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U.S. COMMISSION ON CIVIL RIGHTS

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UNEDITED

SPECIAL MEETING

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FRIDAY, OCTOBER 10, 2014

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

PRESENT:

MARTIN R. CASTRO, Chairman*

ROBERTA ACHTENBERG, Commissioner

GAIL HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner*

DAVID KLADNEY, Commissioner*

KAREN NARASAKI, Commissioner

MICHAEL YAKI, Commissioner

MARLENE SALLO, Staff Director

* *Present via telephone*

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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

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P R O C E E D I N G S

(9:31 a.m.)

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?

1 COMMISSIONER YAKI: The Staff Director is
2 present as well.

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

6 **I. APPROVAL OF THE AGENDA**

7 CHAIRMAN CASTRO: Is there a motion?

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

10 CHAIRMAN CASTRO: Okay.

11 COMMISSIONER YAKI: And --

12 CHAIRMAN CASTRO: Now, is there a second?

13 COMMISSIONER KIRSANOW: Kirsanow seconds.

14 CHAIRMAN CASTRO: Okay. What's the
15 amendment?

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

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

23 Commissioner Yaki, how do you vote on
24 that -- actually should we do the amendment first? That

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1 makes sense, right? Yes, Commissioner Yaki, how do you
2 vote?

3 COMMISSIONER YAKI: Aye.

4 CHAIRMAN CASTRO: Commissioner Kladney,
5 how do you vote?

6 COMMISSIONER KLADNEY: Aye.

7 CHAIRMAN CASTRO: Commissioner Heriot,
8 how do you vote?

9 COMMISSIONER HERIOT: Yes.

10 CHAIRMAN CASTRO: Commissioner
11 Achtenberg, how do you vote?

12 COMMISSIONER ACHTENBERG: No.

13 CHAIRMAN CASTRO: No?

14 COMMISSIONER ACHTENBERG: Yes.

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

17 COMMISSIONER NARASAKI: Yes.

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

21 COMMISSIONER KIRSANOW: Yes.

22 CHAIRMAN CASTRO: And I vote no. One,
23 two, three, four, five yeses to two nos, the motion
24 passes. Any further motions on the agenda?

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1 COMMISSIONER KLADNEY: Mr. Chairman, Dave
2 Kladney, I'd like to amend the agenda to talk about the
3 legal memorandums and opinions that I'd like to request
4 from the Office of General Counsel.

5 COMMISSIONER ACHTENBERG: Second.

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

8 COMMISSIONER ACHTENBERG: Second.

9 CHAIRMAN CASTRO: Was that Commissioner
10 Achtenberg?

11 COMMISSIONER ACHTENBERG: It was, yes.

12 CHAIRMAN CASTRO: Okay. I could hardly
13 hear you.

14 COMMISSIONER ACHTENBERG: Sorry.

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

18 COMMISSIONER YAKI: Aye.

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

21 COMMISSIONER KLADNEY: Yes.

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

24 COMMISSIONER ACHTENBERG: Yes.

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1 CHAIRMAN CASTRO: Commissioner Narasaki,
2 how do you vote?

3 COMMISSIONER NARASAKI: Yes.

4 CHAIRMAN CASTRO: Commissioner Heriot,
5 how do you vote?

6 COMMISSIONER HERIOT: Yes.

7 CHAIRMAN CASTRO: Commissioner Kirsanow,
8 how do you vote?

9 COMMISSIONER KIRSANOW: Yes.

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

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

20 **II. PROGRAM PLANNING AND ISSUE**

21 Today's special meeting was called by a
22 majority of the commissioners who which to discuss the
23 various policies and procedures involving agency
24 personnel matters.

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1 And as I stated in September when I
2 cancelled the meeting due to insufficient business
3 items and inappropriate topics that were proposed for
4 the Commission business meeting, and as I'll state again
5 on the record, I was informed by the general counsel at
6 that time that the Commission was not authorized to
7 discuss ongoing confidential personnel matters that
8 could potentially be litigated with the Commission as
9 a party.

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

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

18 And that's why, in the best interest of the
19 Agency I opted not to have the September meeting.
20 Ultimately, however, there was a vote taken by the
21 commissioners, which I was outvoted on because our CFR
22 allows the four commissioners to call the vote for a
23 special meeting whether or not the Chairman calls for
24 one.

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1 The majority of the Commission voted for
2 the special meeting to take place and the Staff Director
3 noticed the meeting according to the CFR. As Chair, I'm
4 required to chair this meeting since we don't have a vice
5 chair for to whom I could delegate this.

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

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

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

24 This is important in this instance in light

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1 of potential for litigation. Please be mindful," he
2 continued to write, "that this is a criminal statute.
3 The matter will be out of my hands if this statute is
4 implicated and I definitely do not want that to happen."

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

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

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

24 And of course, as you know, I always try to

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1 be fair in allowing folks to speak. So if you just
2 identify for Juana, she'll communicate that to me and
3 then I will prepare a list and I will call you all
4 accordingly.

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

8 MS. SALLO: Good morning.

9 CHAIRMAN CASTRO: Madam Staff Director?

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

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

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

23 In addition, I wanted to indicate that this
24 is an ongoing confidential personnel matter and as the

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1 Administrative Head of the agency, I'm unable to speak
2 on the facts of this matter, which means that today I
3 will not be able to provide any information to support
4 or deny the position that this Agency has taken as a
5 result of an ongoing confidential personnel matter.
6 Thank you.

7 CHAIRMAN CASTRO: Okay. So --

8 COMMISSIONER YAKI: Mr. Chairman?

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

11 COMMISSIONER YAKI: It's --

12 CHAIRMAN CASTRO: Commissioner Yaki?

13 COMMISSIONER YAKI: -- Commissioner Yaki.
14 I have some questions for the Staff Director.

15 CHAIRMAN CASTRO: Sure.

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

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

24 MS. SALLO: I am unable to speak to the

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1 matter at hand, Commissioner Yaki.

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

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

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

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

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

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

23 MS. SALLO: Is this issue about an
24 appointment?

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1 COMMISSIONER YAKI: I'm asking about the
2 appointment power because you were talking about --

3 MS. SALLO: As I indicated --

4 COMMISSIONER YAKI: -- you returned to --

5 MS. SALLO: -- OPM delegates --

6 COMMISSIONER YAKI: -- the delegation.

7 MS. SALLO: OPM delegates the --

8 COMMISSIONER YAKI: So do you --

9 MS. SALLO: -- authority.

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

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

15 COMMISSIONER YAKI: Thank you, Mr. Chair.
16 Next question, because I did not get a answer to the
17 first one. Do you believe that the staff director has
18 unilateral veto power over the selection of special
19 assistants by each commissioner?

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

23 COMMISSIONER YAKI: This has nothing to do
24 with the matter at hand. This has to do with the

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1 authority of the staff director which can be discussed
2 in open session, which this commission has in the past
3 discussed the authority of the staff director in open
4 session.

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

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

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

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

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

23 COMMISSIONER YAKI: We're not talking
24 about an ongoing personnel matter, we're talking about

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1 your general statement regarding the delegation of your
2 powers by OPM, which is exactly within the purview of
3 the Commission.

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

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

10 COMMISSIONER YAKI: Yes.

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

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

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

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

22 MS. SALLO: Yes, I have.

23 COMMISSIONER YAKI: Do you know what it
24 says?

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1 MS. SALLO: Yes, it does.

2 COMMISSIONER YAKI: And what --

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

5 COMMISSIONER YAKI: And what does it say?

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

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

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

19 MS. SALLO: Yes, I have.

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

21 MS. SALLO: Asked and answered.

22 COMMISSIONER YAKI: And does it talk about
23 the Commission has the ability to detail and hire
24 personnel? Does it mention the staff director? No, it

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1 does not, and I'll answer that question for you.

