

25 There are controls on what we do, and I'm

1 not trying to advise you in any way in terms of how
2 you vote, but I'm just telling you that that is the
3 history of the organization, which you can read in
4 books about the history of -- that people can make
5 available to you if you wish to confirm that this was
6 the case.

7 Is there any further discussion? Yes?

8 COMMISSIONER HIGGINBOTHAM: I will make
9 this last presentation less than five hours.

10 (Laughter.)

11 It makes absolutely no sense to -- in the
12 year 1996, to be making this distinction between
13 private versus governmental. I mean, are we saying
14 that General Motors is private and the State of
15 Mississippi is governmental? Are we saying that
16 Mitsubishi is private and the State of Illinois is
17 governmental? That distinction between private and
18 government has been out of American juris prudence for
19 half a century.

20 We know that major corporations who are
21 (quote) "private" have much more power than
22 governmental. And are we throwing all of the support
23 of the Commission -- throwing out all of the cases
24 which disregard this private/governmental distinction?

25 Let me give you a couple of examples.

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1 Most of -- many of the people who are going to prison
2 now, they aren't in (quote) "state prisons." We have
3 prisons which are being operated by private
4 corporations, and let us suppose that some of the
5 private corporations are -- in the administration of
6 their jails are seriously violating the rights of
7 inmates.

8 Do we say as a Commission, "Oh, yeah, but
9 that's done by a private corporation"? That kind of
10 distinction is dead from any juris prudential view, so
11 we are going back centuries when we start to make
12 these distinctions.

13 If someone is big enough to violate human
14 rights, whether it's done by General Motors,
15 Mitsubishi, or EEOC, or the State of Mississippi,
16 there should be no distinction. And we will look like
17 we are bereft of history when we start making -- when
18 50 years from now when someone looks in our record,
19 they're going to look at Griswold's great descent as
20 a great moment of this Commission, when he was in
21 Mississippi, dealing with private entities who were
22 involved in vigilante movements, to deprive people of
23 their rights.

24 And Griswold could stand up against the
25 vigilante movements, which included killing Medgar

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1 Evers, and now we are worried about offending private
2 enterprises. It is a repudiation of what this
3 Commission has stood for, and maybe that's where we
4 are in this society. But to make this private versus
5 governmental distinction it seems to me is to turn the
6 clock of history back.

7 CHAIRPERSON BERRY: Yes, I know we are
8 going to get --

9 COMMISSIONER HORNER: It is.

10 (Laughter.)

11 CHAIRPERSON BERRY: Yes, Commissioner
12 Horner?

13 COMMISSIONER HORNER: It is, indeed, to
14 roll back and increasing excrescence of public power.
15 Yes, that's an accurate characterization, but there is
16 a different way to look at it. And that is that this
17 will be more in keeping with earlier distinctions of
18 public/private to the benefit of the citizenry.

19 CHAIRPERSON BERRY: Is the Ku Klux Klan a
20 private organization or a public --

21 COMMISSIONER HIGGINBOTHAM: It is. It
22 certainly is.

23 CHAIRPERSON BERRY: It is? Oh. I don't
24 know. Somebody else had their hand up. I think it
25 was Commissioner George. Sorry. I'll recognize the

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1 Vice Chair and then let --

2 COMMISSIONER GEORGE: Oh, sure. Sorry.

3 VICE CHAIRPERSON REYNOSO: I was just
4 going to say that, clearly, government has the
5 potential for the present actions. And, you know, we
6 don't have to go back in history beyond the McCarthy
7 hearings to be reminded of that. And if I were
8 convinced that the history of this Commission was to
9 violate people's first amendment or privacy rights,
10 then I might be thinking differently.

11 The history of this Commission actually
12 has been, it seems to me, the opposite. By the use of
13 the subpoena power to protect the first amendment and
14 civil rights of folk -- and I think basically that's
15 the way the Commission has used it -- so I am
16 reluctant to then vote on what I view is a limitation,
17 a self-imposed limitation of that. So that's sort of
18 where I started.

19 CHAIRPERSON BERRY: Back where you started
20 from.

21 Commissioner George, do you want to speak,
22 or do you want me to go ahead and --

23 COMMISSIONER GEORGE: Well, go ahead and
24 -- I mean, I don't know how we've gotten into this or
25 what I said in my proposal that triggered this, but

1 I'm just very disappointed. I don't think that the --
2 I could be missing it, Leon, but I do not see how
3 anything in my proposal would raise any of the
4 concerns that you've raised.

5 I have not proposed that the Civil Rights
6 Commission cannot play a role in highlighting and
7 combatting discrimination by private parties under
8 civil rights acts that do outlaw that sort of -- those
9 sorts of civil rights violations.

