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states to be approved would be withdrawn and a report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

COMMISSIONER HERIOT: I second that motion.

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

(Chorus of ayes.)

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

VICE CHAIR THERNSTROM: Yes, approve.

CHAIRMAN CASTRO: Okay, the motion passes
unanimously.

Prior to moving on to the next item on our
agenda I would like to acknowledge that today is the
last day with our agency of Kimberly Tolhurst. She has
been many roles in this office from Senior Attorney
Advisor to Acting General Counsel, to Acting Staff
Director, to Ethics Officer, and I'm sure I'm
forgetting a few other hats you've worn. So, I know I want to thank you for the work that you've done for the Commission over the last six years, and I'm sure that other Commissioners here would like to share their thoughts with you, so I will gladly open the floor to my colleagues to opine on your tenure.

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

CHAIRMAN CASTRO: Yes, ma'am.

VICE CHAIR THERNSTROM: Marty?

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

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

CHAIRMAN CASTRO: Yes, the Chair recognizes Commissioner Gaziano.

COMMISSIONER GAZIANO: I'd like to offer some similar words of thanks, encouragement, best wishes to Ms. Tolhurst, and to maybe note for the
record that her involuntary rise, involuntary on her part I think, anyway, to the Staff Director came in a slightly interesting manner. I -- some new members of the Commission on the Democratic side who wanted -- who felt more comfortable with her in the Acting. And at that moment we were only -- some of us appointed by Republicans were a tiny bit upset about the way the motion had been brought to our attention, but in an instant we all were comfortable with Kim because we knew her as an excellent counsel in the General Counsel's office. And I hope I'm not speaking out of school. We asked for a break, we pulled her aside and we said, "Do you want this job?" But we had no hesitation, of course, in unanimously approving her for the job. And our confidence in her, I think, was more than vindicated, not only in the ways that Vice Chair Thernstrom mentioned that I think she was scrupulously fair, or at least tried to be scrupulously fair to both sides. Of course, she didn't achieve it because no one ever could in my mind because someone else would disagree, but she certainly came very close. She listened.

But I also got the sense as Vice Chair Thernstrom said to -- I don't know all the day to day interactions between the Staff Director and the Career
Staff, but over time you get a sense of it as a Commissioner, even a part-time Commissioner like us interacting with our Special Assistants. And I concur in Vice Chair Thernstrom's remarks that you seem like an outstanding SAC Director for the Commission.

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

CHAIRMAN CASTRO: The Chair recognizes Commissioner Heriot.

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

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

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

VICE CHAIR THERNSTROM: Speak up.

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

CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman. I think the kind of work we asked you to do when we elevated you to the position of Staff Director was sometimes difficult, required extraordinary effort, required the exercise of other than legal judgment, as well as legal judgment. I think it's very difficult when someone is in the career civil service to ask them to step into the kind of position we asked you to step into. I think you did it was a lot of grace. I know it was extremely difficult, but we have nothing but respect for the job that you did. And I wish you every good fortune in your new endeavor.
CHAIRMAN CASTRO: Any of the Commissioners on the phone?

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

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

COMMISSIONER YAKI: Yes. Kim, I'm sorry I couldn't be there in person to see you. I'm sure you've having second -- I assume you're thinking do I really want my picture up on this wall. But now that you're leaving I think that I can reveal that during the time -- when I first met you on the Commission I was impressed by your professionalism, by your fairness. During a period when I knew that my
reappointment to the Commission was not going to be
certain I went to you and Commissioner Thernstrom and
I said we've got -- we have to worry about a
transition. Would you consider taking the job of Staff
Director, and you agreed. I now sometimes regret that
because I wonder if that's what has led to your
leaving the Commission, but I don't regret what impact
it had in terms of stabilizing the Commission, keeping
it going forward, and making sure that as others have
said we did things well, and we did things right.

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

I was hoping that you would still be here
when I finished up, but I wish you all the best
because in the end this is about your life and what
you want to do, and where you will be happy, and where
you will find your bliss. And all the best to you, and
many, many thanks, not just from me but from the
people who you have ably served in the Civil Rights
community. Thank you so much.
CHAIRMAN CASTRO: Would you like to say something?

