Disclaimer for Rough Real-Time Transcripts

“Do not quote or rely on this uncorrected transcript without obtaining written permission from the U.S. Commission on Civil Rights at transcripts@usccr.gov.”
U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

UNEDITED

SPECIAL MEETING

+ + + + +

FRIDAY, OCTOBER 10, 2014

+ + + + +

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*

ROBERTA ACHTENBERG, Commissioner

GAIL HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner*

DAVID KLASTNEY, Commissioner*

KAREN NARASAKI, Commissioner

MICHAEL YAKI, Commissioner

MARLENE SALLO, Staff Director

* Present via telephone
Do not quote or rely on this uncorrected transcript without obtaining written permission from the U.S. Commission on Civil Rights at transcripts@usccr.gov.

STAFF PRESENT:

TERESA BROOKS
MARGARET BUTLER
IVY L. DAVIS, Director, ERO
LILLIAN DUNLAP
LATRICE FOSHEE
ANGELA FRENCH-BELL, Deputy Staff Director, OCRE
DORIS GILLIAM
SEAN GOLIDAY
ALFREDA GREENE
MYRNA HERNANDEZ
TINALOUISE MARTIN, Director, OM
JANICE MINOR
PETER MINARIK, Director, WRO
LENORE OSTROWSKY, Acting Chief, PAU
JOHN RATCLIFFE, Chief, BFD
ROREY SMITH, General Counsel, OGC
ASHLEY TIMBERS
KIMBERLY TOLHURST
MICHELE YORKMAN, Director, IT

COMMISSIONER ASSISTANTS PRESENT:

JASON LAGRIA
CLARISSA MULDER
AMY ROYCE
JUANA SILVERIO
ALISON SOMIN
T-A-B-L-E O-F C-O-N-T-E-N-T-S

I. APPROVAL OF AGENDA.............................5

II. PROGRAM PLANNING AND ISSUE
*Discussion and Vote on Staff Director
authority over Special Assistants.................8

III. LEGAL MEMORANDUMS AND OPINIONS
*Request written opinion regarding
reappointment policy............................115

*Legal opinion regarding the jurisdiction
of Commission....................................118

*Written opinion regarding if OGC believes
same jurisdictional requirements apply
to SACs..........................................122

IV. ADJOURN MEETING ...........................124
CHAIRMAN CASTRO: Okay. All right. So let me bring this meeting to order. This is a special meeting of the U.S. Commission on Civil Rights. It is currently 9:30 a.m. Eastern Time on October 10th, 2014. The meeting is taking place at the Commission's headquarters located at 1331 Pennsylvania Avenue, Northwest in Washington, D.C.

I'm Chairman Marty Castro. My understanding that the Commissioners who are present at the meeting are Commissioner Yaki, Commissioner Kladney, Commissioner Achtenberg, Commissioner Narasaki and Commissioner Heriot.

Commissioner Kirsanow and I are joining the meeting by phone. And it's my understanding that Commissioner Timmons Goodson is out of the country and will not be participating. So a quorum of the Commissioners is present. Is the Court Reporter present?

COMMISSIONER YAKI: The Court Reporter is present.

CHAIRMAN CASTRO: Okay. Is the Staff Director present?
COMMISSIONER YAKI: The Staff Director is present as well.

CHAIRMAN CASTRO: Okay. So the meeting will now come to order. The first item of the agenda is the approval of the agenda.

I. APPROVAL OF THE AGENDA

CHAIRMAN CASTRO: Is there a motion?

COMMISSIONER YAKI: I have a motion to amend the agenda.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: And --

CHAIRMAN CASTRO: Now, is there a second?

COMMISSIONER KIRSANOW: Kirsanow seconds.

CHAIRMAN CASTRO: Okay. What's the amendment?

COMMISSIONER YAKI: I move that we put on the agenda as item number one, discussion of the staff director authority over special assistants and consideration of motions related to that discussion.

CHAIRMAN CASTRO: There's a second. Is there a discussion on the motion? Hearing none, let me go down the roll here and take a vote.

Commissioner Yaki, how do you vote on that -- actually should we do the amendment first? That
makes sense, right? Yes, Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADNEY: Aye.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: No.

CHAIRMAN CASTRO: No?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, I already took your vote. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: And I vote no. One, two, three, four, five yeses to two nos, the motion passes. Any further motions on the agenda?
COMMISSIONER Kladney: Mr. Chairman, Dave Kladney, I'd like to amend the agenda to talk about the legal memorandums and opinions that I'd like to request from the Office of General Counsel.

COMMISSIONER Achtenberg: Second.

CHAIRMAN CASTRO: Is there a second to that motion?

COMMISSIONER Achtenberg: Second.

CHAIRMAN CASTRO: Was that Commissioner Achtenberg?

COMMISSIONER Achtenberg: It was, yes.

CHAIRMAN CASTRO: Okay. I could hardly hear you.

COMMISSIONER Achtenberg: Sorry.

CHAIRMAN CASTRO: Any discussion on that motion? Hearing none, I'll take the roll. Commissioner Yaki, how do you vote?

COMMISSIONER Yaki: Aye.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER Achtenberg: Yes.
CHAIRMAN CASTRO: Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: And at this point, since I don't know exactly what the opinions are, I'm going to abstain. The motion carries. It's one, two, three, four, five, six yeses and one abstention.

Okay. Anything else? So the agenda has been amended to include those two topics. We will now move on to -- bear with me here a second. Well, under the program planning and issue, we had a discussion of personnel matters and I think the amendments still relate to that issue.

II. PROGRAM PLANNING AND ISSUE

Today's special meeting was called by a majority of the commissioners who wish to discuss the various policies and procedures involving agency personnel matters.
And as I stated in September when I cancelled the meeting due to insufficient business items and inappropriate topics that were proposed for the Commission business meeting, and as I'll state again on the record, I was informed by the general counsel at that time that the Commission was not authorized to discuss ongoing confidential personnel matters that could potentially be litigated with the Commission as a party.

And I was given the option of either postponing the meeting or adjourning it should it go in that direction. I chose to postpone it to give folks an opportunity to speak.

The Office of the General Counsel specifically advised commissioners to that discussing a confidential personnel matter is inappropriate whether it=s done in an open or a closed session.

And that's why, in the best interest of the Agency I opted not to have the September meeting. Ultimately, however, there was a vote taken by the commissioners, which I was outvoted on because our CFR allows the four commissioners to call the vote for a special meeting whether or not the Chairman calls for one.
The majority of the Commission voted for the special meeting to take place and the Staff Director noticed the meeting according to the CFR. As Chair, I'm required to chair this meeting since we don't have a vice chair for to whom I could delegate this.

In addition, in the interim, we were informed by the General Counsel, all commissioners were via email, of the possible implication of 18 U.S.C. Section 205, aide to activities of officers and employees in claims against and other matters affecting the Government.

Specifically, he wrote to each of us as follows. "I would also be remiss if I did not mention criminal conflict of interest, statute 18 U.S.C. Section 205, activities and officers and employees and claims against and other matters affecting the Government.

Specifically," he wrote," 18 U.S.C. Section 205(d)(1)(a) states that on officer or employee cannot act as an attorney, agent or otherwise represent a person in a personnel proceeding when that action is inconsistent with the faithful performance of that officer's or employee's duties.

This is important in this instance in light
of potential for litigation. Please be mindful," he continued to write, "that this is a criminal statute. The matter will be out of my hands if this statute is implicated and I definitely do not want that to happen."

While I have asked for written clarification on this point, I've not obtained it in writing. I understand that we, as special Government employees, either Presidential or Congressional appointees may be implicated under the statute if we are to discuss matters that are covered and that are pending in the department or agency of the Government in which we're serving with the intent to influence.

If it appears that we're going in that direction, I would ask their general counsel advise us and if required we'll consider whether we have to adjourn the meeting. But it's my hope that that doesn't have to occur.

Also since I'm participating by phone, I've asked my Special Assistant, Juana Silverio, to identify for me and communicate to me which commissioners raise their hands in an effort to speak so that I can at least try to manage the meeting as best I can in an orderly manner.

And of course, as you know, I always try to
be fair in allowing folks to speak. So if you just identify for Juana, she'll communicate that to me and then I will prepare a list and I will call you all accordingly.

However, before that I'd like to seed the floor to the Staff Director and then we'll continue with the discussion of the agenda items.

MS. SALLO: Good morning.

CHAIRMAN CASTRO: Madam Staff Director?

MS. SALLO: Thank you. Good morning. For the past four weeks I have the authority divested in this agency has been a question for the commissioners through a slew of emails and conversations with myself.

And for the record, I just wanted to indicate that the hiring authority for Federal employment is vested with OPM and not with an individual. OPM then delegates its authority to Federal agencies.

In this particular case because I am the Agency's Administrative Head as per the statute for the Commission on Civil Rights, the delegation authority is vested in me.

In addition, I wanted to indicate that this is an ongoing confidential personnel matter and as the
Administrative Head of the agency, I'm unable to speak on the facts of this matter, which means that today I will not be able to provide any information to support or deny the position that this Agency has taken as a result of an ongoing confidential personnel matter.

Thank you.

CHAIRMAN CASTRO: Okay. So --

COMMISSIONER YAKI: Mr. Chairman?

CHAIRMAN CASTRO: -- we will now, then open up -- yes. Is that --

COMMISSIONER YAKI: It's --

CHAIRMAN CASTRO: Commissioner Yaki?

COMMISSIONER YAKI: -- Commissioner Yaki.

I have some questions for the Staff Director.

CHAIRMAN CASTRO: Sure.

COMMISSIONER YAKI: And I believe that these questions do not implicate anything other than the issue of authority, which she has put on the table today. So I have a series of questions for her. I'd like her to answer them to the best of her ability.

Madam Staff Director, do you believe the staff director can unilaterally select special assistants for commissioners?

MS. SALLO: I am unable to speak to the
matters at hand, Commissioner Yaki.

COMMISSIONER YAKI: That's not the matter at hand. The matter at hand is do you believe, you just stated that the staff director is the administrative head and has delegated the authority thereto by OPM for the selection or whatever as you were just saying.

So I'm just asking, as a consequence of that, are you asserting that you have the power to unilaterally select special assistants for commissioners?

MS. SALLO: I'm not referring to selection, Commissioner Yaki, I'm referring to appointment.

COMMISSIONER YAKI: So do you believe that the staff director unilaterally decide who to appoint as a special assistant for a commissioner?

MS. SALLO: As I indicated, OPM delegates the authority for appointment to the Agency.

COMMISSIONER YAKI: So what you're succinctly saying is yes, that you could, in this situation, decide whom to appointment as a special assistant for a commissioner?

MS. SALLO: Is this issue about an appointment?
COMMISSIONER YAKI: I'm asking about the appointment power because you were talking about --

MS. SALLO: As I indicated --

COMMISSIONER YAKI: -- you returned to --

MS. SALLO: -- OPM delegates --

COMMISSIONER YAKI: -- the delegation.

MS. SALLO: OPM delegates the --

COMMISSIONER YAKI: So do you --

MS. SALLO: -- authority.

COMMISSIONER YAKI: So therefore, do you believe that the staff --

CHAIRMAN CASTRO: Oh, I understand you wanted to get your questions answered, but let's both of you try not to talk over one another.

COMMISSIONER YAKI: Thank you, Mr. Chair.

Next question, because I did not get a answer to the first one. Do you believe that the staff director has unilateral veto power over the selection of special assistants by each commissioner?

MS. SALLO: Once again, I am not speaking to the matter at hand due to an ongoing personnel and confidential matter.

COMMISSIONER YAKI: This has nothing to do with the matter at hand. This has to do with the
authority of the staff director which can be discussed in open session, which this commission has in the past discussed the authority of the staff director in open session.

So I'm asking you, do you believe, based on the statement that you just made today, that the staff director has unilateral veto power over the selection of special assistants by each commissioner?

MS. SALLO: Once again, I am unable to answer your question.

COMMISSIONER YAKI: Well, Madam Staff Director, you just said that OPM delegates you something. I'm trying to find out what that something is and if you're not going to ask what that something is, I think we're -- well, let me keep on going.

Do you believe that the staff director has unilateral authority to judge whether a special assistant is performing to the expectations of a commissioner?

MS. SALLO: Once again, I am unable to discuss this due to an ongoing confidential personnel matter.

COMMISSIONER YAKI: We're not talking about an ongoing personnel matter, we're talking about
your general statement regarding the delegation of your powers by OPM, which is exactly within the purview of the Commission.

Since you refuse to answer that, I'll ask you another question. Does a staff director have the unilateral power to evaluate the ability or skills of a special assistant for a commissioner?

MS. SALLO: We're talking about appointment authority.

COMMISSIONER YAKI: Yes.

MS. SALLO: Once again, I will not respond based on an ongoing personnel confidential matter.

COMMISSIONER YAKI: But we're talking about the appointment authority. We haven't even talked about termination authority. I'm talking about appointment authority.

MS. SALLO: Appointment authority is given to the Agency.

COMMISSIONER YAKI: Madam Staff Director, have you read the appropriations language for the Commissioner with regard to special assistants?

MS. SALLO: Yes, I have.

COMMISSIONER YAKI: Do you know what it says?
MS. SALLO: Yes, it does.

COMMISSIONER YAKI: And what --

MS. SALLO: And as for appropriations, that has nothing to do with personnel matters.

COMMISSIONER YAKI: And what does it say?

MS. SALLO: You read it. You know it.

COMMISSIONER YAKI: Well, you're the staff director. Let me ask you this, would you confirm that the appropriations language, which by the way, if you do a search of the entire consolidated appropriations bill for 2014, there's only one mention of the word special assistants for the entire Federal Government, and it goes to this Agency.