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

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

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

11 COMMISSIONER NARASAKI: Here.

12 COMMISSIONER YAKI: Go head. I'm sorry.
13 Commissioner Narasaki would like to speak.

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

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

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

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

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1 the Office of the Staff Director reports to the
2 commissioners, is that a correct interpretation?

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

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

6 MS. SALLO: As the --

7 COMMISSIONER NARASAKI: -- report to?

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

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

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

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

17 MS. SALLO: It is to --

18 COMMISSIONER NARASAKI: -- who are --

19 MS. SALLO: -- work with --

20 COMMISSIONER NARASAKI: -- the
21 Commission?

22 MS. SALLO: -- the Commission, ma'am. And
23 it's also to look after the best interests of this
24 Agency.

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1 COMMISSIONER NARASAKI: As I understand
2 it, the Commissioners do do a review of the staff
3 director, at least that has been the practice in the
4 past. Am I incorrect in that?

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

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

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

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

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

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

21 MS. SALLO: The organizational chart is
22 the organizational chart, ma'am. Once again, as
23 administrative head of the Agency, I'm responsible for
24 personnel matters.

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1 COMMISSIONER NARASAKI: So my read of this
2 is you can be responsible for personnel matters, but
3 that does not necessarily encompass the special
4 assistants who under Federal law are seen as having a
5 very confidential relationship to the people that they
6 assist.

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

11 MS. SALLO: Okay.

12 COMMISSIONER NARASAKI: Am I incorrectly
13 reading that?

14 MS. SALLO: No, ma'am.

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

18 CHAIRMAN CASTRO: Yes.

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

23 MS. SALLO: Commissioner submits a request
24 for a special assistant, documentation is completed.

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1 I, as the Administrative Head of the Agency, sign that
2 documentation and submit it to the White House.

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

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

14 CHAIRMAN CASTRO: Go ahead, Commissioner
15 Narasaki.

16 COMMISSIONER NARASAKI: As I recall, since
17 I recently went through the process in terms of my own
18 special assistant, one of the papers that is processed
19 is, in fact, a nomination-type of form where I was asked
20 to justify the selection of the particular person which
21 I believe is what Commissioner Yaki is referring to to
22 me that what I thought was doing was, in fact, acting
23 as a someone nominating my special assistant for the
24 president to consider.

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1 MS. SALLO: Correct. There's a
2 nomination.

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

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

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

12 MS. SALLO: Yes, ma'am.

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

18 COMMISSIONER ACHTENBERG: I don't know
19 that --

20 COMMISSIONER KLADNEY: That it would
21 reflect --

22 COMMISSIONER ACHTENBERG: Yes, well.

23 COMMISSIONER YAKI: Commissioner
24 Achtenberg.

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

7 COMMISSIONER YAKI: No, but we can
8 overrule you.

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

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

20 COMMISSIONER YAKI: Commissioner
21 Achtenberg had her hand up.

22 CHAIRMAN CASTRO: Okay. Commissioner
23 Achtenberg, please proceed.

24 COMMISSIONER ACHTENBERG: Mr. Chairman,

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1 you made the point I was going to make.

2 CHAIRMAN CASTRO: Thank you.

3 COMMISSIONER YAKI: Commissioner --

4 CHAIRMAN CASTRO: Who's next?

5 COMMISSIONER YAKI: -- Kladney had his
6 hand up.

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

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

16 COMMISSIONER KLADNEY: Okay.

17 COMMISSIONER YAKI: Commissioner --

18 COMMISSIONER KIRSANOW: Commissioner, may
19 I speak?

20 CHAIRMAN CASTRO: Commissioner Kirsanow,
21 yes please.

22 COMMISSIONER KIRSANOW: Thank you very
23 much, Mr. Chair. It was good Commissioner Narasaki,
24 but not necessarily commissioner's observations.

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1 First of all I think we've descended into lunacy here.

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

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

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

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

22 No non-supervisor ever does anything like
23 that. Now, that simple act doesn't necessarily find
24 any kind of justification in a regulation, but it sure

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1 suggests that when viewed in terms of our statute,
2 regulations and AIs, there has been a long standing
3 understanding that our special assistants work for us.
4 In addition to which they are Schedule C.

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

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

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

22 There is no doubt in my mind we have had a
23 number of briefings, for example, during my tenure from
24 GCs and Staff Directors related to personnel matters

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1 before the Commission, many of them or some of them
2 related to employment litigation by special assistants
3 against the Commission. We've been briefed on those.

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

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

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

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

24 CHAIRMAN CASTRO: Mr. Kladney's next.

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1 COMMISSIONER KLADNEY: No, I didn't raise
2 my hand.

3 COMMISSIONER YAKI: Yes, Commissioner
4 Yaki --

5 CHAIRMAN CASTRO: Oh. I'm sorry.

6 COMMISSIONER YAKI: -- Mr. Chair.

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

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

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

19 We are part-time, so therefore we need a
20 staff to do it. And we have a staff director who most
21 of the time, is someone who we trust to do the work that
22 enables us to keep this mission going even though we are
23 restricted by statute by the number of hours that we
24 have.

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1 I would just note that even the regulations
2 state that the staff director disseminates the policies
3 established by the commissioners.

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

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

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

18 When the relationship with that supervisor
19 ends, that person's job no longer exists. At that time
20 the administrative head of the Agency can then execute
21 the paperwork to terminate that person, but really only
22 in that circumstance. Because think about the
23 situation that the staff director has just posed and
24 what it really means to this Agency.

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1 If indeed, as she has asserted, she has
2 delegated the entire authority by OPM over all personnel
3 in this Agency, what is to prevent a staff
4 director -- let's take a hypothetical example.

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

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

20 I don't think that's where Congress
21 intended. I think there's a reason why in the
22 Appropriations Statute language in the only place in the
23 entire Federal budget special assistants are called out
24 specifically for each commissioner.

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1 Because there's a recognition that we have
2 a function to serve and, again, we are not full-time,
3 our special assistants can be. That confidential
4 policy-making relationship is undermined if the staff
5 director has the ability to fire that person
6 unilaterally.

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

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

15 COMMISSIONER KIRSANOW: No.

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

21 I know you have a mortgage, I know you have
22 a kid on the way, you better back off from what
23 Commissioner Yaki's asking you to do. Just put it on
24 the slow road, give him just a little bit, but don't give

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1 him this other stuff you were looking at, otherwise I'm
2 going to just fire you because I have the power to do
3 so.

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

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

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

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

22 And pursuant to this directive, the
23 decision of the staff director to terminate any special
24 assistant pursuant to this policy to her interpretation

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1 is declared ultra vires and null and void.

2 And the staff director is directed to
3 rescind and process any paperwork necessary to restore
4 any such person terminated under this now revoked power
5 effective the date of that purported termination.
6 That's my motion.

7 COMMISSIONER KIRSANOW: Kirsanow --

8 COMMISSIONER HERIOT: I second.

9 COMMISSIONER KIRSANOW: -- second.

10 COMMISSIONER HERIOT: I second.

11 MR. SMITH: May I speak?

12 COMMISSIONER KLADNEY: Please.

13 COMMISSIONER ACHTENBERG: Go ahead.

14 COMMISSIONER NARASAKI: Go ahead.

15 COMMISSIONER YAKI: The General Counsel
16 wishes to speak.

17 COMMISSIONER ACHTENBERG: Who seconded
18 that?

19 COMMISSIONER HERIOT: I seconded it.

20 COMMISSIONER NARASAKI: So did Peter.

21 COMMISSIONER KLADNEY: You seconded it?

22 COMMISSIONER HERIOT: Yes.

23 MR. SMITH: Commissioner Yaki, I
24 appreciate your motion. However, it's the position of

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1 the General Counsel that the Staff Director does have
2 the authority under OPM delegation for all personnel
3 actions. So therefore, your motion is an illegal
4 motion and the General Counsel cannot support the
5 motion.

