

UNITED STATES OF AMERICA

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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MEETING

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OPEN SESSION

+ + +

ORIGINAL

March 14 , 1995

+ + +

PRESENT:

GILBERT F. CASELLAS, Chairman
PAUL M. IGASAKI, Vice-Chairman
PAUL STEVEN MILLER, Commissioner
R. GAULL SILBERMAN, Commissioner
JOYCE E. TUCKER, Commissioner
BERNADETTE WILSON, Executive Secretariat

PRESENTERS:

EDWARD CHEN, Staff Counsel, San Francisco Office
of the American Civil Liberties Union
KENNETH KIMERLING, Associate Counsel for the
Puerto Rican Legal Defense and Education
Fund
CHARLES KAMASAKI, Senior Vice President for
Research, National Council of La Raza

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

1
2 CHAIRMAN CASELLAS: I'll call the meeting
3 to order. The first item on the agenda is a reading
4 of the notation votes. The Office of the Executive
5 Secretariat will do that.

6 MS. WILSON: Good afternoon, Mr. Chairman,
7 Vice-Chairman, Commissioners, I'm Bernadette Wilson
8 from the Executive Secretariat. During the period
9 February 11, 1995, through March 13, 1995, the
10 Commission acted on 57 items by notation vote,
11 approved litigation on 27 cases, disapproved
12 litigation on eight cases, referred six cases to the
13 Department of Justice with a recommendation to
14 litigate, referred one case to the Department of
15 Justice without a recommendation to litigate, approved
16 intervention on one case, approved the EEOC FY 1993
17 annual report, approved a non-competitive contract for
18 Litigation Support Services, approved including
19 guidelines on the application of the Americans With
20 Disabilities Act of 1990 to employer provided health
21 insurance in the April, 1995 regulatory agenda,
22 approved including procedures of the Age

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1 Discrimination and Employment Act in the April, 1995
2 regulatory agenda, approved including procedures on
3 interagency coordination of Equal Employment
4 Opportunity issuances, the coordination rule, in the
5 April, 1995 regulatory agenda, approved including
6 procedures for handling complaints of employment
7 discrimination under the Government Employee Rights
8 Act of 1991 in the April, 1995 regulatory agenda,
9 approved including federal sector equal employment
10 opportunity regulations in the April, 1995 regulatory
11 agenda, approved adding the language, "The Commission
12 may also make other changes to the federal sector
13 complaint processing regulations as appropriate," to
14 the federal sector equal employment opportunity
15 regulations in the April, 1995 regulatory agenda,
16 approved including regulations interpreting Title II
17 of the Older Workers Benefit Protection Act of 1990 in
18 the April, 1995 regulatory agenda, approved including
19 interpretation relating to apprenticeship programs
20 under the ADEA in the April, 1995 regulatory agenda,
21 approved a non-competitive contract for an aviation
22 human factors expert, approved a competitive 8A

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1 procurement for data cabling components and
2 installation for headquarters and field offices,
3 approved a non-competitive contract for an aviation
4 expert and approved compliance manual Section 902,
5 Definition of the Term Disability.

6 Mr. Chairman, it would be appropriate at
7 this time to have a motion to close a portion of the
8 next Commission meeting scheduled for April 11, 1995.

9 CHAIRMAN CASELLAS: Do I hear a motion?

10 COMMISSIONER SILBERMAN: So moved.

11 CHAIRMAN CASELLAS: Second. All in favor.

12 (Ayes.)

13 CHAIRMAN CASELLAS: Any opposition? Thank
14 you, so moved.

15 Thank you very much, Bernadette, and we'll
16 move to the second item on our agenda, and as we do so
17 I'm pleased to welcome everyone here to the portion of
18 today's meeting which will be devoted to an
19 examination of national origin-based discrimination
20 and the Commission's responsibility in this area.

21 This will be the first in a series of
22 Commission meetings that will focus on the various

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1 types of illegal and unlawful employment
2 discrimination covered by the laws we enforce.

3 In the upcoming months, I hope we will
4 separately address discrimination on the basis of
5 race, gender, religion, age and disability. We all
6 know, all too well, that they continue on all of those
7 bases.

8 In deciding to embark on this process, we
9 are responding to the needs of the communities we
10 serve, the need for us to take a fresh look at the
11 state of today's workplace, to understand what we
12 still have to accomplish to ensure equal employment
13 opportunity.

14 It is my hope that this series of meetings
15 will accomplish two things. First, I hope to increase
16 the awareness by Commission staff, the business
17 community and the public of the unique needs and
18 problems affecting these various communities that
19 frequently encounter unlawful employment
20 discrimination.

21 I also hope to initiate a dialogue among
22 all interested or affected parties about how the

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1 Commission can improve its service to these various
2 communities.

3 I must emphasize that any effort we
4 undertake to improve our service to any one affected
5 community should not, and will not, come at the
6 expense of other affected communities. Instead, it is
7 part of our broader mission to reinvent the Commission
8 so that it is able to more effectively combat unlawful
9 employment discrimination in all of its various forms.

10 The sad reality is that the Commission is
11 severely under funded to effectively enforce the
12 various statutes we are mandated to enforce. The
13 commitment to equal employment opportunity is but an
14 empty promise unless there is a similar commitment to
15 provide the resources necessary to realize this
16 commitment. We are encouraged by the President's 1996
17 budget, which would give the agency a much needed
18 increase. We must now remind Congress that Presidents
19 of both parties, along with bipartisan majorities in
20 Congress, have repeatedly reaffirmed the unique
21 federal role in eradicating workplace discrimination.

22 At the same time, however, I am motivated

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1 by the President's call to improve the performance of
2 government. During my tenure with the Commission, I
3 have been continually impressed by the level of
4 dedication and excellence of Commission staff in the
5 field and in headquarters. Still, I know that there
6 are numerous opportunities for improving the
7 organizational and operational efficiency and
8 effectiveness of our agency. The taxpayers deserve
9 nothing less than our concentrated effort to identify
10 and seize these opportunities.

11 Today's focus on national origin
12 discrimination is emblematic of the broader challenges
13 currently facing the Commission. Section 111 of the
14 Civil Rights Act of 1991, often referred to as the
15 Serrano Amendment, requires that the Commission
16 improve its outreach and educational efforts in
17 traditionally under-served national origin and
18 language minority communities, namely, the Hispanic,
19 Asian Pacific American and Native American
20 communities.

21 This amendment emerged in part from
22 longstanding criticisms of the Commission's

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1 performance in the delivery of service to those
2 communities. For instance, in 1983, the Commission
3 published a report that found that the EEOC had a
4 minimal presence in the Hispanic community. This
5 report further concluded that most Hispanics were
6 either unaware of or did not trust the EEOC and that
7 the Commission did little, if any, to remedy this
8 problem.

9 In a follow-up to the Hispanic charge
10 study, the National Council of La Raza reported in
11 1993 that while some field offices had made gains in
12 this area, the Commission as a whole had made little,
13 if any, progress remedying the problems identified in
14 the Commission's 1983 report.

15 With respect to the Commission's service to
16 the Asian American community, a 1990 U.S. Civil Rights
17 Commission report recommended that the EEOC make
18 greater outreach and enforcement efforts in the Asian
19 American community.

20 While we have requested funds to fully
21 implement the Serrano Amendment, the commitment to
22 improving the delivery of services to traditionally

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1 under-served national origin communities cannot hinge
2 solely upon the appropriation of funds. I believe we
3 can take several immediate steps to improve our
4 delivery of services to these communities.

5 First, we must work to increase the
6 awareness and understanding of all Commission staff of
7 the unique needs and problems encountered by various
8 national origin communities. This includes greater
9 sensitivity of Commission staff, who interact with
10 these communities on a daily basis. We must do our
11 best to make these communities feel welcomed and well
12 served. We must dedicate ourselves to generating
13 trust where it has been lacking before. We must
14 ensure that field intake personnel and investigators
15 are thoroughly familiar with the Commission's policies
16 regarding national origin discrimination, including
17 our guidance prohibiting non-job-related, English only
18 policies in the workplace.

19 Although we have encountered some recent
20 setbacks in this area, it is undisputed that English
21 only rules impact national origin or language minority
22 communities and must be challenged. Further education

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1 about accent-based discrimination is also necessary.