And it talks about the fact that the Agency has four Schedule Cs, exclusive of one special assistant for each commissioner. Let me ask you this, Madam Director, have you read the authorizing language for the Commission?

MS. SALLO: Yes, I have.

COMMISSIONER YAKI: 42 U.S.C. 1975(b)?

MS. SALLO: Asked and answered.

COMMISSIONER YAKI: And does it talk about the Commission has the ability to detail and hire personnel? Does it mention the staff director? No, it
does not, and I'll answer that question for you.

Let me ask you this, in our regulations 42 U.S.C., does the description of the staff director include a jurisdiction over the special assistants by name or description?

MS. SALLO: Once again, I am not speaking to this matter.

COMMISSIONER YAKI: Well, the answer is no. So based on that, since you are not speaking, then I think we simply have to --

COMMISSIONER NARASAKI: Here.

COMMISSIONER YAKI: Go head. I'm sorry.

Commissioner Narasaki would like to speak.

CHAIRMAN CASTRO: Okay. Commissioner Narasaki, go right ahead.

COMMISSIONER NARASAKI: Thank you, Mr. Chair. As you know, I'm a new Commissioner, so I'm still trying to find my way through the regulations, so I would appreciate some clarification from staff.

My understanding is that this issue turns on whether the administrative head is also the head of the Agency for purposes of being the appointing officer.

So in the administrative instructions, when I look at the organizational chart, it looks like

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C.  20005-3701
(202) 234-4433 www.nealrgross.com
the Office of the Staff Director reports to the commissioners, is that a correct interpretation?

MS. SALLO: I don't believe it is.

COMMISSIONER NARASAKI: So what do you believe the interpretation is? Who do you --

MS. SALLO: As the --

COMMISSIONER NARASAKI: -- report to?

MS. SALLO: -- Administrative Head of the Agency. I'm responsible for all personnel matters.

COMMISSIONER NARASAKI: That's not what I asked. I asked who do you report to, if not the Commissioners?

MS. SALLO: I don't have a written supervisor.

COMMISSIONER NARASAKI: So you don't feel that your job is to work with the Commissioners --

MS. SALLO: It is to --

COMMISSIONER NARASAKI: -- who are --

MS. SALLO: -- work with --

COMMISSIONER NARASAKI: -- the Commission?

MS. SALLO: -- the Commission, ma'am. And it's also to look after the best interests of this Agency.
COMMISSIONER NARASAKI: As I understand it, the Commissioners do do a review of the staff director, at least that has been the practice in the past. Am I incorrect in that?

MS. SALLO: Yes, ma'am. I have --

COMMISSIONER NARASAKI: I'm incorrect in what I've been told by former staff directors of this Agency?

MS. SALLO: Ma'am, I've never had a review done. I am not aware of any review being done.

COMMISSIONER NARASAKI: That doesn't necessarily mean that that's not what is supposed to be the practice.

MS. SALLO: Well, I'm not aware of that practice.

COMMISSIONER NARASAKI: I see. And so the org chart, I don't know who created the org chart, it's an administrative instruction showing that you report to the Commission. So you dispute the organizational chart?

MS. SALLO: The organizational chart is the organizational chart, ma'am. Once again, as administrative head of the Agency, I'm responsible for personnel matters.
COMMISSIONER NARASAKI: So my read of this is you can be responsible for personnel matters, but that does not necessarily encompass the special assistants who under Federal law are seen as having a very confidential relationship to the people that they assist.

And the only thing that we could find in the AI that referred to the Commissioners and the special assistants noted that Commissioners were considered the supervisor for their special assistants.

MS. SALLO: Okay.

COMMISSIONER NARASAKI: Am I incorrectly reading that?

MS. SALLO: No, ma'am.

COMMISSIONER YAKI: Commissioner Narasaki, if I may follow up on that for just a moment. Mr. Chair?

CHAIRMAN CASTRO: Yes.

COMMISSIONER YAKI: Is it not the case, Madam Staff Director, that it is the Commissioner who signs the form to name the person to whom they wish to chose to be the special assistant?

MS. SALLO: Commissioner submits a request for a special assistant, documentation is completed.
I, as the Administrative Head of the Agency, sign that documentation and submit it to the White House.

COMMISSIONER YAKI: So let me just follow up on that. So I'm a little confused because what you just described was simply an executory function in carrying out a decision made by a Commissioner.

So I ask you once again, the question that I made first of all, do you believe that you have the power to unilaterally select a special assistant for a commissioner based on what you have told Commissioner Narasaki and based on what you have said in your preface to my questioning today? Commissioner Narasaki wishes to speak.

CHAIRMAN CASTRO: Go ahead, Commissioner Narasaki.

COMMISSIONER NARASAKI: As I recall, since I recently went through the process in terms of my own special assistant, one of the papers that is processed is, in fact, a nomination-type of form where I was asked to justify the selection of the particular person which I believe is what Commissioner Yaki is referring to to me that what I thought was doing was, in fact, acting as a someone nominating my special assistant for the president to consider.
MS. SALLO: Correct. There's a nomination.

COMMISSIONER NARASAKI: That does not come from you, it's something that I signed as a commissioner.

MS. SALLO: A statement is submitted by the commissioner nominating a candidate.

COMMISSIONER NARASAKI: So this second question I have is as I understand it, in order for a staff director to be appointed by the President, a majority of the commissioners must approve.

MS. SALLO: Yes, ma'am.

COMMISSIONER NARASAKI: Which to me indicates that the commissioners have the responsibility of selecting and supervising the staff director, which to me indicates that in fact the staff director must in fact report to the commissioners.

COMMISSIONER ACHTENBERG: I don't know that --

COMMISSIONER KLANDNEY: That it would reflect --

COMMISSIONER ACHTENBERG: Yes, well.

COMMISSIONER YAKI: Commissioner Achtenberg.
CHAIRMAN CASTRO: Let me intervene there. I don't think you can necessarily read that in, Commissioner Narasaki, because the chairman is also required to be approved by a majority of the commissioners and I don't think the commissioners have that kind of authority over the chairman.

COMMISSIONER YAKI: No, but we can overrule you.

CHAIRMAN CASTRO: You can over-vote me, but you can't remove me, you can't discipline me, you can't do anything other than vote against me or overrule me as you did with setting up today's meeting.

But I just wanted to make that distinction or at least point that out, so folks understand that there are two situations in which the Commission votes to approve the appointment of the president and the chairmanship is the other way and it's different than Commissioner Narasaki has believed it is with the staff director. So anyway, who's next?

COMMISSIONER YAKI: Commissioner Achtenberg had her hand up.

CHAIRMAN CASTRO: Okay. Commissioner Achtenberg, please proceed.

COMMISSIONER ACHTENBERG: Mr. Chairman,
you made the point I was going to make.

CHAIRMAN CASTRO: Thank you.

COMMISSIONER YAKI: Commissioner --

CHAIRMAN CASTRO: Who's next?

COMMISSIONER YAKI: -- Kladney had his hand up.

COMMISSIONER KЛАDNEY: I just have a question. I remember in the past for bonuses to be awarded, I think at the end of the year we award bonuses to the staff. And in the past I remember the Commission had to vote. I can't quite recall. If somebody can clarify this for me, I think we had the vote on the staff director's bonus money. I can't remember.

CHAIRMAN CASTRO: No, that's not correct. That's not my recollection, Commissioner Kladney.

COMMISSIONER KЛАDNEY: Okay.

COMMISSIONER YAKI: Commissioner --

COMMISSIONER KIRSANOW: Commissioner, may I speak?

CHAIRMAN CASTRO: Commissioner Kirsanow, yes please.

COMMISSIONER KIRSANOW: Thank you very much, Mr. Chair. It was good Commissioner Narasaki, but not necessarily commissioner's observations.
First of all I think we've descended into lunacy here.

We, apparently, are suffering under the delusion that the Commission consists of something other than the commissioners contrary to our organic statute and contrary to at least three court cases dealing with the Commission.

Specifically, the Ishimaru case, George versus Ishimaru where the Court explicitly said what the Commission is. The staff director does not have independent unilateral authority to override what the Commissioners do.

The commissioners are the Commission. The Commission give directions to the staff director and to the general counsel and to anybody else who's within the Commission. That's not an if, and or but. That is definitely the case.

Second, I've had four special assistants. If I am not the supervisor for employment law purposes of my special assistants why the heck am I asked to go through the trouble of filling out an evaluation for my special assistant.

No non-supervisor ever does anything like that. Now, that simple act doesn't necessarily find any kind of justification in a regulation, but it sure
suggests that when viewed in terms of our statute, regulations and AIs, there has been a long standing understanding that our special assistants work for us. In addition to which they are Schedule C.

Beyond that, if you take a look at a regulation, you're pretty clear. This is something a first year law student understands. The staff director has authority over members of the staff that are specifically outlined in the regulations. And strangely enough, special assistants are the only creature within the organization not listed there under.

Seems pretty clear. Based on the entire structure of the Commission, it's simple common sense that special assistants can only be terminated by their commissioner.

In addition to that, I mean, we could go on and on and on, it seems to me that we're going through an exercise in which we're in an alternate reality. I am completely baffled by what we're going through here. It's some kind of a Kabuki dance.

There is no doubt in my mind we have had a number of briefings, for example, during my tenure from GCs and Staff Directors related to personnel matters.
before the Commission, many of them or some of them related to employment litigation by special assistants against the Commission. We've been briefed on those.

Among other things, one of the reasons we're briefed on those is because our regulations specifically say we are briefed or advised on personnel matters. It says it right there.

Beyond that there is a requirement that almost, I think, almost everybody on the Commission is a lawyer, we all know where duties are to our clients in terms of ethics and professional responsibility.

And if you take a look at the model rules, every state has a similar rule. In my state it's 1.1 and 1.4 that we're advised by our attorney. There was no exceptions, related to Governmental attorneys or Governmental personnel.

I will say that I'm completely baffled by what's going on here. So I'll conclude by saying I'm not sure why we're having this meeting. I think this is a no-brainer. I think there have been a number of ultra vires actions taken and I'm willing to hear what type of explanation our staff can come up with in usurping the evident authority of commissioners.

CHAIRMAN CASTRO: Mr. Kladney's next.
COMMISSIONER KLADNEY: No, I didn't raise my hand.

COMMISSIONER YAKI: Yes, Commissioner Yaki --

CHAIRMAN CASTRO: Oh. I'm sorry.

COMMISSIONER YAKI: -- Mr. Chair.

CHAIRMAN CASTRO: I apologize here. Yes, go ahead.

COMMISSIONER YAKI: I guess that I would like to say that I am surprised, but actually I think instead the only word I can describe is deep, deep puzzlement and disappointment that the answer that the Staff Director gave to Commissioner Narasaki regarding the organizational chart.

Because we are, as Commissioner Kirsanow said, we are the Commission. We're the ones who are appointment by either the President or by Congress to be the watchdog for civil rights in this country.

We are part-time, so therefore we need a staff to do it. And we have a staff director who most of the time, is someone who we trust to do the work that enables us to keep this mission going even though we are restricted by statute by the number of hours that we have.
I would just note that even the regulations state that the staff director disseminates the policies established by the commissioners.

There is no independent authority of the staff director to usurp the roll of each and every one of us. And that is one of the larger issues raised. But I want to get back to this specific issue because I think it flows from that.

My understanding of a Schedule C, and I think it's everyone's understanding of a Schedule C, it's a confidential policy-making relationship between a supervisor and his or her employee.

The key words are confidential policy-making relationship. And when you in the regs, when you look at what OPM guidance on this, it basically says that the Schedule C is at the will of the supervisor.

When the relationship with that supervisor ends, that person's job no longer exists. At that time the administrative head of the Agency can then execute the paperwork to terminate that person, but really only in that circumstance. Because think about the situation that the staff director has just posed and what it really means to this Agency.
If indeed, as she has asserted, she has delegated the entire authority by OPM over all personnel in this Agency, what is to prevent a staff director -- let's take a hypothetical example.

Say you have six democrats, sorry, six liberals I should say because we only have four, and two conservatives on a panel and you get a conservative staff director coming in, under the theory propounded by the staff director that person could unilaterally fire all six assistants for the liberals without explanation, without anything other than this assumed authority from OPM.

That's one of the circumstances. Let's take this a little step further. We are an independent agency appointed jointly by the Executive and the Legislative Branch. So again, under the theory propounded by the staff director, the Executive Branch could decide we're going to jettison all the Congressional staff assistants.

I don't think that's where Congress intended. I think there's a reason why in the Appropriations Statute language in the only place in the entire Federal budget special assistants are called out specifically for each commissioner.
Because there's a recognition that we have a function to serve and, again, we are not full-time, our special assistants can be. That confidential policy-making relationship is undermined if the staff director has the ability to fire that person unilaterally.

I can give a perfect example. When I was in the minority -- let's be blunt. And I see former General Counsel David Blackwood in the audience and I'm sure he can testify to this.

I did everything in my power, using my special assistants and whatever time I could devote, as is allowed by law, to undermine what the majority was trying to do. For --

COMMISSIONER KIRSANOW: No.

COMMISSIONER YAKI: -- lack of a better word. Yes, I know, Commissioner Kirsanow, that comes as a shock to you. What happens if a staff director, at that time, were to say to my assistant, you better back off.

I know you have a mortgage, I know you have a kid on the way, you better back off from what Commissioner Yaki's asking you to do. Just put it on the slow road, give him just a little bit, but don't give
him this other stuff you were looking at, otherwise I'm going to just fire you because I have the power to do so.

That undermines that confidential policy-making relationship that we have with our assistants. And that is anathema to the nature of the Schedule C relationship, anathema to the statute and anathema to our role as commissioners.

