

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, MAY 18, 2012

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The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:35 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

- MARTIN R. CASTRO, Chairman
- ABIGAIL THERNSTROM, Vice Chair
- ROBERTA ACHTENBERG, Commissioner
- TODD F. GAZIANO, Commissioner
- GAIL L. HERIOT, Commissioner
- PETER N. KIRSANOW, Commissioner
- DAVID KLADNEY, Commissioner (via telephone)
- MICHAEL YAKI, Commissioner (via telephone)

## STAFF PRESENT:

TERESA BROOKS

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

TINALOUISE MARTIN, Director, OM

PETER MINARIK, Director, RPCU

TORRENCE MONTGOMERY

LENORE OSTROWSKY, Acting Chief, PAU

MICHELE RAMEY

JOHN RATCLIFFE, Chief, Budget and Finance

KIMBERLY TOLHURST, Senior Attorney, OGC

VANESSA WILLIAMSON

## COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

RICHARD SCHAMEL

MARLENE SALLO

ALISON SOMIN

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

2 (9:35 a.m.)

3 CHAIRMAN CASTRO: Good morning. This  
4 meeting is coming to order. This is a meeting of the  
5 U.S. Commission on Civil Rights. It is now 9:35 a.m.  
6 on May 18, 2012. This meeting is taking place at the  
7 headquarters of the U.S. Commission on Civil Rights,  
8 624 9th Street, Northwest, in Washington, D.C.

9 I'm Chairman Marty Castro. Commissioners  
10 who are present at this meeting are myself, Vice Chair  
11 Thernstrom, Commissioner Kirsanow, Commissioner  
12 Heriot, Commissioner Gaziano, and Commissioner  
13 Achtenberg. Commissioner Yaki and Commissioner  
14 Kladney are joining us by telephone. So a quorum of  
15 commissioners is present.

16 Is the person who is acting as the court  
17 reporter present?

18 COURT REPORTER: Yes, Mr. Chairman.

19 CHAIRMAN CASTRO: Thank you. The meeting  
20 shall now come to order.

21 I. APPROVAL OF AGENDA

22 CHAIRMAN CASTRO: The first item is the  
23 approval of the agenda for May 18th. I know we have  
24 got some amendments that we want to make by unanimous  
25 consent. So those amendments would include moving the

1 discussion of the agency staffing issue to the  
2 beginning of the agenda and to put off the review of  
3 the minutes until the next meeting because there are  
4 some questions raised about the minutes. And the  
5 third item was a request by Commissioner Gaziano to  
6 add a report from the senior attorney in our Office of  
7 the General Counsel to give us an update on the Voting  
8 Rights Act draft report.

9 Did I accurately summarize the amendments  
10 by unanimous consent?

11 (No response.)

12 CHAIRMAN CASTRO: So with that, I would  
13 move that the agenda with these proposed amendments be  
14 moved. Is there a second?

15 COMMISSIONER GAZIANO: I second.

16 CHAIRMAN CASTRO: All those in favor say  
17 aye.

18 (Chorus of ayes.)

19 CHAIRMAN CASTRO: Any abstentions?

20 (No response.)

21 CHAIRMAN CASTRO: Any against?

22 (No response.)

23 II. MANAGEMENT AND OPERATIONS

24 - DISCUSSION ON AGENCY STAFFING

25 CHAIRMAN CASTRO: Okay. So the first

1 item, then, we will move on to a discussion of our  
2 agency staffing issues. As my colleagues know, over  
3 the last couple of weeks since our last meeting, there  
4 has been a lot of shuttle diplomacy.

5 I know I have talked to virtually all of  
6 you and, finally, this morning Commissioner Kirsanow  
7 because of scheduling and trying to find if there was  
8 some way to move forward with finding an acting staff  
9 director. We pursued for a period of time identifying  
10 potential detailee candidates, both from our  
11 conservative colleagues as well as our democratic  
12 colleagues.

