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U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

UNEDITED

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FRIDAY, OCTOBER 12, 2012

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The Commission convened in Suite 1150 at
1331 Pennsylvania Avenue, Northwest, Washington, D.C.
at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair*

ROBERTA ACHTENBERG, Commissioner

TODD GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner*

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner*

VANESSA EISEMANN, Parliamentarian

LOUISE DIBENEDETTO, Inspector General

* *Present via telephone*

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STAFF PRESENT:

MARGARET BUTLER, Acting Director, OCRE
IVY L. DAVIS, Director, ERO
BARBARA DELAVIEZ, ERO
PAMELA DUNSTON, Chief, ASCD
YASMIN ELHADY
LATRICE FOSHEE
ALFREDA GREENE
JENNIFER CRON HEPLER, Solicitor
TINALOUISE MARTIN, Director, OM
DAVID MUSSATT, Acting Director, RPCU/Director, MWRO*
LENORE OSTROWSKY, Acting Chief, PAU
EILEEN RUDERT
MICHELE YORKMAN
JOHN RATCLIFFE, Chief, BFD
KIMBERLY TOLHURST, Senior Attorney, OGC

** Present via telephone*

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTON
ALEC DEULL
TIM FAY
JOHN MARTIN
CARISSA MULDER
RICHARD SCHMECHEL
ALISON SOMIN
MARLENE SALLO

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P R O C E E D I N G S

(9:33 a.m.)

CHAIRMAN CASTRO: This is a meeting of the U.S. Commission on Civil Rights. It is currently 9:32 on October 12th, 2012. This meeting is taking place at the Commission's headquarters located at 1331 Pennsylvania Avenue, N.W. in Washington, D.C.

I'm Chairman Marty Castro. The Commissioners that are present here in person with me are Commissioner Gaziano, Commissioner Heriot, Commissioner Kladney, and Commissioner Achtenberg. On the phone participating are Vice Chair Thernstrom, Commissioner Kirsanow, and Commissioner Yaki.

A quorum of the Commission is present. Is the court reporter present? Yes.

Okay. So, the meeting shall now come to order. The first item is the Approval of the Agenda.

I. APPROVAL OF AGENDA

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

COMMISSIONER GAZIANO: I second.

CHAIRMAN CASTRO: Okay. Any amendments?

COMMISSIONER ACHTENBERG: Mr. Chairman.

CHAIRMAN CASTRO: Yes?

COMMISSIONER ACHTENBERG: I'd like to move

1 that we amend the agenda, the part that pertains to
2 approval of the State Advisory Committee Slates. My
3 colleague on the Subcommittee and I would like to ask
4 that the listed slates for consideration be removed at
5 this time and we substitute that list for a report
6 that we'd like to give to the group. And we're getting
7 close, but we're not quite there yet, so the list of
8 states to be approved would be withdrawn and a report
9 would be substituted in its place.

10 COMMISSIONER HERIOT: I second that motion.

11 CHAIRMAN CASTRO: Are there any other
12 amendments? If not, let's vote to approve the agenda.
13 All in favor say aye.

14 (Chorus of ayes.)

15 CHAIRMAN CASTRO: Any opposed? Any
16 abstentions? Everyone on the phone heard?

17 VICE CHAIR THERNSTROM: Yes, approve.

18 CHAIRMAN CASTRO: Okay, the motion passes
19 unanimously.

20 Prior to moving on to the next item on our
21 agenda I would like to acknowledge that today is the
22 last day with our agency of Kimberly Tolhurst. She has
23 been many roles in this office from Senior Attorney
24 Advisor to Acting General Counsel, to Acting Staff
25 Director, to Ethics Officer, and I'm sure I'm

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1 forgetting a few other hats you've worn. So, I know I
2 want to thank you for the work that you've done for
3 the Commission over the last six years, and I'm sure
4 that other Commissioners here would like to share
5 their thoughts with you, so I will gladly open the
6 floor to my colleagues to opine on your tenure.

7 VICE CHAIR THERNSTROM: Well, I'll say
8 something, Marty.

9 CHAIRMAN CASTRO: Yes, ma'am.

10 VICE CHAIR THERNSTROM: Marty?

11 CHAIRMAN CASTRO: Madam Vice Chair, you
12 have the floor.

13 VICE CHAIR THERNSTROM: Okay. Kim, I just
14 want to say something that I've made clear before. Now
15 getting to my long tenure at the Commission you were
16 the best Staff Director we have had in my experience.
17 You were always professional. It didn't matter when
18 you substance agreed on divisive issues with one side
19 or another, you just kept your professional hat on and
20 I'm full of admiration, and full of appreciation.

21 CHAIRMAN CASTRO: Yes, the Chair recognizes
22 Commissioner Gaziano.

23 COMMISSIONER GAZIANO: I'd like to offer
24 some similar words of thanks, encouragement, best
25 wishes to Ms. Tolhurst, and to maybe note for the

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1 record that her involuntary rise, involuntary on her
2 part I think, anyway, to the Staff Director came in a
3 slightly interesting manner. I -- some new members of
4 the Commission on the Democratic side who wanted --
5 who felt more comfortable with her in the Acting. And
6 at that moment we were only -- some of us appointed by
7 Republicans were a tiny bit upset about the way the
8 motion had been brought to our attention, but in an
9 instant we all were comfortable with Kim because we
10 knew her as an excellent counsel in the General
11 Counsel's office. And I hope I'm not speaking out of
12 school. We asked for a break, we pulled her aside and
13 we said, "Do you want this job?" But we had no
14 hesitation, of course, in unanimously approving her
15 for the job. And our confidence in her, I think, was
16 more than vindicated, not only in the ways that Vice
17 Chair Thernstrom mentioned that I think she was
18 scrupulously fair, or at least tried to be
19 scrupulously fair to both sides. Of course, she didn't
20 achieve it because no one ever could in my mind
21 because someone else would disagree, but she certainly
22 came very close. She listened.

23 But I also got the sense as Vice Chair
24 Thernstrom said to -- I don't know all the day to day
25 interactions between the Staff Director and the Career

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1 Staff, but over time you get a sense of it as a
2 Commissioner, even a part-time Commissioner like us
3 interacting with our Special Assistants. And I concur
4 in Vice Chair Thernstrom's remarks that you seem like
5 an outstanding SAC Director for the Commission.

6 We used to have the pictures -- I don't
7 know whether we're going to in this new building. This
8 is the first time -- of the Staff Directors and the
9 Commissioners, but that was an appropriate sort of
10 commemoration in my mind because the Staff Director
11 has a great impact on the Commission, and I think your
12 tenure, Kim, is worthy of our thanks and praise.

13 CHAIRMAN CASTRO: The Chair recognizes
14 Commissioner Heriot.

15 COMMISSIONER HERIOT: I want to be real
16 quick here. Just thanks, best wishes. We are going to
17 miss you terribly. And I want you to come back here
18 sometime maybe in late spring and early summer and
19 laugh your head off at the people who are desperately
20 trying to get that enforcement report out. You deserve
21 not having to work on it this time. Thanks so much for
22 what you've done.

23 CHAIRMAN CASTRO: My colleagues on the
24 phone on the right here which is figuratively my right
25 but really the left, Commissioner Kladney and then

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1 Commissioner Achtenberg.

2 COMMISSIONER KLADNEY: I'd like to thank
3 you, Kim, because I'm obviously the newest
4 Commissioner here, and I was walking into the woods
5 when I came through the door the first time.

6 VICE CHAIR THERNSTROM: Speak up.

7 COMMISSIONER KLADNEY: And I would join
8 everybody's else remarks. And I would just add that I
9 want to thank you for your direction, your
10 professionalism, your truth, your honesty. And I give
11 you all the best wishes I can on a much deserved
12 future success.

13 CHAIRMAN CASTRO: Commissioner Achtenberg.

14 COMMISSIONER ACHTENBERG: Thank you, Mr.
15 Chairman. I think the kind of work we asked you to do
16 when we elevated you to the position of Staff Director
17 was sometimes difficult, required extraordinary
18 effort, required the exercise of other than legal
19 judgment, as well as legal judgment. I think it's very
20 difficult when someone is in the career civil service
21 to ask them to step into the kind of position we asked
22 you to step into. I think you did it was a lot of
23 grace. I know it was extremely difficult, but we have
24 nothing but respect for the job that you did. And I
25 wish you every good fortune in your new endeavor.

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1 CHAIRMAN CASTRO: Any of the Commissioners
2 on the phone?

3 COMMISSIONER KIRSANOW: Yes, Mr. Chair.
4 Kim, this is Pete Kirsanow. I would echo many of the
5 comments that were made by my fellow Commissioners.
6 Your professionalism has been outstanding. You've
7 been wearing a number of different hats and
8 discharging all those functions admirably. I don't
9 know of any better Staff Director during my entire
10 tenure. You've been placed in difficult positions and
11 have been executing all of your duties virtually
12 without any complaint, well without any complaint that
13 I'm aware of, at least. Probably you're muttering to
14 yourself on a regular basis, so I have nothing but
15 admiration. Thanks very much, Kim.

16 CHAIRMAN CASTRO: Commissioner Yaki, would
17 you like to make a statement for the record?

18 COMMISSIONER YAKI: Yes. Kim, I'm sorry I
19 couldn't be there in person to see you. I'm sure
20 you've having second -- I assume you're thinking do I
21 really want my picture up on this wall. But now that
22 you're leaving I think that I can reveal that during
23 the time -- when I first met you on the Commission I
24 was impressed by your professionalism, by your
25 fairness. During a period when I knew that my

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1 reappointment to the Commission was not going to be
2 certain I went to you and Commissioner Thernstrom and
3 I said we've got -- we have to worry about a
4 transition. Would you consider taking the job of Staff
5 Director, and you agreed. I now sometimes regret that
6 because I wonder if that's what has led to your
7 leaving the Commission, but I don't regret what impact
8 it had in terms of stabilizing the Commission, keeping
9 it going forward, and making sure that as others have
10 said we did things well, and we did things right.

11 I am going to miss you. I know that a lot
12 of people are going to miss you, but I just wanted to
13 say that you stepped in under extraordinarily
14 difficult circumstances. You did not want this, but
15 you stepped up on behalf of the Agency and its
16 mission. You did an incredible job. I am truly sorry
17 to see you go.

18 I was hoping that you would still be here
19 when I finished up, but I wish you all the best
20 because in the end this is about your life and what
21 you want to do, and where you will be happy, and where
22 you will find your bliss. And all the best to you, and
23 many, many thanks, not just from me but from the
24 people who you have ably served in the Civil Rights
25 community. Thank you so much.

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1 CHAIRMAN CASTRO: Would you like to say
2 something?