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

8 COMMISSIONER HERIOT: And I still seconded
9 the motion.

10 COMMISSIONER YAKI: We have discussion of
11 the motion?

12 COMMISSIONER HERIOT: I --

13 COMMISSIONER KIRSANOW: Kirsanow here.
14 Am I recognized?

15 COMMISSIONER YAKI: Mr. Chair?

16 COMMISSIONER NARASAKI: Did we lose the
17 Chair?

18 COMMISSIONER HERIOT: I'll recognize it
19 Peter.

20 COMMISSIONER ACHTENBERG: Is the Chair --

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

22 COMMISSIONER ACHTENBERG: Mr. Chairman?

23 MR. SMITH: Wait for him for him to get back
24 on the phone.

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1 CHAIRMAN CASTRO: No, I think I was muted.

2 Commissioner Kirsanow, go ahead. Can you hear me?

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

9 COMMISSIONER HERIOT: Okay.

10 CHAIRMAN CASTRO: Was that your comment?

11 COMMISSIONER KIRSANOW: That's all I --

12 COMMISSIONER YAKI: Commissioner Heriot?

13 COMMISSIONER KIRSANOW: -- have to say.

14 CHAIRMAN CASTRO: Commissioner Heriot,
15 you're next.

16 COMMISSIONER YAKI: No, Commissioner
17 Achtenberg had a --

18 COMMISSIONER ACHTENBERG: My --

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

21 COMMISSIONER YAKI: No, Commissioner
22 Heriot.

23 CHAIRMAN CASTRO: -- then Achtenberg.

24 COMMISSIONER YAKI: Sorry.

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1 COMMISSIONER ACHTENBERG: Go ahead --

2 COMMISSIONER HERIOT: Me?

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

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

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

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

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

21 Insofar as OPM delegates authority to
22 someone, they delegate that authority to the
23 Commission. What is the Commission? The Commission
24 consists of eight commissioners. That would be the

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1 group that's meeting here. So that's where that
2 authority is delegated.

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

9 COMMISSIONER ACHTENBERG: Mr. Chairman?

10 CHAIRMAN CASTRO: Commissioner
11 Achtenberg.

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

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

24 COMMISSIONER ACHTENBERG: To the

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1 Commission --

2 MR. SMITH: Right.

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

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

10 COMMISSIONER ACHTENBERG: Okay.

11 MR. SMITH: So that's the --

12 COMMISSIONER ACHTENBERG: Right.

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

15 COMMISSIONER ACHTENBERG: I understand
16 that.

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

20 COMMISSIONER ACHTENBERG: Sure. Yes, go
21 ahead.

22 MR. SMITH: Just to --

23 CHAIRMAN CASTRO: That's fine. Go ahead,
24 Rorey.

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1 MR. SMITH: Oh yes. Just to Commissioner
2 Yaki's hypotheticals that he raised concerning undue
3 influence on a special assistant, there are Federal
4 rules that prohibit it. There are prohibited personnel
5 practices.

6 COMMISSIONER YAKI: On Schedule Cs?

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

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

18 COMMISSIONER NARASAKI: Could I speak?

19 COMMISSIONER YAKI: Commissioner Narasaki
20 wishes to speak.

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

24 MS. SILVERIO: I'm sorry, it was

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1 Commissioner Kladney next on this.

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

6 CHAIRMAN CASTRO: It's actually --

7 COMMISSIONER YAKI: -- a staff assistant
8 now --

9 CHAIRMAN CASTRO: Okay.

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

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

16 COMMISSIONER YAKI: Okay. I --

17 CHAIRMAN CASTRO: I missed it --

18 COMMISSIONER YAKI: -- take that back.

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

21 COMMISSIONER KLADNEY: I yield to the --

22 CHAIRMAN CASTRO: -- Commissioner
23 Kladney --

24 COMMISSIONER KLADNEY: -- Commissioner

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1 Narasaki.

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

6 COMMISSIONER NARASAKI: Thank you.

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

10 COMMISSIONER NARASAKI: Yes.

11 COMMISSIONER KLADNEY: I yield to
12 Commissioner Narasaki.

13 CHAIRMAN CASTRO: Okay.

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

19 I would disagree with the General Counsel.
20 I don't think, even if I haven't had the chance to
21 research even if there is such protection in law, we've
22 just been told by the Staff Director that she does not
23 report to the commissioners, that, in fact, we do not
24 supervise her.

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1 So if she is, in fact, going to abuse the
2 power, then it's a little unclear to me who then makes
3 sure that she's not abusing that power.

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

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

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

23 At the time we were seeking many creative
24 solutions to that, one of which was requesting a

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1 detailee from the Executive Branch. We reached out to
2 OPM and presidential personnel to try to help us
3 interpret who the Agency Head was in the absence of a
4 staff director because we needed to have an Agency Head
5 sign off on the detail.

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

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

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

20 COMMISSIONER NARASAKI: Can I note,
21 though, that the commissioners repeatedly asked the
22 Staff Director and the General Counsel for a written
23 legal opinion outlining the position, which we have yet
24 to receive and it's been at least a couple weeks since

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1 this debate has been ongoing. I'd also --

2 CHAIRMAN CASTRO: Yes.

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

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

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

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

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

23 And I can assure you, knowing some of those
24 people that if they thought they could have, they would

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1 have. So I just find it extraordinary to be told that
2 the Commission does not have power over interpreting the
3 regulations when there is no clear law stating
4 otherwise.

5 COMMISSIONER KLADNEY: Mr. Chairman,
6 Kladney here.

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

10 COMMISSIONER KLADNEY: I'd like to say
11 that a big problem here, and Commissioner Narasaki kind
12 of stole my thunder, but there are no legal opinions.

13 And it seems to me that if OPM has taken this
14 position, they would have something in writing and if
15 requested they would've issued a notation, an opinion,
16 a letter, an email, something to that effect.

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

21 And although, I've been many long past
22 years and I'm sure Commissioner Kirsanow is much more
23 versed in this than I am, I believe that absent a clear
24 path to the actions taken, there are other alternatives

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1 that the administrator of an Agency has to protect the
2 Agency and that none of them were taken here.

3 And I think that we should actually look to
4 that as authority for the staff director to have over
5 the staff absent termination of our special assistants.
6 That's all I have to say.

7 CHAIRMAN CASTRO: Commissioner
8 Achtenberg?

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

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

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

22 And I think in a moment some motions to that
23 effect are going to be offered by my colleague and I
24 intend to support those motions. I think we need the

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1 advice of counsel. And if our own counsel --

2 COMMISSIONER KLADNEY: Fails.

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

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

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

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

22 And as much as I respect Supervisor Yaki's
23 legal acumen, I want to be advised by counsel whether
24 or not I, as a Commissioner, am properly interpreting

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1 the Commission's mandate in agreeing to or disagreeing
2 with such a motion.

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

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

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

13 COMMISSIONER ACHTENBERG: Did I call you
14 supervisor?

15 COMMISSIONER YAKI: You did.

16 COMMISSIONER ACHTENBERG: But old habits
17 die hard.

18 COMMISSIONER YAKI: I know. I know. The
19 problem, and I appreciate the point that you make and
20 I appreciate the point that raised by Commissioner
21 Kladney, the problem, of course, is that in so doing
22 we're attempting to deal with a problem that could have
23 been avoided had such an opinion been sought in the first
24 place, which it was not.

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1 Instead, peremptory action was taken by the
2 Staff Director without the consent of the appointing
3 Commissioner and which brought us to the situation
4 today. I think the --

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

9 COMMISSIONER YAKI: Well, we've --

10 CHAIRMAN CASTRO: -- let you --

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

18 CHAIRMAN CASTRO: Go on.

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

22 That being the case, my motion attempts to
23 correct that and put everything in a position prior to
24 any injury befalling either any individual or the Agency

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1 because, quite frankly, what astonishes me is that my
2 motion is to prevent injury to the Commission.