10 I could, I think, make a detailed response
11 to draw some distinctions to try to show you that your
12 most recent intervention was not apt in response to
13 what I'm trying to do here. But I'm afraid it would
14 just get us into a very lengthy, continuous exchange
15 on the matter. I think there is a valid distinction
16 between private and public power. I think it's
17 absolutely -- the power of private and public
18 institutions is absolutely crucial in many areas of
19 our juris prudence, which I would be very happy to go
20 into.

21 Nothing in that, in the recognition of
22 such a distinction, suggests that civil rights cannot
23 be violated by private organizations or that the Ku
24 Klux Klan is not a private organization, or that we
25 ought not to be able to reach the activities of the Ku

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1 Klux Klan. I mean, nothing like that at all.

2 I'm trying to deal here with what I take
3 to be a significant problem, and I thought at least
4 many of my colleagues agreed with me that there's at
5 least a problem here. And I can appreciate that I
6 perhaps haven't quite accomplished it or done it as
7 well as I could, but this is not a debate over whether
8 we ought to be concerned about discrimination by
9 powerful private interests at all.

10 CHAIRPERSON BERRY: Do I hear other
11 comments, or should I call this for a vote? Yes,
12 Commissioner Anderson?

13 COMMISSIONER ANDERSON: Let me just say,
14 I don't want to read an implication into anything that
15 has been said that's not there. But as far as I'm
16 concerned, and my intention, it was in no way to
17 shield any organization that would be violating civil
18 rights through this proposal. Certainly, I mean, the
19 question isn't the Ku Klux Klan a private
20 organization. I mean, it is not an intention to
21 shield any organization like that.

22 And I think if any -- for example, if we
23 were to hear serious allegations that there is a
24 private contractor operating a prison system where
25 there are violations, I would assume that we would all

1 vote to go after that. I mean, I voted to go into the
2 Mississippi -- a review of the jail situation there
3 that we did. So I don't see it as that.

4 I see it simply, number one, we are a
5 federal agency in charge -- directed to review the
6 civil rights enforcement of other federal agencies,
7 and so I think that we ought to have a very automatic,
8 if you will, subpoena power with federal agencies.
9 And we ought to be able to get those documents very
10 readily.

11 And there should be no -- well, really,
12 there should be no need for a subpoena, because it's
13 a federal agency. And, certainly, there really should
14 not be a need for a subpoena against a state agency
15 because they should cooperate with us. So I see that
16 as a perfectly reasonable part of this proposal, that
17 if there is resistance then we have very clear
18 discretion to go do that.

19 What I'm saying is where we have a private
20 entity, we ought to afford a second look, a review by
21 the Commission. And I don't see that review as being
22 in any way shielding it, but I think that people are
23 entitled to that, and I think organizations are
24 entitled to it. And I think, frankly, if we give that
25 second look up front, it will make it much more easy

1 to move for enforcement, to recommend enforcement, and
2 to deal with the witnesses and the documents that we
3 do get.

4 So that's -- anyway, that's the intention
5 that I had behind it, and we may have a very important
6 disagreement on philosophy. But at least I want to
7 make my intention and my motivation clear on the
8 thing.

9 CHAIRPERSON BERRY: I'll recognize you,
10 Commissioner Horner, but first let me say that my
11 saying is the Ku Klux Klan a private organization was
12 not meant to imply that anyone here thought the Ku
13 Klux Klan should be insulated from investigation. I
14 was simply trying to clarify, you know, what did we
15 mean by private organization.

16 And, secondly, to remind you again that
17 the Commission, when it agrees to have a hearing, if
18 it's a documents hearing, it knows that we are
19 subpoenaing documents from brokerage houses, banks,
20 whatever. It's not that you don't know this. It's
21 not that it comes as a surprise when we get the
22 witness list. You know this already, and you have a
23 full opportunity to say, "You know, I don't think we
24 should subpoena banks," or whatever it is you don't
25 think we should, "or pressure groups against banks,"

1 or whatever.

2 Commissioners do have opportunities --
3 they may not be sufficient opportunities in the minds
4 of some Commissioners, but Commissioners do have
5 opportunities to make decisions about this process.

6 Commissioner Horner?

7 COMMISSIONER HORNER: I just wanted to say
8 -- to make sure that I was not misunderstood, that I
9 am trying to support a situation in which the
10 Commissioners take responsibility for subpoenaing
11 governmental and private organizations and citizens,
12 not to avoid subpoenaing, but to force us to take
13 responsibility and to walk us back a bit from the
14 power of the Staff Director and the staff and elevate
15 the potency and meaning of our inquiries and our
16 investigations by forcing us to take responsibility.