2 Second, we must reaffirm our commitment to
3 refer to the Office of Special Counsel of the United
4 States Department of Justice charges potentially
5 implicating anti-discrimination provisions of the
6 Immigration Reform and Control Act, and conversely, to
7 process charges referred to us by the Office of
8 Special Counsel.

9 The Office of Special Counsel is
10 responsible for enforcing Section 102 of the
11 Immigration Reform and Control Act of 1986, which was
12 enacted to address employment discrimination resulting
13 from employer sanctions.

14 A 1990 report by the General Accounting
15 Office found that employer sanctions have resulted in
16 a "widespread pattern of employment discrimination,"
17 particularly against Hispanics and Asian Americans.

18 Because the anti-discrimination provisions
19 of IRCA bear close resemblance to Title VII, some
20 charges of discrimination either implicate both
21 statutes or are inadvertently filed with the wrong
22 agency.

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1 In 1989, the Commission and the Office of
2 Special Counsel entered into a Memorandum of
3 Understanding requiring that each agency serve as the
4 agent for the other, for the sole purpose of receiving
5 discrimination charges under Title VII and Section 102
6 of IRCA, and providing for interagency coordination of
7 charge processing activities.

8 Since 1987, however, approximately 60
9 charges have been referred by the EEOC to the Office
10 of Special Counsel. It is imperative that we ensure
11 that all staff understand our responsibilities in this
12 area.

13 Fourth, if they have not already done so,
14 I encourage the field offices to appoint at least one
15 person to conduct outreach and develop linkages with
16 various community groups and organizations serving
17 traditionally under-served communities in their
18 geographic region, and to educate employer groups on
19 the unique needs and problems encountered by these
20 communities.

21 The field offices are ideally suited to
22 develop outreach and enforcement strategies suitable

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1 to their local communities. Obviously, strategies for
2 effectively serving the Puerto Rican community in New
3 Jersey may not be the same as those for effectively
4 serving the Chinese American community in San
5 Francisco or the Navajo Dineh community in Arizona and
6 New Mexico. It is critical that we be sensitive to
7 these differences.

8 Finally, I urge Commission staff to review
9 the reports criticizing our performance in serving
10 national origin groups. I ask them to think about how
11 to improve service to the various national origin
12 communities in their local area.

13 To the extent that they have not already
14 done so, I encourage all EEOC staff to learn to
15 appreciate the unique cultural characteristics of
16 these communities. I also support the development of
17 relationships with community organizations that both
18 serve and represent these communities. These
19 organizations are frequently invaluable allies in
20 identifying discriminatory practices and in providing
21 the support network necessary for victims of and
22 witnesses to employment discrimination to come

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1 forward.

2 I know that many of our field offices have
3 already begun serious outreach programs, and they have
4 made significant progress. A good example is our
5 Houston District Office, which hosted an open house
6 for key community leaders and organizations.

7 Before closing, I would like to mention a
8 1990 study conducted by the Urban Institute. In that
9 study, testers were used to evaluate the scope of
10 discrimination against Hispanics in San Diego and
11 Chicago. The study paired Anglo and Hispanic job
12 applicants, who then applied for job vacancies listed
13 in the local newspapers. The study found that the
14 Anglo tester received more favorable treatment
15 approximately 20 percent of the time. This study was
16 part of a GAO report evaluating the discriminatory
17 impact of employer sanctions under IRCA. Some argue
18 that the GAO report triggered a congressional response
19 to repeal employer sanctions.

20 Some critics of the GAO report, however,
21 maintain that the pervasive discrimination documented
22 by the Urban Institute study could not be linked to

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1 employer sanctions, and that, therefore, employer
2 sanctions should not be repealed.

3 Regardless of one's views on this issue,
4 the Urban Institute study presents a stark reminder
5 that a significant number of employers continue to
6 discriminate against Hispanics in hiring, solely
7 because they possess certain characteristics common to
8 that community.

9 Similar studies have documented significant
10 levels of employment discrimination against other
11 national origin communities, as well as African
12 Americans and the elderly. This discrimination
13 deprives thousands of individuals the opportunity to
14 be hired on their own individual merit. These studies
15 are strong evidence that unlawful employment
16 discrimination continues to be a very real problem for
17 many in today's society.

18 As the Chairman of the Commission, I am
19 strongly committed to improving the Commission's
20 performance in combating national origin
21 discrimination, as well as all other forms of unlawful
22 discrimination. I know that the Vice-Chairman and my

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1 fellow commissioners share this commitment, and I
2 welcome any suggestions from my fellow commissioners,
3 Commission staff, and, most importantly, the general
4 public, on how to achieve this goal.

5 I know the Vice-Chairman himself would like
6 to make a statement.

7 VICE-CHAIRMAN IGASAKI: Thank you, Mr.
8 Chairman. I'm sure you covered a lot of the areas
9 that I also would support, and I think it's very good
10 that we're covering this topic at the Commission
11 today. I'm also going to be conscious of not trying
12 to cover the ground that our three distinguished
13 panelists will cover. Their expertise in this area is
14 widely known and very important to us.

15 This is a very important area, and one that
16 is very close to my heart in my own professional and
17 personal experience. As Executive Director of the
18 Asian Law Caucus in San Francisco, I saw the increase
19 in discrimination against Asian Pacific Americans and
20 other immigrant Americans first hand. It's not news
21 to anybody here that there's a tidal wave of anti-
22 immigrant scapegoating that's sweeping the country

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1 today. This isn't the first of this sort of
2 discrimination we've seen, but it certainly is an
3 unprecedented level in recent memory.

4 In San Francisco, a city that is 30 percent
5 Asian, a state that is ten percent Asian, with a state
6 that has far greater even Hispanic population, that
7 discrimination and exclusion was keenly felt.

8 But, it's also true that Asian and Hispanic
9 populations, particularly in urban areas, are growing
10 substantially in all areas of the country. When I

11 worked for Mayor Harold Washington in Chicago, I was
12 involved in the city's efforts to alleviate that
13 exclusion, both of Asians and Hispanics, in addition
14 to African Americans and women. I learned well that
15 discrimination against one group is discrimination
16 against all, and that a commitment to overcome bias
17 against one group enhances, as opposed to detracts,
18 from efforts in support of other groups.

19 That being said, I have reviewed and am
20 familiar with the Serrano Amendment and the NCLR study
21 and other reports that well demonstrate that our
22 agency has not adequately served all who we are

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1 supposed to serve. Many Asian Pacific Americans who
2 read the NCLR study were quick to say amen after
3 reading it. Our progress is slow and is, at best,
4 haphazard and uneven, and we have a long way to go.

5 There are some who have argued, some in
6 this debate that currently rages over affirmative
7 action and other areas, their civil rights laws were
8 not met for Hispanic and Asian groups or other newer
9 communities. But, the truth is the anti-immigrant
10 attitudes have long existed, specific racially-based
11 discrimination has historically been practiced against
12 Asian and Hispanic Americans both.

13 My grandparents and great grandparents came
14 to America at the beginning of the century, yet it
15 wasn't until 1952 that they were eligible for
16 naturalization, when the racial ban was lifted.
17 Racial inequality and immigration allocations
18 generally existed until 1965.

19 So, the historical basis continues today,
20 and this anti-immigrant phenomena is not new.
21 Generally, immigrant populations are the least aware
22 of their rights. They are blocked by language

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1 barriers and by cultural limitations. Institutions,
2 like the EEOC, do not have substantial multilingual
3 staffing and are difficult for those not familiar with
4 the system to interact with. Further, our system of
5 rights and individual advocacy are quite new to many
6 cultures, including Asian Americans.

7 Proposition 187 is now a fact of life in
8 California. Whether good or bad policy, I have my
9 opinion on that, but it both symbolizes and has
10 increased racial and national origin discrimination in
11 California. Just as the Chairman pointed out
12 regarding the IRCA studies in GAO, many are
13 misapplying 187 and taking the short cut of
14 discrimination against Hispanics and Asians, assuming
15 that only they are undocumented, or that they are
16 naturally not citizens.

17 In services, private and public, in hiring
18 and in harassment generally, the impact is very clear.
19 EEOC must be on the front line in fighting this new
20 phenomena.

21 I'm informed by the Office of Program
22 Operations that national origin harassment charges in

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1 our current situation are up significantly for the
2 first quarter of this year. I believe that that is an
3 indication of what's going on on the streets, but I
4 think that there are -- it is only the tip of the
5 iceberg, and that there's a lot more we can do to find
6 out.