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

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

13 MS. SALLO: May I speak, Chairman Castro?
14 This is the Staff Director.

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

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

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

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1 the pleasure of the President.

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

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

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

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

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

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

22 MR. SMITH: No. No.

23 COMMISSIONER HERIOT: -- move on with
24 this.

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

5 COMMISSIONER YAKI: I'm sorry.

6 MR. SMITH: -- or --

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

9 CHAIRMAN CASTRO: I recognize the General
10 Counsel.

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

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

20 COMMISSIONER HERIOT: I will not.

21 MR. SMITH: -- at all times.

22 MS. SALLO: Commissioner Yaki wishes to
23 speak.

24 CHAIRMAN CASTRO: Commissioner Yaki,

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1 please --

2 COMMISSIONER YAKI: Yes.

3 CHAIRMAN CASTRO: -- proceed.

4 COMMISSIONER YAKI: Thank you very much.

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

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

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

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

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

24 COMMISSIONER YAKI: No, no, this is just

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1 his --

2 COMMISSIONER ACHTENBERG: This is ask
3 permission, I don't think --

4 COMMISSIONER YAKI: This is --

5 COMMISSIONER ACHTENBERG: -- you need a
6 motion.

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

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

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

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

21 And in fact, there have been meetings at
22 which I have advocated and the majority at that time,
23 who was not very fond of the viewpoint I was doing, would
24 allow members of the public to address for a limited

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1 period of time for this. It simply confers no right,
2 it doesn't mean that there cannot be the privilege
3 extended to an individual.

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

6 MR. SMITH: So --

7 CHAIRMAN CASTRO: Rorey, are you there?

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

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

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

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

20 COMMISSIONER YAKI: Yes, he has --

21 MR. SMITH: Yes, there are --

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

24 CHAIRMAN CASTRO: He's not making a

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1 motion --

2 COMMISSIONER YAKI: -- about being out of
3 order.

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

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

6 CHAIRMAN CASTRO: -- advice.

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

10 CHAIRMAN CASTRO: Okay.

11 MR. SMITH: Yes.

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

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

24 I don't know if maybe you could say to us

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1 what you were thinking of moving and see if maybe taking
2 that tack might be able to move this along without a
3 development of an impasse?

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

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

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

15 COMMISSIONER KLADNEY: Right.

16 CHAIRMAN CASTRO: I believe that was --

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

19 CHAIRMAN CASTRO: Yes, it was.

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

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1 word on the subject, we're not going to get on.

2 MR. SMITH: Can I say --

3 CHAIRMAN CASTRO: Okay.

4 COMMISSIONER KLADNEY: I mean, that --

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

7 COMMISSIONER KLADNEY: -- seems to me to
8 be --

9 MR. SMITH: Well, let me --

10 COMMISSIONER KLADNEY: -- where we are.

11 MR. SMITH: If I may?

12 CHAIRMAN CASTRO: Wait. Yes, is that
13 Rorey?

14 MR. SMITH: Yes, Mr. Chairman.

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

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

23 In my view those two cannot be separated.
24 And, in fact, if we have continued discussions based on

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1 the email traffic that I have seen, unfortunately, from
2 the Commissioners, that it will do harm and prejudice
3 the Agency's position in future litigation.

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

8 COMMISSIONER KLADNEY: Mr. Chairman?

9 COMMISSIONER YAKI: I'll defer to
10 Commissioner Kladney and then --

11 CHAIRMAN CASTRO: Okay.

12 COMMISSIONER YAKI: -- reserve my time
13 after him.

14 COMMISSIONER KLADNEY: You know, I respect
15 that, so that's what I said. And so we're not getting
16 the legal opinion and so I'm not going to make a motion.

17 CHAIRMAN CASTRO: Okay. Thanks for
18 clarifying that.

19 COMMISSIONER YAKI: Mr. Chair, I --

20 CHAIRMAN CASTRO: Yes, we have
21 Commissioner Narasaki after Commissioner Yaki.

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

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1 CHAIRMAN CASTRO: Okay.

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

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

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

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

24 CHAIRMAN CASTRO: Okay.

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1 COMMISSIONER YAKI: Commissioner Yaki --

2 CHAIRMAN CASTRO: Who's next.

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

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

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

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

24 I asked him to come and give his viewpoint

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1 because it seemed to me that at some point during this
2 discussion it was going to come up what interpretations
3 are there of this that are out there from the perspective
4 of someone who has sat in the seat of general counsel.

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

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

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

19 We can engage in that or we can simply let
20 him speak for a couple minutes as a former General
21 Counsel, as someone who served this Commission for many
22 years, just by the way as I would extend that courtesy
23 to any former Commissioner who may have come here to
24 speak, as well.

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1 They know this Commission. They have been
2 part of it. They have a history. I think it's
3 important for all of us to understand that history.
4 That's why Mr. Chair, I asked that Mr. Blackwood be
5 allowed to speak.

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

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

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

16 CHAIRMAN CASTRO: Okay.

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

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

22 COMMISSIONER HERIOT: He didn't say that.

23 COMMISSIONER YAKI: Mr. Chair --

24 CHAIRMAN CASTRO: Let me finish, okay?

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1 Come on, let me finish. Then everyone will get a chance
2 to talk, I promise you. If nothing else, I've tried to
3 do that throughout the course of my chairmanship.

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

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

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

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

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

19 CHAIRMAN CASTRO: This probably would --

20 COMMISSIONER YAKI: So if it's --

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

24 Just like when we put on our hearings and

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1 our briefings, you want to make them balanced.
2 Anything that is presented here with only one person who
3 was not noticed or not given the heads-up that this was
4 going to happen would be unbalanced.

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

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

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

16 CHAIRMAN CASTRO: Yes.

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

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

20 COMMISSIONER YAKI: And I move the
21 question.

22 CHAIRMAN CASTRO: Could you restate your
23 motion, please?

24 COMMISSIONER YAKI: I move that we

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1 reaffirm that it is the policy of the U.S. Commission
2 on Civil Rights that each commissioner is a sole
3 supervising appointed official of his or her special
4 assistant.

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

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

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

23 My understanding of today's meeting was
24 that we were going to talk about general policy issues.

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1 And it seems to me that your motion, Commissioner Yaki,
2 with all due respect, is crossing that line.

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

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

16 COMMISSIONER HERIOT: We're ready to vote.

17 COMMISSIONER YAKI: I will ask for a vote.

18 CHAIRMAN CASTRO: Well, I --

19 COMMISSIONER KIRSANOW: Motion seconded.

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

23 COMMISSIONER YAKI: I move to overrule the
24 Chair.

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1 CHAIRMAN CASTRO: Let --

2 COMMISSIONER HERIOT: Second.

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

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

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

17 COMMISSIONER YAKI: Mr. --

18 CHAIRMAN CASTRO: -- Agency.

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

24 There's the specific exemption within that

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1 statute for personnel matters. This is I do not know
2 where the General Counsel came up with the
3 interpretation. I respect the fact that he did.

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

12 CHAIRMAN CASTRO: Well, then I have to --

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

15 CHAIRMAN CASTRO: Wait.

16 COMMISSIONER YAKI: -- I will --

17 CHAIRMAN CASTRO: Let me --

18 COMMISSIONER YAKI: -- take you up --

19 CHAIRMAN CASTRO: Okay.

20 COMMISSIONER YAKI: -- on that motion.

21 MR. SMITH: Mr. Chairman?

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

24 MR. SMITH: All right. Mr. Chairman?

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1 CHAIRMAN CASTRO: All I have right now
2 is --

3 MR. SMITH: Yes.

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

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

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

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

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

23 CHAIRMAN CASTRO: Okay. You heard my
24 concerns?

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1 MR. SMITH: Yes. Yes, and I share you
2 concerns, Mr. Chairman.