3 MS. TOLHURST: Thank you all. Those are all
4 very kind words for me. I don't know how many of you
5 know it but when I was in law school many, many years
6 ago I actually interned at the Commission on Civil
7 Rights, so I've been able to see it change over time
8 Due to a stagnant budget, due to loss of staff it was
9 quite different when I came back as a professional
10 attorney. And in leaving I wish you all well, and I
11 want to make sure that something gets stabilized, and
12 some leadership arrives.

13 This is a Commission that is supposed to
14 be a civil rights Commission. I know we've got the
15 most briefing I've ever seen lined up, so I hope that
16 goes well, but we really have less than -- you don't
17 even need both hands to count the number of civil
18 rights researchers, lawyers, analysts, and I hope you
19 can find a way to get that back and get that to grow
20 in addition to finally getting a Staff Director.

21 I was glad in the end to get to do that.
22 It was certainly a good career move, a nice builder of
23 skills other than just being a lawyer. As Commissioner
24 Kirsanow said it was too many hats, and it seems like
25 all the hats actually literally hurt my head. I was

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1 gone for a while unfortunately right when our new
2 lawyer started.

3 That's an other thing I wanted to let you
4 know before I signed off is, they're sort of not going
5 to have me in any kind of lead role, and I'm not sure
6 how they'll relate to you all, or how they'll be in
7 touch with you, the three new lawyers. They're all
8 very good. I want you to know my assessment of them,
9 and their writing and research, and attitude is that I
10 hope you'll be successful in relying on them, as well,
11 and able to use them because they came in without me
12 here, unfortunately. And I wanted to let you know
13 their job has been good, and just thank you all again.

14 CHAIRMAN CASTRO: Thank you.

15 (Applause.)

16 CHAIRMAN CASTRO: Well, we are now going to
17 proceed on to our Program Planning and Update and
18 Discussion of Projects.

19 **II. PROGRAM PLANNING UPDATE AND**

20 **DISCUSSION OF PROJECTS**

21 **UPDATE ON THE CIVIL RIGHTS IMPLICATIONS OF**

22 **EMINENT DOMAIN ABUSE BRIEFING**

23 CHAIRMAN CASTRO: The first item up is an
24 update on our Civil Rights Implications of Eminent
25 Domain Abuse Briefing. I'd like to ask Margaret Butler

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1 to please step forward and give us an update on where
2 we are with the preparation of that report.

3 MS. BUTLER: Good morning. ERS has
4 addressed -- I'm sorry, OCRE has addressed the LSR
5 and two of the ERB comments for the Eminent Domain
6 Briefing Report. We have one set of ERB comments to
7 address, and we will do so once we have finalized a
8 briefing book for the Arab and Muslim briefing.

9 COMMISSIONER HERIOT: What's ERB?

10 MS. BUTLER: Editorial Review. So, it's
11 going through that process.

12 CHAIRMAN CASTRO: So, about when would we
13 anticipate seeing a draft report?

14 MS. BUTLER: November 13th. I think that
15 will be right after the briefing.

16 CHAIRMAN CASTRO: Okay. Commissioner
17 Gaziano, do you have a question?

18 COMMISSIONER GAZIANO: Yes. I don't imagine
19 it's not inappropriate, but if it is appropriate, how
20 many editorial review people and who were the people,
21 the Editorial Review -- just want to familiarize
22 myself partially with the process, but partially with
23 who was selected.

24 MS. BUTLER: There were three ERB people,
25 and right off I don't remember exactly who they were.

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1 Once I get back to my office I can email you that
2 information.

3 COMMISSIONER GAZIANO: Sure, if it's --
4 and the type of things they were reviewing it for
5 would help.

6 MS. BUTLER: Okay.

7 COMMISSIONER GAZIANO: Thank you.

8 CHAIRMAN CASTRO: You know, Commissioners,
9 what would really be helpful is -- and I found this
10 out more recently since I've been given the authority
11 to start reviewing SAC reports and make sure that the
12 ERBs and legal sufficiencies are done. It's been
13 fascinating to read those and to see how that process
14 works where staff are going -- making sure that there
15 are editorial changes that need to be made, or there's
16 legal sufficiency issues, so many of those memos are
17 very interesting, and it seems to be well done. But
18 it's a lot of paper to go through. I have learned,
19 too, after we got the California SAC report approved,
20 and I'm working on like five others now, but I'd be
21 happy to show you what one of those looks like, if
22 you'd like, just so you can see.

23 COMMISSIONER HERIOT: I just want to make
24 sure I understand the process now.

25

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1 CHAIRMAN CASTRO: Yes.

2 COMMISSIONER HERIOT: When you get
3 Commissioner comments it's going to be you, Margaret,
4 who's in charge of incorporating those?

5 MS. BUTLER: Yes, or someone on staff. Yes,
6 we will incorporate them.

7 COMMISSIONER HERIOT: So, that person on
8 staff will either be you or your designee.

9 MS. BUTLER: Yes, yes, yes.

10 CHAIRMAN CASTRO: Any other questions for
11 our Chief of OCRE on the Eminent Domain? If not, you
12 might as well stay there because I think we also want
13 to kind of find out where we are on the Status of the
14 Sex Trafficking: A Gender-Based Violation of Civil
15 Rights Briefing report.

16 **II. PROGRAM PLANNING UPDATE AND**
17 **DISCUSSION OF PROJECTS**

18 **UPDATE ON SEX TRAFFICKING: A GENDER-BASED**
19 **VIOLATION OF CIVIL RIGHTS BRIEFING**

20 MS. BUTLER: We have a rough draft of that
21 report completed. We've been putting all of our
22 efforts into trying to get the Muslim briefing done,
23 and we will return to that once we finish up on
24 November 9th. And maybe within a couple of weeks after
25 the November 9th briefing we should have a draft that

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1 can go forward to LSR and ERB.

2 CHAIRMAN CASTRO: And that will starts its
3 legal sufficiency review.

4 MS. BUTLER: Yes.

5 CHAIRMAN CASTRO: Okay. Any questions for
6 Ms. Butler on that? Okay. I think you've got the next
7 one, as well. Our next briefing is in November, and
8 it's the Federal Civil Rights Engagement with Arab and
9 Muslim Communities Post 9/11.

10 **II. PROGRAM PLANNING UPDATE AND**

11 **DISCUSSION OF PROJECTS**

12 **UPDATE ON FEDERAL CIVIL RIGHTS ENGAGEMENT**

13 **WITH ARAB & MUSLIM COMMUNITIES**

14 **POST 9/11 BRIEFING**

15 CHAIRMAN CASTRO: Could you give us an
16 update on where we are with that? I think you might
17 have circulated some papers.

18 MS. BUTLER: Yes. I passed out two pages
19 where the front page lists the individuals who have
20 actually accepted the invite, and the second page
21 lists the people who we have contacted and we haven't
22 received any response.

23 I think one of the federal agencies, the
24 White House has already declined, and I'm not sure DOJ
25 is going to come. On the phone they said they wouldn't

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1 come but we actually sent them a letter. Once we sent
2 them the letter of invite, we hope we get a response
3 to that.

4 CHAIRMAN CASTRO: Commissioner Gaziano.

5 COMMISSIONER GAZIANO: I'm always
6 interested whenever the DOJ refuses our polite request
7 to provide us information since the federal statute
8 commands them to respond without exception to our
9 requests for information.

10 So, could you help me, and maybe
11 Commissioner Yaki might help me with part of this. The
12 kind of information that the Department of Justice --
13 I'm just trying to get up to speed a little bit on
14 the briefing, could provide. And then if you could
15 provide, Ms. Butler, whether they gave a reason they
16 don't want to provide that information.

17 MS. BUTLER: Well, we didn't -- we talked
18 to someone informally, I guess, and then we sent out -
19 - so, the person indicated that, you know -- I guess
20 they had been busy and they may not be able to
21 participate. And we sent them a formal letter signed
22 by the Chair, and we haven't gotten a response.

23 COMMISSIONER GAZIANO: Okay.

24 MS. BUTLER: We sent that letter to all of
25 the federal agencies.

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1 COMMISSIONER GAZIANO: Okay, just to need
2 to drill down that the -- who was the letter addressed
3 to?

4 MS. BUTLER: I don't have -- Tom Perez.

5 COMMISSIONER GAZIANO: Okay. And what is
6 the type of information that we -- that they could
7 provide us?

8 MS. BUTLER: Well, we asked them about
9 their role in outreach. I don't have all the
10 information in front of me right now.

11 COMMISSIONER GAZIANO: Okay.

12 MS. BUTLER: But we asked them about their
13 role in outreach, and we went by what we were asking
14 Panel One for in the Concept Paper.

15 COMMISSIONER GAZIANO: Okay. Well, I hope
16 that -- to encourage you to be diligent and follow-up
17 with Mr. Perez as is -- sometimes we want a specific
18 official but often, of course, we're happy with
19 whoever the department or agency thinks would be the
20 most effective witness, and there may be several. So,
21 hopefully in an agency with I think tens of thousands
22 of employees that they could find one suitable witness
23 to send us.

24 MS. BUTLER: Well, that's normally what the
25 agency does. They'll designate someone. As a matter of

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1 fact --

2 VICE CHAIR THERNSTROM: I can't hear you.
3 Can you speak up?

4 MS. BUTLER: Normally, the agency will
5 designate someone if the person that the letter has
6 been addressed to can't make. And that's what the
7 Department of Homeland Security has done.

8 COMMISSIONER GAZIANO: Thank you.

9 CHAIRMAN CASTRO: Any other questions on
10 this particular panel? Hearing none, thank you, Ms.
11 Butler. We'll now move on to Management and
12 Operations. Is David Mussatt on the phone?

13 MR. MUSSATT: Yes, I am.

14 CHAIRMAN CASTRO: Okay. So, we're going to
15 move on to Management and Operations. The first item
16 is a report from the Chief of Regional Programs.

17 **III. MANAGEMENT AND OPERATIONS**

18 **CHIEF OF REGIONAL PROGRAMS REPORT**

19 CHAIRMAN CASTRO: Mr. Mussatt.

20 MR. MUSSATT: Yes, hi, thank you. Last week
21 I was detailed to be the Acting Chief of RPCU. Since
22 then we have started to accumulate all the data that
23 Peter had compiled to the end of the fourth quarter
24 and have -- are still in the process of getting that
25 together. I believe we've sent a number of these

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1 forwarded emails to all the Commissioners yesterday.

2 We also had a meeting of the Subcommittee
3 that arose out of last month's meeting where
4 Commissioner Heriot and Commissioner Achtenberg asked
5 to get together with some of the regional offices. We
6 had that meeting yesterday which I thought went very
7 well.

8 I've also reached out to the Secretariat
9 to address some of the issues that Peter raised in his
10 memo to you regarding compliance with our charter
11 filing, and that has been -- well, an amended version
12 of our charter has been sent up to FACA for their
13 approval. So, that's we have done in the last week.