17 And I also would like to associate myself
18 with Commissioner Anderson's remarks about the
19 necessity to force us to engage in what I think the
20 founders anticipated in setting up our form of
21 government -- horse trading, moving to the center,
22 modification of views. And I think that by forcing us
23 to deal with these more difficult issues, and not just
24 leaving it to the untrammelled power of staff, that we
25 will become a better Commission.

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1 CHAIRPERSON BERRY: If there are no other
2 comments, I guess the motion is on the floor.

3 COMMISSIONER HIGGINBOTHAM: Madame Chair,
4 I gather that silence -- no response is not considered
5 that there's not one thought about.

6 (Laughter.)

7 COMMISSIONER HORNER: Fair enough.

8 CHAIRPERSON BERRY: I wish to call the
9 question. All those in favor of Commissioner
10 Anderson's motion --

11 COMMISSIONER GEORGE: Just to clarify,
12 Madame Chairman, I think we're just voting on
13 Section 2 of my original draft as revised by Carl
14 Anderson.

15 COMMISSIONER ANDERSON: Yeah.

16 COMMISSIONER GEORGE: Right? Not
17 Section 1. There's no --

18 CHAIRPERSON BERRY: Yeah, your proprietary
19 statement here on the part of George.

20 COMMISSIONER GEORGE: What's that?

21 CHAIRPERSON BERRY: I'm telling Anderson
22 he heard your proprietary statement.

23 COMMISSIONER GEORGE: Oh, I didn't mean to
24 be proprietary. I just mean -- we're not voting on
25 the --

1 CHAIRPERSON BERRY: I'm getting to it.
 2 We're voting on the George-initiated proposal of your
 3 Section 2, as modified by Commissioner Anderson. And
 4 all of those who are in favor of this proposal -- and
 5 a roll call vote has been asked for. First of all,
 6 let me see what the vote is, and then I'll call the
 7 roll.

8 All those in favor indicate by saying aye.
 9 (Chorus of ayes.)

10 Okay. Who said aye? 1, 2, 3, 4. Okay.

11 All those opposed indicate by saying no.
 12 (Chorus of nos.)

13 1, 2, 3. And then I have to vote. Hm.
 14 (Laughter.)

15 COMMISSIONER GEORGE: Surprise us, Madame
 16 Chairman.

17 (Laughter.)
 18 Let's call the roll.

19 CHAIRPERSON BERRY: It's a tough one,
 20 Robbie. No.

21 Commissioner Anderson?

22 COMMISSIONER ANDERSON: Aye.

23 CHAIRPERSON BERRY: Commissioner Berry,
 24 no.

25 Commissioner George?

1 COMMISSIONER GEORGE: Aye.

2 CHAIRPERSON BERRY: Commissioner

3 Higginbotham?

4 COMMISSIONER HIGGINBOTHAM: No.

5 CHAIRPERSON BERRY: Commissioner Horner?

6 COMMISSIONER HORNER: Aye.

7 CHAIRPERSON BERRY: Commissioner Lee?

8 COMMISSIONER LEE: No.

9 CHAIRPERSON BERRY: Commissioner

10 Redenbaugh?

11 COMMISSIONER REDENBAUGH: Aye.

12 CHAIRPERSON BERRY: Vice Chair Reynoso?

13 VICE CHAIRPERSON REYNOSO: No.

14 CHAIRPERSON BERRY: Okay. The motion

15 fails. But let me suggest this. I --

16 COMMISSIONER GEORGE: Well, let me just

17 say that I am beginning to change my opinion on the

18 view and have been persuaded by you that work --

19 (Laughter.)

20 CHAIRPERSON BERRY: And I would like to

21 suggest that I think that maybe we should move for

22 further discussion on this.

23 COMMISSIONER GEORGE: Okay.

24 CHAIRPERSON BERRY: And I will be speaking

25 to some of you about some ways that we can do

1 something else on this.

2 COMMISSIONER GEORGE: I want to know how
3 I allowed myself to get --

4 CHAIRPERSON BERRY: I'm not giving up
5 altogether.

6 COMMISSIONER GEORGE: -- so emotionally
7 invested in subpoena requirements.

8 (Laughter.)

9 CHAIRPERSON BERRY: It's important.
10 Future agenda items? Anyone have future
11 agenda items?

12 COMMISSIONER REDENBAUGH: Do you mean for
13 a future meeting?

14 CHAIRPERSON BERRY: Yes.

15 COMMISSIONER REDENBAUGH: Good. Because
16 I'm worn out now.

17 (Laughter.)

18 And I wasn't even in the middle. I would
19 like to come back to two questions. My reading of the
20 transcript confuses me, as to our project proposal for
21 '97.

22 CHAIRPERSON BERRY: '97.

23 COMMISSIONER REDENBAUGH: '97. So I don't
24 want to take it up now, but I think I'd like some
25 clarification on that. It also is my view that it is

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