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

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

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

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

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

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

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

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

21 COMMISSIONER YAKI: Under Robert's
22 Rules --

23 CHAIRMAN CASTRO: I want to --

24 COMMISSIONER YAKI: -- the --

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1 CHAIRMAN CASTRO: -- see if we can address
2 it, but I have concerns.

3 COMMISSIONER YAKI: There was a request --

4 CHAIRMAN CASTRO: Go on, General Counsel.

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

7 CHAIRMAN CASTRO: He can --

8 COMMISSIONER YAKI: -- and it was denied --

9 CHAIRMAN CASTRO: -- read it now --

10 COMMISSIONER YAKI: -- by the General
11 Counsel.

12 CHAIRMAN CASTRO: -- or now.

13 COMMISSIONER YAKI: Well --

14 CHAIRMAN CASTRO: Commissioner --

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

17 COMMISSIONER NARASAKI: Mr. Chair --

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

22 MR. SMITH: Yes.

23 CHAIRMAN CASTRO: -- I have a lawyer --

24 COMMISSIONER NARASAKI: Yes, Mr. Chair,

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1 though --

2 CHAIRMAN CASTRO: -- point of view.

3 COMMISSIONER NARASAKI: -- could you --

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

6 COMMISSIONER NARASAKI: Yes, Mr. Chair --

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

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

10 CHAIRMAN CASTRO: Please proceed.

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

13 CHAIRMAN CASTRO: Yes, please proceed.

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

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

21 COMMISSIONER KIRSANOW: Wait a minute.
22 Kirsanow here. I am making a specific request as client
23 to my attorney to read the entire statute into the
24 record.

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1 MR. SMITH: My client --

2 COMMISSIONER KIRSANOW: We are the
3 Commission.

4 MR. SMITH: Yes, you are.

5 COMMISSIONER KIRSANOW: You are our
6 counsel.

7 MR. SMITH: Excuse me.

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

10 COMMISSIONER NARASAKI: Under the --

11 COMMISSIONER KIRSANOW: You're my
12 attorney.

13 CHAIRMAN CASTRO: Well --

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

15 CHAIRMAN CASTRO: -- is anyone --

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

18 CHAIRMAN CASTRO: -- to sit here --

19 COMMISSIONER NARASAKI: -- to the
20 Commission --

21 CHAIRMAN CASTRO: You know, we --

22 COMMISSIONER NARASAKI: -- and the
23 commissioners.

24 CHAIRMAN CASTRO: This is a difficult

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1 situation for everyone.

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

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

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

13 MR. SMITH: MR. Chairman --

14 CHAIRMAN CASTRO: -- would you please?

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

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

24 CHAIRMAN CASTRO: Okay.

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1 MR. SMITH: So --

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

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

8 COMMISSIONER HERIOT: This is
9 completely --

10 CHAIRMAN CASTRO: Well --

11 COMMISSIONER HERIOT: -- stunning.

12 COMMISSIONER KIRSANOW: I know I'm
13 confused.

14 CHAIRMAN CASTRO: Mr. General Counsel,
15 if --

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

18 MR. SMITH: So if --

19 COMMISSIONER HERIOT: You know, this is
20 simple stuff.

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

23 CHAIRMAN CASTRO: Yes, please. Mr.
24 General Counsel, proceed to read us what you're going

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1 to read and then when you're done with that, we will have
2 questions for you.

3 COMMISSIONER NARASAKI: Could --

4 MR. SMITH: All right.

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

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

10 COMMISSIONER NARASAKI: Staff Director
11 supervises --

12 CHAIRMAN CASTRO: Read --

13 COMMISSIONER NARASAKI: -- the General
14 Counsel.

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

18 COMMISSIONER KLADNEY: Mr. Chairman, this
19 is Kladney.

20 CHAIRMAN CASTRO: Yes.

21 COMMISSIONER KLADNEY: I'll read the
22 statute.

23 COMMISSIONER HERIOT: Thank you,
24 Commissioner Kladney.

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1 COMMISSIONER KLADNEY: If I can see it.

2 18 U.S.C. --

3 CHAIRMAN CASTRO: Someone get him his
4 reading glasses.

5 COMMISSIONER KLADNEY: Pardon, Mr.
6 Chairman?

7 CHAIRMAN CASTRO: Someone get him his
8 reading glasses.

9 COMMISSIONER KLADNEY: Yes. Amen.
10 Section 18 U.S.C. Section 205, Activities of Officers
11 and Employees and claims against and other matters
12 affecting the Government.

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

22 Or Sub (2), acts as agent or attorney for
23 anyone before any department, agency, court,
24 court-martial, officer, or civil, military, or naval

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1 commission in the connection with any covered matter in
2 which the United States is a party or has direct and
3 substantial interest shall be subject to the penalties
4 set forth in Section 216 of this title.

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

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

21 Subsection (c), a special Government
22 employee shall be subject to Subsections A and B only
23 in relation to a covered matter involving a specific
24 party or parties.

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1 Sub (1), in which he has any interest, has
2 any time participated personally and substantially as
3 a Government employee or a special Government employee
4 through the decision, approval, disapproval,
5 recommendation, the pending of advice, investigation,
6 or otherwise, or 2, which is pending in the department
7 or agency of the Government in which he is serving.

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

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

22 Or capital B, except as provided in
23 Paragraph (2), any cooperative, voluntary,
24 professional, recreational, or similar organization or

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1 group not established or operated for profit if a
2 majority of the organization's or group's members are
3 current officers or employees of the United States or
4 the District of Columbia or their spouses or dependent
5 children.

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

9 CHAIRMAN CASTRO: Hello? Did I lose
10 you --

11 COMMISSIONER KLADNEY: Well, no.

12 CHAIRMAN CASTRO: -- or did you give up?

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

16 CHAIRMAN CASTRO: All right.

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

21 Capital B, is a judicial or administrative
22 proceeding whether the organization or group is a party
23 or capital C, involves a grant, contract, or other
24 agreement (including a request for any such grant,

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1 contract, or agreement) providing for the disbursement
2 of Federal funds to the organization or group.

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

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

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

21 Small F, nothing in subsection small A or
22 B prevents a special Government employee from acting as
23 agent or attorney for another person in the performance
24 of work under a grant by or a contract with or for the

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1 benefit of the United States if the head of the
2 department or agency concerned with the grant or
3 contract certifies in, excuse me, certifies contract
4 or -- the United States is the head of the -- wait a
5 second.

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

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

21 Small H, for the purpose of this section,
22 the term "covered matters" means any judicial or other
23 proceeding, application, request for a ruling or other
24 determination, contract, claim, controversy,

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1 investigation, charge, accusation, arrest, or other
2 particular matter.

3 Small I, nothing in this section prevents
4 an employee from acting pursuant to 1, Chapter 71 of
5 Title 5; 2, Section 1004 of Chapter 12 of Title 39; 3,
6 Section 3 of the Tennessee Valley Authority Act of 1933
7 (16 U.S.C. 831 small B); 4, Chapter 10 of Title I of
8 the Foreign Service Act of 1980 (22 U.S.C. 4104 et seq.);
9 or management relations between an agency or
10 instrumentality of the United States or the District of
11 Columbia and any labor organization that represents its
12 employees. Does anybody want me to read the --

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

15 COMMISSIONER HERIOT: What's left?

16 COMMISSIONER YAKI: The legislative
17 history.

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

20 COMMISSIONER NARASAKI: Thank you,
21 Commissioner.

22 CHAIRMAN CASTRO: Are you done,
23 Commissioner Kladney?

24 COMMISSIONER KLADNEY: Well, unless you

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1 want me to read the amendments and the years they were
2 made?