14 CHAIRMAN CASTRO: Busy week, great. Do we
15 have any questions for Mr. Mussatt? The Chair
16 recognizes Commissioner Gaziano.

17 COMMISSIONER GAZIANO: I have more of a
18 question for the Chair and for my fellow
19 Commissioners. As my fellow Commissioners know, I sent
20 an email to them questioning the Chair's authority to
21 make the Acting designation of Mr. Mussatt as RPCU
22 Chief. And by the way, Mr. Mussatt, that's no
23 indication of my opinion of you. If I'm right that the
24 Chair lacked the authority to make the Acting
25 authority, I'm happy to entertain a motion to make the

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1 Acting Chair. But I want to discuss the -- whether the
2 designation was effective or not.

3 I have now come to know at least one
4 reason, and I'd like you to explain, Mr. Chair, why
5 you think you might have had that authority. I think
6 it's mistaken for three reasons. And to the extent
7 that this is an important designation, and I think,
8 obviously, it's an important position, that we need to
9 make sure that it's done in an appropriate way.

10 CHAIRMAN CASTRO: Well, I do believe I have
11 the authority to do it. That's why I did it. I looked
12 at various sources that based on my review and
13 conversations with others, I felt that as Chairman, in
14 particular as Agency head in the absence of a Staff
15 Director, I had various sources of authority to do
16 this. Despite some folks who think to the contrary,
17 the CFR which supposedly lists my limited duties is
18 not all encompassing. In fact, as evidenced by other
19 actions I have been requested to take during the
20 course of my tenure that are not specifically listed
21 in the CFR, but because I'm Chairman and Agency Head,
22 I've done that and there has not been a dispute about
23 those.

24 But, in particular, OMB, the Office of
25 Management and Budget, has declared that the

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1 Chairperson of this Commission is the Agency Head for
2 purposes of matters relating to the administration of
3 the SACs. And if you look at the Federal Advisory
4 Committee Act as it relates to the administration of
5 SACs it says in Section 8(a) that "Each Agency Head
6 shall establish uniform administrative guidelines and
7 management controls for Advisory Committees
8 established by the Agency." So, I believe that that
9 also indicates that I as Agency Head have the ability
10 to handle matters that relate to the administration
11 and management controls.

12 Further, 8(b) of FACA says that "The Head
13 of each Agency which has an Advisory Committee shall
14 designate an Advisory Committee Management Officer,
15 the CMO, which is the RPCU, as well." And it
16 delineates various responsibilities for that CMO which
17 are also the responsibilities for the RPCU Chief.

18 Furthermore, the RPCU Chief is not a
19 management position. It is a position which
20 facilitates the work of the regions in terms of the
21 SAC and compliance with FACA. Our CFR is silent as to
22 how the RPC Chief may be appointed; however, when you
23 look at the responsibilities it's clear to me that the
24 work of the RPCU Chief is administrative and
25 ministerial in nature, so under my authority as Agency

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1 Head both from OMB, as well as under FACA, I feel that
2 I have the authority.

3 Furthermore, at a prior meeting this
4 Commission gave me the authority to act on those
5 duties of the Staff Director that are ministerial in
6 nature. I view this as one of those areas.

7 You also said that if I felt there was a
8 gray area, that I should come back at that point to
9 the Commission. Everything I have just stated to you
10 to me is not gray, but to me very clear. But at an
11 overabundance of caution, I also approached our HR
12 Office and asked do I based on the current situation
13 as Agency Head have the authority to detail someone to
14 the RPCU position which, by the way, is not any
15 additional compensation to that position, and it is
16 something that would be done as an additional job to
17 whomever, in this case David Mussatt, would continue
18 in their role.

19 I was informed that both I or the head of
20 HR had the authority to do that. So, looking at all of
21 these in the totality I felt, and I do believe that I
22 have the authority to make this appointment.

23 Now, I also believe there are other areas
24 where I don't have the authority to make an
25 appointment. During this same time it was suggested

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1 that there might be a detail to another department
2 where that person might end up becoming the Staff
3 Director. And I said absolutely is not what I am going
4 to do because I don't think that that decision is a
5 ministerial one. I feel that this one is.

6 But more importantly, overall, the reason
7 for doing this is that we have to insure that our
8 Federal Advisory Committee process is in compliance,
9 because what I do not want is for this Agency to be
10 the only agency where we are out of compliance. So, I
11 took this action based on what I believe is clear
12 authority from FACA, from OMB, and despite some
13 dispute from the memo that was prepared in July by our
14 Office of the General Counsel, and I do believe I have
15 the authority to do what I did.

16 COMMISSIONER GAZIANO: Well, thank you. If
17 I could exercise a little bit deference now that
18 you've explained yourself.

19 CHAIRMAN CASTRO: Absolutely.

20 COMMISSIONER GAZIANO: I think the exchange
21 of emails and your explanation is helpful. Let me just
22 explain why I think it's mistaken. But before I even
23 do that, I appreciate your -- but I at least
24 understand now why you believed that you had authority
25 in this instance regarding the RPCU Chief, because it

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1 at least does touch upon matters covered in FACA.

2 So, before I even address those issues, I
3 think where we have common ground is that at least
4 FACA doesn't confer any authority upon the Chairman as
5 Agency Head beyond the Advisory Committees.

6 The Supreme Court a few years ago in the
7 PCAOB case made it clear that if a Chairman of a
8 collegial commission is considered an Agency Head for
9 one statutory purpose, that does not necessarily mean
10 that the Chair is Agency Head for any other purpose.
11 So, we've got to be careful.

12 But addressing the RPCU Chief issue, I
13 think that the FACA is terribly clear that OMB has no
14 authority to designate an Agency Head unless or if it
15 is a Board or Commission. I think it's 3, Subsection
16 H(1) confers the Office of Management and Budget
17 authority, "After consultation with the Comptroller
18 General of the United States shall publish in the
19 Federal Register a list of entities and designated
20 federal entities, and the designated federal entity is
21 not a Board or Commission." So, the authority is
22 limited only to those entities that are not a Board or
23 Commission.

24 The previous -- the operative subsection
25 says, "The term the Head of Federal Agency means

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1 person or persons designated by the statute as the
2 head of the federal entity, and if no such designation
3 exists, the chief policy making officer or Board of
4 the federal entity is the head of the entity." So, OMB
5 misread its authority under FACA in designating the
6 Chairman of this Commission. That's ultra vires and
7 ineffective.

8 But even assuming, even assuming your --
9 OMB's interpretation is correct, and your reliance on
10 it is correct, and for only purposes of the Advisory
11 Committee, you are the head of the Agency under FACA,
12 I agree with our former Staff Director, former General
13 Counsel, former leaving Senior Counsel's opinion that
14 providing administrative guidance to the SACs
15 themselves does not extend to designating who on our
16 career staff shall be the RPCU Chief.

17 And, finally, I think that the discussion
18 in our July meeting was somewhat clear as to what
19 ministerial duties were and what ministerial acts were
20 not, and that this designation goes beyond what was
21 contemplated as a ministerial act. And for those
22 reasons I think that your authority at best to make
23 the designation is questionable after considering the
24 authorities, and I would submit is clearly lacking.

25 CHAIRMAN CASTRO: And if I may respond --

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1 Commissioner Heriot, I'm sorry, go ahead.

2 COMMISSIONER HERIOT: If you want to
3 respond to the legal question --

4 CHAIRMAN CASTRO: I want to respond to what
5 Commissioner Gaziano just stated, yes.

6 COMMISSIONER HERIOT: Why don't you do
7 that.

8 CHAIRMAN CASTRO: Okay. Yes, I find it
9 amusing that we are saying that the Office of
10 Management and Budget which oversees the entire
11 federal government and all of its agencies happens to
12 be wrong because one of our offices here in our small
13 agency says they're wrong. Well, I'm sorry, OMB has
14 made a statement that I am the Agency Head. They
15 listed it in their most recent list. The Office of
16 Management and Budget 2009 List of Designated Federal
17 Entities, and Federal Entities, and it's available at
18 the Federal Register, and that lists the Chairperson
19 as the Agency Head.

20 Furthermore, the Secretariat of the GSA in
21 an email to our Office of the General Counsel on July
22 12th -- and this is from Tabitha Dove, GSA Desk
23 Officer for this says, "It is up to the Commission's
24 Agency Head to make a determination on how to proceed
25 to insure the Commission's FACA program remains

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1 operational without interruption." And that gives me
2 the authority to insure that there's an RPCU Chief and
3 a CMO that can insure that our compliance and our
4 processes for these SACs remains operational without
5 interruption. It cannot be --

6 COMMISSIONER GAZIANO: Assuming you're the
7 Agency Head, and we're not the Agency Head. If you
8 read the statute properly, we're the Agency Head, and
9 it is our collective responsibility. So, citations to
10 the statute regarding what the Agency Head's
11 responsibilities are doesn't address the precise legal
12 issue. The precise legal issue is are we the Agency
13 Head, or are you the Agency Head, at least, by the way
14 -- I'm at least comforted to know that this would only
15 apply to matters that address guidance to our Advisory
16 Committees. But even so, I think we ought to be clear
17 on the legal authority.

18 CHAIRMAN CASTRO: Well, OMB is very clear.
19 But I think when its authority is clear you seem to
20 disregard it.

21 COMMISSIONER GAZIANO: I think the statute
22 is absolutely clear.

23 CHAIRMAN CASTRO: Commissioner Heriot.

24 COMMISSIONER HERIOT: I think I can help
25 here.

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1 CHAIRMAN CASTRO: I know you can.

2 COMMISSIONER HERIOT: This is a complicated
3 legal issue that is not going to be resolved during
4 this meeting, and people are concerned about the legal
5 precedent that's being set here. On the other hand,
6 there is the much more mundane issue of who is going
7 to deal with the SACs over the next few months before
8 we get a Staff Director. So, what I would like to do
9 is separate those two issues, and I would like to make
10 a motion, and here's the motion.

11 Without prejudice to anyone's view of what
12 the Chairman's powers are, or what the Commission's
13 powers are, I move that the Commission detail David
14 Mussatt to the position of RPCU until such time as a
15 new Staff Director is appointed and confirmed.

16 CHAIRMAN CASTRO: RPCU and CMO.

17 COMMISSIONER HERIOT: And CMO, friendly
18 amendment.

19 CHAIRMAN CASTRO: Do we have a second to
20 that motion?

21 COMMISSIONER ACHTENBERG: Second.

22 CHAIRMAN CASTRO: Any additional
23 discussion?

24 VICE CHAIR THERNSTROM: Well, can I come in
25 here, Marty?

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1 CHAIRMAN CASTRO: Certainly, Madam Vice
2 Chair.