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

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

I was glad in the end to get to do that. It was certainly a good career move, a nice builder of skills other than just being a lawyer. As Commissioner Kirsanow said it was too many hats, and it seems like all the hats actually literally hurt my head. I was
gone for a while unfortunately right when our new lawyer started.

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

CHAIRMAN CASTRO: Thank you.

(Appplause.)

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

II. PROGRAM PLANNING UPDATE AND DISCUSSION OF PROJECTS

UPDATE ON THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE BRIEFING

CHAIRMAN CASTRO: The first item up is an update on our Civil Rights Implications of Eminent Domain Abuse Briefing. I'd like to ask Margaret Butler
to please step forward and give us an update on where we are with the preparation of that report.

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

COMMISSIONER HERIOT: What's ERB?

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

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

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

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

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

MS. BUTLER: There were three ERB people, and right off I don't remember exactly who they were.
Once I get back to my office I can email you that information.

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

MS. BUTLER: Okay.

COMMISSIONER GAZIANO: Thank you.

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

COMMISSIONER HERIOT: I just want to make sure I understand the process now.
CHAIRMAN CASTRO: Yes.

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

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

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

MS. BUTLER: Yes, yes, yes.

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

II. PROGRAM PLANNING UPDATE AND DISCUSSION OF PROJECTS

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

MS. BUTLER: We have a rough draft of that report completed. We've been putting all of our efforts into trying to get the Muslim briefing done, and we will return to that once we finish up on November 9th. And maybe within a couple of weeks after the November 9th briefing we should have a draft that...
CHAIRMAN CASTRO: And that will start its legal sufficiency review.

MS. BUTLER: Yes.

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

II. PROGRAM PLANNING UPDATE AND DISCUSSION OF PROJECTS

UPDATE ON FEDERAL CIVIL RIGHTS ENGAGEMENT WITH ARAB & MUSLIM COMMUNITIES POST 9/11 BRIEFING

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

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

I think one of the federal agencies, the White House has already declined, and I'm not sure DOJ is going to come. On the phone they said they wouldn't
come but we actually sent them a letter. Once we sent
them the letter of invite, we hope we get a response
to that.

CHAIRMAN CASTRO: Commissioner Gaziano.

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

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

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

COMMISSIONER GAZIANO: Okay.

MS. BUTLER: We sent that letter to all of
the federal agencies.
COMMISSIONER GAZIANO: Okay, just to need to drill down that the -- who was the letter addressed to?

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

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

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

COMMISSIONER GAZIANO: Okay.

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

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

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

VICE CHAIR THERNSTROM: I can't hear you.

Can you speak up?

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

COMMISSIONER GAZIANO: Thank you.

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

MR. MUSSATT: Yes, I am.

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

III. MANAGEMENT AND OPERATIONS

CHIEF OF REGIONAL PROGRAMS REPORT

CHAIRMAN CASTRO: Mr. Mussatt.

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

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

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

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

COMMISSIONER GAZIANO: I have more of a question for the Chair and for my fellow Commissioners. As my fellow Commissioners know, I sent an email to them questioning the Chair's authority to make the Acting designation of Mr. Mussatt as RPCU Chief. And by the way, Mr. Mussatt, that's no indication of my opinion of you. If I'm right that the Chair lacked the authority to make the Acting authority, I'm happy to entertain a motion to make the
Acting Chair. But I want to discuss the -- whether the designation was effective or not.

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

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

But, in particular, OMB, the Office of Management and Budget, has declared that the
Chairperson of this Commission is the Agency Head for purposes of matters relating to the administration of the SACs. And if you look at the Federal Advisory Committee Act as it relates to the administration of SACs it says in Section 8(a) that "Each Agency Head shall establish uniform administrative guidelines and management controls for Advisory Committees established by the Agency." So, I believe that that also indicates that I as Agency Head have the ability to handle matters that relate to the administration and management controls.

