

UNITED STATES COMMISSION ON CIVIL RIGHTS

 COMMISSION MEETING

FRIDAY, APRIL 12, 1996

The meeting took place in Conference Room 540, 624 9th Street, N.W., Washington, D.C., 20036, at 9:30 a.m., Mary Frances Berry, Chairperson, presiding.

PRESENT:

MARY FRANCES BERRY	Chairperson
CRUZ REYNOSO	Vice Chairperson
CARL ANDERSON	Commissioner
ROBERT P. GEORGE (by telephone)	Commissioner
A. LEON HIGGINBOTHAM, JR.	Commissioner
CONSTANCE HORNER (by telephone)	Commissioner
YVONNE Y. LEE	Commissioner
RUSSELL G. REDENBAUGH	Commissioner
MARY K. MATHEWS	Staff Director

COMMISSION STAFF PRESENT:

Barbara Brooks
 Ki Taek Chun
 James S. Cunningham
 Pamela Dunston
 Gerri Hall
 George Harbison
 Carol-Lee Hurley
 Jacqueline L. Johnson
 Frederick Isler
 William Lee

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1 (Chorus of ayes.)

2 Opposed?

3 (No response.)

4 Okay. So ordered. So we've finished the
5 SAC appointments.

6 Shall we go to the subpoena power? What
7 is the status? We've not heard yet from Commissioner
8 Horner, so why don't we go to the issue of the
9 Commission's subpoena power and continue to hold the
10 program planning discussion, per request, until we see
11 if she is able to join us.

12 The subpoena power --

13 COMMISSIONER GEORGE: Madam Chairman?

14 CHAIRPERSON BERRY: Yes, Commissioner
15 George?

16 COMMISSIONER GEORGE: I have circulated --
17 I apologize for its lateness -- a revised draft. Now,
18 this is still a working draft of what I'd like to
19 propose. It's not for consideration now, but I did
20 try to take into account some comments, particularly
21 those of Judge Higginbotham, but also of Vice Chairman
22 Reynoso.

23 The additional possibility of revision
24 would have to do with the report that we've gotten
25 from our General Counsel regarding the subpoena

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1 practices of other commissions. I haven't yet had a
2 chance to read that report, but my assistant tells me
3 that it raises the possibility of still further
4 research that might be necessary.

5 So I don't know if I have anything more to
6 say about it at this point. I'm not sure whether
7 people have had an opportunity to read my draft or an
8 opportunity to read General Counsel Moore's memo.
9 It's going to have to remain in mid-air a bit longer.

10 CHAIRPERSON BERRY: And in mid-air, can we
11 have some Commissioner discussion? Or does anyone
12 want to make a motion, or is it premature to move
13 anything? And could we just have some discussion?
14 Have people had an opportunity to look at this or to
15 look at the memo we got on the subpoena authority in
16 other federal commissions?

17 COMMISSIONER HIGGINBOTHAM: Madam Chair,
18 my instincts are that since the initiative was taken
19 by Commissioner George, that he should have an
20 opportunity to reflect on the memorandum from the
21 General Counsel, and then we can have a more
22 thoughtful discussion when he has had a chance to
23 compare these two. And this is not a matter of the
24 greatest urgency that has to be resolved --

25 CHAIRPERSON BERRY: Today.

1 COMMISSIONER HIGGINBOTHAM: -- today.

2 CHAIRPERSON BERRY: Vice Chair, do you
3 have any --

4 VICE CHAIRPERSON REYNOSO: Well, I was
5 going to comment on the memorandum that we got, and I
6 was very pleased by the quality of the memorandum. I
7 got a quick education on how other commissions
8 function.

9 My general impression, and I just suggest
10 to Commissioner George that he keep this in mind, was
11 that most of the other commissions seem to have even
12 broader powers than this Commission does, with fewer
13 restrictions, in light of the fact that we really
14 can't enforce anything but for the Justice Department
15 doing it for us.

16 So that one of the things that I -- I had
17 asked Robbie to do this, to consider whether or not we
18 want to restrict the powers that we have, and I think
19 that we would want to -- that we would be very careful
20 before we would want to suggest, in terms of process,
21 that we have any restrictions if you will.

22 CHAIRPERSON BERRY: But I would probably
23 think that the best thing to do is to leave us to mull
24 over this memo and the proposal, since you haven't had
25 a chance to analyze it. Is that right, Commissioner

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1 George?