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

7 MR. SMITH: Yes, I'm here, Mr. Chairman.
8 No, thank you.

9 CHAIRMAN CASTRO: You have nothing to add?

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

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

15 MR. SMITH: Right.

16 CHAIRMAN CASTRO: -- I have for you.

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

19 COMMISSIONER ACHTENBERG: It's this one.

20 COMMISSIONER KLADNEY: Can I show it to
21 him --

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

24 CHAIRMAN CASTRO: If you could reread it,

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1 Commissioner Yaki, that would be helpful.

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

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

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

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

23 CHAIRMAN CASTRO: Mr. General Counsel?

24 MR. SMITH: Yes, Mr. Chairman. So, thank

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1 you, Commissioner Yaki. So my position is still going
2 back to what I said, I don't know how long ago,
3 concerning the delegation of authority from OPM.

4 This motion would still change that
5 language in effect from the regulations that OPM has
6 promulgated for all Federal agencies. So --

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

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

13 COMMISSIONER NARASAKI: Okay.

14 COMMISSIONER KLADNEY: Mr. Chairman,
15 Kladney here.

16 CHAIRMAN CASTRO: Yes, Commissioner
17 Kladney.

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

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

22 CHAIRMAN CASTRO: Go ahead.

23 COMMISSIONER KLADNEY: This authority
24 from OPM is that the General Regulatory Authority? Is

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1 that what you're citing? Any special requests from
2 them regarding this situation -- not this situation, a
3 situation concerning a special assistant to a
4 commissioner and the Administrative Head of the Agency?

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

7 COMMISSIONER KLADNEY: Assumed --

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

10 COMMISSIONER KLADNEY: Yes.

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

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

15 MR. SMITH: Yes. And I can tell you what
16 that statute or that regulation is. So the regulation
17 is headed Schedule C and the citation is 5 C.F.R.
18 213.3301 et al. And let's see, it says positions of --

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

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

22 COMMISSIONER YAKI: 5 C.F.R.

23 MR. SMITH: -- 213.3301 and it's positions
24 of a confidential or policy determining nature.

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1 COMMISSIONER KLADNEY: What's it --

2 MR. SMITH: Did that answer your question?

3 COMMISSIONER KLADNEY: -- say?

4 MR. SMITH: So --

5 COMMISSIONER KLADNEY: I don't want to --

6 MR. SMITH: Yes.

7 COMMISSIONER KLADNEY: -- force you to

8 read it.

9 MR. SMITH: Right, but --

10 COMMISSIONER KLADNEY: I'll read it if you

11 want me to.

12 MR. SMITH: Are you asking to read the

13 language --

14 COMMISSIONER KLADNEY: No, I just --

15 MR. SMITH: -- or are you asking me to say

16 what I think it says?

17 COMMISSIONER KLADNEY: Well, why don't you

18 say what you think it says and refer to the part that

19 it says it --

20 MR. SMITH: So it goes back to --

21 COMMISSIONER KLADNEY: -- so I can get an

22 opinion.

23 MR. SMITH: Yes, this goes back to the

24 Staff Director's opening remarks. And so this section

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1 here says that the authority of Schedule C is delegated
2 from OPM to the Agency. That's what this says.

3 COMMISSIONER YAKI: Commissioner Yaki.

4 CHAIRMAN CASTRO: Yes, go ahead.

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

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

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

23 I believe that if you were to ask, again,
24 I go back to the fact that spanning over 20 years of

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1 commissions to a person, all individuals who I spoke to
2 from general counsel or staff director positions
3 believe that the position that I am asserting today and
4 which is contained in this motion is the correct and true
5 position of this Agency and has been and should continue
6 to be.

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

11 CHAIRMAN CASTRO: I have concerns about --

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

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

23 COMMISSIONER ACHTENBERG: I have to say
24 that I believe that we, as commissioners, are in need

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1 of counsel and I want to seek the opinion of counsel
2 before I vote on such a motion. And if forced to vote
3 on such a motion, I'm going to vote no.

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

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

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

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

22 Certainly, she can't do it for an
23 impermissible reason, but that doesn't mean that she
24 can't do it for any reason. And I want to test out that

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1 thought on my part with the opinion of a lawyer who I
2 think we're entitled to, as commissioners, you know, the
3 appointment of some kind of special counsel.

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

8 COMMISSIONER YAKI: And --

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

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

19 COMMISSIONER KLADNEY: Commissioner
20 Castro.

21 CHAIRMAN CASTRO: Let me --

22 COMMISSIONER KLADNEY: Chairman Castro.

23 CHAIRMAN CASTRO: -- just say here, my
24 inclination right now is to rule this motion out of

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1 order. However, given the point that Commissioner
2 Achtenberg has raised, I think it's important for us to
3 have some form of independent counsel, whether it's
4 special counsel or whether we figure out whether there's
5 an agency out there that will give us counsel or whether
6 we hire someone to take a look at this questions for us.

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

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

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

17 COMMISSIONER NARASAKI: And I'll
18 document.

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

24 COMMISSIONER KLADNEY: But I'm not

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1 finished.

2 CHAIRMAN CASTRO: Okay. Go ahead.

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

6 CHAIRMAN CASTRO: Get an answer.
7 Commissioner Narasaki, I note you want to speak?
8 Commissioner Narasaki?

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

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

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

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

24 COMMISSIONER ACHTENBERG: -- not

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1 expressing any opinion about anyone's competence or
2 motivation or anything like that. And I'm pleased to
3 make the acquaintance of a former general counsel of
4 this Agency.

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

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

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

21 CHAIRMAN CASTRO: And for the reasons I
22 stated earlier, I think it's not fair to bring one
23 witness today when this is not the appropriate forum and
24 not allow for others to come. But anyway, Commissioner

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1 Yaki, I know you have your hand up?

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

6 MS. SALLO: Commissioner --

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

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

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

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

22 And the motion today restores the status
23 quo, prevents any potential injury to the Commission and
24 allows the inquiry posed by Commissioner Achtenberg to

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1 go forward.

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

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

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

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

20 COMMISSIONER YAKI: Well, I --

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

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1 help address this issue.

2 COMMISSIONER KLADNEY: Mr. Chairman,

3 Kladney here. I'm --

4 CHAIRMAN CASTRO: Commissioner Kladney,

5 go ahead.

6 COMMISSIONER YAKI: Yes.

7 COMMISSIONER KLADNEY: I'd like to request

8 a 15-minute recess.

9 CHAIRMAN CASTRO: For what purpose?

10 COMMISSIONER ACHTENBERG: So we could take

11 a break.

12 COMMISSIONER KLADNEY: There are several.

13 CHAIRMAN CASTRO: Oh, okay.

14 COMMISSIONER KLADNEY: I would like to

15 take a break and --

16 COMMISSIONER HERIOT: Don't make me say

17 anything.

18 CHAIRMAN CASTRO: No, you don't have to go

19 into too much detail if you need to do certain things,

20 but do you want me to call in somewhere or are you all

21 going to kibbutz without the Chairman? In fact, you

22 know, go ahead. Take how long a recess?

23 COMMISSIONER YAKI: Ten.

24 COMMISSIONER KLADNEY: Ten.

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1 MR. SMITH: Or whatever.

2 CHAIRMAN CASTRO: Ten minutes, okay.

3 Well then --

4 COMMISSIONER KLADNEY: Okay. But the --

5 CHAIRMAN CASTRO: -- ten minutes.

6 COMMISSIONER KLADNEY: -- General Counsel
7 wanted to say something.

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

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

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

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

23 COMMISSIONER NARASAKI: Mr. Chair, this is
24 Commissioner Narasaki.

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1 CHAIRMAN CASTRO: Yes, Commissioner.

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

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

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

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

24 CHAIRMAN CASTRO: Okay. We're going to

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1 take a ten minute recess. It is now 11:19 Eastern, so
2 we will be back at 11:29 Eastern. Thank you.