So I think we've gone down this rabbit hole enough and I'm going to make a motion. I move that we reaffirm that it is the policy of the U.S. Commission on Civil Rights that each commissioner is the sole supervising and appointed official of his or her special assistant.

That termination of any special assistant as a confidential accepted service appointee is within the sole discretion of the supervising commissioner.

And that the staff director, as the administrative head of the agency, executes the appointment and termination process at the behest direction and discretion of each commissioner.

And pursuant to this directive, the decision of the staff director to terminate any special assistant pursuant to this policy to her interpretation
is declared ultra vires and null and void.

And the staff director is directed to rescind and process any paperwork necessary to restore any such person terminated under this now revoked power effective the date of that purported termination.

That's my motion.

COMMISSIONER KIRSANOW: Kirsanow --
COMMISSIONER HERIOT: I second.
COMMISSIONER KIRSANOW: -- second.
COMMISSIONER HERIOT: I second.
MR. SMITH: May I speak?
COMMISSIONER Kladney: Please.
COMMISSIONER ACHTENBERG: Go ahead.
COMMISSIONER NARASAKI: Go ahead.
COMMISSIONER YAKI: The General Counsel wishes to speak.
COMMISSIONER ACHTENBERG: Who seconded that?
COMMISSIONER HERIOT: I seconded it.
COMMISSIONER NARASAKI: So did Peter.
COMMISSIONER Kladney: You seconded it?
COMMISSIONER HERIOT: Yes.
MR. SMITH: Commissioner Yaki, I appreciate your motion. However, it's the position of
the General Counsel that the Staff Director does have
the authority under OPM delegation for all personnel
actions. So therefore, your motion is an illegal
motion and the General Counsel cannot support the
motion.

COMMISSIONER YAKI: That's fine. I'm
still moving the motion.

COMMISSIONER HERIOT: And I still seconded
the motion.

COMMISSIONER YAKI: We have discussion of
the motion?

COMMISSIONER HERIOT: I --

COMMISSIONER KIRSANOW: Kirsanow here.

Am I recognized?

COMMISSIONER YAKI: Mr. Chair?

COMMISSIONER NARASAKI: Did we lose the
Chair?

COMMISSIONER HERIOT: I'll recognize it
Peter.

COMMISSIONER ACHTENBERG: Is the Chair --

MR. SMITH: We've got to wait for him.

COMMISSIONER ACHTENBERG: Mr. Chairman?

MR. SMITH: Wait for him for him to get back
on the phone.
CHAIRMAN CASTRO: No, I think I was muted. Commissioner Kirsanow, go ahead. Can you hear me?

COMMISSIONER KIRSANOW: Just very quickly, setting aside the statute, the regs, the AIs, past practice, the cases including Kirsanow versus Wilson. You have to recognize that if Commissioner Yaki and Commissioner Kirsanow are on the same page, something's gone seriously off the rails here.

COMMISSIONER HERIOT: Okay.

CHAIRMAN CASTRO: Was that your comment?

COMMISSIONER KIRSANOW: That's all I --

COMMISSIONER YAKI: Commissioner Heriot?

COMMISSIONER KIRSANOW: -- have to say.

CHAIRMAN CASTRO: Commissioner Heriot, you're next.

COMMISSIONER YAKI: No, Commissioner Achtenberg had a --

COMMISSIONER ACHTENBERG: My --

CHAIRMAN CASTRO: Okay. Well, I heard Heriot --

COMMISSIONER YAKI: No, Commissioner Heriot.

CHAIRMAN CASTRO: -- then Achtenberg.

COMMISSIONER YAKI: Sorry.
COMMISSIONER ACHTENBERG: Go ahead --

COMMISSIONER HERIOT: Me?

COMMISSIONER ACHTENBERG: -- Commissioner Heriot, and then I'll --

COMMISSIONER HERIOT: Okay. I just wanted to, one, concur with Pete that it takes really quite an issue for Pete and I to agree with Commissioner Yaki.

This doesn't happen very often. I appreciate Commissioner Yaki's willingness to put on the record what he was doing when he was in the minority too.

But like this is a fundamental issue. This is something that really goes to the ability of the Commission to function. Part of the function of a special assistant is to keep an eye on the staff director and the regular staff.

That cannot be done, as Commissioner Yaki was saying, in a situation where the special assistant is beholden to the staff director.

Insofar as OPM delegates authority to someone, they delegate that authority to the Commission. What is the Commission? The Commission consists of eight commissioners. That would be the
group that's meeting here. So that's where that
authority is delegated.

It just doesn't make any sense and it's
really quite an outrage that we had to call this special
meeting in the first place. All of this should be very,
very clear and if it's not clear, we've got some very,
very fundamental problems going on with this
Commission.

COMMISSIONER ACHTENBERG: Mr. Chairman?

CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: I'd like some
clarification. Mr. General Counsel, when you say that
this motion, is it the motion that Commissioner Yaki
made that are you saying it's out of order or what is
it you're saying?

MR. SMITH: Yes, thank you for the
clarification, Commissioner Achtenberg. Yes, I am
saying it's out of order. The Commissioners cannot
vote to supersede law. And it's my position that the
Office of Personnel Management has delegated this
authority to the Commission. And it wasn't as stated
before. So this motion is --

COMMISSIONER ACHTENBERG: To the
MR. SMITH: Right.

COMMISSIONER ACHTENBERG: -- via the actions to be taken by the staff director of the Commission.

MR. SMITH: Correct. So if, in fact, the commissioners were to vote in the affirmative on this motion, you would, in fact, be overturning the regulations as defined by OPM.

COMMISSIONER ACHTENBERG: Okay.

MR. SMITH: So that's the --

COMMISSIONER ACHTENBERG: Right.

MR. SMITH: -- position of the General Counsel.

COMMISSIONER ACHTENBERG: I understand that.

MR. SMITH: And if I'm not out of order, if I can just add one more thing, Mr. Chairman, if that's okay?

COMMISSIONER ACHTENBERG: Sure. Yes, go ahead.

MR. SMITH: Just to --

CHAIRMAN CASTRO: That's fine. Go ahead, Rorey.
MR. SMITH: Oh yes. Just to Commissioner Yaki's hypotheticals that he raised concerning undue influence on a special assistant, there are Federal rules that prohibit it. There are prohibited personnel practices.

COMMISSIONER YAKI: On Schedule Cs?

MR. SMITH: On Schedule Cs as well as career employees. So if, in fact, we had another staff director that came in that, in fact, was targeting, let's say the staff director was a conservative and was targeting democratically appointed special assistants, and for that reason because of their political affiliation, that would be a violation of law.

So there are safeguards in the Federal Government service to prevent such actions. So I just wanted to make sure that we know that. And it didn't say that really clearly.

COMMISSIONER NARASAKI: Could I speak?

COMMISSIONER YAKI: Commissioner Narasaki wishes to speak.

CHAIRMAN CASTRO: Yes, Commissioner Narasaki, go ahead. And then I have Commissioner Kladney after that.

MS. SILVERIO: I'm sorry, it was
Commissioner Kladney next on this.

COMMISSIONER YAKI: I'm sorry. We're Commissioners here and we're in charge of the meeting, not a staff assistant at last I checked. Unless of course --

CHAIRMAN CASTRO: It's actually --

COMMISSIONER YAKI: -- a staff assistant now --

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: -- relegated the authority of the staff director.

CHAIRMAN CASTRO: Mr. Yaki, I am blind here. So as I said at the beginning of the meeting, I asked her to communicate to me who raises their hand. She did send me a text saying Commissioner Kladney.

COMMISSIONER YAKI: Okay. I --

CHAIRMAN CASTRO: I missed it --

COMMISSIONER YAKI: -- take that back.

CHAIRMAN CASTRO: -- when I heard you say Commissioner Narasaki. So it'll --

COMMISSIONER KLADENY: I yield to the --

CHAIRMAN CASTRO: -- Commissioner Kladney --

COMMISSIONER KLADENY: -- Commissioner
Narasaki.

CHAIRMAN CASTRO: -- and Commissioner Narasaki. Okay? Everyone will get a chance to speak. I'm just trying to be fair to people who raised their hands first. Okay?

COMMISSIONER NARASAKI: Thank you.

CHAIRMAN CASTRO: I'm conducting the meeting, not the special assistant. She's assisting me remotely. Go ahead, Commissioner Kladney.

COMMISSIONER NARASAKI: Yes.

COMMISSIONER KLADNEY: I yield to Commissioner Narasaki.

CHAIRMAN CASTRO: Okay.

COMMISSIONER NARASAKI: I would suggest that we all take a deep breath right now. And I think it's important for the Commission to continue to try to avoid making this personal and try to keep this civil because we're debating an important rule.

I would disagree with the General Counsel. I don't think, even if I haven't had the chance to research even if there is such protection in law, we've just been told by the Staff Director that she does not report to the commissioners, that, in fact, we do not supervise her.
So if she is, in fact, going to abuse the power, then it's a little unclear to me who then makes sure that she's not abusing that power.

Secondly, my understanding is OPM itself has refused to rule on this question, which leads me to believe that it is open to interpretation. And my understanding from prior conversations with Marlene, is that the language involved, as she notes, is she is the Administrative Head.

There's a qualifier there, administrative head, not Agency head. And I continue to believe that the Commission is, in fact, collectively the head of the Agency, that the Commission has the, not only right, but obligation to interpret the laws that govern us and we do that, as I understand it, through administrative instructions and that those are created and passed by majority vote.

CHAIRMAN CASTRO: Commissioner Narasaki, let me just intervene to give you a little bit of history. And you and I may have discussed, sort of, the situation that we found ourselves in a few years ago without a staff director.

At the time we were seeking many creative solutions to that, one of which was requesting a
detailee from the Executive Branch. We reached out to OPM and presidential personnel to try to help us interpret who the Agency Head was in the absence of a staff director because we needed to have an Agency Head sign off on the detail.

And some people were of the opinion that as Chairman, I was the Agency Head. There were something of the opinion that the Staff Director was the Agency Head, who was lacking.

Ultimately, it was concluded, and I don't recall by who, perhaps it was our General Counsel at the time or acting, someone in the office that since we lacked a staff director, we did not have an Agency Head for purposes of the detailee approval.

So it was one of those horrible, sort of, cyclical situations. So we were unable to, in any of those situations, to get any written guidance from any of the other agencies. So I just wanted to make sure you understood that historical fact.

COMMISSIONER NARASAKI: Can I note, though, that the commissioners repeatedly asked the Staff Director and the General Counsel for a written legal opinion outlining the position, which we have yet to receive and it's been at least a couple weeks since
this debate has been ongoing. I'd also --

CHAIRMAN CASTRO: Yes.

COMMISSIONER NARASAKI: -- like to note for the record --

CHAIRMAN CASTRO: And I just wanted to clarify the question or just let you know the nuances that we had when in the past when we were trying to determine who the Agency Head was. That's all.

COMMISSIONER NARASAKI: Yes. I appreciate that. I'd also like to note for the record that as Commissioner Heriot notes and Commissioner Kirsanow notes, this is unprecedented in the history of the Commission.

That, in fact, there were many times over some of the heated partisan battles that have taken place, as I understand it, and as has been documented by the leadership conference on civil and human rights and their history of the Commission.

But there have been many times where I'm sure that either the Chair or the Staff Director would have liked to have fired someone's special assistant who was in the minority like Commissioner Yaki, but did not.

And I can assure you, knowing some of those people that if they thought they could have, they would...
have. So I just find it extraordinary to be told that the Commission does not have power over interpreting the regulations when there is no clear law stating otherwise.

COMMISSIONER KLADNEY: Mr. Chairman,

Kladney here.

CHAIRMAN CASTRO: Yes, and then you'll be followed by Commissioner Achtenberg, Commissioner Kladney. Please proceed.

COMMISSIONER KLADNEY: I'd like to say that a big problem here, and Commissioner Narasaki kind of stole my thunder, but there are no legal opinions. And it seems to me that if OPM has taken this position, they would have something in writing and if requested they would've issued a notation, an opinion, a letter, an email, something to that effect.

Absent that, I would think that our own General Counsel would have issued us a legal opinion showing us the authority. But absent all of that, in a past life I actually was a labor lawyer.

And although, I've been many long past years and I'm sure Commissioner Kirsanow is much more versed in this than I am, I believe that absent a clear path to the actions taken, there are other alternatives
that the administrator of an Agency has to protect the
Agency and that none of them were taken here.

And I think that we should actually look to
that as authority for the staff director to have over
the staff absent termination of our special assistants.

That's all I have to say.

CHAIRMAN CASTRO: Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Mr. Chairman, I
have a lot of faith that the Staff Director, in addition
to being a good lawyer, is also a good person and a
thorough person. And I think I regret the ways in which
some of her actions have been mischaracterized by my
colleagues.

I also regret the fact that we don't have
written opinions on a number of these issues. So I want
to concur with my colleagues in that regard.

I think we need counsel in terms of helping
us decide what the authority of the Commission is as
exercised by majority vote of the commissioners, what
it is and what it is not.

And I think in a moment some motions to that
effect are going to be offered by my colleague and I
intend to support those motions. I think we need the
advice of counsel. And if our own counsel --

COMMISSIONER KLADNEY: Fails.

COMMISSIONER ACHTENBERG: Well, it's not a matter of failure. His interpretation, I believe, is such that he believes he's precluded from offering us counsel because there's an ongoing matter that could result in litigation.

That means he has to reserve his work for that purpose or, I mean, I'm not completely sure why he can't, but his interpretation is that he can't. I'll accept that and if you can clarify that.