2 COMMISSIONER GEORGE: Yes, I haven't even
3 had a chance to read it.

4 CHAIRPERSON BERRY: Okay. Well, then,
5 you're at a particular disadvantage.

6 COMMISSIONER GEORGE: Yes.

7 CHAIRPERSON BERRY: So why don't we
8 simply, at this point, unless others have read it in
9 great detail and have comments that they would like to
10 make, or let's have some more preliminary comments, if
11 anyone has any right now, and then just say we'll
12 discuss it again.

13 Yes, Commissioner Anderson?

14 COMMISSIONER ANDERSON: I thought the
15 memorandum was very good, too. I was pleased with it.
16 The one area that I would like explored a little bit
17 more -- I mean, I'm very happy that the Nuclear
18 Regulatory Commission has broad subpoena power.
19 However, I think there is a category, it seemed to me,
20 of commissions that do not have that kind of
21 enforcement responsibility like the -- I don't -- that
22 are closer to our agency, and I don't see any
23 commissions like that in this memorandum.

24 I think if we could find some and see,
25 maybe it is that simply other commissions don't have

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1 the subpoena power. But you see the point that I'm
2 trying to make. We're not really an enforcement
3 agency. You'd expect an enforcement agency to have
4 broad subpoena power. It might be helpful if we could
5 identify several agencies a little bit more like us
6 and see what their subpoena power is.

7 COMMISSIONER HIGGINBOTHAM: What entity in
8 the world is like us?

9 (Laughter.)

10 CHAIRPERSON BERRY: That's what Dwight
11 Eisenhower asked when he asked Congress to pass the
12 statute and put subpoena power in, and Herbert
13 Brownell told him that the only way the Commission
14 could force anybody to tell him anything is to have
15 subpoena power. And he said, "Well, how do you get
16 that, and what other agency is like this?" And the
17 answer to the question according to Arthur Flemming,
18 who told me this story and was at the meeting, the
19 answer was no one.

20 And I'm not sure there is any now, but
21 that's worth looking at. I have a hunch we are sort
22 of different from most agencies.

23 COMMISSIONER ANDERSON: Well --

24 COMMISSIONER GEORGE: Can I briefly
25 respond to --

1 CHAIRPERSON BERRY: Yes, only after
2 Commissioner Anderson finishes his thought.

3 COMMISSIONER GEORGE: All right.

4 CHAIRPERSON BERRY: I know he is soft
5 spoken, but --

6 COMMISSIONER ANDERSON: Well, I think
7 you're probably right, although my guess is there are
8 a few more federal agencies now --

9 CHAIRPERSON BERRY: Now than there were
10 then.

11 COMMISSIONER ANDERSON: -- that we're
12 under Eisenhower --

13 (Laughter.)

14 -- even after the Reagan administration.
15 But, anyway, that was my question. If we could find
16 something, it might be helpful.

17 CHAIRPERSON BERRY: Yes. Commissioner
18 George?

19 COMMISSIONER GEORGE: Yes. I just wanted
20 to say that the approach that I'm taking in the memo
21 -- or the motion I'm trying to draft I think will not
22 significantly restrict the subpoena power of the
23 Commission. That, in any event, is not my intention.
24 But will deal with the -- with two problems, or at
25 least what I perceive to be problems. One is the

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1 compulsion of opinion testimony, and two is increasing
2 the Commissioner responsibility and accountability and
3 involvement in subpoenas duces tecum.

4 Then, I have a question, and that is
5 whether the General Counsel's memo anticipates further
6 research. I'm not quite sure from my assistant
7 whether the memo itself indicated that there was a
8 need for further research or whether he was suggesting
9 to me that there might be further research that's
10 needed. Is the memorandum, in a certain sense,
11 preliminary to still more work, or is it complete from
12 the General Counsel's own point of view? I just don't
13 have it. I haven't read it, so I don't know.

14 CHAIRPERSON BERRY: The answer -- do you
15 know the answer, Staff Director?

16 STAFF DIRECTOR MATHEWS: Yes, Madam Chair.
17 It's my impression that this is completed research on
18 the part of the General Counsel's staff, in terms of
19 a survey of other agencies.

20 CHAIRPERSON BERRY: Could we ask the
21 General Counsel?

22 STAFF DIRECTOR MATHEWS: Yes, absolutely.
23 Would you come forward?

24 CHAIRPERSON BERRY: General Counsel, would
25 you mind answering the question and telling us what it

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1 means?