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

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

7 CHAIRMAN CASTRO: Is everyone back?

8 MS. SALLO: Yes, sir.

9 CHAIRMAN CASTRO: Is that a yes?

10 MS. SALLO: Yes.

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

14 COMMISSIONER KIRSANOW: Sorry. I am.

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

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

21 CHAIRMAN CASTRO: Okay. Go ahead.

22 COMMISSIONER KLADNEY: The Commission
23 shall hire outside counsel of its choosing to render an
24 opinion regarding the extent to which the Staff

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1 Director's authority to take adverse action against a
2 Schedule C employee.

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

10 COMMISSIONER ACHTENBERG: Second.

11 CHAIRMAN CASTRO: Who seconded that?

12 COMMISSIONER ACHTENBERG: Achtenberg.

13 CHAIRMAN CASTRO: I'm sorry?

14 COMMISSIONER ACHTENBERG: Commissioner
15 Achtenberg.

16 CHAIRMAN CASTRO: Okay. Discussion?

17 COMMISSIONER YAKI: It's Commissioner
18 Yaki.

19 CHAIRMAN CASTRO: Yes.

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

24 I wonder if we could add a friendly

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1 amendment to ask that the Commission designate a special
2 committee comprised of three members of the Commission,
3 Commissioner Narasaki, Commissioner Kladney and
4 Commissioner Heriot to -- I mean, I'm sorry,
5 Commissioner Narasaki, Commissioner Achtenberg and
6 Commissioner Heriot to be engaged in selecting counsel
7 and forwarding it to the entire Commission for approval.

8 COMMISSIONER KLADNEY: That's fine with
9 me.

10 CHAIRMAN CASTRO: Is the Staff Director
11 there?

12 MS. SALLO: Yes. Yes, sir.

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

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

19 CHAIRMAN CASTRO: Is Mr. Smith available?

20 COMMISSIONER YAKI: Is what?

21 CHAIRMAN CASTRO: Our General Counsel,
22 Rorey?

23 MR. SMITH: Yes, Mr. Chairman. Sorry.
24 I'm coming up to the mic. And so your question to me

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1 is?

2 CHAIRMAN CASTRO: Question to you is is
3 this motion, as it's been crafted, appropriate insofar
4 as the issue that I had a concern with earlier on the
5 prior motion?

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

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

17 COMMISSIONER KLADNEY: That'll be fine,
18 Mr. Chairman, because this is the only alternative I can
19 come up with.

20 CHAIRMAN CASTRO: And, you know,
21 Commissioner Kladney, I really do appreciate that you
22 tried. I thank you for that.

23 COMMISSIONER KLADNEY: Someone has to take
24 action somewhere, Mr. Chairman.

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1 CHAIRMAN CASTRO: No, I appreciate that.
2 And I'm trying to see if we can find the middle ground
3 as well to see if we can at least table these motions
4 and get that legal counsel which I think is really at
5 the core of your motion and then to be able to better
6 address the concerns with counsel having been provided
7 to us, which was raised by Commissioner Achtenberg very
8 thoughtfully before we went on recess.

9 COMMISSIONER NARASAKI: I don't agree.

10 COMMISSIONER YAKI: So --

11 CHAIRMAN CASTRO: So --

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

14 CHAIRMAN CASTRO: Yes, I am.

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

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

21 COMMISSIONER ACHTENBERG: I think we have
22 the original motion.

23 COMMISSIONER NARASAKI: -- the original
24 motion. So I just want to be clear --

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1 COMMISSIONER ACHTENBERG: Yes, right.

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

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

6 COMMISSIONER NARASAKI: Original motion?

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

11 COMMISSIONER NARASAKI: No.

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

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

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

18 COMMISSIONER HERIOT: Just split it off.

19 COMMISSIONER YAKI: Let me --

20 COMMISSIONER HERIOT: He just ruled that
21 out of order.

22 COMMISSIONER YAKI: Oh, he just ruled that
23 out of order. Okay. Then we go back to the original
24 motion then, that I proposed.

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1 CHAIRMAN CASTRO: Okay. And so I rule the
2 original motion out of order as well.

3 COMMISSIONER YAKI: And then I appeal that
4 ruling.

5 CHAIRMAN CASTRO: Okay.

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

8 COMMISSIONER ACHTENBERG: Okay.

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

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

15 CHAIRMAN CASTRO: Repeat that?

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

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

20 COMMISSIONER YAKI: A no vote --

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

23 COMMISSIONER YAKI: -- is disagreeing with
24 the Chair.

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1 CHAIRMAN CASTRO: Right. So if you agree
2 with me that it is out of order, you vote yes.

3 COMMISSIONER YAKI: Yes.

4 CHAIRMAN CASTRO: Yes.

5 COMMISSIONER NARASAKI: Which motion?

6 COMMISSIONER HERIOT: Motion --

7 CHAIRMAN CASTRO: The original motion.

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

11 COMMISSIONER YAKI: Yes.

12 CHAIRMAN CASTRO: Correct. Is that
13 right --

14 COMMISSIONER HERIOT: And then we'll
15 have --

16 CHAIRMAN CASTRO: -- Commissioner Heriot?

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

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

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

23 CHAIRMAN CASTRO: Okay. Got it.

24 COMMISSIONER ACHTENBERG: -- on the first

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1 motion.

2 CHAIRMAN CASTRO: Okay.

3 COMMISSIONER YAKI: You ruled the --

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

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

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

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

13 CHAIRMAN CASTRO: No, no --

14 COMMISSIONER YAKI: I --

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

20 COMMISSIONER KIRSANOW: Understood.

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

24 COMMISSIONER KIRSANOW: No.

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1 CHAIRMAN CASTRO: Commissioner Kladney,
2 how do you vote?

3 COMMISSIONER KLADNEY: No.

4 CHAIRMAN CASTRO: Commissioner Heriot,
5 how do you vote?

6 COMMISSIONER HERIOT: I vote no.

7 CHAIRMAN CASTRO: Commissioner
8 Achtenberg, how do you vote?

9 COMMISSIONER ACHTENBERG: Yes. Yes.

10 CHAIRMAN CASTRO: Commissioner
11 Achtenberg?

12 COMMISSIONER ACHTENBERG: Yes.

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

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

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

20 COMMISSIONER NARASAKI: No.

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

23 COMMISSIONER YAKI: No.

24 CHAIRMAN CASTRO: And I vote yes. That's

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1 two yeses and five nos. So I have been overruled.

2 COMMISSIONER HERIOT: Call the question.

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

6 COMMISSIONER HERIOT: Are you amending it
7 or --

8 COMMISSIONER YAKI: I'm --

9 COMMISSIONER HERIOT: -- just making a --

10 COMMISSIONER YAKI: Well, I'm --

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

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

15 COMMISSIONER HERIOT: You want to --

16 COMMISSIONER YAKI: -- different --

17 COMMISSIONER HERIOT: -- full amendment.

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

23 The termination of any special assistant as
24 a confidential accepted service appointee is within the

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1 sole discretion of the supervising Commissioner and
2 that the Staff Director, as the Administrative Head of
3 the Agency, executes the appointment and termination
4 process at the behest, direction and discretion of each
5 Commissioner.

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

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

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

16 COMMISSIONER YAKI: Okay.

17 COMMISSIONER ACHTENBERG: Has it been
18 seconded?

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

21 CHAIRMAN CASTRO: I'll need a second?

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

24 CHAIRMAN CASTRO: I'm sorry. I thought

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1 it'd been previously seconded.

2 COMMISSIONER HERIOT: Yes, it had been.

3 COMMISSIONER KLADNEY: It has been.

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

8 COMMISSIONER KIRSANOW: Yes.

9 CHAIRMAN CASTRO: Commissioner Kladney,
10 how do you vote?

11 COMMISSIONER KLADNEY: Yes.

12 CHAIRMAN CASTRO: Commissioner Heriot,
13 how do you vote?

14 COMMISSIONER HERIOT: Yes.

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

17 COMMISSIONER ACHTENBERG: Absolutely not.

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

20 COMMISSIONER ACHTENBERG: No. The
21 answer's --

22 CHAIRMAN CASTRO: No --

23 COMMISSIONER ACHTENBERG: -- no.

24 CHAIRMAN CASTRO: -- okay. Commissioner

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1 Narasaki, how do you vote?