7 I think about some of the facts that I hear
8 in cases, that come up in cases like this. One case
9 that my agency handled involved Filipino security
10 guards who were employed by a federal -- well,
11 employed by a private operation providing security to
12 a federal building. Someone complained about having
13 difficulty understanding a Filipino security guard.
14 Shortly thereafter, all Filipino security guards were
15 fired.

16 Our office took up that case, and with our
17 meager resources were able to make some progress. In
18 that case, luckily we were able to talk to the EEOC
19 and get them on board and involved in the case.

20 I've heard a lot of other cases that are in
21 our system. There are cases involving construction
22 workers who are harassed by supervisors about their

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1 Mexican heritage, facing derogatory friends, like you
2 and your wetback friends, get off the jobs, Mexican
3 scum bags, Mexican slugs, threats to call police,
4 border patrol and immigration, comments that Mexicans
5 don't like to work. That one was also settled
6 favorably.

7 I've seen cases come across the table, I
8 got these statistics from our staff, that people,
9 Asian Americans speaking with a mild accent, were
10 perceived by managers to have a lack of communication
11 skills and were barred from promotion beyond a certain
12 level, in a situation where there was a large number
13 of Asian employees but none made it into management
14 ranks.

15 I've heard of cases involving Hispanic
16 Americans, where a Hispanic college student, who
17 didn't have a dark complexion, was interviewed, but
18 then when he filled out the nationality found that
19 there were no jobs available.

20 Those are the kinds of cases that are
21 happening today that we see, and as I said, I think
22 that only a small portion of them are even coming

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1 through our door.

2 I am not satisfied that we have
3 strategically tried hard enough to fight this
4 increasing discriminatory phenomena. I am hopeful
5 that this Administration and the EEOC generally can
6 get on top of establishing strategic enforcement and
7 litigation plans that will enable us to target the
8 most serious cases of discrimination that exist, in
9 order to send a message that these trends can be
10 stopped.

11 Reviewing our systemic case docket,
12 particularly on the West Coast, I am surprised that we
13 haven't produced cases that send this stronger
14 message. I am confident that we can.

15 The Asian Law Caucus, where I used to work,
16 was funded to do outreach concerning application of
17 employer sanctions, anti-discrimination provisions.
18 While finding the cases were hard, given language and
19 cultural barriers, I was impressed by the very high
20 level of ignorance about the protections against
21 discrimination that exist under this law, both among
22 employers and employees. So, we have much work to do.

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1 I support the Chairman's recommendation
2 that we focus on community partnerships and increased
3 outreach. Unless we poke through the isolation
4 imposed on our newer communities through multi-lingual
5 outreach and access, through regular connections to
6 the civil rights and community-based organizations
7 that are day-to-day familiar with the problems that we
8 know exist, it is no wonder that we aren't involved in
9 the cases that so many of them are overwhelmed by.

10 I know that a few of our offices have
11 gotten involved in some important cases, and some do
12 perform regular outreach, but I don't think that there
13 is enough. It's interesting that a lot of these cases
14 coincide with those offices that do that sort of
15 outreach.

16 As I mentioned before, ALC attorneys did
17 find a receptive ear when they reached out to the EEOC
18 on an important case on the West Coast. Because some
19 of them knew EEO staff attorneys, we were able to
20 persuade them to get involved. But, this is the least
21 I would expect in San Francisco.

22 The truth is that there is a substantial

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1 Hispanic and Asian community in virtually every major
2 urban area today, and while some remain small on a
3 percentage level they shouldn't be ignored. I think
4 the connections that we speak of are critical, and
5 that they should be part of our daily work commitment,
6 not something we do when we've caught up on our case
7 work, because then it will never get done if we do
8 that.

9 It is not surprising, considering the
10 scarcity of Asian Pacific Americans in the EEOC work
11 force, that we lack the institutional understanding of
12 the community, but that particularly carries a burden
13 for us to respond to. We have an obligation to serve
14 everybody well, even with the limited resources we
15 have.

16 I look forward to hearing from our
17 panelists on ways that we can strategically increase
18 our effectiveness in serving their communities.

19 Thank you.

20 CHAIRMAN CASELLAS: Thank you, Mr. Vice-
21 Chairman.

22 I think we'll move to our guests, and if

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1 you would take seats here. Our guests are Edward
2 Chen, Staff Counsel for the San Francisco Office of
3 the American Civil Liberties Union, and a legal expert
4 in the area of language and accent discrimination,
5 including speak-English-only rules in the workplace.
6 Mr. Chen was lead counsel in the case of Garcia v.
7 Spun Staek. Charles Kamasaki who's Senior Vice
8 President of the Office of Research Advocacy and
9 Legislation at the National Council of La Raza, and
10 Kenneth Kimerling, Associate Counsel for the Puerto
11 Rican Legal Defense and Education Fund, a leading
12 authority on national origin discrimination in
13 employment.

14 I welcome the three of you here, and I
15 leave it to you to decide on which order you'd like to
16 proceed.

17 MR. CHEN: I guess I lose.

18 Thank you, Mr. Chairman, members of the
19 Commission, for the opportunity to address this very
20 important issue, and for giving me a respite from the
21 California rains. I'm very happy to be here.

22 Obviously, I think all of us, I speak on

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1 behalf of all of us, in affirming the observations
2 that you and the Vice-Chair have made about the
3 importance of national origin discrimination, and it's
4 important, I think, to realize the dual facet of what
5 is happening out there, the two factors that make
6 national origin discrimination an important issue, and
7 I think an increasingly important issue in the years
8 to come.

9 Growing numbers of national origin
10 minorities, particularly of Latinos and Asians, is
11 well documented. As we know, between 1980 and 1990
12 the Asian American population increased by 95 percent
13 and the Latino population increased by 53 percent. By
14 1990, there were 32 million Americans over the age of
15 five who spoke a language other than English at home,
16 representing approximately a 40 percent increase over
17 the ten-year period.

18 In California, that figure is one in three.
19 At the same time, and I think causally related to this
20 changing demographics, is the growing intolerance of
21 immigrants as we see through the polls, through the
22 votes, through the talk shows, the hate violence, and

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1 now Proposition 187.

2 I think Proposition 187 will undoubtedly
3 contribute, regrettably, to anti-immigration
4 discrimination. I don't think the public is capable
5 in the end of drawing distinctions between
6 undocumented immigrants and immigrants generally,
7 because the tenor of the debate, the rationale for
8 measures like Proposition 187, that fuel the flames of
9 fear and intolerance, cannot be confined. The notion
10 that a certain group of people are getting their
11 disproportionate share of resources and impinging upon
12 the rights of others, I think is one that will infect
13 the overall debate and the impact upon national origin
14 minorities generally.

15 I would suggest to the Commission, in terms
16 of increasing its effectiveness, a two-prong approach.
17 One which has been referred to is a logistical one, to
18 increase the education and outreach to affected and
19 historically disenfranchised communities. Two, to
20 develop a coherent legal strategy, hopefully, in
21 coordination with members of the private bar and
22 public interest organizations, which do work in this

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1 area, to try to develop legal doctrines that will make
2 Title VII fully effective in addressing national
3 origin discrimination.

4 Let me address the second prong first. I
5 think it's important that we step back and think what
6 it means to discriminate on the basis of national
7 origin in functional terms. There, of course, is a
8 definitional term, that is, discrimination on the
9 basis of national origin is discrimination on the
10 basis of somebody's place of origin or their
11 ancestors' place of origin. But, that doesn't have a
12 lot of meaning to me, and I think we have to realize
13 that there is a great deal of overlap between race
14 discrimination and national origin discrimination.
15 For instance, discrimination against Arab Americans
16 can really be both. It is discrimination on the basis
17 of race and color, and it is discrimination on the
18 basis of national origin.

19 I think the significance of national origin
20 discrimination is that at its core what it targets is
21 a sense of foreignness, a sense of otherness that is
22 not based upon skin color, or, perhaps, even the

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1 particular country of origin, but really upon ethnic
2 and cultural traits, such as surname, customs,
3 language and dress, as the Commission guidelines on
4 national origin discrimination well recognize, and has
5 recognized since 1980.

6 I think it's important to appreciate that
7 the discrimination on the basis of national origin is
8 often subtle, increasingly, rather than overt
9 discrimination, employers are using subtle forms,
10 neutral criteria, such as English proficiency
11 requirements, or prohibiting workers from speaking to
12 their co-workers in their native language.