2 MS. MOORE: Well, we have two points.
3 One, this is the --

4 COMMISSIONER GEORGE: Could you use the
5 microphone?

6 MS. MOORE: What we have produced here
7 does constitute the full universe of independent
8 commissions, so there are no other commissions that
9 are independent executive commissions for us to look
10 at that have subpoena power.

11 COMMISSIONER GEORGE: Okay.

12 MS. MOORE: The second point is that we
13 did indicate that if it was the desire of the
14 Commission that we could look -- we could examine case
15 law to determine more precisely what the actual
16 practices were. What we've limited our research to
17 here is the statutory and regulatory authorization of
18 the commissions to issue subpoenas.

19 CHAIRPERSON BERRY: So it's -- go ahead.

20 MS. MOORE: Does that clarify that point?

21 CHAIRPERSON BERRY: That answered his
22 question.

23 So the query here is, does the Commission
24 desire -- one, the Commission desires, according to
25 Commissioner Anderson, to be assured whether there are

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1 other agencies or commissions that are like us that
2 haven't been included. And the answer is that insofar
3 as independent commissions are concerned, apparently
4 not.

5 The other question is, do we want the
6 staff to look into how, in actual practice, some of
7 these agencies carry out the subpoena responsibility.
8 They have not researched that. And if we want them to
9 do that, we should say that that's what we want them
10 to do, if we think it's necessary for this particular
11 enterprise.

12 COMMISSIONER GEORGE: I wonder if before
13 putting them to that work, if what we should do is --

14 CHAIRPERSON BERRY: Read it.

15 COMMISSIONER GEORGE: -- I should read the
16 memo carefully --

17 (Laughter.)

18 -- and then ask if -- unless those of you
19 who have read it might already think that we should
20 ask for the additional work. But, otherwise, I could
21 read it and it might very well be that I don't think
22 that any more work is needed, at least for me to draft
23 the motion that I'm trying to draft. But if it is,
24 maybe I could then just reserve the right to ask the
25 Staff Director to ask the General Counsel to --

1 CHAIRPERSON BERRY: Well, why don't you--

2 COMMISSIONER GEORGE: -- to do it.

3 CHAIRPERSON BERRY: Why don't you read it
4 first and see? Because I have read it, and the Vice
5 Chair has just told me he has read it, and he doesn't
6 think for this precise enterprise that we need to have
7 more work done. But your view may be different after
8 you read it.

9 COMMISSIONER GEORGE: Okay.

10 CHAIRPERSON BERRY: I hate to ask them to
11 do something they don't need to do.

12 COMMISSIONER GEORGE: Right. I agree.

13 CHAIRPERSON BERRY: Okay. So we will then
14 defer -- we haven't taken this, really, from the
15 table. So I didn't do it right, because I tabled it
16 last time. But we will, then, defer discussion of
17 this until we have the next meeting on this question.

18 Now, what I'd like to do is on the program
19 planning matter, there are a few things that we
20 actually do need to get done, that may not be
21 controversial at all, in view of the discussion we had
22 last time. And those of you who find it controversial
23 can say so, if you find it so.

24 We need to say what the Commission is
25 going to keep doing the rest of this year, since this

1 year is rapidly coming to a close. So to go meeting
2 by meeting and to never say what the staff is supposed
3 to be finishing is hardly fair and hardly productive.

4 So, in 1996, if we are to say what the
5 Commission is to be doing, what the Commission is to
6 be doing based on what is going on now and what we
7 said at the last meeting, part of which was added to
8 the minutes by Commissioner George, as I understand
9 it, is the annual statutory report -- that's the one
10 that's in our statute -- is on education. And we all
11 understood that from the last discussion, so there is
12 no controversy about finishing that.

13 Do I hear any controversy or comments?

14 On Los Angeles, we do have an issue.
15 Well, let me get through the ones where we don't have
16 an issue. The New York hearing, of course, there's no
17 issue about the fact that the staff is supposed to be
18 finishing that. Anybody make an issue of that? No,
19 I hear nothing.

20 The Miami hearing report, the staff is
21 supposed to be writing a report to present to us.
22 There's no controversy about that.

23 The Mississippi Delta, we discussed last
24 time having a hearing this year, if possible. Is
25 there any controversy about that? If it's possible to

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