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

Furthermore, the RPCU Chief is not a management position. It is a position which facilitates the work of the regions in terms of the SAC and compliance with FACA. Our CFR is silent as to how the RPC Chief may be appointed; however, when you look at the responsibilities it's clear to me that the work of the RPCU Chief is administrative and ministerial in nature, so under my authority as Agency Head...
Head both from OMB, as well as under FACA, I feel that I have the authority.

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

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

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

Now, I also believe there are other areas where I don't have the authority to make an appointment. During this same time it was suggested...
that there might be a detail to another department where that person might end up becoming the Staff Director. And I said absolutely is not what I am going to do because I don't think that that decision is a ministerial one. I feel that this one is.

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

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

CHAIRMAN CASTRO: Absolutely.

COMMISSIONER GAZIANO: I think the exchange of emails and your explanation is helpful. Let me just explain why I think it's mistaken. But before I ever do that, I appreciate your -- but I at least understand now why you believed that you had authority in this instance regarding the RPCU Chief, because it
at least does touch upon matters covered in FACA.

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

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

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

The previous -- the operative subsection says, "The term the Head of Federal Agency means
person or persons designated by the statute as the head of the federal entity, and if no such designation exists, the chief policy making officer or Board of the federal entity is the head of the entity." So, OMB misread its authority under FACA in designating the Chairman of this Commission. That's ultra vires and ineffective.

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

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

CHAIRMAN CASTRO: And if I may respond --
Commissioner Heriot, I'm sorry, go ahead.

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

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

COMMISSIONER HERIOT: Why don't you do that.

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

Furthermore, the Secretariat of the GSA in an email to our Office of the General Counsel on July 12th -- and this is from Tabitha Dove, GSA Desk Officer for this says, "It is up to the Commission's Agency Head to make a determination on how to proceed to insure the Commission's FACA program remains
operational without interruption." And that gives me
the authority to insure that there's an RPCU Chief and
a CMO that can insure that our compliance and our
processes for these SACs remains operational without
interruption. It cannot be --

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

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

COMMISSIONER GAZIANO: I think the statute
is absolutely clear.

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: I think I can help
here.
CHAIRMAN CASTRO: I know you can.

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

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

CHAIRMAN CASTRO: RPCU and CMO.

COMMISSIONER HERIOT: And CMO, friendly amendment.

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

COMMISSIONER ACHTENBERG: Second.

CHAIRMAN CASTRO: Any additional discussion?

VICE CHAIR THERNSTROM: Well, can I come in here, Marty?
CHAIRMAN CASTRO: Certainly, Madam Vice Chair.

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

CHAIRMAN CASTRO: Other comments?

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

CHAIRMAN CASTRO: What was that?

VICE CHAIR THERNSTROM: I can't hear you.

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

CHAIRMAN CASTRO: Why not just leave it until we get a Staff Director, because with the track
record we have we don't know, and the last thing we want to do is have another interruption in services.

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

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

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

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

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

COMMISSIONER GAZIANO: Mr. Chair --

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

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

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

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

COMMISSIONER GAZIANO: I -- given the careful way Commissioner Heriot raised the motion, I'm
willing to support it. She said without prejudice to whether the original -- as I understand it, the original -- what it means is without regard to whether the original designation was effective or not, we are hereby moving to elevate Mr. Mussatt to that position.

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

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

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

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

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

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

COMMISSIONER KLADNEY: I just want to add in addition to what was just said. Part of the reason for the time limiting quotient on the job is that there really was no posting of the job. There was no
interviewing of anybody else, unless there was, Mr. CHAIRMAN.

CHAIRMAN CASTRO: Not required from what I understand.

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

CHAIRMAN CASTRO: There was no posting, nobody applied.

COMMISSIONER KLADNEY: Did anybody have notice, anybody else?

CHAIRMAN CASTRO: Why are you asking me this?

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

CHAIRMAN CASTRO: I made the appointment.

COMMISSIONER KLADNEY: You should know whether they had --

(Simultaneous speaking.)