13 And, even if the use of neutral criteria is
14 not simply a subterfuge for intentional
15 discrimination, often it is affected by unconscious
16 bias in stereotypes, a bias that people possess, for
17 instance, against certain accents more than others, or
18 a bias that we find in unfounded suspicions in the
19 workplace against people who speak a foreign language,
20 the natural assumption that so many workers seem to
21 have that if they are speaking a foreign language to
22 each other they must be speaking about me, or they

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1 must be conspiring. Perceptions that those with an
2 accent lack leadership skills or intelligence.

3 I think we have an opportunity at this
4 point in time to impact upon the law and the
5 development of Title VII, because it is interesting
6 that the case law regarding national origin
7 discrimination, particularly, in the area of language
8 discrimination, is quite sparse. The number of
9 circuit court decisions on accent discrimination
10 number approximately three or four. The same with
11 speak-English-only rules, and with respect to English
12 proficiency requirements, I'm not even aware of any
13 circuit court level decisions that directly address
14 this issue.

15 And so, I think the doctrine is still in
16 its infancy, in terms of how Title VII is going to
17 evolve, and now is the time to make an impact. Thus
18 far, I believe that the law and the courts have not
19 been sufficiently sensitive to the issues and to the
20 dangers of national origin discrimination, as
21 illustrated by language rights cases.

22 And, I want to talk about three areas to

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1 illustrate this, and make some suggestions about the
2 kinds of legal thinking that we might look at in
3 developing an overall strategy.

4 First is accent discrimination, which is
5 often addressed by disparate treatment theory, the
6 notion that somebody didn't get a promotion or a job
7 because of their accent, and somebody who was less
8 qualified on every other front gets the job because
9 they don't have the accent.

10 Where there is disparate treatment, the
11 issue then generally turns on the critical question of
12 the relative qualification of the candidates involved,
13 which, in turn, turns on an assessment about the
14 severity and the comprehensibility of the plaintiff's
15 accent.

16 If you'll look at the case law, you see
17 that the evaluation that has been done really has been
18 done an off-the-cuff assessment by the trial judge or
19 by the jury, with little safeguard against what one
20 commentator, Mary Matsuta, has termed "listener bias"
21 or the context of the job.

22 A good illustration of this is the 9th

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1 Circuit decision in the Fragante case, versus the city
2 and county of Honolulu, in which a Filipino man, who
3 scored number one on all the indicators for a job as
4 a public clerk, but then in the interview process was
5 eliminated because he had a Filipino accent. Now,
6 whether his ability to enunciate clear enough so that
7 it didn't impair his job performance was a question
8 for the judge, but if you read the district court's
9 decision there was an interesting passage in which the
10 district court said that Hawaii is a linguistically
11 complex society, and that in our society people tend
12 to turn off to those with Filipino accents. That says
13 a lot about the kinds of biases, perhaps, if the
14 person had a different kind of accent people wouldn't
15 turn off and he might have been deemed qualified, yet,
16 notwithstanding that observation by the judge in his
17 written opinion the 9th Circuit found no bias, found
18 no violation of Title VII.

19 I think it is important that in the area of
20 accent discrimination that we develop ways and explore
21 ways to ensure that a neutral objective evaluation is
22 rendered by employers in the field and by the courts,

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1 unaffected by social biases and assumptions. I think
2 we need a more sophisticated analysis.

3 The second area is English proficiency
4 requirements. There is very little case law on this,
5 but the general test, as laid out in the guidelines
6 and a few lower court cases, is is it job related?
7 That, in turn, is a question that often cannot be
8 quantified in any simple way, because whether it is
9 job related or not depends upon the range of duties
10 and the nature of those duties that are assigned to
11 that particular employee, and it may turn upon the
12 availability of resources, such as the availability of
13 bilingual supervisors, because that's often the excuse
14 given not to hire somebody who is non-English
15 proficient.

16 However, if you allow that to dictate the
17 outcome, we have a potentially ironic result, in that
18 those who have hired a bilingual supervisor have less
19 of an excuse to hire limited English proficient
20 workers, and those who don't have bilingual
21 supervisors have less incentive.

22 And, it seems to me that's not right, that

1 it results in perverse incentives. And so, I think in
2 litigating these cases in the future, we need to
3 develop doctrine and advocate doctrines before the
4 court that would guard against that. And, one
5 suggestion that I would pose is that we borrow from
6 disability discrimination law the concept of the duty
7 of reasonable accommodation.

8 Let me give you an example. We've just
9 heard recently of a case that we are looking at in
10 Texas, in which workers, a large work force in the
11 construction area, people who are hired by contractors
12 to do minor construction on the site are Hispanic and
13 Spanish speaking. It has not been a problem for many,
14 many years. And, a safety test is given to ensure
15 compliance with OSHA requirements. That safety test
16 had been given in both English and Spanish. For some
17 reason now, that test is given only in English, and a
18 number of people now who have worked there for several
19 years, who are well qualified, have been terminated
20 from their positions because of this requirement.

21 Well, it seems to me, if we apply a duty of
22 reasonable accommodation analysis, we look at whether

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1 or not there's an undue hardship on the employer to
2 accommodate these people, it would be very simple to
3 reinstate this simple test, and, therefore, I think
4 that that kind of analysis ought to be looked at.

5 The reasonable accommodation analysis is
6 perfectly consistent, I think, with the business
7 necessity defense, which requires an examination of
8 available alternatives. But, of course, none of this
9 has been explored by the case law, and the
10 opportunity, I think, is ripe for advocacy of new and
11 creative doctrine.

12 Finally, the disparate impact analysis as
13 applied to national origin discrimination in the form
14 of English-only rules, which have been upheld,
15 regrettably, by two circuits, in Garcia v. Gloré in
16 the 5th Circuit, and Garcia v. Spun Staek. Both of
17 those cases upheld English-only rules as not
18 constituting even a prima facie case of
19 discrimination, as applied to bilingual workers
20 because there was no significant burden in the eyes of
21 the court, because one can "choose" voluntarily to
22 comply with the rule.

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1 This, of course, ignores the tremendous
2 harms that are suffered, even by bilingual ethnic
3 minorities, by such rules, such rules impinge upon
4 their ability to effectively communicate in the
5 language in which they are most comfortable and
6 articulate. The burden of having to constantly
7 monitor one's speech under the fear of being
8 reprimanded or even terminated, and having to suppress
9 a core aspect of ethnic and personal identity.

10 But, more dangerous than that, I think is
11 the notion that if one can voluntarily comply with an
12 objectionable rule you have no case, I think is one
13 that is extremely dangerous and insidious. It is
14 particularly inappropriate as applied to national
15 origin discrimination, which is commonly based upon
16 traits, as I mentioned, such as name, surname, dress,
17 language, custom, things which are not considered
18 generally immutable.

19 I think that principle undermines the
20 broader anti-discrimination principle. Certainly, we
21 would not condone a rule that required women to wear
22 demeaning uniforms or to submit to unwelcome sexual

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1 requests, or, indeed, as one 9th Circuit judge pointed
2 out, to require African Americans to sit in the back
3 of the bus. Yet, all would be subject to this
4 voluntary choice defense, and, therefore, I think it
5 is imperative that this kind of notion be dealt with
6 forcefully in the litigation efforts of the EEOC.

7 Therefore, I think there is an important
8 need for the Commission and its staff to develop a
9 coherent legal strategy to ensure that the law
10 develops responsibly to national origin
11 discrimination. That strategy includes, I think,
12 using experts in linguistics and sociology to educate
13 the judiciary about the importance of language and
14 ethnic and cultural traits, devising ways of ferreting
15 out biases and obtaining a neutral evaluation of
16 accent, advocating new doctrines such as the
17 accommodation analysis, and taking on the so-called
18 "choice defense."

19 And, in this regard, I would urge that the
20 Commission and its staff work together with public
21 interest organizations, some of whom are well
22 represented here today, and the private bar, which has

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1 expertise which can bring to the table experts that
2 we've worked with, ideas, and to develop in a joint
3 fashion a coherent strategy.

4 Finally, I think that the Commission needs
5 to do, obviously, more outreach and investigation in
6 affected communities. The enactment of anti-immigrant
7 policies and laws is a growth industry. We see now,
8 sort of son of 187 proposals arising, or potentially
9 arising, in states such as New Jersey, Florida,
10 Illinois, Texas, Arizona, Colorado and Missouri.
11 These laws are likely to fuel the flame of national
12 origin discrimination, and I think it is imperative
13 that the regional offices of the Commission be geared
14 up to deal with the problems that are inevitably going
15 to arise in this area.