But it seems to me that if our own counsel is conflicted out for whatever reason, and I'm not going to second guess, it's his interpretation, he's the General Counsel, I think we're entitled to counsel nonetheless.

And absent advice of counsel, I won't support Commissioner Yaki's motion to substitute our judgement for that of the staff director. I have nothing other than his assertion that the law would allow that.

And as much as I respect Supervisor Yaki's legal acumen, I want to be advised by counsel whether or not I, as a Commissioner, am properly interpreting
the Commission's mandate in agreeing to or disagreeing with such a motion.

And if the General Counsel wants to clarify his position, I would love to hear it. But I really think we need some advice and I think we need it in writing.

CHAIRMAN CASTRO: Okay. Commissioner Yaki is next followed by Commissioner Heriot.

COMMISSIONER YAKI: I appreciate what Commissioner Achtenberg has said. And Commissioner, you gave me a demotion back to supervisor and I take exception to that.

COMMISSIONER ACHTENBERG: Did I call you supervisor?

COMMISSIONER YAKI: You did.

COMMISSIONER ACHTENBERG: But old habits die hard.

COMMISSIONER YAKI: I know. I know. The problem, and I appreciate the point that you make and I appreciate the point that raised by Commissioner Kladney, the problem, of course, is that in so doing we're attempting to deal with a problem that could have been avoided had such an opinion been sought in the first place, which it was not.
Instead, peremptory action was taken by the Staff Director without the consent of the appointing Commissioner and which brought us to the situation today. I think the --

CHAIRMAN CASTRO: Mr. Yaki, I just want to note here, I think you're getting close to talking about an individual case as opposed to the general policy issues. So I just want to --

COMMISSIONER YAKI: Well, we've --

CHAIRMAN CASTRO: -- let you --

COMMISSIONER YAKI: Mr. Chair, we've already established that there is a case because the General Counsel already made that clear that there could be a case involved. So I don't think I'm saying out of school given the fact that General Counsel rang that bell in his very first statement. Be that as it may, in a --

CHAIRMAN CASTRO: Go on.

COMMISSIONER YAKI: -- hypothetical situation one would hope to have this opinion done prior to any action taken by the staff director.

That being the case, my motion attempts to correct that and put everything in a position prior to any injury befalling either any individual or the Agency
because, quite frankly, what astonishes me is that my motion is to prevent injury to the Commission.

It is to prevent a claim to the Commission. It is to ensure that we are acting according to well-established patterns, practices, rules, procedures and executive authority of the Commission.

What Commissioner Achtenberg is asking for is, I believe, appropriate, but it should be appropriate in a situation where there's no injury to any party as a result of this inquiry. That is why I made my motion, that is why I support my motion and that is why I urge my colleagues to support the motion.

MS. SALLO: May I speak, Chairman Castro?

This is the Staff Director.

CHAIRMAN CASTRO: Yes, why don't you go ahead and then after you is Commissioner Heriot.

MS. SALLO: I just wanted to indicate that at no point-in-time when I was appointed by the President was I advised that I had a direct supervisor and at no point-in-time was I advised that an evaluation would be made of my day-to-day activities.

If that is the case, then that is the case, but at no point-in-time was that ever said to me. And my appointment documentation indicates that I serve at
the pleasure of the President.

And no one advised me that I had a direct supervisor or that an evaluation would be done. So that is the reason why I said what I said. Thank you.

CHAIRMAN CASTRO: Okay. Commissioner Heriot, you have the floor.

COMMISSIONER HERIOT: I think most of what I wanted to say was already said by Commissioner Yaki. I did want to point out this notion of we need counsel.

We have counsel. I mean, each one of us has a special assistant and counsel. Commissioner Achtenberg has a very talented counsel and she can rely upon him for -- we are also all lawyers ourselves.

So I think we're looking a little silly in suggesting that we must hang on every word that the General Counsel gives here. Sometimes you get legal advice that you can tell right on the surface is just not right. And I think that's happened many times now in the last few months.

MR. SMITH: Excuse me. COMMISSIONER HERIOT: So I would --

MR. SMITH: No. No.

COMMISSIONER HERIOT: -- move on with this.
MR. SMITH: I'm sorry. You know what, I'm sorry, I'm not going to have you impugn my reputation on the record. Everything that I've said today has not been directed at any particular commissioner --

COMMISSIONER YAKI: I'm sorry.

MR. SMITH: -- or --

COMMISSIONER YAKI: Mr. Chair, the General Counsel was not recognized. I think there was a --

CHAIRMAN CASTRO: I recognize the General Counsel.

MR. SMITH: If we're going to speak to these issues, we need to do it in a professional way, but not impugn anyone's reputation.

And, Commissioner Heriot, I have been nothing but helpful. In fact, I sent you a personal email saying, you know what, I'm here for you and your assistant. So I would ask you to please retract your statement because I've been nothing, but professional to you --

COMMISSIONER HERIOT: I will not.

MR. SMITH: -- at all times.

MS. SALLO: Commissioner Yaki wishes to speak.

CHAIRMAN CASTRO: Commissioner Yaki,
please --

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: -- proceed.

COMMISSIONER YAKI: Thank you very much.

With the leave of my colleagues, if it requires a vote by my colleagues, I'll ask for it.

When it comes to the situation of General Counsel pronouncements, I have been at times adverse, in favor, unequivocating, downright hostile to, and otherwise skeptical because, as we noted, we're all lawyers. We bring out own view and study and viewpoint to a situation.

But I think it important to add to this debate if my colleague would so give me leave. I would like, we have in the audience a former General Counsel of the Commission, David Blackwood and I would like the opportunity for him to make a brief statement about his view about this given that he's served under two different staff directors as well.

COMMISSIONER KIRSANOW: If that's a motion, Kirsanow seconds.

COMMISSIONER ACHTENBERG: Wait. There's a pending motion and I don't think --

COMMISSIONER YAKI: No, no, this is just
COMMISSIONER ACHTENBERG: This is ask permission, I don't think --

COMMISSIONER YAKI: This is --

COMMISSIONER ACHTENBERG: -- you need a motion.

COMMISSIONER YAKI: -- to seek permission to have Mr. Blackwood say a few words.

COMMISSIONER ACHTENBERG: This is question of the Chairman, right?

MS. SALLO: Under C.F.R. 702.52, open meeting requirements, Section B, this sub-part gives the public the right to attend and observe Commission open meetings. It confers no right to participate in any way in such meetings.

COMMISSIONER YAKI: Well, that may be true, Madam Staff Director, but that only says they have no right to, it does not speak to whether or not a commissioner may give leave to someone on a special circumstance or any circumstance to speak.

And in fact, there have been meetings at which I have advocated and the majority at that time, who was not very fond of the viewpoint I was doing, would allow members of the public to address for a limited time.
period of time for this. It simply confers no right, it doesn't mean that there cannot be the privilege extended to an individual.

CHAIRMAN CASTRO: Can our general counsel provide us some guidance on this?

MR. SMITH: So --

CHAIRMAN CASTRO: Rorey, are you there?

MR. SMITH: Yes. Yes, I'm here Mr. Chairman. Madam Staff Director appropriately stated what the open meeting requirements are and there is no right to speak at a Agency public meeting.

And in fact, I believe that this is not in the interest of the Commission or the Federal Government as a whole and therefore, I recommend that you deny this request.

CHAIRMAN CASTRO: Is there a distinction between a special meeting and a hearing? Is there --

COMMISSIONER HERIOT: Do you want to do a motion to override that?

COMMISSIONER YAKI: Yes, he has --

MR. SMITH: Yes, there are --

COMMISSIONER YAKI: The General Counsel cannot make a motion, so whatever he said --

CHAIRMAN CASTRO: He's not making a
motion --

COMMISSIONER YAKI: -- about being out of order.

CHAIRMAN CASTRO: -- he's giving his --

MR. SMITH: I'm not making a motion.

CHAIRMAN CASTRO: -- advice.

MR. SMITH: Yes, Mr. Chairman, the section that the Staff Director quoted is a public meeting requirement. So --

CHAIRMAN CASTRO: Okay.

MR. SMITH: Yes.

CHAIRMAN CASTRO: Right. Let me suggest something here. Commissioner Kladney, you had mentioned earlier that you were going to have some motions as it relates to requesting specific legal advice on the topic at hand.

You haven't gotten yet to the point where you're going to raise those motions, but I wonder if those motions might, at least for the time being, address some of these or begin to move in the direction of addressing some of these questions in a manner that might be less in question as to whether we have the authority to do that today.

I don't know if maybe you could say to us
what you were thinking of moving and see if maybe taking
that tack might be able to move this along without a
development of an impasse?

COMMISSIONER KLADNEY: You know, Mr.
Chairman, my motions do not really deal with this.
Actually, if you recall two weeks ago, I think it's the
only email I ever responded to in this entire chain was
after we were informed that the General Counsel had
given his last word on the subject. I think that
was -- and I just want to be sure I said that right.

MR. SMITH: I'm sorry. I didn't hear you.

CHAIRMAN CASTRO: Yes, actually, it was
after I requested clarification and then you responded
saying that he had said it was his last word.

COMMISSIONER KLADNEY: Right.

CHAIRMAN CASTRO: I believe that was --

COMMISSIONER KLADNEY: And I think that
was a quote from his email. I --

CHAIRMAN CASTRO: Yes, it was.

COMMISSIONER KLADNEY: -- said I don't
understand why we can't get a legal opinion on this
subject and we haven't gotten a legal opinion on this
subject, so I don't know if they haven't provided a legal
opinion, anything we're going to do, and it's his last
word on the subject, we're not going to get on.

MR. SMITH: Can I say --

CHAIRMAN CASTRO: Okay.

COMMISSIONER Kladney: I mean, that --

CHAIRMAN CASTRO: So then you're not going to make a motion.

COMMISSIONER Kladney: -- seems to me to be --

MR. SMITH: Well, let me --

COMMISSIONER Kladney: -- where we are.

MR. SMITH: If I may?

CHAIRMAN CASTRO: Wait. Yes, is that Rorey?

MR. SMITH: Yes, Mr. Chairman.

CHAIRMAN CASTRO: Go ahead. And then I understand Commissioner Yaki had his hand up, so Mr. General Counsel and then Commissioner Yaki.

MR. SMITH: Yes. So I will not be speaking to the facts. However, I think for clarity purposes I should at least state why, in my opinion, the issue of the staff director's authority is inextricably linked to the underlying personnel action.

In my view those two cannot be separated.

And, in fact, if we have continued discussions based on
the email traffic that I have seen, unfortunately, from
the Commissioners, that it will do harm and prejudice
the Agency's position in future litigation.

So that is why I am not rendering a legal
opinion. And I will not. Because my job right now, is
to protect and defend the Agency and that's what I will
do.

COMMISSIONER KLADNEY: Mr. Chairman?
COMMISSIONER YAKI: I'll defer to
Commissioner Kladney and then --
CHAIRMAN CASTRO: Okay.
COMMISSIONER YAKI: -- reserve my time
after him.

COMMISSIONER KLADNEY: You know, I respect
that, so that's what I said. And so we're not getting
the legal opinion and so I'm not going to make a motion.
CHAIRMAN CASTRO: Okay. Thanks for
clarifying that.

COMMISSIONER YAKI: Mr. Chair, I --
CHAIRMAN CASTRO: Yes, we have
Commissioner Narasaki after Commissioner Yaki.

COMMISSIONER YAKI: Do you want to go
first? Okay. I'm going to yield first to Commissioner
Narasaki, I'm sorry.
CHAIRMAN CASTRO: Okay.

COMMISSIONER NARASAKI: So I'm a little lost because I thought that what we had been discussing was the issue of whether the Commission wanted to hear from someone who has some expert opinion on the matter.

As I understand it, Commissioner Achtenberg has said that she would like to get some more legal advice as to this. So I don't know what the appropriate procedure is since we have a pending motion, whether the Commission can vote to hear from this person or not. And I know Gail's the reigning expert on Robert's Rules, so maybe she could figure that out.

And then the second point I wanted to make is that I don't think commissioners mean to impugn the honor of the general counsel. I had raised concerns about having this kind of discussion on the record, but was told that because the general counsel would not certify this for an executive session, we could not go into executive session.

I continue to feel that that's an option that we should consider. Again, I'm not sure what the procedures are since I'm new, but I just want to lay that on the table.

CHAIRMAN CASTRO: Okay.
COMMISSIONER YAKI: Commissioner Yaki --

CHAIRMAN CASTRO: Who's next.

COMMISSIONER YAKI: -- who had yielded to
Commissioner Kladney then Commissioner Narasaki. I'm
going to say this for the record.

In the interest of due diligence and the
fact that I did not want to be seen as someone who is
simply acting out of any self-interest in this, I
conferred with former general counsels both Democrat
and Republican, former staff directors both Democrat
and Republican, former commissioners both Democrat and
Republican.

All of them to a person, left, right,
whatever, expressed puzzlement and astonishment at the
notion that the Staff Director has the authority that
she claims she has over commissioners special
assistants.

I asked the former General Counsel for the
Commission that I used to serve on prior to this one,
the former iteration, Mr. David Blackwood, who is a
Republican, with whom I disagreed with many times in the
course of my duties as a commissioner and in that
commission where I was in the minority.

I asked him to come and give his viewpoint
because it seemed to me that at some point during this discussion it was going to come up what interpretations are there of this that are out there from the perspective of someone who has sat in the seat of general counsel.

Especially given the fact, as Commissioner Kladney has noted, a series of questions were propounded by the Chair and by myself to the General Counsel, which have not received a response. And this is not impugning, that is simply stating a fact.