3 VICE CHAIR THERNSTROM: Look, I do think,
4 Commissioner Heriot, that that's a nice way of kind of
5 getting us through the current impasse, but I do think
6 that Commissioner Gaziano has raised some important
7 issues that shouldn't be papered over and that need
8 discussion, further discussion, or further
9 exploration, or whatever. But I don't really want to
10 just drop them, if we can find a way of exploring them
11 while at the same time keeping the Agency functioning.

12 CHAIRMAN CASTRO: Other comments?

13 COMMISSIONER KLADNEY: I'd amend the motion
14 not until we receive a Director, but for a period not
15 to exceed six months.

16 CHAIRMAN CASTRO: What was that?

17 VICE CHAIR THERNSTROM: I can't hear you.

18 COMMISSIONER KLADNEY: The motion -- I
19 don't know how these things work. The motion was that
20 the Commission detail Mr. Mussatt to RPCU and CMO
21 until we get a Staff Director. And I think we should
22 time limit it to six months, because hopefully we'll
23 have someone by then.

24 CHAIRMAN CASTRO: Why not just leave it
25 until we get a Staff Director, because with the track

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1 record we have we don't know, and the last thing we
2 want to do is have another interruption in services.

3 COMMISSIONER KLADNEY: I don't think that
4 accumulating information on a monthly basis is vital
5 to the operation, number one. And number two, it
6 involves -- if someone is in that position for more
7 than a year, an increase in salary and responsibility.
8 And I think that should be left for the new Staff
9 Director, and that should automatically occur as a
10 matter of time.

11 CHAIRMAN CASTRO: Any of these decisions
12 are subject to ultimate change by a new Staff
13 Director, and none of this is an effort to try to
14 undermine that. But, ultimately, it's not just about
15 issuing monthly reports. The FACA is very clear about
16 compliance with it, and it is one of the two major
17 statutory requirements that Congress places on us. One
18 is to prepare for them a Statutory Enforcement Report
19 due at the end of our fiscal year, and I'm pleased
20 that the Commission for the second year in a row has
21 met that mandate. And the other is that we charter and
22 appoint SACs. And the last thing we want is for
23 Congress to say that we are not doing that. And I
24 think making sure that this position remains
25 constantly filled is important to insure that we meet

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1 our obligations to Congress.

2 COMMISSIONER KLADNEY: Well, if we are
3 meeting our obligations to Congress, we now have 26
4 SACs that are not chartered. And I --

5 CHAIRMAN CASTRO: All the more reason to do
6 what we're doing today.

7 COMMISSIONER KLADNEY: Thank you, Mr.
8 Chairman, but I also think that we should time limit
9 this and we can renew that appointment any time
10 necessary.

11 COMMISSIONER GAZIANO: Mr. Chair --

12 VICE CHAIR THERNSTROM: Mr. Chairman, I
13 would like to hear further from Commissioner Gaziano.

14 CHAIRMAN CASTRO: Yes, he had just raised
15 his hand, Madam Vice Chair, so I will --

16 COMMISSIONER GAZIANO: On what would you
17 like to hear more? I was going to support Commissioner
18 Kladney's amendment.

19 VICE CHAIR THERNSTROM: Okay, that's fine.
20 I wanted a response of yours since you've done a lot
21 of work on this. I wanted a response of yours to the
22 current proposal, and I'm happy to have -- happy to
23 join you in supporting Commissioner Kladney.

24 COMMISSIONER GAZIANO: I -- given the
25 careful way Commissioner Heriot raised the motion, I'm

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1 willing to support it. She said without prejudice to
2 whether the original -- as I understand it, the
3 original -- what it means is without regard to whether
4 the original designation was effective or not, we are
5 hereby moving to elevate Mr. Mussatt to that position.

6 I have a few questions about that, just
7 sort of factually, I supposed, but I don't think that
8 that -- this motion does prejudice my position which I
9 think is an important one for us to discuss. And I
10 don't know that we need to resolve it today, so that's
11 why I'm willing to vote on the underlying motion.

12 The reason I support the amendment is for
13 the last point I think Commissioner Kladney made.
14 Regardless of how important this position is, we can
15 renew it, a six-month designation, a month in advance
16 or two months in advance. But I think given the
17 unusual circumstances of the resignation, I don't
18 necessarily want to go into Executive Session. I think
19 we need to -- or we don't need to go into Executive
20 Session to inquire about, but I have some questions
21 about how the vacancy arose, the different candidates
22 who might have been given the position. But I'm
23 willing to defer those, but I think it's -- for those
24 reasons it's almost wise only to extend this to either
25 the Staff Director's new appointment or six months,

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1 sort of time limit it to the outer bounds.

2 And then at some point amongst ourselves
3 we can talk about the underlying legal authority. I
4 was a little oblique, I suppose, in my earlier point.
5 Let me just state for the record that our -- let's
6 see, her former Staff Director, former General
7 Counsel, current Senior Attorney who's leaving, Kim
8 Tolhurst, has circulated a legal memorandum to us
9 essentially stating the legal view that the Chairman
10 lacked authority to make the appointment, so I just
11 want to put that on the record considering all the
12 authorities that I think both he and I have discussed.

13 CHAIRMAN CASTRO: And just for the record
14 that's an email, not a legal memorandum. The
15 memorandum by OGC was July 12th by Vanessa Eisemann.

16 COMMISSIONER GAZIANO: I stand corrected,
17 but the email as I -- looks like kind of a memo to me.
18 But, anyway, it references the earlier July memo so it
19 takes that into account, as well.

20 CHAIRMAN CASTRO: Any other -- I think you
21 have a second to the motion to amend already.

22 COMMISSIONER KLADNEY: I just want to add
23 in addition to what was just said. Part of the reason
24 for the time limiting quotient on the job is that
25 there really was no posting of the job. There was no

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1 interviewing of anybody else, unless there was, Mr.
2 CHAIRMAN.

3 CHAIRMAN CASTRO: Not required from what I
4 understand.

5 COMMISSIONER KLADNEY: So, you didn't do
6 that. You didn't give any of the other employees an
7 opportunity to apply for the position. Is that
8 correct?

9 CHAIRMAN CASTRO: There was no posting,
10 nobody applied.

11 COMMISSIONER KLADNEY: Did anybody have
12 notice, anybody else?

13 CHAIRMAN CASTRO: Why are you asking me
14 this?

15 COMMISSIONER KLADNEY: Because you're the
16 one who made the appointment.

17 CHAIRMAN CASTRO: I made the appointment.

18 COMMISSIONER KLADNEY: You should know
19 whether they had --

20 (Simultaneous speaking.)

21 COMMISSIONER KLADNEY: Listen, I an old
22 Labor lawyer, you give people opportunities to apply
23 and to make --

24 (Simultaneous speaking.)

25 COMMISSIONER KLADNEY: And then the other

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1 thing is, is if this -- whoever the appointment would
2 be would become permanent in that position with the
3 raise after, it's my understanding, a year. I believe
4 the Director -- any new Director may keep this person
5 rather than make their own choice, which I would like
6 to Sunset the appointment, and we could remake the --

7 CHAIRMAN CASTRO: So, let's vote on the
8 amendment first. We have an amendment to Sunset it.
9 It's been seconded. All those -- let's take a -- you
10 want to take a blind vote?

11 COMMISSIONER ACHTENBERG: Point of
12 clarification.

13 CHAIRMAN CASTRO: Yes.

14 COMMISSIONER ACHTENBERG: Does the maker of
15 the motion find that a friendly amendment, or do you
16 want it voted on --

17 COMMISSIONER HERIOT: I think we better
18 vote on it because I'm kind of torn on it myself. I
19 don't know --

20 CHAIRMAN CASTRO: So, Commissioner Heriot,
21 how do you vote?

22 COMMISSIONER HERIOT: I'm going to pass.

23 CHAIRMAN CASTRO: Okay. Commissioner
24 Gaziano.

25 COMMISSIONER GAZIANO: Yes.

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1 CHAIRMAN CASTRO: Commissioner Kladney.

2 COMMISSIONER KLADNEY: Yes.

3 CHAIRMAN CASTRO: Commissioner Achtenberg.

4 COMMISSIONER ACHTENBERG: No.

5 CHAIRMAN CASTRO: I'll go to the phone.

6 Madam Vice Chair?

7 VICE CHAIR THERNSTROM: Yes.

8 CHAIRMAN CASTRO: Commissioner Kirsanow.

9 COMMISSIONER KIRSANOW: Abstain.

10 CHAIRMAN CASTRO: Okay. Commissioner Yaki?

11 Commissioner Yaki? I'll come back to you, Commissioner

12 Heriot. We have three yeses, a no, and an abstention

13 so far.

14 COMMISSIONER HERIOT: I guess I'm a no.

15 CHAIRMAN CASTRO: Okay.

16 COMMISSIONER HERIOT: It's a close call.

17 CHAIRMAN CASTRO: I vote no. Commissioner

18 Yaki? Commissioner Yaki? Okay. Well, calling

19 Commissioner Yaki once, twice --

20 COMMISSIONER YAKI: I'm sorry, what?

21 CHAIRMAN CASTRO: Oh, there you go. How do

22 you vote on the motion to amend the original motion to

23 put a six month or until a Staff Director is appointed

24 time limit --

25 COMMISSIONER KLADNEY: No, no, no, no. The

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1 motion is that the detail of Mr. Mussatt to RPCU and
2 CMO will last until -- last for a period of six
3 months.

4 CHAIRMAN CASTRO: Okay. That's the motion.
5 How do you vote?

6 COMMISSIONER YAKI: Aye.

7 CHAIRMAN CASTRO: Okay. So, we have one,
8 two, three, four yeases, three nos, and an abstention.
9 The motion passes. So, now we'll vote on the main
10 motion as amended, which is that David Mussatt will be
11 appointed to the position of RPCU Chief, Acting RPCU
12 Chief and CMO for a period not to exceed six months.
13 And, Commissioner Heriot, how do you vote?

14 COMMISSIONER HERIOT: Yes.

15 CHAIRMAN CASTRO: Commissioner Gaziano, how
16 do you vote?

17 COMMISSIONER GAZIANO: Yes.

18 CHAIRMAN CASTRO: Commissioner Kladney, how
19 do you vote?

20 COMMISSIONER KLADNEY: Yes.

21 CHAIRMAN CASTRO: Commissioner Achtenberg,
22 how do you vote?

23 COMMISSIONER ACHTENBERG: Yes.

24 CHAIRMAN CASTRO: Commissioners on the
25 phone, Madam Vice Chair, how do you vote?

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1 VICE CHAIR THERNSTROM: Yes.