16 Secondly, it is important that I think the
17 kind of testing that Mr. Chair has indicated, the
18 Urban Institute study, that kind of testing for accent
19 discrimination, for appearance discrimination, be
20 either conducted by the EEOC or coordinated with
21 community groups, because I think they are very
22 revealing. If you just look at the numbers that come

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1 in the door that may not be an indication because of
2 the problems of linguistic and cultural barriers and
3 historical problems of outreach to these communities,
4 that may not give you a true indication of the depth
5 of the problem, but I think testing might.

6 And, I might add that, to add to the Urban
7 Institute study, there was a study by the New York
8 City Commission on Human Rights in 1989 that showed
9 that out of 86 tested employers 41 percent treated job
10 applicants with accents differently, and that is not
11 a very surprising number if you talk to people in the
12 community who experience this on a day-to-day basis.

13 I think it is important to step up
14 culturally and linguistically sensitive outreach to
15 national origin minorities. This is especially
16 important because in those communities the linguistic
17 and cultural barriers have been compounded by, I
18 think, a diminution in legal resources available. I
19 think the size of the private bar that is willing to
20 undertake expensive and time-consuming plaintiff
21 discrimination cases is diminishing for various
22 reasons, attributable both to the economics of that

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1 kind of litigation, to changing substantive law, as
2 well as laws regarding attorneys' fees recovery.

3 Proposition 187 is likely to pose
4 additional barriers, not only by creating a more
5 hostile political environment that makes people less
6 trusting of government, but it touches, and I think we
7 need to understand this, not only those who are
8 undocumented, but those who might be touched by
9 undocumented status, may be reluctant to file a claim.

10 And, I need only cite the very tragic story
11 that was widely reported just shortly before the
12 passage of 187, about a Korean woman in a suburb of
13 San Francisco, an 87-year old woman who decided to
14 take her morning bath, turned on the hot water faucet
15 and forgot to turn on the cold water faucet, ran the
16 water not knowing it was scalding hot, she proceeded
17 to step into the tub, immediately her foot turned red
18 from the scalding water, she panicked and fell into
19 the scalding water. She was unable to get out, she
20 was burned severely, and her cries for help were not
21 answered until minutes later.

22 And, although she was a documented resident

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1 of the United States, her family was reluctant to call
2 the services, the emergency medical services, because
3 there were undocumented members in that household.
4 And, regrettably, by the time they finally made the
5 decision to take the chance and to make the call, she
6 had died.

7 And so, laws like Proposition 187 send a
8 chilling effect, and I think will make the outreach
9 efforts of this Commission even more difficult,
10 regrettably. And, therefore, this Commission needs to
11 redouble its efforts to bring people in and to make
12 that link.

13 I think it is also important to understand
14 that an important essential outreach tool is the
15 bringing of high-profile cases by the EEOC, not
16 necessarily by private counsel with the help of EEOC,
17 but by the EEOC itself, because I think that sends an
18 important message to the community, both the employer
19 community and the minority community as well.

20 Let me close by urging finally that the
21 Commission not overlook the importance of outreach to
22 the Asian Pacific American community. As I mentioned,

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1 the numbers are growing. The numbers of speakers of
2 Asian languages has more than doubled over the last
3 ten years. There are now over 4 million speakers of
4 Chinese, Korean, Filipino, Indian, Vietnamese, Thai
5 and Laotian languages. The myth that Asian Pacific
6 Americans are a model minority I think is a dangerous
7 myth, because it tends to suggest that the resources
8 of the Commission are not needed to address their
9 issues.

10 The problem with that myth is that it masks
11 the tremendous variety and disparity within the Asian
12 Pacific American community, both ethnically,
13 generationally, socioeconomically and in job
14 classification.

15 Although there have been limited success by
16 Asian Pacific Americans in certain areas, there are
17 great disparities and under-representation remains.
18 There is a world of difference between the educational
19 attainments of third generation Japanese Americans,
20 for instance, and the employment rates and poverty
21 rates for Laotian and Cambodians, who suffer some of
22 the highest unemployment and poverty rates in the

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1 Nation. Laotian and Cambodians experience a poverty
2 rate of 67 percent and 47 percent, respectively.

3 If we look at the Chinese American
4 community, one naturally tends to look at the
5 educational attainment and the fact that the median
6 income of Chinese American families is higher than the
7 national mean. Yet, there is a disproportionate
8 poverty rate within the Chinese American population,
9 which suggests a segmented population.

10 And, while Asian Pacific Americans are well
11 represented in certain fields, they are vastly under-
12 represented in others, such as law, construction and
13 public safety. Glass ceiling issues remain
14 significant. According to a Fortune 500 survey, only
15 .3 percent of senior executives in the United States
16 are Asian, representing one tenth of their parity in
17 the population.

18 The U.S. Commission on Civil Rights found
19 that Chinese, and Japanese and Filipino American men
20 with a college degree and 20 years of experience are
21 half as likely as non-Hispanic White men to become
22 managers. Asian Pacific Americans with equal

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1 you to follow through on your commitments that have
2 been made by the Chair and the Vice-Chair. Thank you
3 very much.

4 CHAIRMAN CASELLAS: Thank you very much.

5 Mr. Kamasaki.

6 MR. KAMASAKI: Thank you, Mr. Chairman, and
7 I join my colleagues in thanking you for the
8 opportunity to be here.

9 Let me, since my colleagues have covered so
10 much ground, let me try and focus my presentation on
11 specifically the scope and degree of employment
12 discrimination attributable to employer sanctions and
13 related anti-immigrant sentiment.

14 I'd like to spend a few minutes discussing
15 some of the newer pending policy proposals that pose
16 similar dangers, and I speak there about employment
17 verification schemes proposed by the Immigration
18 Reform Commission and others, and conclude with some
19 suggestions regarding the role of the EEOC in
20 addressing such discrimination. Let's talk about the
21 types and scope of employment discrimination
22 attributable to employer sanctions and its progeny

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1 first.

2 The Chairman noted the GAO report, which
3 found a widespread pattern of discrimination, I would
4 just note for the record there were nearly a dozen
5 other reports filed by organizations ranging, not only
6 from the city and the State of New York which Ed
7 referred to, but the State of California, the U.S.
8 Commission on Civil Rights, the American Civil
9 Liberties Union and others, all of which concluded
10 that employer sanctions had caused a widespread
11 pattern of discrimination.

12 It's also worthy to note that the GAO
13 report concluded that some 800,000 employers, by its
14 admittedly very conservative estimate, were engaging
15 in one or more of the kinds of discriminatory
16 practices which I am about to describe. Let's go into
17 what types of employment discrimination were
18 attributable to employer sanctions. There were some
19 very simple and some very complex.

20 The simple ones were clear overreactions to
21 the law, things like citizens only hiring policies.
22 If you were to look at the case load of the Office of

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1 Special Counsel at the Department of Justice, probably
2 60 percent or more are simply charges related to
3 advertising in job offers where the employer is saying
4 we only hire U.S. citizens. It is that kind of
5 reaction outlawed by IRCA which is very common.

6 You also have another very common form of
7 discrimination in which employers simply play it safe,
8 they screen out all persons they believe to be
9 foreign, who look or sound foreign, so this is a
10 simple refusal to hire kind of policy.

11 Probably more common are selective
12 application of the rather complex document
13 verification requirements of the Immigration Reform
14 and Control Act. I think as the Commissioners know,
15 when you go through a hiring process after the 1986
16 law you have to fill out a so-called I9 form and
17 review documents provided by the job applicant.

18 The GAO and others have found four specific
19 types of document-related discrimination. The first
20 is simply selective application of those requirements,
21 that is to say, many employers, about eight percent
22 according to the GAO, only verify the documents of

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1 people they believe to look or sound foreign.

2 Second, there is a practice called
3 "preferred documents." This is very common, it was
4 very common in the wake of the Zoe Baird incident
5 where many of the Nation's leading newspapers and
6 magazines incorrectly said the only time you should
7 hire somebody is if they have a Green Card. Not
8 surprisingly, many employers responded, including in
9 employment advertising, by suggesting that you need
10 not apply unless you have a Green Card. Of course, as

11 the Chairman knows, many people who are mistakenly
12 believed to be immigrants, like Puerto Ricans who are
13 native-born U.S. citizens, do not have Green Cards,
14 have no way of getting Green Cards, and could not
15 possibly produce Green Cards if they are asked for
16 those.