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

(Simultaneous speaking.)

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

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

COMMISSIONER ACHTENBERG: Point of
clarification.

CHAIRMAN CASTRO: Yes.

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

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

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

COMMISSIONER HERIOT: I'm going to pass.

CHAIRMAN CASTRO: Okay. Commissioner

Gaziano.

COMMISSIONER GAZIANO: Yes.
CHAIRMAN CASTRO: Commissioner Kladney.

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: No.

CHAIRMAN CASTRO: I'll go to the phone.

Madam Vice Chair?

VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN CASTRO: Okay. Commissioner Yaki?

Commissioner Yaki? I'll come back to you, Commissioner Heriot. We have three yeses, a no, and an abstention so far.

COMMISSIONER HERIOT: I guess I'm a no.

CHAIRMAN CASTRO: Okay.

COMMISSIONER HERIOT: It's a close call.


COMMISSIONER YAKI: I'm sorry, what?

CHAIRMAN CASTRO: Oh, there you go. How do you vote on the motion to amend the original motion to put a six month or until a Staff Director is appointed time limit --

COMMISSIONER Kladney: No, no, no, no. The
motion is that the detail of Mr. Mussatt to RPCU and CMO will last until -- last for a period of six months.

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

COMMISSIONER YAKI: Aye.

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

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KладNEY: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioners on the phone, Madam Vice Chair, how do you vote?
VICE CHAIR THERNSTROM: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Abstain.

CHAIRMAN CASTRO: I will vote yes, reserving my right that I do believe I had the authority to do this in the first place. So, the motion passes with seven yeses and an abstention.

Okay, thank you, everybody. Any other questions on the RPCU report that Mr. Mussatt gave? None?

All right. We will now move on to --

(Off the record comment.)

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

### III. MANAGEMENT AND OPERATIONS

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

CHAIRMAN CASTRO: Jennifer Hepler from our
Office of General Counsel will school us on this today.

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

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

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

COMMISSIONER GAZIANO: I study all your emails very carefully.

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

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

(Laughter.)

MS. HEPLER: I know. Well, I know John had the training.
COMMISSIONER GAZIANO: May I ask one -- so, do we get continuing legal education credit for this, or is this just --

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

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

MS. HEPLER: That would be it, yes.

COMMISSIONER KLADNEY: This is like your program.

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

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

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

COMMISSIONER KLADNEY: This would be also like with the Money thing we had last month?
MS. HEPLER: The one last month, right. The total is to give you at least a year --

COMMISSIONER KLASNLEY: Commissioner Heriot,

I must admit that is a lovely photograph.

(Laughter.)

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

CHAIRMAN CASTRO: I try not to be in it.

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

And in this case with the Teaching, Speaking and Writing, it's also to make sure that the public knows that you're speaking either for the government or on your own, or who you're speaking for. And that they don't misunderstand that you may be saying something, and that's what they think the government says, or the Commission says when it really is your personal opinion.
And there's two ways to look at this. We have official duty, and I was going to buy hats but I never got to the costume store. I wanted one with Uncle Sam and one with something else. And let me explain first what an SGE is.

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

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

And if you're doing an official duty, and that's with the Uncle Sam hat, your represent the government or the Commission when you're out there. You can reference to your employee's official position because you're speaking in that position or title, Commissioner, Special Assistant to the Commissioner, et cetera. You're compensated by the federal government, and actually you're criminally prohibited
from getting compensation from an outside source for
doing your official duty. And you can go to jail for
it.