2 CHAIRMAN CASTRO: Commissioner Yaki, how do
3 you vote?

4 COMMISSIONER YAKI: Yes.

5 CHAIRMAN CASTRO: Commissioner Kirsanow,
6 how do you vote?

7 COMMISSIONER KIRSANOW: Abstain.

8 CHAIRMAN CASTRO: I will vote yes,
9 reserving my right that I do believe I had the
10 authority to do this in the first place. So, the
11 motion passes with seven yeases and an abstention.
12 Okay, thank you, everybody. Any other questions on the
13 RPCU report that Mr. Mussatt gave? None?

14 All right. We will now move on to --

15 (Off the record comment.)

16 CHAIRMAN CASTRO: I'm sorry? Okay. We'll
17 now move to the next item which is our OGC's Training
18 on Ethics Rules Relating to Teaching, Speaking, and
19 Writing which is good. I've been wanting the answer to
20 a lot of these questions, so I know Ms. Tolhurst has
21 helped us a bit.

22 **III. MANAGEMENT AND OPERATIONS**

23 **OGC TRAINING: ETHICS RULES RELATING TO**
24 **TEACHING, SPEAKING AND WRITING**

25 CHAIRMAN CASTRO: Jennifer Hepler from our

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1 Office of General Counsel will school us on this
2 today.

3 MS. HEPLER: And for the Commissioners that
4 are not here I emailed the training by your Special
5 Assistant so you should have it. And please send me an
6 email afterward that you attended the training so
7 you'll get credit.

8 COMMISSIONER GAZIANO: And if I might
9 interrupt, where do we get credit? Do we get a
10 certificate?

11 MS. HEPLER: If you want, I can set up
12 something. What it is, let me explain. Under the law
13 you're supposed to have an hour of ethics training
14 annually. I did some last month. You weren't here,
15 unfortunately, and I'm trying to parcel it out over
16 the meetings so it's not an hour solid. So, that's why
17 you're having a section at each meeting.

18 COMMISSIONER GAZIANO: I study all your
19 emails very carefully.

20 MS. HEPLER: Well, I don't know --

21 CHAIRMAN CASTRO: Remember he's not under
22 oath right now.

23 (Laughter.)

24 MS. HEPLER: I know. Well, I know John had
25 the training.

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1 COMMISSIONER GAZIANO: May I ask one -- so,
2 do we get continuing legal education credit for this,
3 or is this just --

4 MS. HEPLER: This is ethics training. I
5 haven't looked into it. It would be sort of difficult
6 because I know everybody belongs to a separate bar. I
7 even -- I took a course at DOJ and I was shocked, I
8 had to apply to my state for that training, the CLE.

9 COMMISSIONER KLADNEY: That's what I would
10 have to do with my state. You have like a -- something
11 I could turn in to show them what this is. I guess
12 this, right?

13 MS. HEPLER: That would be it, yes.

14 COMMISSIONER KLADNEY: This is like your
15 program.

16 MS. HEPLER: That's the program for today.
17 Right.

18 COMMISSIONER KLADNEY: Okay. And is this an
19 hour, do you have it timed?

20 MS. HEPLER: Well, see this one, what I've
21 been trying to do is plan on 15 or 20 minutes. I'll be
22 honest, this may go on longer. It depends if I get
23 questions.

24 COMMISSIONER KLADNEY: This would be also
25 like with the Money thing we had last month?

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1 MS. HEPLER: The one last month, right. The
2 total is to give you at least a year --

3 COMMISSIONER KLADNEY: Commissioner Heriot,
4 I must admit that is a lovely photograph.

5 (Laughter.)

6 MS. HEPLER: I tried to bring in some of
7 the Commissioners that I could find examples. Please
8 don't be upset if you're not in there, but if you are,
9 but I tried to --

10 CHAIRMAN CASTRO: I try not to be in it.

11 MS. HEPLER: You are not. To make it more
12 true to life. And today I'm talking on Teaching,
13 Speaking and Writing. And it's -- the purpose of the
14 rule is to insure the public that the -- that we have
15 confidence in the federal government, so they know
16 that federal employees are -- you're not using their
17 public office for private interest.

18 And in this case with the Teaching,
19 Speaking and Writing, it's also to make sure that the
20 public knows that you're speaking either for the
21 government or on your own, or who you're speaking for.
22 And that they don't misunderstand that you may be
23 saying something, and that's what they think the
24 government says, or the Commission says when it really
25 is your personal opinion.

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1 And there's two ways to look at this. We
2 have official duty, and I was going to buy hats but I
3 never got to the costume store. I wanted one with
4 Uncle Sam and one with something else. And let me
5 explain first what an SGE is.

6 An SGE is a Special Government Employee,
7 and that's the Commissioners, your part-time
8 appointees, and also the SACs. And for all employees
9 an official duty, what it is is something that you're
10 presently assigned or something that you've been
11 assigned over the past year, and that's for everybody.

12 Then when you go to Special Assistants and
13 Career Employees, it also includes subject matter
14 that's an ongoing or announced policy, program, or
15 operation of the agency. That does not apply to the
16 Special Government Employees, the Commissioners. And
17 I have an example to show you in a bit.

18 And if you're doing an official duty, and
19 that's with the Uncle Sam hat, your represent the
20 government or the Commission when you're out there.
21 You can reference to your employee's official position
22 because you're speaking in that position or title,
23 Commissioner, Special Assistant to the Commissioner,
24 et cetera. You're compensated by the federal
25 government, and actually you're criminally prohibited

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1 from getting compensation from an outside source for
2 doing your official duty. And you can go to jail for
3 it.

4 And pursuant to the U.S. -- the Admin
5 instructions, I just want to say a majority vote of
6 Commissioners is needed to approve items, as you know.
7 And it would be very unlikely that in your official
8 duty one of you would be teaching a course at a
9 university or teaching a course period, or writing a
10 book or blog. However, the one that does come up and
11 has come up is the speaking issue. And there's two --
12 there' an AI for the Commissioners and it's the
13 Public Affairs Unit that says the Chair and the Staff
14 Director are the designated spokespersons for the
15 Commission. Whenever the Chair, Vice Chair or other
16 Commissioner goes out, you can speak unpublicly about
17 matters before the Commission, but if it's your
18 opinion be sure to say I'm a Commissioner but this is
19 what my view is. Don't -- you can't bind the
20 Commission. You have to tell them that this is not the
21 view of the majority, or this is, you know, that
22 you're -- you know, you can't bind the government if
23 you're talking about yourself. But if it's a matter
24 that has to do with the Commission and you're speaking
25 as a Commissioner, you can do it.

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1 Now, as for the other employees, and this
2 is interesting, okay, they can speak individual
3 employees, but for career employees, and I don't --
4 I'll get to that. There is an AI that says you have
5 to go through the Staff Director, Office Director,
6 Regional Director for any speeches.

7 I could not find a specific one that
8 applied to Special Assistants either way. I would
9 think it would be since you are in most cases deemed a
10 regular employee versus a SGE that there should be
11 some approval, but if you do it remember you are
12 representing the government, and it probably should be
13 -- if we had a Staff Director I would say it probably
14 should be approved through there. But it is open, the
15 RAIs.

16 And if you get an invitation to speak as a
17 Commissioner, as a Commission employee please see me.
18 And I have had -- you know, it has come to me when
19 we've come -- when we've looked at it. Did you get
20 invited as a Commissioner, or did you get invited as
21 your other position, and how are you going to this,
22 because we'll go through the analysis. And I know when
23 we decided the person was not invited as a
24 Commissioner.

25 Okay. Now we're going to put on the other

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1 hat, which is outside, your outside activity. And it's
2 not related technically to your federal government
3 duty. It's undertaken outside of the Commission on
4 your own time, as you say on your own dime. And if
5 it's compensated it's from a non-governmental source.
6 Remember there's the criminal prohibition on it.

7 And what I wanted to say especially for
8 the Commissioners, you can continue to receive salary
9 for your outside job doing speaking, teaching,
10 undertaken in your personal duties. And in here,
11 Commissioner Kirsanow, I don't know if you get
12 compensated or not, but he has a blog that he writes.
13 And it's very good because he doesn't say any
14 reference. It's on the National Review Online Blog.
15 There's no reference to his Commission position on
16 there, and he's free to do that. He's a Special
17 Government Employee, if you're listening out there.

18 Okay. You're prohibited from -- and I'm
19 stretching this because you're prohibited from
20 receiving compensation for doing -- federal government
21 compensation for doing something related to your
22 government duties.

23 There's another exception that applies to
24 all employees including SGEs. And this is where if you
25 get compensated for teaching, speaking, or writing

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1 that relates generally to the subject matter of the
2 agency which you're working on, and it's not a
3 specific thing. And I bring -- and I'm not promoting
4 her book, but Commissioner Thernstrom wrote a book on
5 voting rights, and it was written in her own capacity.
6 She's an author. And the good thing was this was
7 written before the Voting Rights Report. And if it had
8 been written during the time the Commission was
9 working on it that wouldn't have been allowed. But
10 since this was before, and she's an expert, she's
11 allowed to do it.

12 COMMISSIONER GAZIANO: Why wouldn't it have
13 been allowed?

14 MS. HEPLER: Because if it was something
15 she was working on at the time, you can't -- and she'd
16 be using stuff from here, it would be related to what
17 she's working on, the matter.

18 COMMISSIONER GAZIANO: We've got to close
19 down our brain?

20 MS. HEPLER: No, no, I'm not saying closing
21 down your brain.

22 COMMISSIONER GAZIANO: So, we can't use --

23 MS. HEPLER: You could wait --

24 COMMISSIONER GAZIANO: -- the other side
25 of our brain --

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1 MS. HEPLER: I would say wait a year until
2 after it reports out.

3 COMMISSIONER GAZIANO: That may be an
4 abundance of caution, but is the abundance of caution
5 required if we -- sometimes, for example, there's a
6 pressing issue. The Commission is taking it up and
7 the rest of the world is taking it up. And if we have
8 other jobs like being law professors or authors like
9 Vice Chair Thernstrom, we can't pursue the same topic
10 in our other career or capacity if the Commission is
11 taking up?

12 MS. HEPLER: That's what -- official duty
13 is something, the matter you're assigned on now or
14 within the past year.

15 COMMISSIONER HERIOT: I mean, I teach
16 Employment Discrimination. I can't leave out a chapter
17 just because the Commission happens to take up an
18 issue.

19 MS. HEPLER: Well, you -- there's another
20 exception coming up that you fall under, which is
21 teaching the course. And that's a regular course. And
22 you teach courses --

23 COMMISSIONER HERIOT: Yes, but even the
24 writing, I can't not write about something that I need
25 to write about just because the Commission happens to

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1 have chosen to --

2 COMMISSIONER KLADNEY: Does that mean you
3 can't be on the Commission, or you have to abstain?

4 COMMISSIONER HERIOT: I don't think that we
5 have a rule that says that people can't -- people are
6 appointed to the Commission because they're experts on
7 these issues, not because they don't know anything
8 about them. So, I mean, is this something -- are you
9 saying the Vice Chair couldn't have accepted
10 compensation for that book, or that she can't write
11 it?