17 Third is excessive scrutiny of documents,
18 that is to say, people who "looked or sounded foreign"
19 would present legitimate, genuine documents for the
20 employer to review, and the employer would say, geez,
21 this document doesn't look very good to me, or I think
22 it's forged, or I think it's counterfeit, or could you

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1 bring me something else. Again, that tends to be
2 selectively applied.

3 Finally, there is the practice of simply
4 refusing to accept valid documents, even after the
5 case load of the Office of Special Counsel, I know the
6 Asian Law Caucus brought some of these cases of simply
7 the employer, even after checking with the Immigration
8 Service, even after the job applicant produced a
9 number of documents, the employer simply refused to
10 accept them as valid.

11 Finally, there also appeared to have been
12 substantial discrimination related to terms and
13 conditions of employment, not so much in the sort of
14 glass ceiling promotion context, but more commonly in
15 the sort of bread and butter wage and hour context,
16 employers believing certain people to be either
17 undocumented or unlikely to bring complaints or being
18 asked to accept lower wages than comparably situated
19 employees.

20 I think as Ed has noted, that the type --
21 the scope and range of this kind of discrimination has
22 not been limited only to employment discrimination.

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1 Landlords, banks, insurance companies and others have,
2 in essence, taken it upon themselves to enforce the
3 law, the neo-vigilantism associated with Prop 187 has
4 really be quite remarkable in its scope, and it
5 borders on the hysterical and irrational to have a
6 waitress card young Hispanic teenagers trying to buy
7 a pizza, or to have a grocery store clerk ask someone
8 who is checking out at a grocery store line to prove
9 that they are here legally before they will accept
10 their business seems quite remarkable, and yet, those
11 kinds of incidents are well documented out in
12 California post 187.

13 I think if I could leave you one thought
14 today, however, if you could sort of combine all of
15 these types of discrimination, I think the bottom line
16 is, what we are seeing is the most subtle form of
17 discrimination, which is that in this case the person
18 who looks or sounds foreign, the national origin
19 applicant just does not get any breaks. And, the way
20 to think about this is this, early in the 1990s,
21 actually late in the 1980s when the Home Mortgage
22 Disclosure Act started to produce a lot of data around

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1 people who were denied home mortgages, one of the
2 things that the industry frequently used to point to
3 was to go through the Blacks and Hispanics who had
4 been denied mortgages and point out, you know, geez,
5 this person didn't have the right income to equity
6 ratio, and this person had a sketchy credit record,
7 and so on and so forth, which seemed to be persuasive
8 at first until you looked at the Whites who were
9 granted mortgages who had the exact same problems at
10 the exact same degree.

11 In essence, what you see with employer
12 sanctions, and with this kind of discrimination, is
13 the same situation. Even though an employer may apply
14 the standards equally, he or she treats the results
15 differently, so that if in the classic examples when
16 Robert Redford or someone who looks like Robert
17 Redford goes and applies for a job and, geez, they
18 just forgot their documentation that day, no problem,
19 they get hired and they can bring their document the
20 next day. But, if you look or sound foreign and you
21 forgot to bring your document, no way you are going to
22 get a job. And, it's that never getting a break

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1 multiplied throughout this hiring process, through
2 this IRCA verification process, that we think is the
3 major factor in leading to discrimination.

4 It's also important, I think, to note the
5 motivation that employers seem to have. Many of us,
6 I think incorrectly, feared initially that the real
7 cause of discrimination would simply be fear of the
8 civil penalty, fear of the sanction. But, I think
9 increasingly, as we've had experience with IRCA, what
10 we've seen are two things. One is simple confusion,
11 just an absence of knowledge, not just about the law,
12 but the overwhelming number of people who make no
13 distinctions between, for example, legal immigrants,
14 illegal immigrants, or U.S. citizens by birth of a
15 certain ethnic origin, you know, to some people,
16 especially in places like California and Texas, they
17 are all Mexican, regardless of what their particular
18 status is.

19 The third is this vigilantism that I talked
20 about, that people believe it is now their patriotic
21 duty to do everything and anything that they can to
22 help enforce the immigration laws, and that is one of

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1 the sources in which you start to get this irrational
2 behavior.

3 Now, I went through that rather laborious
4 process, because I think it's important in order to
5 understand the significance of new or pending
6 proposals designed to "fix" the Immigration Reform and
7 Control Act. And, these are in various forms of
8 intensity, a national ID card, or a national registry
9 of employers or workers as the Jordan Commission has
10 proposed, or expansion of certain document
11 verification pilot projects, most of them using their
12 so-called "TVS projects," telephone verification
13 systems, similar to what you use when you are applying
14 for a credit card transaction.

15 All of these assume, basically, that one
16 can devise a system that works, that you can eliminate
17 any counterfeiting and that you can assure timely,
18 quick and accurate verification of people applying for
19 jobs. And secondly, they assume that if they work,
20 that if employers no longer have confusion, or if
21 employers no longer have fear or doubt about certain
22 employees, that this will reduce, indeed some would

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1 argue would eliminate, job-related discrimination
2 attributable to employer sanctions.

3 Now, we happen to believe that neither of
4 those things are true. The first reason is that these
5 systems we don't believe will work. The accuracy of
6 the databases, the Social Security database, the INS
7 database that would be used, upon which these systems
8 would be based, are very questionable at best. Some
9 have estimated that up to one third of the records in
10 the INS database are inaccurate. The Social Security
11 database has a somewhat better accuracy record, but
12 still the error rate is very high.

13 The second reason is sort of a garbage in,
14 garbage out kind of an analysis. I think all of us
15 have probably at one time or another had experiences
16 where we were incorrectly denied authority to make a
17 credit card purchase, or that we may have checked our
18 credit records and found that somebody else's bad
19 debts were being attributed to us. The same kind of
20 situation is true with many of these databases. They
21 are, according to many technology experts, virtually
22 impossible to keep accurate. The experience of pilot

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1 projects to date suggests that that is true.

2 Under the existing so-called "telephone
3 verification system," which has been tested with about
4 nine employers, what happens is, when a job applicant
5 goes in to seek a job, the employer runs the number
6 through the INS database system, in about 28 percent
7 of the time the INS cannot tell that employer whether
8 or not that person is here legally. Then, that moves
9 on to secondary verification, in which there is
10 supposed to be a manual records check to determine
11 whether that person is eligible.

12 Now, a couple of things are interesting
13 about these data. In at least 50 percent of the
14 cases, secondary verification revealed that the
15 persons were, in fact, here legally, that is to say,
16 the INS can't, at least, well, 28 percent divided by
17 one half, 14 percent of the time the INS will be doing
18 what might be called false negatives, that a person is
19 actually here legally but the computer will show them
20 here as not being here legally.

21 The final reason we believe that the
22 systems are inherently inefficacious is because there

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1 is a cost efficacy tradeoff. According to the Social
2 Security system, you would have to spend between \$3
3 and \$6 billion simply to clean up the existing
4 database. That has nothing to do with future records.
5 The costs of improving and maintaining that database
6 into perpetuity probably are double or triple that
7 cost, and our belief is, regardless of people's
8 sincere commitment to these systems we cannot imagine
9 between \$9 and \$18 billion being found in this federal
10 budget in order to produce systems that are going to
11 be able to accurately respond to some 7 to 9 million
12 new hires that take place each year. The result is a
13 system that won't work, and when the system doesn't
14 work the effect will be, if you are Asian or Hispanic,
15 you are applying for a job, and you are one of those
16 unlucky 14, or 18, or 28 percent where you get back a
17 false negative, you never get hired.

18 When we have mistakes that occur in the
19 credit card context, we have a minor inconvenience
20 where we can't purchase that good that day. When
21 these systems fail, people will be denied employment,
22 and that's why we believe they inherently won't work.

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1 The second reason is that this assumes, all
2 of these systems assume, that the only employer
3 motivation is the fear of the sanction, that is, they
4 assume that the only reason employers are pursuing
5 this is because they don't want to go beyond the law,
6 but they only want to comply with this much of law.
7 But, as we've seen previously, those who are over
8 zealous, who go beyond the scope of the law, are not
9 going to be constrained by the limits of the system,
10 and, therefore, we believe are likely to act in ways
11 that are discriminatory.