13 So many of us interviewed those candidates  
14 only to find that we had reached according to our  
15 Office of General Counsel and through OPM unofficially  
16 that there were some legal impediments to a detailee  
17 as well as to who would sign a detail agreement on  
18 behalf of our agency after Ms. Tolhurst stepped down  
19 as Acting Staff Director.

20 I then went back to the wall to see if we  
21 might be able to reach an agreement among  
22 commissioners to have a majority of us agree to one of  
23 our existing staff members to act as an interim acting  
24 staff director pending the White House's choice of a  
25 candidate for us to review.

1           Unfortunately, we were not able to reach  
2 consensus. One of our candidates withdrew. And I  
3 continue to press the White House on a regular basis.  
4 I understand that they are interviewing candidates.  
5 So that is always a hopeful sign.

6           But, even pending that, we still need  
7 someone to run this agency in the interim. Thirty  
8 days without a staff director has me and many of you  
9 jittery, as it should. But we seem to be at a point  
10 where we don't have a consensus yet on how to proceed.

11           I know that Commissioner Gaziano in  
12 conversations with me has indicated that he may have  
13 some ideas to address the legal concerns regarding a  
14 detailee.

15           So, under the circumstances, you know, I  
16 have asked Commissioner Gaziano to speak to that so  
17 that we can all have an idea of what those issues are  
18 or what the potential ways to address this would be so  
19 that we can move forward, hopefully in one direction  
20 or another, to deal with finding an acting staff  
21 director.

22           COMMISSIONER GAZIANO: Thank you, Mr.  
23 Chairman.

24           After we talk about the acting staff  
25 director position, I would also like to raise a few

1 questions about the senior attorney in the Office of  
2 General Counsel, who is also the only attorney in the  
3 Office of General Counsel.

4 CHAIRMAN CASTRO: Sure.

5 COMMISSIONER GAZIANO: Just to say where  
6 I'm going with that, I am disappointed with one of the  
7 communications that we received about her pay. But I  
8 want to raise a -- I don't see --

9 CHAIRMAN CASTRO: She was here, but she  
10 stepped away.

11 COMMISSIONER GAZIANO: Yes.

12 COMMISSIONER ACHTENBERG: No. She's here.

13 CHAIRMAN CASTRO: There she is.

14 COMMISSIONER GAZIANO: Oh. She is. Okay.  
15 At the conclusion, when we talk about the sector, I do  
16 want to raise an issue of whether it isn't within our  
17 authority to redesignate her acting general counsel  
18 and at least have a pay level that was equivalent to  
19 her previous pay level.

20 But, with regard to the detail, I did do  
21 some preliminary research, mostly with John's help.  
22 And it seemed to confirm the issues of law that I  
23 identified in my email. And I'll go over that a  
24 little bit.

25 In my email, you know, I proposed engaging



1 in some very careful and thorough legal research. And  
2 I said I didn't want to do that if there wasn't some  
3 sense of the rest of the Commission or commissioners  
4 that that would be fruitful. And so I didn't do  
5 exhaustive work. So maybe some indication from you  
6 all that that was worth pursuing.

7 Only a tiny bit of my analysis turns on an  
8 issue that irritates some. So I'd rather not spend  
9 much time on it. And that's the teeny bit whether we  
10 are actually in the Executive Branch or not.

11 I will mention one thing real quickly on  
12 that because whether we are or not, I think the detail  
13 issues are surmountable. But I was made aware that  
14 one of our regulations in the CFR that the Commission  
15 adopted previously says we are an agency within the  
16 Executive Branch. That's unfortunate because I think  
17 it is void given the Constitution. It has been a  
18 violation of the Constitution.

19 But let's assume -- just get this out of  
20 the way -- that that CFR is correct that we're in the  
21 Executive Branch. Then we would be bound as an  
22 Executive Branch agency to follow the binding  
23 precedence of the Office of Legal Counsel. And the  
24 Office of Legal Counsel, binding precedent is that  
25 we're not in Executive Branch.