12 MS. HEPLER: No, she can't -- well, she
13 can't accept any compensation for it. If it had been -
14 - what I would say is -- and it usually takes a while
15 to get the book published anyway, is just wait until
16 like, you know, a year afterwards.

17 COMMISSIONER HERIOT: If you're talking
18 about compensation that's no problem because nobody
19 ever compensates me for writing anything.

20 MS. HEPLER: Oh, okay. Well, I didn't know,
21 like Commissioner Kirsanow, whether you get paid or
22 not.

23 COMMISSIONER KLADNEY: Millions.

24 (Laughter.)

25 MS. HEPLER: Millions. Okay, whatever.

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1 COMMISSIONER GAZIANO: I'm still -- Vice
2 Chair Thernstrom, please stop me if using you as an
3 example is inconvenient, but I imagine you get some
4 royalties from people who continue to buy your book.
5 They may be large, they may be very, very small. Does
6 she need to under your theory stop receiving --

7 MS. HEPLER: Oh, no, that's fine. The book
8 has been out there. There's no problem with that.

9 VICE CHAIR THERNSTROM: Well, wait a
10 minute. But you are suggesting that had the Commission
11 decided before I -- while I was working on a book or
12 whatever that I would have to wait a year to publish a
13 book? There's no such thing as waiting a year with
14 books. If you wait a year, the book is dead. You write
15 a book, you try to get it out there. And, by the way,
16 you're lucky to get a book out there in this book
17 market because nobody knows how to read any more. But,
18 anyway --

19 (Laughter.)

20 VICE CHAIR THERNSTROM: But, you know, it's
21 absurd to think that an author who's got a book
22 underway, or planning to write a book, or whatever can
23 wait a year. It's not possible. They can't function as
24 an author. They can resign from the Commission but
25 they can't function as an author.

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1 COMMISSIONER HERIOT: Yes, and let me add a
2 little bit to that. You know, if Commissioner
3 Thernstrom is writing this book and somebody decides
4 they want to block the book by adopting a briefing
5 that's on the topic because they don't want her book
6 published, that just won't work.

7 MS. HEPLER: You know, I'm fairly new here.
8 I don't know how you work on things like that. I'm
9 just saying that -- I mean, this is fine. It was an
10 example, number one, of the fact that she -- you can
11 write generally on a topic you're doing. And the fact
12 was this wasn't something that was before the
13 Commission at the time.

14 You know, if you're saying you want to
15 write a book, let's say the Islamic briefing right
16 now, and you're involved with it. There are some
17 issues whether or not you can -- you know, you're not
18 supposed to get paid from the outside for doing
19 something that you're assigned to at work.

20 COMMISSIONER GAZIANO: Up until this point
21 I think it's very helpful to understand the kind of
22 walls we need to try to build, and it's good to -- for
23 us to state clearly when we're -- to our audience when
24 we're wearing one hat and we're not wearing another.
25 But now to personalize it in my situation. I work at a

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1 think tank. Okay, I'm sorry. I didn't have you --

2 COMMISSIONER GAZIANO: And the Commission -
3 - the Heritage Foundation. The Commission might be
4 taking up an issue, and I'm actually paid to do my
5 other job, which is convenient to my family. If my
6 boss says boy, this issue, you're a civil rights --
7 knowledgeable civil rights scholar, I want you to
8 write this paper. It's part of my duties. I'm being
9 paid to write such papers. I either need -- if I'm
10 understanding, under one reading I either have to
11 abstain from my duties on the Commission, or I have to
12 tell my boss to go shove it.

13 MS. HEPLER: No.

14 COMMISSIONER GAZIANO: I don't understand
15 why I can't --

16 MS. HEPLER: I'm saying when you're working
17 for your other job, that's your other job.

18 COMMISSIONER GAZIANO: I see.

19 COMMISSIONER HERIOT: You shouldn't be
20 using, you know, like non-public information, things
21 you learn here to write in the other job. I mean,
22 things that are coming out here. You have -- I know
23 you're the Legal Director I believe there. So, no, I
24 would expect you to be writing, and doing things on
25 behalf of your other job. You wear two hats. Remember.

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1 Your outside job. But when you can't -- what I'm
2 saying is -- and I don't know, do you write books, or
3 do you just like -- I don't know what you --

4 COMMISSIONER GAZIANO: I have not written
5 any books yet.

6 COMMISSIONER KLADNEY: Short stories.

7 (Laughter.)

8 MS. HEPLER: Okay. I mean, I don't know.
9 And the only author I knew is Commissioner Thernstrom
10 among the bunch of you, about -- she does that. That's
11 her regular job --

12 VICE CHAIR THERNSTROM: And I --

13 MS. HEPLER: -- is writing books. It's
14 writing books.

15 COMMISSIONER GAZIANO: Yes, I'm still notC-

16 COMMISSIONER HERIOT: This is -- we need to
17 go back and study this a lot more, because this is not
18 -- this seems to me implausible. And it basically
19 means that academics and think tank people can't be on
20 the Commission.

21 MS. HEPLER: No, no, no. No, no, no. That's
22 not it at all. I'm not saying that.

23 COMMISSIONER GAZIANO: I heard something
24 slightly different from you.

25 MS. HEPLER: I'm not saying that --

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1 COMMISSIONER GAZIANO: That I could
2 continue to do so, and I could continue to write as
3 long as I don't use --

4 MS. HEPLER: You've got another job. You're
5 supposed to --

6 COMMISSIONER GAZIANO: -- private
7 information --

8 MS. HEPLER: You're not supposed to take
9 what you take from here --

10 COMMISSIONER GAZIANO: -- in my job.

11 MS. HEPLER: -- and use it over there.

12 COMMISSIONER GAZIANO: But certainly I
13 receive some information from public, from witnesses
14 who publicly testify.

15 MS. HEPLER: Oh, anything that's public --

16 COMMISSIONER GAZIANO: And that informs me
17 the rest of my life.

18 MS. HEPLER: Right, right. No, anything
19 that's publicly available is open to everybody.

20 COMMISSIONER GAZIANO: Okay.

21 MS. HEPLER: Because this record is
22 publicly available. Anyone can take that.

23 COMMISSIONER GAZIANO: I think that helps
24 me a lot.

25 MS. HEPLER: Anything that's public -- it's

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1 non-public information that you're not supposed to
2 take and use in your other -- wearing your other hat.

3 COMMISSIONER GAZIANO: Okay.

4 VICE CHAIR THERNSTROM: I don't understand
5 when the Commission ever gets non-public information.
6 I mean, I wish we did, but I don't think we do.

7 MS. HEPLER: I'm -- you know, I don't --

8 COMMISSIONER KLADNEY: You're saying
9 confidential information, inside information.

10 MS. HEPLER: Right.

11 COMMISSIONER KLADNEY: We had that one
12 thing I remember. It was something about university. I
13 was not here for part of it, and then I was here for
14 part of it. It was something about universities and
15 information that was gathered. And then we had told
16 the universities we weren't going to use this
17 information or something. Does anybody remember that?

18 CHAIRMAN CASTRO: I remember it.

19 COMMISSIONER KLADNEY: Is that --

20 MS. HEPLER: Well, there's some -- I mean,
21 I just -- it's something that -- for example, if you
22 get subpoenaed documents and they're not used at a
23 public hearing, those are -- that's private,
24 confidential information. That should not be used --

25 COMMISSIONER GAZIANO: Makes perfect sense.

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1 MS. HEPLER: Does that make sense? Do you
2 understand? That's the kind of confidential
3 information I'm talking about. Anything at a hearing,
4 anybody can walk in and listen, and get the
5 transcripts. That's what I'm talking about.

6 CHAIRMAN CASTRO: And, ultimately, once
7 you're done with your presentations, we really
8 appreciate it, there's a lot of questions among us.
9 I'm sure that you'd be available to talk to each of us
10 individually to address individual sort of --

11 MS. HEPLER: Sure.

12 CHAIRMAN CASTRO: -- permutations on these
13 rules. Right?

14 MS. HEPLER: Right, right. That's fine. Of
15 course, you know, you can contact me any time. I've
16 contacted, you know, some of you on your individual
17 matters on a personal basis.

18 Okay. Well, the next exception -- I mean,
19 we can go on this more, but that's what I'm talking
20 about. The next example is Commissioner Heriot is an
21 example. If you teach a course full-time, that's fine,
22 too. And here with the SGEs, I'll be honest, I came
23 from NIH where a lot of things you could do as
24 official duty, teaching, speaking and writing, because
25 of their position. We don't have the issues and the

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1 conflicts like we did there. It's a different animal
2 here.

3 VICE CHAIR THERNSTROM: You are the --

4 MS. HEPLER: What, Commissioner Thernstrom?
5 What I'm saying is you can teach a course --
6 Commissioner Heriot teaches law courses. That's fine
7 on the subject area, too.

8 The next item I wanted to get to, if you
9 do something as an outside activity, and this issue
10 has come up, it's use of your biographical reference.
11 And you can use it if it's one of several, and not
12 prominent than other items in your reference. And
13 there is a picture of Commissioner Heriot with page
14 one, and I want to -- page one of ten pages of her
15 biographical reference. And her Commission item is
16 number two, it's not the first one. And she's got
17 many, many pages. This is a good example of how it's
18 not -- how to use your biographical reference.

19 CHAIRMAN CASTRO: May I just add something
20 here? I just noticed from this that your birthday is
21 in five days, so happy birthday, Commissioner Heriot.

22 COMMISSIONER HERIOT: Thank you.

23 MS. HEPLER: Oh, I'm sorry, I didn't mean
24 to -- I had asked Alison and she said you would be
25 okay with me putting it out there. But it's on the

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1 internet, anyway, so it is publicly available.

2 COMMISSIONER HERIOT: No problem.

3 MS. HEPLER: Okay. The next item comes --
4 and this has come up as well since I've been here, is
5 the disclaimer. If you are writing in your outside --
6 and you do put the position -- your position here as
7 one of your items, and you're speaking and you put it
8 as a biographical reference, please use a disclaimer
9 saying this is my opinion. I'm not representing the
10 Commission. I'm not representing the government. I
11 give you a couple of examples there. This is unrelated
12 to my work at the USCCR. Just something like that so
13 you can differentiate from whether you're representing
14 the government, or whether you're not. Yes?

15 COMMISSIONER HERIOT: If you do a newspaper
16 Op Ed, they won't put that in because they care about
17 space. You know, you can beg them to put it in and
18 they won't do it. They don't want to put in stuff that
19 just takes up space and will bore their readers. So, I
20 can't make a newspaper --

21 MS. HEPLER: You can't make a newspaper,
22 right. And an OP Ed, you know, you're using writing in
23 your own personal capacity anyway.