2 COMMISSIONER NARASAKI: Yes.

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

5 COMMISSIONER YAKI: Yes.

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

9 COMMISSIONER KLADNEY: No.

10 CHAIRMAN CASTRO: No?

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

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

15 **III. LEGAL MEMORANDUMS AND OPINIONS**

16 **REQUEST WRITTEN OPINION AS TO REAPPOINTMENT POLICY**

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

24 MS. SALLO: Can you please provide me with

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1 that?

2 COMMISSIONER KLADNEY: It's in the
3 transcript.

4 MS. SALLO: Okay. For which meeting?

5 COMMISSIONER KLADNEY: September -- I'm
6 sorry, August.

7 MS. SALLO: August? Thank you.

8 CHAIRMAN CASTRO: Well --

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

12 CHAIRMAN CASTRO: One at a time.

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

15 COMMISSIONER KIRSANOW: Kirsanow second.

16 COMMISSIONER KLADNEY: I think we can call
17 the question.

18 CHAIRMAN CASTRO: There's no discussion?

19 COMMISSIONER KLADNEY: Well, nobody looks
20 like they want to talk.

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

23 COMMISSIONER ACHTENBERG: Yes, we did.

24 COMMISSIONER YAKI: We did.

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1 CHAIRMAN CASTRO: Yes, I thought so.

2 Okay. So we have a motion and I'll do a roll call.

3 COMMISSIONER KLADNEY: Can --

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

6 COMMISSIONER KLADNEY: Okay. The
7 motion --

8 CHAIRMAN CASTRO: Can you restate it,
9 Commissioner Kladney?

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

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

19 COMMISSIONER KIRSANOW: Kirsanow seconds.

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

23 COMMISSIONER KIRSANOW: Yes.

24 CHAIRMAN CASTRO: Commissioner Kladney,

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1 how do you vote?

2 COMMISSIONER KLADNEY: Yes.

3 CHAIRMAN CASTRO: Commissioner Heriot,
4 how do you vote?

5 COMMISSIONER HERIOT: Yes.

6 CHAIRMAN CASTRO: Commissioner
7 Achtenberg, how do you vote?

8 COMMISSIONER ACHTENBERG: Yes.

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

11 COMMISSIONER ACHTENBERG: Yes. Yes.

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

14 COMMISSIONER NARASAKI: Yes.

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

17 COMMISSIONER YAKI: Yes.

18 CHAIRMAN CASTRO: Yaki?

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

21 CHAIRMAN CASTRO: And I abstain. So we
22 have one, two, three, four, five, six yeses and an
23 abstention. The motion carries. Your next motion,
24 Commissioner Kladney?

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**LEGAL OPINION REGARDING JURISDICTION
OF THE COMMISSION**

COMMISSIONER KLADNEY: 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 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

1 to support Commissioner Kladney's motion, that it's my
2 opinion that the Commission, and by that I define the
3 Commission as the Commissioners as to the statute.

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

8 COMMISSIONER KLADNEY: Commissioner
9 Kirsanow, I actually agree with you. I'm just trying
10 to get a feel for what we're doing because our last set
11 of concept papers were sent to the OGC and some were
12 rejected, some were edited. Everything seemed to be
13 foreign to me, but --

14 COMMISSIONER HERIOT: Yes.

15 COMMISSIONER KLADNEY: -- which is why I'm
16 asking for this opinion.

17 COMMISSIONER KIRSANOW: Well, I
18 understand completely.

19 COMMISSIONER HERIOT: Mr. Chairman?

20 CHAIRMAN CASTRO: Yes, Commissioner
21 Heriot.

22 COMMISSIONER HERIOT: I just wanted to
23 comment on this as well that yes, in this last round of
24 concept papers, we got the opinion from the General

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1 Counsel's office about jurisdiction.

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

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

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

13 COMMISSIONER YAKI: This is Commissioner
14 Yaki.

15 CHAIRMAN CASTRO: Hearing none, I'll --

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

17 CHAIRMAN CASTRO: -- take a roll call vote.

18 COMMISSIONER YAKI: I'm sorry, Mr. Chair.
19 This is Commissioner Yaki.

20 CHAIRMAN CASTRO: Yes.

21 COMMISSIONER YAKI: I just wanted to
22 reinforce the statements made by Commissioners Kladney,
23 Kirsanow and Heriot, and that is, in the end, it is, I
24 think, within the purview of the Commission as

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1 constituted by the eight commissioners to ultimately
2 make the determination.

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

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

10 COMMISSIONER KIRSANOW: Of course.

11 CHAIRMAN CASTRO: Commissioner Kladney,
12 how do you vote?

13 COMMISSIONER KLADNEY: Yes.

14 CHAIRMAN CASTRO: Commissioner Heriot,
15 how do you vote?

16 COMMISSIONER HERIOT: Yes.

17 CHAIRMAN CASTRO: Commissioner
18 Achtenberg, how do you vote?

19 COMMISSIONER ACHTENBERG: No.

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

23 COMMISSIONER ACHTENBERG: No.

24 CHAIRMAN CASTRO: -- since there --

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1 COMMISSIONER ACHTENBERG: No --

2 CHAIRMAN CASTRO: No?

3 COMMISSIONER ACHTENBERG: -- Mr.
4 Chairman.

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

7 COMMISSIONER NARASAKI: Yes.

8 CHAIRMAN CASTRO: Commissioner Yaki, how
9 do you vote?

10 COMMISSIONER YAKI: Yes.

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

14 COMMISSIONER KLADNEY: My next motion
15 is --

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

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

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

22 **WRITTEN OPINION REGARDING IF OGC BELIEVES THE SAME**

23 **JURISDICTIONAL REQUIREMENTS APPLY TO SACs**

24 COMMISSIONER KLADNEY: Well, it really all

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1 has to do with legal opinions. There was a policy
2 instituted by the head of the RPCU that all concept
3 papers from SACs must be reviewed by RPCU and OGC prior
4 to the SACs deliberating and voting on it.

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

11 CHAIRMAN CASTRO: Is there a second.

12 COMMISSIONER HERIOT: Second.

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

16 COMMISSIONER KIRSANOW: Yes.

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

19 COMMISSIONER KLADNEY: Yes.

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

22 COMMISSIONER HERIOT: Yes.

23 CHAIRMAN CASTRO: Commissioner
24 Achtenberg, how do you vote?

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1 COMMISSIONER ACHTENBERG: No, Mr. Chair.

2 CHAIRMAN CASTRO: Commissioner Narasaki,

3 how do you vote?

4 COMMISSIONER NARASAKI: No.

5 CHAIRMAN CASTRO: Commissioner Yaki, how

6 do you vote?

7 COMMISSIONER YAKI: Yes.

8 CHAIRMAN CASTRO: And I vote no. That's

9 three nos to four yeses. The motion passes. Do you

10 have one more?

11 COMMISSIONER KLADNEY: Not at this time.

12 **IV. ADJOURN MEETING**

13 CHAIRMAN CASTRO: Okay. There being no

14 other business on the agenda, I hereby adjourn the

15 special meeting of the Civil Rights Commission at 12:17

16 p.m. Eastern Time.

17 COMMISSIONER YAKI: Thank you, Mr.

18 Chairman.

19 CHAIRMAN CASTRO: Thank you, everyone.

20 COMMISSIONER KLADNEY: Thank you, Mr.

21 Chairman.

22 (Whereupon, the above-entitled matter went

23 off the record at 12:17 p.m.)

24

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