1           So if we are in the Executive Branch,  
2 we've not in the Executive Branch. If we presume, the  
3 most recent -- and this was not just on commissions  
4 like ours with congressional -- specifically of the  
5 Commission on Civil Rights. The most recent was  
6 Walter Dellinger, head of the Office of Legal Counsel,  
7 the Clinton administration, who subsequently became  
8 Acting Solicitor General for the Clinton  
9 administration, citing and essentially reaffirming the  
10 signing statement or a document the DOJ added to the  
11 Reagan signing statement to the Commission.

12           So if we presume that that regulation is  
13 not binding and we make our own determination, I think  
14 we would have to come to the same conclusion, the  
15 Office of Legal Counsel.

16           But now to what really matters, whether  
17 we're in the Executive Branch or not, and I think is  
18 the case, detailees, the Office of Legal Counsel has  
19 also said, which is binding for the rest of the  
20 Executive Branch, that Executive Branch detailees can  
21 be detailed through independent agencies and the  
22 Congress, whichever of those we might be.

23           And clearly they can be detailed to other  
24 agencies, the Office of Legal Counsel, which again are  
25 binding on OPM, binding on the rest of the Executive

1 Branch unless the Attorney General or the President  
2 overrules, are that you can make a temporary  
3 appointment to a position that must be filled by some  
4 other means. And there have been probably thousands  
5 of such temporary appointments over the years.

6 But I have not had a chance to talk to the  
7 senior attorney in the Office of General Counsel.  
8 There are some issues still to track down. I do think  
9 that, as I set forth in my email, I am a little bit  
10 more confident of the interpretation, the quick and  
11 dirty interpretation, I have of the Economy Act. The  
12 Economy Act is very broad and allows any agency to  
13 lend assistance to any other agency. I do not see  
14 that it is proper to interpret that in as narrow a way  
15 to preclude the Commission, the collective Commission,  
16 acting as agency head or its Chairman.

17 And, as I said, the Supreme Court  
18 jurisprudence on who the head of a collective agency  
19 is is a little bit, unfortunately, unclear, but it is  
20 either a majority of the commissioners or its chair.  
21 It depends on the statute.

22 The Supreme Court has gone different ways.  
23 I think that under the Economy Act, the Economy Act  
24 does not say it must be the administrative head of an  
25 agency. It is the head of an agency.

1           So I think that there are one or two  
2 issues that I would want to track down. I also think  
3 there is a way to possibly get the Executive Branch to  
4 bless our interpretation if we were to determine that  
5 it is within our right.

6           But I think that if we were going to  
7 pursue this, we would have to make our independent  
8 judgment that that was right. We would have to  
9 consult our Office of General Counsel in whatever  
10 capacity and be careful about doing that.

11           But I would suggest that we simply accept  
12 the detail and we determine, as appropriate, what  
13 duties that person can perform, whether that person  
14 can perform, the functions of the acting staff  
15 director. I think it would likely be quite possible.

16           But my final thought is, are we likely to  
17 agree on a candidate? I we are not likely to agree on  
18 a candidate, then all these steps also are somewhat  
19 time-consuming.

20           CHAIRMAN CASTRO: Yes. Commissioner, I'm  
21 sorry. Vice Chair?

22           VICE CHAIR THERNSTROM: Just one  
23 clarification here. When you said "accept a  
24 candidate," do you mean in principle because, as you  
25 just said, we may not be able to agree on a candidate?

1                   COMMISSIONER GAZIANO: That's right. And  
2 so I don't know. That's the chicken and egg issue.  
3 Do we conduct all this research to see whether we can  
4 consider a candidate or do we see if a candidate might  
5 be possible and then go through the effort to assure  
6 ourselves that it is?

7                   And, again, different people in the  
8 Executive Branch still would have to go along with  
9 that unless we found a detailee from Congress.

10                  VICE CHAIR THERNSTROM: Detailee is what  
11 you're saying, not exempt?

12                  COMMISSIONER GAZIANO: Correct.

13                  CHAIRMAN CASTRO: Commissioner Gaziano,  
14 let me ask you one question. So that would address  
15 the underlying issue of whether or not a detail --  
16 just assuming that you're right for the moment. But  
17 a detailee would be acceptable, a legal for our  
18 agency. We still would have the issue, which is  
19 really what prompted this whole thing in the first  
20 place as the fact that we don't have an acting staff  
21 director right now.