And pursuant to the U.S. -- the Admin
instructions, I just want to say a majority vote of
Commissioners is needed to approve items, as you know.
And it would be very unlikely that in your official
duty one of you would be teaching a course at a
university or teaching a course period, or writing a
book or blog. However, the one that does come up and
has come up is the speaking issue. And there's two --
there' an AI for the Commissioners and it's the
Public Affairs Unit that says the Chair and the Staff
Director are the designated spokespersons for the
Commission. Whenever the Chair, Vice Chair or other
Commissioner goes out, you can speak unpublicly about
matters before the Commission, but if it's your
opinion be sure to say I'm a Commissioner but this is
what my view is. Don't -- you can't bind the
Commission. You have to tell them that this is not the
view of the majority, or this is, you know, that
you're -- you know, you can't bind the government if
you're talking about yourself. But if it's a matter
that has to do with the Commission and you're speaking
as a Commissioner, you can do it.
Now, as for the other employees, and this is interesting, okay, they can speak individual employees, but for career employees, and I don't --

I'll get to that. There is an AI that says you have to go through the Staff Director, Office Director, Regional Director for any speeches.

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

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

Okay. Now we're going to put on the other
hat, which is outside, your outside activity. And it's not related technically to your federal government duty. It's undertaken outside of the Commission on your own time, as you say on your own dime. And if it's compensated it's from a non-governmental source. Remember there's the criminal prohibition on it.

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

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

There's another exception that applies to all employees including SGEs. And this is where if you get compensated for teaching, speaking, or writing
that relates generally to the subject matter of the
agency which you're working on, and it's not a
specific thing. And I bring -- and I'm not promoting
her book, but Commissioner Thernstrom wrote a book on
voting rights, and it was written in her own capacity.
She's an author. And the good thing was this was
written before the Voting Rights Report. And if it had
been written during the time the Commission was
working on it that wouldn't have been allowed. But
since this was before, and she's an expert, she's
allowed to do it.

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

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

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

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

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

MS. HEPLER: You could wait --

COMMISSIONER GAZIANO: -- the other side
of our brain --
MS. HEPLER: I would say wait a year until after it reports out.

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

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

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

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

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

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

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

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

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

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

COMMISSIONER KLADNEY: Millions.

(Laughter.)

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

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

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

(Laughter.)

VICE CHAIR THERNSTROM: But, you know, it's absurd to think that an author who's got a book underway, or planning to write a book, or whatever can wait a year. It's not possible. They can't function as an author. They can resign from the Commission but they can't function as an author.
COMMISSIONER HERIOT: Yes, and let me add a little bit to that. You know, if Commissioner Thernstrom is writing this book and somebody decides they want to block the book by adopting a briefing that's on the topic because they don't want her book published, that just won't work.

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

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

COMMISSIONER GAZIANO: Up until this point I think it's very helpful to understand the kind of walls we need to try to build, and it's good to -- for us to state clearly when we're -- to our audience when we're wearing one hat and we're not wearing another. But now to personalize it in my situation. I work at a
think tank. Okay, I'm sorry. I didn't have you --

COMMISSIONER GAZIANO: And the Commission --

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

MS. HEPLER: No.

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

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

COMMISSIONER GAZIANO: I see.

COMMISSIONER HERIOT: You shouldn't be

using, you know, like non-public information, things
you learn here to write in the other job. I mean,
things that are coming out here. You have -- I know
you're the Legal Director I believe there. So, no, I
would expect you to be writing, and doing things on
behalf of your other job. You wear two hats. Remember.
Your outside job. But when you can't -- what I'm saying is -- and I don't know, do you write books, or do you just like -- I don't know what you --

COMMISSIONER GAZIANO: I have not written any books yet.

COMMISSIONER KLADNEY: Short stories.

(Laughter.)

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

VICE CHAIR THERNSTROM: And I --

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

COMMISSIONER GAZIANO: Yes, I'm still not C-

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

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

COMMISSIONER GAZIANO: I heard something slightly different from you.

MS. HEPLER: I'm not saying that --
COMMISSIONER GAZIANO: That I could continue to do so, and I could continue to write as long as I don't use --

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

COMMISSIONER GAZIANO: -- private information --

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

COMMISSIONER GAZIANO: -- in my job.

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

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

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

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

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

COMMISSIONER GAZIANO: Okay.

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

COMMISSIONER GAZIANO: I think that helps me a lot.

MS. HEPLER: Anything that's public -- it's
non-public information that you're not supposed to
take and use in your other -- wearing your other hat.