24 COMMISSIONER HERIOT: It's usually obvious.

25 MS. HEPLER: Yes, it's obvious. And an Op

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1 Ed is always an exception because of your First
2 Amendment rights. Anyone can go out there and put in
3 an Op Ed when they want, just if you can sort of --
4 and you're right. You can't control what somebody
5 else puts in.

6 CHAIRMAN CASTRO: Sometimes they will put
7 that in. I think there's been some very wonderful Op
8 Eds done by our Vice Chair. And I recall reading it,
9 it says she's an author and Vice Chair of the
10 Commission. Is that okay? Because I guess they use
11 both titles.

12 MS. HEPLER: I mean, they're probably
13 putting it on there. She's speaking on behalf of
14 herself, the disclaimer is trying to say are you just
15 speaking on behalf of yourself, or on behalf of the
16 Commission. That's what we're trying -- that's what
17 the disclaimer is for, to try to say -- and I realize
18 that sometimes you do things or you have interviews
19 and they post it on line, and you don't have any
20 discretion over what they post. You can ask them --
21 I've had a situation where I've asked the person to
22 go to the place and say can you take that off for that
23 specific -- and I understand. I mean, we understand.

24 COMMISSIONER HERIOT: We get things wrong
25 all the time, too. I mean, the guy at the public

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1 relations office at the University of San Diego has
2 been going crazy because every time I have something
3 in the papers recently it says I work at the
4 University of California at San Diego, and I don't. I
5 work at the University of San Diego.

6 MS. HEPLER: Well, see.

7 COMMISSIONER HERIOT: You know, they get
8 something basic like that wrong, they'll get lots of
9 other things wrong, too. But I think most things it's
10 pretty clear that I'm speaking for myself.

11 MS. HEPLER: Okay. Well, that's what -- go
12 back to the reasons for the Ethics rules. The public
13 needs to know are you representing the government, or
14 your own opinion, or an outside entity.

15 Okay. And the other considerations, what I
16 said, it's not disclosing non-public information,
17 that's a big one. But most of the stuff we do here is
18 very public. And the other -- and the last one is do
19 not use your official government position to promote
20 the outside teaching. You can't go out and say -- and
21 I know you don't do this. I know she -- Commissioner
22 Heriot doesn't say well, I'm Commissioner Heriot. Take
23 my course at -- my law school course. You can't do
24 something like that.

25 And this doesn't apply to Commissioners,

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1 but for others there is a special prior approval
2 requirement for outside employment. And an AI, a CFR
3 and AI, and you need prior approval for any form of
4 non-federal employment, business relationship, or
5 activity whether or not compensated that includes
6 teaching, or speaking, or writing when there's an
7 agreement for a written production of a product. And
8 it doesn't apply to SGEs and it doesn't apply to
9 volunteer -- I mean, doesn't apply to participation in
10 activities of non-profits, religious, professional
11 groups, fraternal, sports, unless you're compensated
12 as a professional. Let's say you're head of your son's
13 -- you coach your son's basketball team, no problem.
14 You know, let's say you're an attorney that handles
15 the basketball league of somewhere and you get paid
16 for that. That's a different story.

17 CHAIRMAN CASTRO: I have a question.

18 MS. HEPLER: Sure.

19 CHAIRMAN CASTRO: The slide just before
20 that says prior approval requirements apply to any
21 form of non-federal employment. You said that does not
22 apply to --

23 MS. HEPLER: It does not apply to
24 Commissioners, no. That doesn't apply. You're a
25 special animal. You're special. Right. Right, you're

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1 special. Well, this is -- everybody knows this is not
2 your full-time job. You know, you've got other jobs,
3 or you're retired, or you're writing, or something.

4 And I want to go through a recap here like
5 I do. Official capacity, you represent the federal
6 government. You're speaking and that. You may use your
7 official title, and you cannot accept compensation
8 from an outside source. Those are the three things to
9 remember.

10 Now, outside activity. The views expressed
11 are yours or a different non-governmental entity. You
12 can't use -- you're not supposed to use the government
13 resources during government duty time. Off duty
14 resources, other resources, other time. May only use
15 official title if it's one of several biographical
16 references, can't be more prominent than others. And
17 use a disclaimer if you're going to put it in there.
18 And you do not disclose the non-public information, as
19 we said, the subpoenaed items that are -- that's
20 private. And do not use your official government
21 position to promote the outside activity. And you may
22 need the approval, but that's not applicable to you.
23 Any other questions? Sure.

24 COMMISSIONER KLADNEY: So, if someone uses
25 your name, and in association with your name they use

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1 this Commissioner, United States Commission on Civil
2 Rights. And say you've made it clear to them not to do
3 it but they do it anyway, not a problem. Right?

4 MS. HEPLER: No, it's not a problem. If you
5 want, you know, I can write them a letter or
6 something, if you think that would help.

7 COMMISSIONER KLADNEY: Okay, thank you.

8 MS. HEPLER: For a contact, you know, I'm
9 willing to do that. Yes, I realize things come up and
10 they'll put it out there. And it's nothing you can
11 control, like you said.

12 CHAIRMAN CASTRO: Any other questions for
13 Ms. Hepler? Anybody on the phone have questions for
14 Ms. Hepler? Hearing none, thank you. This has been
15 very informative. I'm sure you'll get other questions
16 after the fact, but we appreciate it. This is very
17 helpful.

18 MS. HEPLER: Okay.

19 CHAIRMAN CASTRO: Okay. We'll now move on
20 to the State Advisory Committees which we agreed at
21 the beginning we're not going to go through any of the
22 original SAC slates that were listed for today. Rather
23 we want to have a discussion as to how the process has
24 been functioning and determine whether there's any
25 additional tweaks we need to make as we might have

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1 anticipated last month.

2 **IV. APPROVAL OF STATE ADVISORY COMMITTEE SLATES**

3 CHAIRMAN CASTRO: So, I will open the floor
4 to either Commissioners Heriot or Achtenberg to kick
5 this discussion off.

6 COMMISSIONER ACHTENBERG: Mr. Chairman, we
7 have essentially a two-part report, and the first part
8 pertains to issues that we have looked at in terms of
9 developing a process for developing the SACs that
10 might substitute for the current process. After having
11 consulted with staff in charge of this function for
12 the Commission, along with Commissioner Heriot and
13 myself as the -- as your duly appointed Subcommittee
14 on all things SAC chartering, we will want over the
15 course of the next month or two, which date is still
16 to be determined, we'd like the Commissioners to
17 seriously consider the number of recommendations that
18 after discussion we may make to the Commission on a
19 formal basis for your consideration and official
20 adoption.

21 So, we put together this Reform Working
22 Group, and we are discussing structural changes to the
23 SAC Program that might include but would not be
24 limited to the following. And I say that in order to
25 get your juices flowing so that you might encourage us

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1 to add additional issues for our consideration that
2 were not -- or give us even preliminary feedback on
3 some of the things that we're looking at. So, this is
4 all very preliminary, but we wanted to report back to
5 you.

6 Okay. First is, we're recommending that we
7 consider looking at smaller SACs in order to reduce
8 the recruiting burden and administrative work required
9 to keep the appointments of those SACs current. In
10 order to make for smaller SACs, for those out there in
11 the universe, a SAC is a State Advisory Committee. I'm
12 saying that for anyone who doesn't know, a State
13 Advisory Committee to this Commission.

14 The Commission would need to amend both
15 the CFR and our AIs in order to accomplish this. A new
16 AI would have to be drafted that stipulates that we
17 would require no fewer than eight members. So, we are
18 sort of hovering around a recommendation that we have
19 no fewer than eight members to a SAC, but with a
20 maximum of 19. And we can talk about how we arrived at
21 those numbers and what that might represent, and
22 whether or not that meets your issues or concerns.

23 We might also look at something that would
24 allow a SAC to function even if temporarily it was
25 below eight in membership, but not too far below, so

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1 that the whole point is everything should be construed
2 in order to keep the SACs functioning. And when in
3 doubt, to keep them chartered and moving forward as
4 this is consistent with the spirit of our enabling
5 statute in the first place.

6 Okay. If the Commission does permit the
7 individual SACs to become smaller, if you concur in
8 that recommendation ultimately, we recognize that
9 achieving ideological balance within each SAC will
10 become increasingly important and, therefore, other
11 AIs may need to be looked at, revised, et cetera,
12 because at least as far as our Subcommittee was
13 concerned it's easier to achieve ideological balance
14 in a larger group. It will be somewhat more difficult
15 to achieve ideological balance in a smaller group, so
16 that issue will have to be addressed along with other
17 balance issues if our minimum number is eight as
18 opposed to what is it now, 12 or 13, 11.

19 Okay. So, the next issue we discussed were
20 -- was considering proposing longer appointment terms
21 for individual SAC members. Assuming for a moment that
22 we receive a definitive legal opinion that says this
23 can be done, we're operating on the current assumption
24 that the terms for individual SAC member appointment
25 and SAC chartering are no coextensive, or don't have

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1 to be coextensive, as we have heretofore interpreted
2 them as such. We are currently of the tentative
3 belief, at least, and we are seeking a definitive
4 ruling from our Office of General Counsel on that
5 issue, but we are of the -- we want you to consider if
6 it's legally permissible the possibility of moving
7 individual appointees to four-year terms and the SAC
8 chartering will still have to be two years under the
9 FACA, I think. But terms would be for four years.

10 Obviously, this would cut down on the
11 recruiting burden that the staff currently labors
12 under, will allow the reappointment work of the
13 Commission to go more smoothly. And if we were to
14 extend individual appointee member terms to four
15 years, we might also make a recommendation that it
16 will be limited to three four-year terms, so I want
17 you to know that that's under consideration, as well,
18 so that you get the parameters of the discussion so
19 that we can have a real inclusive discussion among all
20 the Commissioners about how we want to perfect this
21 process.

22 On the issue of term limits, let me just
23 underscore now we have -- people are for two-year
24 terms, and how many terms are they -- five. So,
25 they're limited to five, so that their service would

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1 be limited to 10 years as things stand currently. What
2 may become our proposal would be three times four-year
3 terms or a maximum service of 12 years. So, that's
4 another element.

5 Various elements of any reform of this
6 entire SAC function would have to occur in stages.
7 Some of these reform elements require merely -- are
8 merely internal to the Commission, meaning we could
9 undertake them by our own motion, amending AIs or what
10 have you; whereas, others require regulatory
11 amendment, we'd have to undertake new regulations in
12 the -- that would have to be published in the Federal
13 Register, et cetera. And I think the -- which would
14 require -- oh, yes. Reducing the number that would
15 constitute a minimum, if it were to go down to eight
16 would require amendment through the Code of Federal
17 Regulation.