22                  Who at the agency would be the appropriate  
23 entity to actually sign a detail agreement between our  
24 agency and any -- you know, the loaning agency?

25                  COMMISSIONER GAZIANO: With further

1 research, I strongly suspect the answer would be a  
2 majority of the Commission authorizes the Chairman to  
3 sign such an agreement, the majority of the Commission  
4 and the Chairman together exercising their awesome  
5 power --

6 CHAIRMAN CASTRO: Oh, yes.

7 COMMISSIONER GAZIANO: -- that that ought  
8 to satisfy the requirement of the Economy Act. At  
9 least that's --

10 CHAIRMAN CASTRO: And, just for the  
11 record, I wanted to be clear that there has been an  
12 admission that the Chair has awesome power.

13 (Laughter.)

14 CHAIRMAN CASTRO: And I will accept you  
15 all at some point in the future.

16 COMMISSIONER GAZIANO: I did not  
17 distinguish between the awesome power of the Chairman  
18 and the majority of the Commission.

19 CHAIRMAN CASTRO: Okay. Okay. Fine.

20 COMMISSIONER GAZIANO: Together, though.

21 COMMISSIONER HERIOT: Virtual force of  
22 nature.

23 CHAIRMAN CASTRO: Okay. So any other  
24 comments or questions? And I would also like to hear  
25 from our attorney about any thoughts you may have in

1 light of what our commissioner has put forward. Any  
2 commissioners have any questions on Commissioner  
3 Gaziano's suggestions on how this might work?

4 COMMISSIONER ACHTENBERG: I just want to  
5 say, Mr. Chairman, --

6 CHAIRMAN CASTRO: Sure.

7 COMMISSIONER ACHTENBERG: -- that I think  
8 it sounds imminently reasonable, but that doesn't mean  
9 that it is necessarily the law. So, you know, I hope  
10 you're right. So I would look forward to a further  
11 explication assuming I think that it's fruitful to go  
12 forward because we think we can or we might be able to  
13 bring on a candidate.

14 CHAIRMAN CASTRO: Yes.

15 COMMISSIONER ACHTENBERG: But, however we  
16 decide, whether or not we're going to undertake  
17 further this inquiry, I do think it's -- just as my  
18 personal opinion, I do think it sounds promising.

19 CHAIRMAN CASTRO: All right. And let me  
20 say on the issue of whether we can agree on a  
21 detailee, I know at this point many of us have  
22 interviewed two candidates. Not all of us have  
23 interviewed those two candidates.

24 So perhaps if we can surmount legal issues  
25 that our general counsel and OPM have raised for us,

1 I think folks who have not interviewed those  
2 candidates should do that.

3 But that doesn't mean that we can't go out  
4 and try to find some other candidates as well. Now,  
5 I have been looking for other candidates. And some  
6 folks have said they didn't want to come and be  
7 considered this close to the end of a presidential  
8 term.

9 But, having said that, when it was raised  
10 there were legal blockades, I stopped actively  
11 looking. And I can begin to do that as well as well.  
12 So if it turns out we can do this and we can't agree  
13 on one of the two we have interviewed, then we can  
14 certainly begin to try to expand the net some more,  
15 but we'll see if that happens or not. I think it's  
16 all contingent on whether or not any research that you  
17 would present to our Office of the General Counsel  
18 would pass muster.

19 COMMISSIONER GAZIANO: And let me just be  
20 clear. Whether we are in the Executive Branch or not,  
21 we still have to follow certain laws to apply and the  
22 Executive Branch has to follow Executive Branch also.  
23 There are a few elements of this that could become a  
24 little tricky.

25 Again, I apologize, not having talked to



1 all of the attorneys in the Office of General Counsel  
2 to get a further understanding, but unless there is  
3 objection, I will try to have not only that  
4 conversation but if any of your special assistants  
5 want to lend a hand, particularly critical hand, I  
6 would appreciate critical going forward.