COMMISSIONER GAZIANO: Okay.

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

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

COMMISSIONER KLANDNEY: You're saying
confidential information, inside information.

MS. HEPLER: Right.

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

CHAIRMAN CASTRO: I remember it.

COMMISSIONER KLANDNEY: Is that --

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

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

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

MS. HEPLER: Sure.

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

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

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

VICE CHAIR THERNSTROM: You are the --

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

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

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

COMMISSIONER HERIOT: Thank you.

MS. HEPLER: Oh, I'm sorry, I didn't mean to -- I had asked Alison and she said you would be okay with me putting it out there. But it's on the
internet, anyway, so it is publicly available.

COMMISSIONER HERIOT: No problem.

MS. HEPLER: Okay. The next item comes --

and this has come up as well since I've been here, is

the disclaimer. If you are writing in your outside --

and you do put the position -- your position here as

one of your items, and you're speaking and you put it

as a biographical reference, please use a disclaimer

saying this is my opinion. I'm not representing the

Commission. I'm not representing the government. I
give you a couple of examples there. This is unrelated
to my work at the USCCR. Just something like that so

you can differentiate from whether you're representing

the government, or whether you're not. Yes?

COMMISSIONER HERIOT: If you do a newspaper

Op Ed, they won't put that in because they care about

space. You know, you can beg them to put it in and

they won't do it. They don't want to put in stuff that

just takes up space and will bore their readers. So, I
can't make a newspaper --

MS. HEPLER: You can't make a newspaper, right. And an OP Ed, you know, you're using writing in

your own personal capacity anyway.

COMMISSIONER HERIOT: It's usually obvious.

MS. HEPLER: Yes, it's obvious. And an Op
Ed is always an exception because of your First Amendment rights. Anyone can go out there and put in an Op Ed when they want, just if you can sort of -- and you're right. You can't control what somebody else puts in.

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

MS. HEPLER: I mean, they're probably putting it on there. She's speaking on behalf of herself, the disclaimer is trying to say are you just speaking on behalf of yourself, or on behalf of the Commission. That's what we're trying -- that's what the disclaimer is for, to try to say -- and I realize that sometimes you do things or you have interviews and they post it on line, and you don't have any discretion over what they post. You can ask them --

I've had a situation where I've asked the person to go to the place and say can you take that off for that specific -- and I understand. I mean, we understand.

COMMISSIONER HERIOT: We get things wrong all the time, too. I mean, the guy at the public
relations office at the University of San Diego has been going crazy because every time I have something in the papers recently it says I work at the University of California at San Diego, and I don't. I work at the University of San Diego.

MS. HEPLER: Well, see.

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

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

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

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

CHAIRMAN CASTRO: I have a question.

MS. HEPLER: Sure.

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

MS. HEPLER: It does not apply to Commissioners, no. That doesn't apply. You're a special animal. You're special. Right. Right, you're
special. Well, this is -- everybody knows this is not your full-time job. You know, you've got other jobs, or you're retired, or you're writing, or something.

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

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

COMMISSIONER KLADNEY: So, if someone uses your name, and in association with your name they use
this Commissioner, United States Commission on Civil Rights. And say you've made it clear to them not to do it but they do it anyway, not a problem. Right?

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

COMMISSIONER KLADNEY: Okay, thank you.

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

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

MS. HEPLER: Okay.

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

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

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

So, we put together this Reform Working
Group, and we are discussing structural changes to the
SAC Program that might include but would not be
limited to the following. And I say that in order to
get your juices flowing so that you might encourage us
to add additional issues for our consideration that
were not -- or give us even preliminary feedback on
some of the things that we're looking at. So, this is
all very preliminary, but we wanted to report back to
you.

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

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

We might also look at something that would
allow a SAC to function even if temporarily it was
below eight in membership, but not too far below, so
that the whole point is everything should be construed
in order to keep the SACs functioning. And when in
doubt, to keep them chartered and moving forward as
this is consistent with the spirit of our enabling
statute in the first place.