I also propounded questions at the Staff Director for which I got no response and that is simply a fact as well. I would like Mr. Blackwood be able to say it, but if we're really, truly interested in getting at this issue, I think it would be helpful to the Commission to hear his point of view.

If that is not possible, I will sit here and let him whisper in my ear and I'll repeat what he would have said had he been allowed to say.

We can engage in that or we can simply let him speak for a couple minutes as a former General Counsel, as someone who served this Commission for many years, just by the way as I would extend that courtesy to any former Commissioner who may have come here to speak, as well.
They know this Commission. They have been part of it. They have a history. I think it's important for all of us to understand that history. That's why Mr. Chair, I asked that Mr. Blackwood be allowed to speak.

If the Staff Director is concerned about what he or she is going to say, I can't help that. I'm not just sure what exactly he might be saying at this instance either, other than he wished to make his views known.

CHAIRMAN CASTRO: Well, I would imagine, Commissioner, you have a good guess to what he's going to say or you wouldn't have brought him, but --

COMMISSIONER YAKI: No, I didn't bring him.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: I did not bring him here, he showed up.

CHAIRMAN CASTRO: One, we've got our General Counsel saying that this is not appropriate under these circumstances.

COMMISSIONER HERIOT: He didn't say that.

COMMISSIONER YAKI: Mr. Chair --

CHAIRMAN CASTRO: Let me finish, okay?
Come on, let me finish. Then everyone will get a chance to talk, I promise you. If nothing else, I've tried to do that throughout the course of my chairmanship.

But I'm just trying to get some clarification here. I'm not making a ruling right now. Here's a practical concern that I have.

If folks are going to be bringing in, I don't want to call them witnesses because that's not the right word because this is not a briefing or a hearing, but if there were going to be authorities that were going to be brought in to determine --

COMMISSIONER YAKI: Mr. Chairman, I withdraw my request.

CHAIRMAN CASTRO: Let me finish, Commissioner. I promise you, then you can have the floor.

COMMISSIONER YAKI: No, I'm saying I withdraw my request.

CHAIRMAN CASTRO: This probably would --

COMMISSIONER YAKI: So if it's --

CHAIRMAN CASTRO: -- have been, you know, behooved the other individuals who might wanted to bring someone that might have a different perspective.

Just like when we put on our hearings and
our briefings, you want to make them balanced. Anything that is presented here with only one person who was not noticed or not given the heads-up that this was going to happen would be unbalanced.

And I am concerned about the implication that that might leave. That's my concern. Now, I don't know if I can get additional guidance here from our counsel or I just want to state to you all my concerns.

I don't care what he's going to say personally, but I just want to make sure that what happens here is fair. It's a question of fairness for me.

COMMISSIONER YAKI: Mr. Chair, this is Commissioner --

CHAIRMAN CASTRO: Yes.

COMMISSIONER YAKI: -- Yaki. I withdrew my request.

CHAIRMAN CASTRO: Oh, I'm sorry. Okay.

COMMISSIONER YAKI: And I move the question.

CHAIRMAN CASTRO: Could you restate your motion, please?

COMMISSIONER YAKI: I move that we
reaffirm that it is the policy of the U.S. Commission on Civil Rights that each commissioner is a sole supervising appointed official of his or her special assistant.

That termination of any special assistant as a confidential accepted service appointee is within the sole discretion of the supervising commissioner and that the Staff Director as the Administrative Head of the Agency executes the appointment and termination process at the behest direction and discretion of each commissioner.

Pursuant to this directive, any decision of the Staff Director to terminate any employee pursuant to a now revoked policy is hereby declared null and void and the staff director's directed to restore any persons terminated under now revoked policy to all ranks and privileges effective the date of any purported termination.

CHAIRMAN CASTRO: This sounds to me like you're getting into the specifics of an individual case and you're trying to influence the outcome of that individual case.

My understanding of today's meeting was that we were going to talk about general policy issues.
And it seems to me that your motion, Commissioner Yaki, with all due respect, is crossing that line.

I don't know if my interpretation's accurate, but that's how I'm viewing it. I don't know if other commissioners feel that way. You're not outlining the general powers, you're going into a very specific request that someone be reinstated.

COMMISSIONER YAKI: I'm specifically asking that any decision that the Staff Director may have reached under a policy that is not the policy of the Commission must be corrected. I'm not stating whether or not she did or did not. But if she did, it must be corrected. And I am perfectly prepared to -- well, anyway, that's my motion. It has been seconded.

COMMISSIONER HERIOT: We're ready to vote.

COMMISSIONER YAKI: I will ask for a vote.

CHAIRMAN CASTRO: Well, I --

COMMISSIONER KIRSANOW: Motion seconded.

CHAIRMAN CASTRO: This motion is not appropriate. Is there another way you can restate it or --

COMMISSIONER YAKI: I move to overrule the Chair.
CHAIRMAN CASTRO: Let --

COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: -- me just finish, Michael. Okay? I'm not trying to be a structionist here. I am concerned about the statement that was placed on the record by our General Counsel about the implication of a criminal statute if we are seen as trying to influence a decision.

Now, I'm not saying this motion does that, I'm saying in my interpretation of how I read this, I'm concerned that it might be crossing that line.

I'm not making a legal conclusion as to that, but as the Chairman, I am asking is there some way you could revise your motion to have it focus other than on a direction that I believe is one that is troubling to the --

COMMISSIONER YAKI: Mr. --

CHAIRMAN CASTRO: -- Agency.

COMMISSIONER YAKI: -- Chair, with all due respect, you're repeated references to a criminal statute are simply misplaced. That statute has no application to this kind of decision that we're dealing with here.

There's the specific exemption within that
statute for personnel matters. This is I do not know where the General Counsel came up with the interpretation. I respect the fact that he did.

I respectfully disagree. I respectfully disagree with the fact that you continue to refer this as potentially criminal when it completely is not, and when, in fact, the whole thrust of this motion is to prevent any injury to this Agency by restoring it to the status quo rather than the situation in which we are dealing with right now. So with all due respect, I stand by my motion. Do you wish --

CHAIRMAN CASTRO: Well, then I have to --

COMMISSIONER YAKI: If you wish to rule it out of order --

CHAIRMAN CASTRO: Wait.

COMMISSIONER YAKI: -- I will --

CHAIRMAN CASTRO: Let me --

COMMISSIONER YAKI: -- take you up --

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: -- on that motion.

MR. SMITH: Mr. Chairman?

CHAIRMAN CASTRO: Wait a second. Yes, I have not had independent legal counsel on that question.

MR. SMITH: All right. Mr. Chairman?
CHAIRMAN CASTRO: All I have right now is --

MR. SMITH: Yes.

CHAIRMAN CASTRO: -- a statement in writing and I think I also mentioned to you all, but I had an oral conversation requesting clarification as well.

We don't have the written clarification on that, but what I have sitting here is our General Counsel, who is our General Counsel, having indicated that this statute can be implicated.

I have not gone out and sought independent counsel for myself on that, but as long as I do not have that clarification from him, I have an abundance of caution.

If nothing else, then for the Agency and for myself I have a problem with the way this motion is worded because as a lawyer, I fully view this as crossing the line. What I would do is, right now, I would ask our General Counsel to please give us some guidance on this motion.

MR. SMITH: Yes, Mr. Chairman, I'm here.

CHAIRMAN CASTRO: Okay. You heard my concerns?
MR. SMITH: Yes. Yes, and I share you concerns, Mr. Chairman.

CHAIRMAN CASTRO: Clarification here. Could you please give us some guidance?

MR. SMITH: Yes, so I just want to read into the record the actual language of the statute itself.

COMMISSIONER NARASAKI: Could you read the whole statute including the exceptions, please?

MR. SMITH: I'm going to read the section that I've referred to in the email that I believe is relevant, but you're free to read the whole thing if you so choose. 18 U.S.C. 205(d)(1) --

COMMISSIONER YAKI: I move this out of order. I move this out of order.

CHAIRMAN CASTRO: It's in order. Go ahead, Commissioner --

COMMISSIONER YAKI: No, I appeal your ruling that it's out of order.

CHAIRMAN CASTRO: Michael, please. I know you --

COMMISSIONER YAKI: Under Robert's Rules --

CHAIRMAN CASTRO: I want to --

COMMISSIONER YAKI: -- the --
CHAIRMAN CASTRO: -- see if we can address it, but I have concerns.

COMMISSIONER YAKI: There was a request --

CHAIRMAN CASTRO: Go on, General Counsel.

COMMISSIONER YAKI: -- to read the entire statute --

CHAIRMAN CASTRO: He can --

COMMISSIONER YAKI: -- and it was denied --

CHAIRMAN CASTRO: -- read it now --

COMMISSIONER YAKI: -- by the General Counsel.

CHAIRMAN CASTRO: -- or now.

COMMISSIONER YAKI: Well --

CHAIRMAN CASTRO: Commissioner --

COMMISSIONER YAKI: -- we're going to read the entire statute.

COMMISSIONER NARASAKI: Mr. Chair --

CHAIRMAN CASTRO: Okay, fine. Please read the entire statute, but Mr. General Counsel, could you please proceed? Because I don't feel comfortable moving forward until --

MR. SMITH: Yes.

CHAIRMAN CASTRO: -- I have a lawyer --

COMMISSIONER NARASAKI: Yes, Mr. Chair,
though --

CHAIRMAN CASTRO: -- point of view.

COMMISSIONER NARASAKI: -- could you --

CHAIRMAN CASTRO: If you want to read the whole statute --

COMMISSIONER NARASAKI: Yes, Mr. Chair --

CHAIRMAN CASTRO: -- I'm fine with that.

COMMISSIONER NARASAKI: -- could you instruct him to --

CHAIRMAN CASTRO: Please proceed.

COMMISSIONER NARASAKI: -- read the whole statute? Thank you.

CHAIRMAN CASTRO: Yes, please proceed.

MR. SMITH: First of all, I decide which sections I believe are applicable legally. And I've already stated, in writing, which section I believe is applicable. So I'm telling you on the record what that is and I will read that. Now before --

COMMISSIONER HERIOT: Is that the way you talk to your clients?

COMMISSIONER KIRSANOW: Wait a minute. Kirsanow here. I am making a specific request as client to my attorney to read the entire statute into the record.
MR. SMITH: My client --

COMMISSIONER KIRSANOW: We are the Commission.

MR. SMITH: Yes, you are.

COMMISSIONER KIRSANOW: You are our counsel.

MR. SMITH: Excuse me.

COMMISSIONER KIRSANOW: As our client, I am making a specific request.

COMMISSIONER NARASAKI: Under the --

COMMISSIONER KIRSANOW: You're my attorney.

CHAIRMAN CASTRO: Well --

COMMISSIONER NARASAKI: -- the C.F.R. --

CHAIRMAN CASTRO: -- is anyone --

COMMISSIONER NARASAKI: -- you are the General Counsel --

CHAIRMAN CASTRO: -- to sit here --

COMMISSIONER NARASAKI: -- to the Commission --

CHAIRMAN CASTRO: You know, we --

COMMISSIONER NARASAKI: -- and the commissioners.

CHAIRMAN CASTRO: This is a difficult
situation for everyone.

MR. SMITH: Do you want me to read the section.

CHAIRMAN CASTRO: We want to try to get as much answered as possible. I don't think we need to, you know, dissolve into yelling at one another or being aggressive with one another because I do, as Chairman, have the right to do what I need to do to keep this civil. I don't want to do that.

Mr. General Counsel, please read the statute. I would ask that you read it in its entirety and that would help us move this forward --

MR. SMITH: MR. Chairman --

CHAIRMAN CASTRO: -- would you please?

MR. SMITH: -- the reason why I'm not reading the entire statute is because it's confusing and all of it is not applicable. So that's why I'm not doing it.

If, after this meeting, you want me to circulate the whole thing, I will do that. But for the purposes of this meeting, I would like to read the particular provision of the statute that I quoted in my email to all of the commissioners.

CHAIRMAN CASTRO: Okay.
MR. SMITH: So --

CHAIRMAN CASTRO: Please proceed with that, but, you know, if Commissioners want to ask you specific questions about other parts of the statute you don't read, I hope you'll be willing to answer those.

MR. SMITH: No, because they're not applicable. However --

COMMISSIONER HERIOT: This is completely --

CHAIRMAN CASTRO: Well --

COMMISSIONER HERIOT: -- stunning.

COMMISSIONER KIRSANOW: I know I'm confused.

CHAIRMAN CASTRO: Mr. General Counsel, if --

COMMISSIONER HERIOT: I feel like I'm in Alice in Wonderland or something.

MR. SMITH: So if --

COMMISSIONER HERIOT: You know, this is simple stuff.

MR. SMITH: Do you want me to read this section or not?

CHAIRMAN CASTRO: Yes, please. Mr. General Counsel, proceed to read us what you're going
to read and then when you're done with that, we will have questions for you.

COMMISSIONER NARASAKI: Could --

MR. SMITH: All right.

COMMISSIONER NARASAKI: -- I ask the Chair to ask the Staff Director to direct the General Counsel to read the entire statute?

COMMISSIONER YAKI: He's already refused on the record.

COMMISSIONER NARASAKI: Staff Director supervises --

CHAIRMAN CASTRO: Read --

COMMISSIONER NARASAKI: -- the General Counsel.

CHAIRMAN CASTRO: Mr. General Counsel, read what you're going to read and then we will ask you questions.

COMMISSIONER KLANDNEY: Mr. Chairman, this is Kladney.

CHAIRMAN CASTRO: Yes.

COMMISSIONER KLANDNEY: I'll read the statute.

COMMISSIONER HERIOT: Thank you, Commissioner Kladney.
COMMISSIONER KLADNEY: If I can see it.