12 The second reason is that there is a
13 problem of doubt. Experts in this field tell us that
14 in any system of this type there are going to be
15 glitches, and we just moved into the neighborhood and
16 I can tell you in trying to bring up our computer
17 system, which is a very simple computer system, every
18 possible glitch that could go wrong over the last two
19 weeks has gone wrong. Imagine trying to do a database
20 of 250 million Americans trying to respond to 9
21 million new hires and multiple verifications for each
22 new hire each year. We know things are going to go

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1 wrong.

2 We also know that crooks also know about
3 technology, and the experts tell us here that any
4 counterfeit-proof system immediately becomes non-
5 counterfeit-proof just a few days after the technology
6 is implemented. The result is that there will always
7 be doubt, so just as right now Ed Bradley does a 60
8 Minutes show demonstrating that he can go down to the
9 corner, any corner in east L.A. and pick up a
10 document, false documents for \$30.00, as soon as these
11 kinds of systems are in place you are going to get 60
12 Minutes and 20/20 showing how you can go down to the
13 corner and buy a counterfeit-proof document as well.

14 The result is, as long as there is doubt
15 employers have every incentive to treat people
16 differentially and you get the same kind of selective
17 application and differential treatment under this
18 system that you have under employer sanctions.

19 Indeed, we would argue the creation of
20 these new massive databases, de facto ID cards,
21 whether they are de jure ID cards or not, will
22 increase opportunities for and incentives for police

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1 harassment, difficulties in obtaining and replacing
2 documents, accessing federal benefits, especially if
3 new restrictions on eligibility for federal benefits
4 are passed in this Congress which are virtually
5 certain, and all sorts of other forms of vigilantism.
6 And, this doesn't even go into concerns regarding
7 privacy costs and so forth.

8 Let me conclude by noting two things that
9 we would urge the EEOC to consider. First, with
10 respect to current responsibilities. As the Chairman
11 noted, the Commission has jurisdiction over IRCA-
12 related discrimination for employers with 15 or more
13 employees, pursuant to its MOU with the Office of
14 Special Counsel.

15 I think it's safe to say in this field the
16 easy stuff has been done and the hard stuff has not
17 been done, and what I mean by that is this, those
18 employers who used to advertise their citizens only
19 policy, they are basically taken care of. Those
20 employers who advertise that they only accept Green
21 Cards, I think they've come to attention of the OSC,
22 and I think that kind of problem has been dealt with.

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1 The real problem has been to try and
2 uncover the systemic or pattern and practice type
3 cases having to do with selective application of
4 IRCA's verification requirements, and I would agree
5 with my colleagues, the only way you get to that is
6 testing, and the only way you do that is with very
7 careful testing, keeping in mind IRCA's very complex
8 verification requirements.

9 I also support the notion of increased
10 outreach. I would note, however, that given limits in
11 resources, given the agency's substantial challenges
12 in meeting its current case load, much less new case
13 loads, I would urge greater attention to the
14 enforcement and using testing and other means to
15 making cases, rather than simply trolling for more
16 cases that I think this agency might have troubling
17 handling if they came in significant new volumes.

18 Finally, and I would just note the
19 standard, I would hope that this agency could present
20 a credible deterrent threat, so that it is sufficient
21 to overcome, not only employers' fear of sanction, but
22 employers' I think sometimes unwise and untoward

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1 desire to become immigration law agents.

2 Otherwise, it seems to me, we would have as
3 a country established a policy where it is not only --
4 one can not only can get away with discrimination, it
5 becomes almost rational to discriminate.

6 Second, I would hope that this Commission
7 would weigh in on the pending policy debates, both
8 within the Administration and in the Congress, as the
9 Administration and the Congress try and shape new ID
10 card or worker registry systems to assure that such
11 systems are not implemented absent substantial
12 protections for national origin groups.

13 Thank you.

14 CHAIRMAN CASELLAS: Thank you very much,
15 and I thank the three of you for a very comprehensive
16 and helpful set of presentations.

17 We'll turn now to questions and/or comments
18 by the Commissioners. Mr. Vice-Chairman, do you have
19 any?

20 VICE-CHAIRMAN IGASAKI: No. I got a chance
21 to speak earlier. I'll defer to my colleagues.

22 CHAIRMAN CASELLAS: Commissioner Silberman?

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1 COMMISSIONER SILBERMAN: Thank you, sir,
2 for bringing this panel before us.

3 When I saw that we were going to discuss
4 the interplay between discrimination and immigration,
5 I looked forward to hearing from Mr. Kamasaki again.
6 We worked together on the IRCA Task Force about, what,
7 seven years ago, and it is deja vu all over again
8 because we are again wrestling with the same
9 intractable problems in trying to solve what is, I
10 believe, a growing area in the law, and one that I
11 would hope that the Commission would address with
12 vigor.

13 It seems to me that this is not subtle and
14 it is blatant, old fashioned, intentional
15 discrimination that we really have to fight very hard,
16 and I just would like to commend you for what I think
17 was an extraordinarily realistic assessment of what we
18 can do and what we can't do. I will be watching very
19 carefully, and I hope helping to see that we do do
20 some of the things that we can do, and speak out,
21 because I think that although I agree with you that we
22 can't realistically troll and be able to respond, I do

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1 think that the public education function which goes to
2 making people aware of their rights and their
3 necessity of their coming forward is a very important
4 part of the Commission's charge.

5 So, I thank you all. I can't say that I can
6 thank some of the more partisan remarks, but I thank
7 you all for coming.

8 CHAIRMAN CASELLAS: Commissioner Tucker.

9 COMMISSIONER TUCKER: Well, I am pleased
10 that this is the first in a series of detailed looks
11 that the Commission is going to be taking on the
12 various issues of discrimination.

13 I think Doctor King said it best when he
14 said that, "We're all caught up in an inescapable
15 network of mutuality tied by a single garment of
16 destiny. Whatever impacts one of us directly impacts
17 all of us indirectly," and that certainly is true with
18 discrimination.

19 I do have one question and that is, have
20 you seen a rise of English only rules after Spun
21 Staek?

22 MR. CHEN: Well, it's hard to say whether

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1 after Spun Staek. I can tell you that there has been
2 a rise, at least from where we sit, in terms of the
3 numbers of complaints that we hear about, our agency
4 and other sister agencies, over the past several
5 years. Spun Staek has had a deleterious effect, in
6 that, I have seen at least one employer emboldened now
7 to enforce in a very harsh way its English only rule.
8 There are a series of convalescent hospitals out in
9 California, and this is one industry where we see this
10 problem coming up often, partly because the work force
11 there is largely low wage workers, many, many
12 immigrants, either from Latin America or from the
13 Philippines, people who may have been nurses in the
14 Philippines can't get a job as a nurse here, end up
15 being a nurse's aide in a convalescent hospital, and
16 so you have a very diverse demographic mix.

17 And, I know in one particular case,
18 notwithstanding efforts by the local office of the
19 EEOC, the Union and our office, they have stood firm
20 on their policy citing the Spun Staek case. And, I
21 suspect that that is just the tip of the iceberg,
22 unfortunately.

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1 MR. KIMERLING: I would join that. I mean,
2 we are getting more in our office as well in the
3 recent year.

4 COMMISSIONER TUCKER: What, if any, impact
5 did the fact situation on Spun Staek have on the
6 decision, meaning that the employer in Spun Staek
7 implemented the English only rules to combat racism
8 that was perceived with respect to certain employees.

9 MR. CHEN: Well, hard to know what moved
10 the two judges out of the three of the 9th Circuit
11 panel that heard our case. I think it's inevitable
12 that that fact kind of flavored the dispute to a
13 certain extent. I mean, it made it seem like a less
14 sympathetic case than one, for instance, where, and
15 we've heard stories like this, where an employer will
16 simply implement an English only rule because
17 customers don't like to hear the languages, a more
18 blatant form, I think, of race discrimination.

19 Theoretically, it shouldn't have made a
20 difference, because as we argued successfully in the
21 lower court that, even if it were true, and there is
22 a factual dispute as to whether this was true or not,

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1 but even you assume it was true, the problem in that
2 case was confined to two employees who were allegedly
3 making remarks about other employees. The employer
4 had a range of tools to deal with that, and it did.
5 It sanctioned that kind of behavior, issued a rule
6 that said no more derogatory comments about your
7 fellow employees. It separated the two employees so
8 they couldn't converse with each other anymore. This
9 was all done, and it was effective, and the rule had
10 not been violated since. Nonetheless, the employer
11 insisted on an English only rule.