18 COMMISSIONER GAZIANO: Do you mind if I
19 interrupt. And if this isn't a question you know, do
20 you know if it would require a full Notice of Proposed
21 Rulemaking, comment period, and then final, or under
22 the APA I know in some circumstances --

23 COMMISSIONER ACHTENBERG: You could do a
24 truncated --

25 COMMISSIONER GAZIANO: You can do a

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1 truncated --

2 COMMISSIONER ACHTENBERG: I don't know the
3 answer to that question.

4 COMMISSIONER GAZIANO: Okay. Well, that
5 will be helpful as we move forward.

6 COMMISSIONER ACHTENBERG: Yes. Or do you
7 think you have -- do you have the answer, Ms. Hepler?

8 CHAIRMAN CASTRO: Come to the microphone,
9 please.

10 MS. HEPLER: I'm working on this, and I
11 brought this up at the meeting yesterday. What the
12 proposal is is to -- I think you need to do the whole
13 thing, the notice, the proposed -- proposed notice,
14 you know, the Unified Intent Notice, the proposed, the
15 wait time and all because what we're planning --
16 suggesting that be done is that the whole CFR be
17 revised to mirror the statute so then in the future if
18 there are any changes they can made through the AI
19 instead of having going back to the regulation again.
20 So, it isn't just dropping the term limit, it's
21 revising the entire regulation.

22 COMMISSIONER GAZIANO: You're right.
23 There's a couple of ways we can amend it. And if we
24 adopt the way you suggest -- okay.

25 MS. HEPLER: Does that --

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1 COMMISSIONER GAZIANO: That actually makes
2 sense to me. I used to do some practice in
3 administrative law, but I want to reserve judgment
4 until we all study it a little bit more.

5 COMMISSIONER ACHTENBERG: Sure. Okay. Mr.
6 Chairman, we imagined -- the Subcommittee imagined
7 that this was -- this report is designed to get your
8 ideas about SAC construction and all of that, bring
9 them to the fore.

10 What we're imagining is some extensive
11 discussion by the Commission -- we'll be sending you
12 all opinions, memoranda as they are generated by the
13 Subcommittee in consultation with both our Office of
14 General Counsel and our staff, which is the way we've
15 been proceeding up until now.

16 And we were also thinking, Mr. Chairman,
17 for scheduling purposes that we might want a good
18 piece of a business meeting in order to get a number
19 of these things settled. This reform process, as well
20 as Commissioner Heriot and I hope to be able to
21 present the Commission with at least, you know,
22 certainly eight, but as many as a dozen SAC charters
23 to consider for final approval. And we were -- we're
24 still in the process of putting those together, and
25 that will be the second part of my report. But we're

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1 thinking about maybe the possibility of a two-day
2 meeting in December. One day I'm assuming is devoted
3 to the hearing that's scheduled at that time, but we
4 do need a good bit of time to deal with this element
5 of our statutory mandate, and to deal with it
6 responsibly and thoroughly. And some of the issue -- I
7 mean, it's not so much a partisan issue, Mr. Chairman,
8 as it is I think a discussion among Commissioners to
9 try to create a workable situation, particularly in
10 the absence of a Staff Director. I don't think there's
11 another way to do it.

12 CHAIRMAN CASTRO: That makes sense to me.
13 Commissioner Heriot, did you want to add anything?

14 COMMISSIONER HERIOT: I just want to add
15 that I concur with Commissioner Achtenberg.

16 CHAIRMAN CASTRO: Certainly, if we need two
17 days to do this, one for the briefing and one to
18 actually get this done, we need to get it done. So,
19 absolutely, yes. Commissioner Kladney.

20 COMMISSIONER KLADNEY: My question is when
21 you're talking about was it three four-year terms, and
22 term limits, basically, is there some way that we can
23 -- you can consider staggering the term so that there
24 could be some institutional memory on these panels
25 rather than having them all done at once, and then

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1 expire all at once, that kind of thing?

2 COMMISSIONER HERIOT: My guess is that not
3 everybody is going to want to be reappointed each time
4 and, therefore, there'll be natural staggering.

5 COMMISSIONER KLADNEY: Right, but in the
6 beginning it sounds like --

7 COMMISSIONER ACHTENBERG: Oh, I see.

8 COMMISSIONER KLADNEY: In the beginning
9 you're going to start everybody off at once. That's my
10 only concern.

11 COMMISSIONER HERIOT: Well, we haven't
12 actually worked out whether or not somebody who's
13 already been on the SAC for like -- let's say we've
14 got somebody who's been on for several terms already,
15 how do we translate that into the 12 years? So, we're
16 going to have to think about that a little bit more.

17 COMMISSIONER KLADNEY: Thank you. Just
18 wanted to make a point.

19 COMMISSIONER HERIOT: Sure.

20 CHAIRMAN CASTRO: Any other questions? If
21 not, thanks for a really thoughtful and well reasoned
22 to be proposal. We'll look at it in more detail next
23 time. Thank you. You and all the Committee members
24 that are working on it, thank you. Now, you have a
25 Part Two report. Right?

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1 COMMISSIONER ACHTENBERG: Part Two, yes.
2 So, let me just review the way we've been proceeding,
3 and underscore why things are going as slowly as
4 they're going, but there should be, I hope, a big
5 payoff at the end. The end is coming soon, I'm also
6 hoping.

7 (Simultaneous speaking.)

8 COMMISSIONER ACHTENBERG: So, what
9 Commissioner Heriot and I did was we took a look at
10 the various completed packages that have been
11 presented to us. And I'm saying this as much to give
12 the staff a sense of the way we've been proceeding so
13 that they might have all the information that we're
14 working with.

15 We went through the packages and there was
16 not a huge number, but certainly a number of proposed
17 appointments that gave either one of us pause. So,
18 we've been trying to sort of drill down on those,
19 ascertain whether or not it is a new appointment or a
20 reappointment, whether or not there should be a
21 different standard applied to a new appointment as
22 compared to a reappointment, and -- because at our
23 last meeting you suggested that the work of the
24 Subcommittee was not merely to present you with a
25 balanced slate, but one where at least as far as

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1 Commissioner Heriot and I were concerned we had
2 already taken into account those proposed appointments
3 that either one of us found objectionable. So, we're
4 in the process of doing precisely that, but it's not
5 an easy or a quick process, because if we say one
6 person is going to be removed, then we need to go back
7 to the Director in order to get a replacement of
8 similar ideological persuasion, et cetera.

9 The other thing is, is if the person is a
10 reappointment and they have been recommended for
11 reappointment, and one of us finds that reappointed
12 person potentially objectionable, they're entitled to
13 and need to be asked to submit a letter to the
14 Commission articulating why they think they should be
15 reappointed, and that letter needs to be considered by
16 someone, you know. And we'll have to figure out
17 finally whether or not that is the Commission, or if
18 it's the Subcommittee, or how it is you want us to
19 proceed.

20 We want to expedite the process and we
21 don't want to overreach. On the other hand, you know,
22 we have a lot of SACs awaiting charter, and we need to
23 figure something out expeditiously. So, that's
24 essentially where we are right now.

25 We have another meeting of the

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1 Subcommittee. This has turned into a lot of work, by
2 the way, which is why I know you're all happy that
3 Gail and I are doing it, and that you don't have to.

4 (Laughter.)

5 COMMISSIONER ACHTENBERG: I don't blame
6 you. If I had realized, I might not have volunteered.
7 Nonetheless, it is our statutory -- it is important
8 work, and we aim to kind of drive this to ground, as
9 it were. So, that's the report so far. We'll give you
10 another report in November and seek clarification from
11 the Commission about the extent of our role if that's
12 necessary. But if we could, and people could be
13 advised, if we could take the time in December to
14 resolve these issues and to charter these SACs with
15 everybody receiving well in advance our proposals so
16 that you can do your own due diligence with regard to
17 any particular members. Obviously, we're not trying to
18 take away individual Commissioner's prerogative in
19 this regard. We're just trying to do a thankless job,
20 Mr. Chairman.

21 CHAIRMAN CASTRO: Well, I thank you both,
22 so it's not thankless. Commissioner Gaziano.

23 COMMISSIONER GAZIANO: I want to add my
24 thanks.

25 COMMISSIONER ACHTENBERG: You haven't seen

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1 the charters yet.

2 COMMISSIONER GAZIANO: No, just -- well,
3 for two reasons. That there will be less that I have
4 to do. And, also, that's a valuable service of the
5 Subcommittee, anyway, but I wanted to thank you both
6 for work on the structural issues, as well. And I see
7 some interesting issues, interesting options. You
8 know, I received a partial report last night from the
9 other Subcommittee member. You've spotted a lot of
10 good issues, so I thank you for working on that, as
11 well. And I hope that you're able to formulate that
12 proposal in advance of the December meeting so that we
13 can be more efficient in our discussion in December,
14 as well.

15 But I also do want to point out, I think
16 this is -- even if we had a Staff Director, this is a
17 good use of Commissioners studying an issue like this
18 to reform our rules and regulations. We really ought
19 to be taking lead, but especially without an Acting
20 Staff Director, is even more important.

21 CHAIRMAN CASTRO: Any other questions or
22 comments?

23 VICE CHAIR THERNSTROM: Yes, Mr. Chairman,
24 I'd like to comment.

25 CHAIRMAN CASTRO: Yes, Madam Vice Chair,

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1 please proceed.

2 VICE CHAIR THERNSTROM: Kind of one
3 sentence here, just I'm so grateful to the two of you
4 for having done this. I'm sure I join others in saying
5 the last thing I wanted to do was to spend my time on
6 this, and it sounds like you've done a terrific job.
7 And, you know, if we can adopt at least a good portion
8 of what you are recommending, the Commission will be
9 better off, vastly improved, and all gratitude to the
10 two of you.

11 CHAIRMAN CASTRO: Here, here. Any
12 additional comments or questions? Hearing none, we
13 will move on to the next item, which is the most
14 anticipated item on the agenda; that is the
15 adjournment of this meeting.

16 **V. ADJOURN MEETING**

17 CHAIRMAN CASTRO: So, I hereby move to
18 adjourn. Do I have a second? No? Really, you want to
19 stay here?

20 COMMISSIONER HERIOT: I love it here.

21 CHAIRMAN CASTRO: Okay.

22 COMMISSIONER GAZIANO: I second.

23 CHAIRMAN CASTRO: Oh, thank you. All those
24 in favor say aye.

25 (Chorus of ayes.)

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1 CHAIRMAN CASTRO: Okay. Those opposed? Any
2 abstentions? No. So, it is -- the meeting is adjourned
3 at 11:07 Eastern Daylight Time. Thank you, everyone.

4 (Whereupon, the proceedings went off the
5 record at 11:06:53 a.m.)

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