18 U.S.C. --

CHAIRMAN CASTRO: Someone get him his reading glasses.

COMMISSIONER KLADNEY: Pardon, Mr. Chairman?

CHAIRMAN CASTRO: Someone get him his reading glasses.

COMMISSIONER KLADNEY: Yes. Amen.

Section 18 U.S.C. Section 205, Activities of Officers and Employees and claims against and other matters affecting the Government.

Sub (a), whoever, bring an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties - Subsection (1), acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim.

Or Sub (2), acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval
commission in the connection with any covered matter in
which the United States is a party or has direct and
substantial interest shall be subject to the penalties
set forth in Section 216 of this title.

Sub (b), whoever, being an officer or
employee of the District of Columbia, this thing all
deals with the District of Columbia, or an officer or
employee of the Office of the United States Attorney for
the District of the Columbia, otherwise than in the
proper discharge of official duties, Sub (a), acts as
agent or attorney for prosecuting any claim against the
District of Columbia, or receives any gratuity, or any
share of or interest in such claim in consideration of
assistance in the prosecution of such claim.

Or Sub (2), acts as agent or attorney for
anyone before any department, agency, court, officer,
or commission in connection with any covered matter in
which the District of Columbia is a party or has a direct
and substantial interest shall be subject to the
penalties set forth in Section 216 of this title.

Subsection (c), a special Government
employee shall be subject to Subsections A and B only
in relation to a covered matter involving a specific
party or parties.
Sub (1), in which he has any interest, has any time participated personally and substantially as a Government employee or a special Government employee through the decision, approval, disapproval, recommendation, the pending of advice, investigation, or otherwise, or 2, which is pending in the department or agency of the Government in which he is serving.

Paragraph 2, shall not apply in the case of a special Government employee who has served in such department or agency no more than 60 days during the immediately preceding period of the 365 consecutive days.

Sub (d), sub (1), nothing in subsection A or B prevents an officer or employee, if not inconsistent with the faithful performance of that officer or employee's duties, from acting without compensation as agent or attorney for, or otherwise representing sub capital A, any person who is the subject of disciplinary, loyalty, or other personnel administrative proceedings in connection with those proceedings.

Or capital B, except as provided in Paragraph (2), any cooperative, voluntary, professional, recreational, or similar organization or
group not established or operated for profit if a majority of the organization's or group's members are current officers or employees of the United States or the District of Columbia or their spouses or dependent children.

Sub (2), Paragraph (1)(B), that's capital B, does not apply with respect to a covered matter that, and I'm out.

CHAIRMAN CASTRO: Hello? Did I lose you --

COMMISSIONER KLASNY: Well, no.

CHAIRMAN CASTRO: -- or did you give up?

COMMISSIONER KLASNY: I lost the end of the word. It was the end of this sheet of paper. Wait a second. I've got more now.

CHAIRMAN CASTRO: All right.

COMMISSIONER KLASNY: We're at Sub (2). Oh, here it is. Wait a second. Where was that section of the statute? Oh, that. Capital A, is a claim under Subsection small A(1) or small B(1).

Capital B, is a judicial or administrative proceeding whether the organization or group is a party or capital C, involves a grant, contract, or other agreement (including a request for any such grant,
contract, or agreement) providing for the disbursement of Federal funds to the organization or group.

Subsection (e), that's small E, nothing in subsection small A or small B prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for, or otherwise representing, his parents, spouse, child, or any person for whom or for any estate for which he is serving as guardian, executor, administrator, trustee, or other personal fiduciary.

Except 1, in those matters in which he has participated personally and substantially as a Government employee or a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.

Or 2, in those matters which are the subject of his official responsibility, subject to approval by the Government official responsible for appointment to his position.

Small F, nothing in subsection small A or B prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by or a contract with or for the
benefit of the United States if the head of the department or agency concerned with the grant or contract certifies in, excuse me, certifies contract or -- the United States is the head of the -- wait a second.

I lost my place. I apologize. I'll start again. F, nothing in subsection (a) or (b) prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by or a contract with or for the benefit of the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

Excuse me, but you asked me to read the statute, so I am reading it. And it's hard to read when people are talking. Small G, nothing in this section prevents an officer or employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

Small H, for the purpose of this section, the term "covered matters" means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy,
investigation, charge, accusation, arrest, or other particular matter.

Small I, nothing in this section prevents an employee from acting pursuant to 1, Chapter 71 of Title 5; 2, Section 1004 of Chapter 12 of Title 39; 3, Section 3 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831 small B); 4, Chapter 10 of Title I of the Foreign Service Act of 1980 (22 U.S.C. 4104 et seq.); or management relations between an agency or instrumentality of the United States or the District of Columbia and any labor organization that represents its employees. Does anybody want me to read the --

COMMISSIONER NARASAKI: No, I'm willing to stipulate.

COMMISSIONER HERIOT: What's left?

COMMISSIONER YAKI: The legislative history.

COMMISSIONER HERIOT: Oh no, we don't need it. Let's just --

COMMISSIONER NARASAKI: Thank you, Commissioner.

CHAIRMAN CASTRO: Are you done, Commissioner Kladney?

COMMISSIONER KLADEY: Well, unless you
want me to read the amendments and the years they were made?

CHAIRMAN CASTRO: No, that's okay. I'm already falling asleep from the first version. I'm sorry. Mr. General Counsel, do you have anything to say? Mr. General Counsel?

MR. SMITH: Yes, I'm here, Mr. Chairman.

No, thank you.

CHAIRMAN CASTRO: You have nothing to add?

MR. SMITH: No, he read the entire statute.

CHAIRMAN CASTRO: Okay. So does it continue to be your position that this motion -- what's your position as to the appropriateness of this motion? I guess, is the question --

MR. SMITH: Right.

CHAIRMAN CASTRO: -- I have for you.

MR. SMITH: Can you repeat the motion? I don't remember what it is now. Oh.

COMMISSIONER ACHTENBERG: It's this one.

COMMISSIONER KLANDNEY: Can I show it to him --

COMMISSIONER YAKI: No, I rewrote it. I took it --

CHAIRMAN CASTRO: If you could reread it,
Commissioner Yaki, that would be helpful.

COMMISSIONER YAKI: I move that we reaffirm that it is the policy of the U.S. Commission on Civil Rights that each commissioner is the sole supervising and appointed official of his or her special assistant.

The termination of any special assistant as a confidential accepted service of appointees within the sole discretion of the supervising commissioner and that the Staff Director, as the Administrative Head of the Agency, executes the appointment and termination process at the behest direction and discretion of each commissioner.

Pursuant to this directive, any decision of the Staff Director pursuant to this now revoked policy is hereby declared ultra vires, null and void.

And that the Staff Director is directed to ensure that any actions taken pursuant to this now revoked directory are rescinded and restored. And any person terminated pursuant to this is restored to the all ranks and privilege effected day of any purported termination or any other action.

CHAIRMAN CASTRO: Mr. General Counsel?

MR. SMITH: Yes, Mr. Chairman. So, thank
you, Commissioner Yaki. So my position is still going back to what I said, I don't know how long ago, concerning the delegation of authority from OPM. This motion would still change that language in effect from the regulations that OPM has promulgated for all Federal agencies. So --

COMMISSIONER NARASAKI: Is it the motion wording, Mr. General Counsel?

MR. SMITH: Well, I think the question that was posed to me was do I still have concern with the motion. So the answer is yes and I was trying to explain why.

COMMISSIONER NARASAKI: Okay.

COMMISSIONER KLANDNEY: Mr. Chairman, Kladney here.

CHAIRMAN CASTRO: Yes, Commissioner Kladney.

COMMISSIONER KLANDNEY: I have a question for the General Counsel. Don't scoot away.

MR. SMITH: Okay. Okay. I'm here. I'm waiting.

CHAIRMAN CASTRO: Go ahead.

COMMISSIONER KLANDNEY: This authority from OPM is that the General Regulatory Authority? Is
that what you're citing? Any special requests from
them regarding this situation -- not this situation, a
situation concerning a special assistant to a
commissioner and the Administrative Head of the Agency?

MR. SMITH: Mr. Kladney, are you asking if
I have --

COMMISSIONER KLADNEY: Assumed --

MR. SMITH: -- sought out opinions from OPM
or are you asking --

COMMISSIONER KLADNEY: Yes.

MR. SMITH: -- me am I referring to a
certain language?

COMMISSIONER KLADNEY: Yes, are you
referring to a CFR or --

MR. SMITH: Yes. And I can tell you what
that statute or that regulation is. So the regulation
is headed Schedule C and the citation is 5 C.F.R.
213.3301 et al. And let's see, it says positions of --

COMMISSIONER YAKI: Could you reread that
again, 5 U.S.C. what?

MR. SMITH: Yes, it's 5 C.F.R. --

COMMISSIONER YAKI: 5 C.F.R.

MR. SMITH: -- 213.3301 and it's positions

of a confidential or policy determining nature.
COMMISSIONER KLADNEY: What's it --

MR. SMITH: Did that answer your question?

COMMISSIONER KLADNEY: -- say?

MR. SMITH: So --

COMMISSIONER KLADNEY: I don't want to --

MR. SMITH: Yes.

COMMISSIONER KLADNEY: -- force you to read it.

MR. SMITH: Right, but --

COMMISSIONER KLADNEY: I'll read it if you want me to.

MR. SMITH: Are you asking to read the language --

COMMISSIONER KLADNEY: No, I just --

MR. SMITH: -- or are you asking me to say what I think it says?

COMMISSIONER KLADNEY: Well, why don't you say what you think it says and refer to the part that it says it --

MR. SMITH: So it goes back to --

COMMISSIONER KLADNEY: -- so I can get an opinion.

MR. SMITH: Yes, this goes back to the Staff Director's opening remarks. And so this section
here says that the authority of Schedule C is delegated from OPM to the Agency. That's what this says.

COMMISSIONER YAKI: Commissioner Yaki.

CHAIRMAN CASTRO: Yes, go ahead.

COMMISSIONER YAKI: Mr. Chair, with all due respect to the General Counsel, this is a general delegation. The reg does not speak to the nature of the appointing official, supervisor, other types of relationships that are involved.

It is an administrative regulation that details how Schedule Cs are to be processed. It does not detail how they are to be appointed, who is to be appointed, who is to be supervising, who determines fitness and duty, all those other issues that are at issue here and which, by the way, I believe are within the discretion and policy-making ability of this Agency.

And by the way, I'm just going to say, I want to say this very clearly, nothing that I am proposing or that other people have been talking about here today is extraordinary or out of the ordinary. It does not cause any changes to OPM.

I believe that if you were to ask, again, I go back to the fact that spanning over 20 years of
commissions to a person, all individuals who I spoke to from general counsel or staff director positions believe that the position that I am asserting today and which is contained in this motion is the correct and true position of this Agency and has been and should continue to be.

So I moved the question. I'd like us to take a vote on it. And Mr. Chair, I understand your reluctance. If you wish to abstain or vote no, you may, but I want to move this question now.

CHAIRMAN CASTRO: I have concerns about --

COMMISSIONER ACHTENBERG: Mr. Chairman, can I articulate what I think the motion is either out of order or if it's ruled in order, which I'm willing to accept. While I'm going to vote against the motion, are you suggesting, Mr. Yaki, that we've had sufficient discussion and are you moving the previous question or not?

COMMISSIONER YAKI: I am moving the previous question. But however, Commissioner Achtenberg, if you wish to state your reasons why you will not support it, I defer to you.

COMMISSIONER ACHTENBERG: I have to say that I believe that we, as commissioners, are in need
of counsel and I want to seek the opinion of counsel before I vote on such a motion. And if forced to vote on such a motion, I'm going to vote no.

I don't know the extent to which it's an accurate representation of the law. And it is absolutely the case, as Commissioner Heriot suggested, that one is entitled to disagree with one's counsel.

But in my opinion, we, as the commissioners, have not been proffered the opinion of counsel about what authority we do and do not have, which as commissioners to the extent that we may be deemed separate from the Agency who's action is embodied by the Staff Director.

She may indeed have the authority she purports to have or not. But whether or not she does, I'm not sure that a motion adopted by us is, you know, dispositive in that regard.

And I don't necessarily agree with the notion that under no circumstances can any staff director discipline in any way any Schedule C for any reason.

Certainly, she can't do it for an impermissible reason, but that doesn't mean that she can't do it for any reason. And I want to test out that
thought on my part with the opinion of a lawyer who I think we're entitled to, as commissioners, you know, the appointment of some kind of special counsel.

We've been, you know, sometimes when your lawyer is conflicted out, we, you know, you can provide separate counsel. And I want to suggest that that's what I think is the appropriate action in this case.

COMMISSIONER YAKI: And --

COMMISSIONER ACHTENBERG: So if the motion is in order, I'm going to vote no. But I want to suggest that there's the possibility that it could be ruled out of order. And if that ruling can be overruled by a majority vote of the Commission then I suppose if it can be and I suppose it will be, I'm, you know, I'll accept that as well. But I just wanted to offer that rationale on the record because that's --

CHAIRMAN CASTRO: And thank you Commissioner Achtenberg. I appreciate that.

COMMISSIONER Kladney: Commissioner Castro.

CHAIRMAN CASTRO: Let me --

COMMISSIONER Kladney: Chairman Castro.

CHAIRMAN CASTRO: -- just say here, my inclination right now is to rule this motion out of
order. However, given the point that Commissioner Achtenberg has raised, I think it's important for us to have some form of independent counsel, whether it's special counsel or whether we figure out whether there's an agency out there that will give us counsel or whether we hire someone to take a look at this questions for us.