12 And, as the district court said, it was
13 like hitting a flea with a sledge hammer. It wasn't
14 necessary.

15 But, nonetheless, I do think,
16 unfortunately, that those facts tended to kind of
17 color the debate to a certain extent. My suspicion is
18 that I think the panel probably would have come out
19 the same way, even if it weren't that problem I think
20 there's a real -- there's two very extreme views and
21 polarized views of this whole question of English
22 only. Some people feel it is a real threat, and,

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1 therefore, employers should have the prerogative to
2 deal with this problem. Other people see it as a real
3 impingement upon personal liberty, and those two views
4 seem to be irreconcilable.

5 CHAIRMAN CASELLAS: Commissioner Miller.

6 COMMISSIONER MILLER: Thank you, and thank
7 you, Mr. Chairman. I'm glad that this is the first in
8 a series, and that we are sort of inviting members of
9 the public to come and share with us their thoughts,
10 their ideas and their perceptions. I look forward to
11 others in the series.

12 I think that it is important that we start
13 with this board today, in talking about these issues
14 of historically undeserved groups, outreach in the
15 Serrano Amendment and the like, because to not get
16 people and not get cases coming in through the door to
17 the EEOC means that we are not out there combating
18 discrimination as is our charge, and as is our
19 mandate. And, thus, to raise these issues and to
20 figure out ways of dealing with issues is, as I see
21 it, critically important, and I look forward to
22 working on these issues.

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1 I want to just sort of note, by way of
2 footnote, that the Serrano Amendment deals with
3 issues, outreach to persons whose language is other
4 than English, and that, of course, would include
5 people in the deaf community whose primary language is
6 American sign language, and I think there, too, you
7 get a lot of the same issues, a lot of the same types
8 of discrimination, similarly with accent
9 discrimination, as I believe Mr. Chen talked about,
10 people with Cerebral Palsy and other disabilities,
11 sort of face those issues too. So, there is a lot of
12 cross pollination of these issues and these problems
13 out there in the workplace.

14 One question that I wanted to just sort of
15 raise, because I don't think -- I didn't hear anybody
16 speak about it specifically, and that is, I guess, the
17 intersection between national origin discrimination
18 and gender, in particular. My understanding, based
19 upon sort of meetings with the folks, that in
20 particular communities with particular, sort of,
21 plaintiff or charging party groups, that sexual
22 harassment is particularly rampant and that there are

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1 equal pay issues are particularly rampant. And, I
2 wonder if you can just spend a couple of minutes
3 talking about the intersection between gender and
4 national origin, because I think those raise, or I
5 believe that that raises particular issues.

6 MR. KAMASAKI: If I could start, I think
7 maybe that's what you get when you have three men
8 testifying on one panel. I think there are, with
9 respect to Hispanic women, there are reams of social
10 science data which clearly, strongly suggest enormous
11 problems. Hispanic women are the lowest paid workers
12 in the labor force, bar none, and it's not by a small
13 amount, it is by a very significant amount.

14 During hearings on the Civil Rights Act in
15 19 -- either '90 or '91, there were, in fact, a number
16 of Hispanic women who came to D.C. to testify about
17 their situations, and they, I think, clearly and
18 powerfully noted a lot of intersections between the
19 two, that they frequently believed several things,
20 one, that they were discriminated against on both
21 grounds, frequently more severely on gender grounds
22 than necessarily on national origin or race grounds,

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1 and secondly, they were, in effect, twice feared -- to
2 the extent there was a fear of retaliation in this
3 field, and there clearly is, they feared retaliation
4 double because they were, in fact, both women and
5 Hispanics. So, both the rationale for discrimination
6 and the scope of discrimination appears to be
7 increased, as well as the barriers that prevent
8 redress appear to be increased.

9 MR. KIMERLING: We've actually begun a
10 Latina rights initiative at the Puerto Rican Legal
11 Defense Fund, focusing in on Latina issues, and the
12 Puerto Rican women, in particular, who are very often
13 involved in employment in the 40s and the 50s at
14 higher rates than White and African American women,
15 are now greatly below African American and White women
16 in terms of employment.

17 So, there is real, both economic changes,
18 but I think discrimination also happening.

19 The other thing that I think is probably
20 endemic to exploited workers and women who are in low
21 paying jobs is sexual harassment. We get numbers of
22 complaints from women in New York who work in the

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1 cleaning industry, who are essentially asked for sex
2 for jobs, or sex for keeping their jobs or particular
3 assignments. And, I know there's been some recent
4 attempts to look at those issues, but, again, very
5 rarely will they come forward.

6 And, they'll talk to us about it, but they
7 don't want to move on it, and it's really a scary
8 situation because almost -- to a person they talk
9 about it as a real part of employment.

10 MR. CHEN: Let me just add that to the
11 extent that women, both generally and within
12 communities of color, tend to be segregated by jobs in
13 lower paying categories than men, they are doubly
14 vulnerable, doubly disempowered, and particularly when
15 then you add the factor of those with some language
16 proficiency issues. Again, I mean, if you look at the
17 issues, the English only sort of context in the
18 convalescent hospital health care area, women are
19 typically immigrant, the workers are typically women
20 and members of national origin minorities, not only do
21 they suffer, you know, double discrimination, but
22 because of their low paying, precarious economic

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1 situation it is much more difficult for them to bring
2 cases.

3 And, I have to say that in the number of
4 complaints that we get, we get a number of people who
5 have come to us who ultimately decide that they just
6 cannot take the risk of challenging some rule, some
7 employment practice, because they know that their life
8 will be hell after that.

9 And, indeed, regrettably, in the cases that
10 we have brought, I would have to say in almost every
11 case, whether we win or lose, it is not a happy
12 ending. From the first case that I brought against
13 the University of California at San Francisco,
14 surprisingly, which had an English only rule, we had
15 a situation where the main plaintiff was continually
16 harassed and ultimately had to leave because of stress
17 and became very ill.

18 In the case of the Spun Staek plaintiffs,
19 one woman had to leave, she couldn't take it anymore,
20 and completely left the employ. The other is still
21 working there, but has been seeing a doctor and is
22 continuing to suffer tremendous stress, and I can see

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1 the personal toll it has taken.

2 And so, when you are confined to a low wage
3 industry, where jobs are very competitive, it makes it
4 extremely difficult to bring those claims, and that's
5 why I think the point that you made about the need to
6 protect people against retaliation is particularly
7 well taken.

8 I just might add as a footnote that in the
9 Spun Staek case, the whole thing originated because
10 one of the plaintiffs, a Latina women, had gone to the
11 employer to complain about sexual harassment. She
12 felt that her supervisor was making -- well, was
13 harassing her in a sexual way, and it was in response
14 to that in the investigation, the owner of the company
15 then talked to the alleged perpetrator, who then
16 accused her of making these untoward comments in
17 Spanish, that that instigated the whole English only
18 rule. Somewhat ironically, her claim was never dealt
19 with. Her claim was never investigated beyond the
20 fact that, you know, of talking to the perpetrator,
21 the alleged perpetrator, and the response was a
22 punitive measure of imposing English only rules,

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1 rather than doing something about the sexual
2 harassment.

3 And so, I think that well illustrates the
4 dilemma.

5 COMMISSIONER MILLER: I think the real
6 problem of exploitation of people in the job market,
7 and trying to get into the job market people on the
8 job, the real exploitation really comes out in these
9 various different scenarios, and I really encourage
10 and look forward to working with you to create
11 strategies with us here at the EEOC to both reach out
12 to folks who are victims and being exploited, and to
13 create strategies to bring some of these cases to
14 justice, to enforcement, because I think it's just
15 critical that the message of enforcement go out there,
16 that this kind of level of exploitation just shouldn't
17 and won't be tolerated.

18 CHAIRMAN CASELLAS: Thank you, and again,
19 thank you three for appearing here today. As I said,
20 it was comprehensive, very helpful, but it lays out
21 before us yet another challenge, and I hope we can
22 meet it.

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Do I hear a motion to adjourn?

COMMISSIONER TUCKER: So moved.

CHAIRMAN CASELLAS: So moved. Thank you
very much.

(Whereupon, the meeting was concluded.)

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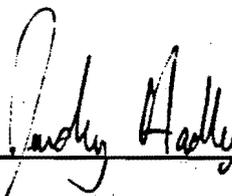
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