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

Okay. So, the next issue we discussed were
-- was considering proposing longer appointment terms
for individual SAC members. Assuming for a moment that
we receive a definitive legal opinion that says this
can be done, we're operating on the current assumption
that the terms for individual SAC member appointment
and SAC chartering are no coextensive, or don't have
to be coextensive, as we have heretofore interpreted them as such. We are currently of the tentative belief, at least, and we are seeking a definitive ruling from our Office of General Counsel on that issue, but we are of the -- we want you to consider if it's legally permissible the possibility of moving individual appointees to four-year terms and the SAC chartering will still have to be two years under the FACA, I think. But terms would be for four years.

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

On the issue of term limits, let me just underscore now we have -- people are for two-year terms, and how many terms are they -- five. So, they're limited to five, so that their service would
be limited to 10 years as things stand currently. What
may become our proposal would be three times four-year
terms or a maximum service of 12 years. So, that's
another element.

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

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

COMMISSIONER ACHTENBERG: You could do a
truncated --

COMMISSIONER GAZIANO: You can do a
COMMISSIONER ACHTENBERG: I don't know the answer to that question.

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

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

CHAIRMAN CASTRO: Come to the microphone, please.

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

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

MS. HEPLER: Does that --
COMMISSIONER GAZIANO: That actually makes sense to me. I used to do some practice in administrative law, but I want to reserve judgment until we all study it a little bit more.

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

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

And we were also thinking, Mr. Chairman, for scheduling purposes that we might want a good piece of a business meeting in order to get a number of these things settled. This reform process, as well as Commissioner Heriot and I hope to be able to present the Commission with at least, you know, certainly eight, but as many as a dozen SAC charters to consider for final approval. And we were -- we're still in the process of putting those together, and that will be the second part of my report. But we're
thinking about maybe the possibility of a two-day
meeting in December. One day I'm assuming is devoted
to the hearing that's scheduled at that time, but we
do need a good bit of time to deal with this element
of our statutory mandate, and to deal with it
responsibly and thoroughly. And some of the issue -- I
mean, it's not so much a partisan issue, Mr. Chairman,
as it is I think a discussion among Commissioners to
try to create a workable situation, particularly in
the absence of a Staff Director. I don't think there's
another way to do it.

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

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

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

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

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

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

COMMISSIONER ACHTENBERG: Oh, I see.

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

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

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

COMMISSIONER HERIOT: Sure.

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

So, let me just review the way we've been proceeding, and underscore why things are going as slowly as they're going, but there should be, I hope, a big payoff at the end. The end is coming soon, I'm also hoping.

(Simultaneous speaking.)

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

We went through the packages and there was not a huge number, but certainly a number of proposed appointments that gave either one of us pause. So, we've been trying to sort of drill down on those, ascertain whether or not it is a new appointment or a reappointment, whether or not there should be a different standard applied to a new appointment as compared to a reappointment, and -- because at our last meeting you suggested that the work of the Subcommittee was not merely to present you with a balanced slate, but one where at least as far as
Commissioner Heriot and I were concerned we had already taken into account those proposed appointments that either one of us found objectionable. So, we're in the process of doing precisely that, but it's not an easy or a quick process, because if we say one person is going to be removed, then we need to go back to the Director in order to get a replacement of similar ideological persuasion, et cetera.

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

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

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

(Laughter.)

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

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

COMMISSIONER GAZIANO: I want to add my thanks.

COMMISSIONER ACHTENBERG: You haven't seen
the charters yet.

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

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

CHAIRMAN CASTRO: Any other questions or comments?

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

CHAIRMAN CASTRO: Yes, Madam Vice Chair,
please proceed.

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

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

V. ADJOURN MEETING

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

COMMISSIONER HERIOT: I love it here.

CHAIRMAN CASTRO: Okay.

COMMISSIONER GAZIANO: I second.

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

(Chorus of ayes.)
CHAIRMAN CASTRO: Okay. Those opposed? Any abstentions? No. So, it is -- the meeting is adjourned at 11:07 Eastern Daylight Time. Thank you, everyone.

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