I would feel comfortable tabling this motion until such time as our next business meeting where we, in the interim, can seek counsel to determine whether or not -- well, as I think was so eloquently stated by Commissioner Achtenberg.

That way I'm not ruling it out of order at this point. We're just sort of putting it in a ban while we go out and thoughtfully get counsel.

COMMISSIONER KLADNEY: I asked for that like two-and-a-half weeks ago, Mr. Chairman. And --

COMMISSIONER NARASAKI: And I'll document.

CHAIRMAN CASTRO: At the same time, Commissioner Kladney, we do want to give people the opportunity to be heard. And I know that that's important and that's what we've been trying to do here today. But I appreciate that.

COMMISSIONER KLADNEY: But I'm not
CHAIRMAN CASTRO: Okay. Go ahead.

COMMISSIONER Kladney: And our next meeting is going to be like five or six weeks away, so what do we do in the interim?

CHAIRMAN CASTRO: Get an answer.

Commissioner Narasaki, I note you want to speak?

Commissioner Narasaki?

COMMISSIONER NARASAKI: Yes, sorry. I am wondering, I don't know that Commissioner Achtenberg answered the question that I had asked earlier which is would it be useful at this point, in fact, to hear from a former general counsel to the Agency to get their opinion.

We're a fact-finding agency and one of the ways we find facts is to hear from experts. And I'm wondering if that would be useful for determining whether, in fact, we need to expend the Commission's money to hire special counsel.

COMMISSIONER ACHTENBERG: Well, let me just say that I'm --

COURT REPORTER: I'm sorry, you're not on the --

COMMISSIONER ACHTENBERG: -- not
expressing any opinion about anyone's competence or
motivation or anything like that. And I'm pleased to
make the acquaintance of a former general counsel of
this Agency.

But I believe that when our counsel is
conflicted out, that it, you know, it's incumbent upon
him to find counsel for the commissioners to the extent
that there is a distinction between the Commission and
the Commissioners.

Now, I mean, I don't know that that's a
valid position, but that's one of the positions I think
needs to be explored in this case. And that's why I'm
reluctant to vote on something that seems to conflate
the Commission and the Commissioners.

I think we need separate counsel. And I
don't believe that we are putting the Agency in the best
position possible by asserting that we have the
authority as the Commission to supersede our Staff
Director's actions in this case. I have no confidence
that that's prolonged.

CHAIRMAN CASTRO: And for the reasons I
stated earlier, I think it's not fair to bring one
witness today when this is not the appropriate forum and
not allow for others to come. But anyway, Commissioner
Yaki, I know you have your hand up?

COMMISSIONER YAKI: Yes. I just want to say that I did not want this special meeting to have to occur. I did everything in my power to try to deal with issues in a way. This particular authority --

MS. SALLO: Commissioner --

COMMISSIONER YAKI: I'm not talking about any specific instance.

MS. SALLO: No, but you're also not providing me with an opportunity to speak when you know that I'm bound by the Privacy Act.

COMMISSIONER YAKI: I am simply stating that I did everything I could to try and avoid to have this meeting occur. That's a simple statement of fact. I'm not too sure what you mean by the other stuff, but I'll just say that I appreciate your objection.

What Commissioner Achtenberg wishes to do is, I think, appropriate and helpful and should have been done long ago. But we're now in a situation where authority has been asserted. That authority has been various concerns among commissioners.

And the motion today restores the status quo, prevents any potential injury to the Commission and allows the inquiry posed by Commissioner Achtenberg to
go forward.

Absent this motion, we actually do fall into the potential problems that the General Counsel has laid out. And with that, again, I call the question and ask for a vote.

CHAIRMAN CASTRO: Commissioner Yaki, again, by saying you want to return to the status quo, what that is communicating to me is that you're trying to change a specific HR decision. That causes me concern based on all of the issues we discussed here today.

What I'm trying to do is to find a safe harbor for us to address this and allow your questions to be resolved and allow the opportunity to properly be heard on these issues without crossing any lines that may or may not be there.

And that's why, I think, what Commissioner Achtenberg is suggesting is not only thoughtful, but I think it's extremely wise for us to do.

COMMISSIONER YAKI: Well, I --

CHAIRMAN CASTRO: I don't want to rule your motion out of order right now. I want to be respectful and ask if you'll allow us to at least, you know, table it and go out and figure out if we can get counsel to
help address this issue.

COMMISSIONER Kladney: Mr. Chairman, Kladney here. I'm --

CHAIRMAN CASTRO: Commissioner Kladney, go ahead.

COMMISSIONER YAKI: Yes.

COMMISSIONER Kladney: I'd like to request a 15-minute recess.

CHAIRMAN CASTRO: For what purpose?

COMMISSIONER ACHTENBERG: So we could take a break.

COMMISSIONER Kladney: There are several.

CHAIRMAN CASTRO: Oh, okay.

COMMISSIONER Kladney: I would like to take a break and --

COMMISSIONER HERIOT: Don't make me say anything.

CHAIRMAN CASTRO: No, you don't have to go into too much detail if you need to do certain things, but do you want me to call in somewhere or are you all going to kibbutz without the Chairman? In fact, you know, go ahead. Take how long a recess?

COMMISSIONER YAKI: Ten.

COMMISSIONER Kladney: Ten.
MR. SMITH: Or whatever.

CHAIRMAN CASTRO: Ten minutes, okay.

Well then --

COMMISSIONER KLANDNEY: Okay. But the --

CHAIRMAN CASTRO: -- ten minutes.

COMMISSIONER KLANDNEY: -- General Counsel wanted to say something.

CHAIRMAN CASTRO: All right. Mr. General Counsel before we go recess, please.

MR. SMITH: Yes, Mr. Chairman. I just wanted to speak to the issue of conflict. And I wanted to raise this point because I think it's critical.

General Counsels often give advice that many agree with, many disagree with and some are in emboldened about. But just because you don't have to agree with a decision, doesn't mean that there's a conflict. And so I wanted to make that clear.

I can give advice that you don't agree with, but it doesn't mean, and in this case there isn't a conflict, I'm just giving advice that you may or may not agree with. So I wanted to put that on the record and just to make that statement. So thank you.

COMMISSIONER NARASAKI: Mr. Chair, this is Commissioner Narasaki.
CHAIRMAN CASTRO: Yes, Commissioner.

COMMISSIONER NARASAKI: I might be confused, but my understanding is that it was, in fact, the General Counsel who voiced that he felt that there was a conflict of interest here between what he views the Commissioner's view and the Commission's view as represented by, at least, the perspective of the Staff Director and General Counsel.

So the conflict is not because we disagree with the General Counsel. In fact, I read the emails and the statements here today as really something that was put out by him.

I believe that Commissioner Achtenberg is correct in her assessment of where things stand. Because we were told by the General Counsel that he would not opine, well, he would not discuss the matter any further.

We've made many requests for written legal opinion so that we could -- you know, I'd be happy to agree if I had something to look at to determine whether in fact I could agree, but that was not in offering. So I believe that is what Commissioner Achtenberg is referring to.

CHAIRMAN CASTRO: Okay. We're going to
take a ten minute recess. It is now 11:19 Eastern, so we will be back at 11:29 Eastern. Thank you.

(Whereupon, the above-entitled matter went off the record at 11:20 am and resumed at 11:56 a.m.)

MS. SALLO: Chairman Castro, everyone's in the room now.

CHAIRMAN CASTRO: Is everyone back?

MS. SALLO: Yes, sir.

CHAIRMAN CASTRO: Is that a yes?

MS. SALLO: Yes.

CHAIRMAN CASTRO: Okay. All Commissioners are back. Commissioner Kirsanow, are you on the phone?

COMMISSIONER KIRSANOW: Sorry. I am.

CHAIRMAN CASTRO: Okay. So we're back on the record. Recess took a little longer than ten minutes, but so where were we?

COMMISSIONER KLADNEY: Mr. Chairman, I don't know the proper procedure, but I'd like to offer an alternative motion to Commissioner Yaki's motion.

CHAIRMAN CASTRO: Okay. Go ahead.

COMMISSIONER KLADNEY: The Commission shall hire outside counsel of its choosing to render an opinion regarding the extent to which the Staff
Director's authority to take adverse action against a Schedule C employee.

Furthermore, since no written legal opinion has been rendered concerning the subject of any Schedule C employee who has had an adverse employment action taken against them, they shall be reinstated with back pay, if possible, and placed on administrative leave with pay pending further action by the Staff Director and/or Commission.

COMMISSIONER ACHTENBERG: Second.

CHAIRMAN CASTRO: Who seconded that?

COMMISSIONER ACHTENBERG: Achtenberg.

CHAIRMAN CASTRO: I'm sorry?

COMMISSIONER ACHTENBERG: Commissioner Achtenberg.

CHAIRMAN CASTRO: Okay. Discussion?

COMMISSIONER YAKI: It's Commissioner Yaki.

CHAIRMAN CASTRO: Yes.

COMMISSIONER YAKI: I wish to speak to this motion. I have one problem in the initial wording and that is one of the issues that has been brought up here is the definition of Commission.

I wonder if we could add a friendly
amendment to ask that the Commission designate a special committee comprised of three members of the Commission, Commissioner Narasaki, Commissioner Kladney and Commissioner Heriot to -- I mean, I'm sorry, Commissioner Narasaki, Commissioner Achtenberg and Commissioner Heriot to be engaged in selecting counsel and forwarding it to the entire Commission for approval.

COMMISSIONER KLADNEY: That's fine with me.

CHAIRMAN CASTRO: Is the Staff Director there?

MS. SALLO: Yes. Yes, sir.

CHAIRMAN CASTRO: Madam Staff Director, I'd like your thoughts on this motion before I determine our next steps.

MS. SALLO: Well, Chairman, I can't opine on the motion. All I can say is that an action was taken and the action stands. That is all I can say, sir.

CHAIRMAN CASTRO: Is Mr. Smith available?

COMMISSIONER YAKI: Is what?

CHAIRMAN CASTRO: Our General Counsel, Rorey?

MR. SMITH: Yes, Mr. Chairman. Sorry. I'm coming up to the mic. And so your question to me
Chairman Castro: Question to you is this motion, as it's been crafted, appropriate insofar as the issue that I had a concern with earlier on the prior motion?

Mr. Smith: So my response to this is it's actually pretty similar to, I think, one of the earlier motions that Commissioner Yaki put forth where I stated that in my opinion, this undoes the delegation provided by OPM. So that's my position on this motion as well.

Chairman Castro: Well, I'm going to ask, once again, as I asked with Commissioner Yaki's original motion, I think we can table this motion pending getting outside counsel and then return to the issue. Otherwise I'm going to rule the motion out of order given the concern of --

Commissioner Kladney: That'll be fine, Mr. Chairman, because this is the only alternative I can come up with.

Chairman Castro: And, you know, Commissioner Kladney, I really do appreciate that you tried. I thank you for that.

Commissioner Kladney: Someone has to take action somewhere, Mr. Chairman.
CHAIRMAN CASTRO: No, I appreciate that. And I'm trying to see if we can find the middle ground as well to see if we can at least table these motions and get that legal counsel which I think is really at the core of your motion and then to be able to better address the concerns with counsel having been provided to us, which was raised by Commissioner Achtenberg very thoughtfully before we went on recess.

COMMISSIONER NARASAKI: I don't agree.

COMMISSIONER YAKI: So --

CHAIRMAN CASTRO: So --

COMMISSIONER YAKI: -- Mr. Chair, are you ruling this out of order?

CHAIRMAN CASTRO: Yes, I am.

COMMISSIONER YAKI: Okay. I'm appealing that ruling to the entire body. I'd like a roll call vote.

COMMISSIONER NARASAKI: Can I ask, I'm a little confused, which motion are we on because we were formally on --

COMMISSIONER ACHTENBERG: I think we have the original motion.

COMMISSIONER NARASAKI: -- the original motion. So I just want to be clear --
COMMISSIONER ACHTENBERG: Yes, right.

COMMISSIONER NARASAKI: -- which one we're talking about.

CHAIRMAN CASTRO: Well, right now, we're talking about Commissioner Kladney's motion.

COMMISSIONER NARASAKI: Original motion?

COMMISSIONER YAKI: No, no, I think from a procedural perspective, this is Commissioner Yaki, he offered a substitute motion. There was a second. You ruled it out of order. I --

COMMISSIONER NARASAKI: No.

COMMISSIONER YAKI: -- appeal that rule -- no, no, no, no, because then we go back to the original motion after this one.

CHAIRMAN CASTRO: Right. We're at the --

COMMISSIONER YAKI: No, no, actually, hang on, hang on. Hang on.

COMMISSIONER HERIOT: Just split it off.

COMMISSIONER YAKI: Let me --

COMMISSIONER HERIOT: He just ruled that out of order.

COMMISSIONER YAKI: Oh, he just ruled that out of order. Okay. Then we go back to the original motion then, that I proposed.
CHAIRMAN CASTRO: Okay. And so I rule the
original motion out of order as well.

COMMISSIONER YAKI: And then I appeal that
ruling.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: And so I ask for a roll
call vote.

COMMISSIONER ACHTENBERG: Okay.

CHAIRMAN CASTRO: Okay. Let me get my
roll call list. Hold on a second. Bear with me. And
I --

COMMISSIONER ACHTENBERG: Procedurally on
this, is a yes vote a vote in favor of then voting on
the motion?

CHAIRMAN CASTRO: Repeat that?

COMMISSIONER YAKI: No, procedurally, a
yes vote is agreeing with the Chair.

COMMISSIONER ACHTENBERG: Okay. So,
what, a --

COMMISSIONER YAKI: A no vote --

COMMISSIONER ACHTENBERG: -- no vote to
disagree with the Chair.

COMMISSIONER YAKI: -- is disagreeing with
the Chair.
CHAIRMAN CASTRO: Right. So if you agree with me that it is out of order, you vote yes.

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Yes.

COMMISSIONER NARASAKI: Which motion?

COMMISSIONER HERIOT: Motion --

CHAIRMAN CASTRO: The original motion.

COMMISSIONER HERIOT: -- to overrule the Chair's decision that this cannot be put forward. So a no vote puts forward the original motion.

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Correct. Is that right --

COMMISSIONER HERIOT: And then we'll have --

CHAIRMAN CASTRO: -- Commissioner Heriot?

COMMISSIONER HERIOT: -- a vote on the original motion.

CHAIRMAN CASTRO: Okay. So first we're voting on the substitute motion, is that right then?

COMMISSIONER ACHTENBERG: No, we're voting whether to overrule the Chair --

CHAIRMAN CASTRO: Okay. Got it.

COMMISSIONER ACHTENBERG: -- on the first
motion.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: You ruled the --

CHAIRMAN CASTRO: If you overrule me, then you're going to vote on the underlying motion.

COMMISSIONER KIRSANOW: Personally, we could have just recant, make a motion again and what would make an impression of a yes or no.

CHAIRMAN CASTRO: Michael, you want to repeat your original motion? I think that's what we're getting to, right?

COMMISSIONER YAKI: Yes, well -- no, no --

CHAIRMAN CASTRO: No, no --

COMMISSIONER YAKI: I --

CHAIRMAN CASTRO: -- I am ruling his original motion out of order. And so you're going to vote on whether you support my ruling. And if you do, you vote yes. If you don't, then you vote no. Is that clear?

COMMISSIONER KIRSANOW: Understood.

CHAIRMAN CASTRO: Okay. So on my ruling of it's out of order, Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: No.
CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLASDEY: No.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: I vote no.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes. Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: You vote yes? I'm sorry.

COMMISSIONER ACHTENBERG: I vote to support the Chair ruling it out of order.

CHAIRMAN CASTRO: Okay. I didn't hear you. I'm sorry. Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: No.

CHAIRMAN CASTRO: Let's see who am I missing here. Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: No.

CHAIRMAN CASTRO: And I vote yes. That's
two yeses and five nos. So I have been overruled.

COMMISSIONER HERIOT: Call the question.

COMMISSIONER YAKI: I'd like to offer an amendment to my motion to clean up some of the language so we have one thing to work off of because --

COMMISSIONER HERIOT: Are you amending it or --

COMMISSIONER YAKI: I'm --

COMMISSIONER HERIOT: -- just making a --

COMMISSIONER YAKI: Well, I'm --

COMMISSIONER HERIOT: -- putting it forward in a slightly different format?

COMMISSIONER YAKI: I'm putting it forward in a slightly --

COMMISSIONER HERIOT: You want to --

COMMISSIONER YAKI: -- different --

COMMISSIONER HERIOT: -- full amendment.

COMMISSIONER YAKI: -- format to make it a little clearer. I move that the Commission reaffirms that it is the policy of the U.S. Commission on Civil Rights that each Commissioner is the sole supervising and appointed official of his or her special assistant.

The termination of any special assistant as a confidential accepted service appointee is within the
sole discretion of the supervising Commissioner and that the Staff Director, as the Administrative Head of the Agency, executes the appointment and termination process at the behest, direction and discretion of each Commissioner.

Pursuant to this reaffirmation of policy any adverse action taking by the Staff Director with regard to any special assistant is declared ultra vires and null and void.

And the Staff Director is hereby directed to process all paperwork and take any action necessary to restore the ranks and privileges of any such special assistant terminated by her action. That's my motion.

CHAIRMAN CASTRO: I'll take a roll call vote then.

COMMISSIONER YAKI: Okay.

COMMISSIONER ACHTENBERG: Has it been seconded?

COMMISSIONER HERIOT: Seconded. I don't think it needs it --

CHAIRMAN CASTRO: I'll need a second?

COMMISSIONER HERIOT: -- but there it is anyway, seconded.

CHAIRMAN CASTRO: I'm sorry. I thought
it'd been previously seconded.

COMMISSIONER HERIOT: Yes, it had been.

COMMISSIONER KLADEY: It has been.

CHAIRMAN CASTRO: All right. Well, I'll just remind everybody about the statute that was pointed out by our General Counsel previously, but I will now take the roll. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADEY: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Absolutely not.

CHAIRMAN CASTRO: I'm sorry, I didn't hear you.

COMMISSIONER ACHTENBERG: No. The answer's --

CHAIRMAN CASTRO: No --

COMMISSIONER ACHTENBERG: -- no.

CHAIRMAN CASTRO: -- okay. Commissioner
Narasaki, how do you vote?

COMMISSIONER NARASAKI: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: And I vote no, so that's two nos and five yeses. Okay. Is this all the business that we have today?

COMMISSIONER KLADNEY: No.

CHAIRMAN CASTRO: No?

COMMISSIONER KLADNEY: I have a couple of motions I'd like to make regarding legal opinions.

CHAIRMAN CASTRO: Okay. I thought you were not going to make those, but go ahead.

III. LEGAL MEMORANDUMS AND OPINIONS

REQUEST WRITTEN OPINION AS TO REAPPOINTMENT POLICY

COMMISSIONER KLADNEY: My first motion is in September we had a meeting and we were informed that the FACA disallowed our reappointment policy, I think, in our AIs. And I requested a written opinion as to that and I have yet to receive one. So I'd like the Commission to direct the General Counsel that we receive a written opinion on that issue.

MS. SALLO: Can you please provide me with
that?

COMMISSIONER Kladney: It's in the transcript.

MS. Sallo: Okay. For which meeting?

COMMISSIONER Kladney: September -- I'm sorry, August.

MS. Sallo: August? Thank you.

CHAIRMAN Castro: Well --

COMMISSIONER Kladney: So do you want to take them one at a time or you want to take them all together, Mr. Chair?

CHAIRMAN Castro: One at a time.

COMMISSIONER Kladney: Okay. That's my first motion. Do I have a second?

COMMISSIONER Kirsanow: Kirsanow second.

COMMISSIONER Kladney: I think we can call the question.

CHAIRMAN Castro: There's no discussion?

COMMISSIONER Kladney: Well, nobody looks like they want to talk.

CHAIRMAN Castro: We did amend the agenda to do this, right, is my recollection?

COMMISSIONER Achtenberg: Yes, we did.

COMMISSIONER Yaki: We did.
CHAIRMAN CASTRO: Yes, I thought so.
Okay. So we have a motion and I'll do a roll call.

COMMISSIONER KLADNEY: Can --

COMMISSIONER HERIOT: I'm sorry. I didn't hear the motion.

COMMISSIONER KLADNEY: Okay. The motion --

CHAIRMAN CASTRO: Can you restated it, Commissioner Kladney?

COMMISSIONER KLADNEY: -- is that we request a written opinion from our General Counsel regarding FACA and his opinion that our AI concerning reappointments is in opposite to that statute. And actually, I'd like to add something to that motion, that we receive that opinion, hopefully, two weeks before the November meeting.

CHAIRMAN CASTRO: Is there a second to that motion?

COMMISSIONER KIRSANOW: Kirsanow seconds.

CHAIRMAN CASTRO: All right. Any discussion? None, I'll take a roll call. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Kladney,
how do you vote?

COMMISSIONER Kladney: Yes.

CHAIRMAN CASTRO: Commissioner Heriot,

how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: Yes.

CHAIRMAN CASTRO: I'm sorry. I can't hear you, Commissioner.

COMMISSIONER ACHTENBERG: Yes. Yes.

CHAIRMAN CASTRO: Yes. Okay.

Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: Yaki?

COMMISSIONER YAKI: I'm sorry, my mic was off. Yes.

CHAIRMAN CASTRO: And I abstain. So we have one, two, three, four, five, six yeses and an abstention. The motion carries. Your next motion, Commissioner Kladney?
LEGAL OPINION REGARDING JURISDICTION

OF THE COMMISSION

COMMISSIONER KLANDNEY: My next motion concerns receiving a legal opinion regarding the jurisdiction of the Commission. I've heard several different things, but I've seen nothing in writing concerning the jurisdiction of the Commission requiring that there be a Federal hook.

I've read the statute many times and I may or may not agree. So my motion is to request to General Counsel to provide us with a written legal memorandum and opinion concerning the jurisdiction of the Commission and what exactly we are allowed under his opinion to do and not do concerning our authorizing statute.

I would also ask as a -- well, let's start with that one. And that it be done two weeks before our November meeting, provided to us.

CHAIRMAN CASTRO: Is there a second to that motion? Is there a second?

COMMISSIONER HERIOT: I'll second it.

CHAIRMAN CASTRO: Okay. Any discussion?

COMMISSIONER KIRSANOW: Yes, Kirsanow here. I'll just note that I think although I'm prepared
to support Commissioner Kladney's motion, that it's my opinion that the Commission, and by that I define the Commission as the Commissioners as to the statute.

So while I'm happy to get the opinion, my voting in favor of getting that opinion, I guess, here by law my own authority to determine what our jurisdiction is.

COMMISSIONER KIRSANOW: Well, I understand completely.

COMMISSIONER HERIOT: Mr. Chairman?

CHAIRMAN CASTRO: Yes, Commissioner Heriot.

COMMISSIONER HERIOT: I just wanted to comment on this as well that yes, in this last round of concept papers, we got the opinion from the General
Counsel's office about jurisdiction.

And I just wanted to emphasize again, it is good to get the opinion of the General Counsel or anybody else that wants to voice an opinion on our jurisdiction.

But the decision is ultimately the Commission's. The General Counsel's office does not have the authority to alter concept papers and, you know, can tell us whether or not the attorneys in that office think that we have jurisdiction over that matter, but ultimately, the decision is the Commission's.

CHAIRMAN CASTRO: Any other comments or discussion before we vote on the motion?

COMMISSIONER YAKI: This is Commissioner Yaki.

CHAIRMAN CASTRO: Hearing none, I'll --

COMMISSIONER YAKI: I'm sorry. This is --

CHAIRMAN CASTRO: -- take a roll call vote.

COMMISSIONER YAKI: I'm sorry, Mr. Chair.

This is Commissioner Yaki.

CHAIRMAN CASTRO: Yes.

COMMISSIONER YAKI: I just wanted to reinforce the statements made by Commissioners Kladney, Kirsanow and Heriot, and that is, in the end, it is, I think, within the purview of the Commission as
constituted by the eight commissioners to ultimately make the determination.

But I agree with Commissioner Kladney, it would be helpful to get some clarity, at least, or some counsel on this issue.

CHAIRMAN CASTRO: Okay. Any other things before I take a roll call vote on it? All right. None, I'm going to go ahead and read the roll. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Of course.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLADNEY: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

COMMISSIONER ACHTENBERG: No.

CHAIRMAN CASTRO: I think there's something wrong with your mic, Commissioner Achtenberg --

COMMISSIONER ACHTENBERG: No.

CHAIRMAN CASTRO: -- since there --
COMMISSIONER ACHTENBERG: No --

CHAIRMAN CASTRO: No?

COMMISSIONER ACHTENBERG: -- Mr. Chairman.

CHAIRMAN CASTRO: Okay. Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: Yes.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: And I also vote no. So we have two nos to one, two, three, four, five yeses. The motion passes.

COMMISSIONER KLADNEY: My next motion is --

CHAIRMAN CASTRO: You have one more motion, you said, Commissioner Kladney?

COMMISSIONER KLADNEY: One or two. I'm not sure.

CHAIRMAN CASTRO: Oh really? Okay. You're very prolific today.

WRITTEN OPINION REGARDING IF OGC BELIEVES THE SAME JURISDICTIONAL REQUIREMENTS APPLY TO SACs

COMMISSIONER KLADNEY: Well, it really all
has to do with legal opinions. There was a policy instituted by the head of the RPCU that all concept papers from SACs must be reviewed by RPCU and OGC prior to the SACs deliberating and voting on it.

And I am wondering whether the same jurisdictional requirements, if the OGC believes the same jurisdictional requirements apply to the SACs per the opinion I just requested. So I'd like a written opinion on that also, two weeks before our November meeting. And that's my motion.

CHAIRMAN CASTRO: Is there a second.

COMMISSIONER HERIOT: Second.

CHAIRMAN CASTRO: Any discussion? Hearing none, I'll take the roll. Commissioner Kirsanow, how do you vote?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN CASTRO: Commissioner Kladney, how do you vote?

COMMISSIONER KLANDNEY: Yes.

CHAIRMAN CASTRO: Commissioner Heriot, how do you vote?

COMMISSIONER HERIOT: Yes.

CHAIRMAN CASTRO: Commissioner Achtenberg, how do you vote?

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
www.nealrgross.com
(202) 234-4433
COMMISSIONER ACHTENBERG: No, Mr. Chair.

CHAIRMAN CASTRO: Commissioner Narasaki, how do you vote?

COMMISSIONER NARASAKI: No.

CHAIRMAN CASTRO: Commissioner Yaki, how do you vote?

COMMISSIONER YAKI: Yes.

CHAIRMAN CASTRO: And I vote no. That's three nos to four yeses. The motion passes. Do you have one more?

COMMISSIONER KLADNEY: Not at this time.

IV. ADJOURN MEETING

CHAIRMAN CASTRO: Okay. There being no other business on the agenda, I hereby adjourn the special meeting of the Civil Rights Commission at 12:17 p.m. Eastern Time.

COMMISSIONER YAKI: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: Thank you, everyone.

COMMISSIONER KLADNEY: Thank you, Mr. Chairman.

(Whereupon, the above-entitled matter went off the record at 12:17 p.m.)