7 The other thing, though, is my suggestion  
8 about a detailee was to get another senior staffer in.  
9 We can still decide. I'm not measurably opposed to  
10 someone else being the acting staff director. I think  
11 pursuing a detail is worthy whether that's necessarily  
12 the acting staff director.

13 You know, one issue about elevating anyone  
14 on our career staff is that most of them are doing  
15 between three and six or seven jobs. And then who  
16 would do their three and six or seven jobs? I mean,  
17 that's an issue. But a detailee could help on either  
18 of those.

19 CHAIRMAN CASTRO: And let me also suggest  
20 that you might want to touch base with our HR person,  
21 Tina Martin, who has got a lot of experience in these  
22 issues as well in terms of her input on these issues  
23 to detail in addition to our General Counsel's Office.

24 But is there consensus that perhaps  
25 Commissioner Gaziano and some team of his essays or

1 others would be willing to let him kind of have at it  
2 and provide our general counsel and our HR people some  
3 basis for their position and if it passes muster, then  
4 we can come back to the table and say, "All right.  
5 Let's take a look"? If it doesn't, then, you know, we  
6 can revisit again other staff.

7 But I know that we have all amongst us  
8 talked about a number of staff and, for various  
9 reasons, have not been able to reach consensus. But  
10 maybe after we realize that a detailee it is clear is  
11 not possible, if that turns out to be the ultimate  
12 conclusion, and maybe that will change people's minds.

13 So does that seem like a course of action  
14 that we can undertake with all due haste?

15 COMMISSIONER ACHTENBERG: Mr. Chairman?

16 CHAIRMAN CASTRO: Yes? I'm sorry.

17 Commissioner Achtenberg?

18 COMMISSIONER ACHTENBERG: With one caveat.  
19 And that is that I would like to hear from --

20 CHAIRMAN CASTRO: That's right, yes.

21 COMMISSIONER ACHTENBERG: -- our senior  
22 attorney --

23 CHAIRMAN CASTRO: I'm sorry. They asked  
24 about that earlier, yes.

25 COMMISSIONER ACHTENBERG: -- how she views

1 both the original rationale that was postulated from  
2 her office and the additional information that the  
3 commissioner just presented if that's okay.

4 MS. TOLHURST: Okay. This is Kim  
5 Tolhurst. So my initial thought is not to say that  
6 more detailee is possible. My reading of the Economy  
7 Act -- and I will grant you that I consider myself an  
8 expert on this.

9 COMMISSIONER ACHTENBERG: Sure.

10 MS. TOLHURST: I think, really, no one is.  
11 I can't find any instance of an agency's detailing  
12 their head to --

13 CHAIRMAN CASTRO: Could you speak up? Do  
14 you have your mike on?

15 MS. TOLHURST: Yes.

16 CHAIRMAN CASTRO: Okay.

17 MS. TOLHURST: I can't really say that I  
18 found an example of an agency doing this that we could  
19 model. My concern is that for something that's as  
20 important as the head of the agency, I want us to be  
21 completely on the up and up. And when you look at the  
22 Economy Act, whether it's the staff director, acting  
23 staff director, or if you said, "Well, the  
24 commissioners, let's say that they can do this,"  
25 although our AIs and our regs and our statute are

1 pretty clear that the staff director is meant to do  
2 personnel actions, even if we decided commissioners  
3 would need to take on that role because of our very  
4 unique dire situation, the effect of the Economy Act  
5 speaks of the head of the agency, whomever that is,  
6 being the person to approve a detail to me tells us  
7 the spirit of the act is that the detail is not to the  
8 person who is going to become the head of the agency.  
9 And any other kind of detail, again, if you wanted to  
10 take a staff member and put them as acting general  
11 counsel and then they needed a detail for their job,  
12 I would think that would be more reasonable. It was  
13 just a bit too cute. I have to say we are going to  
14 use this act to appoint the person basically we all  
15 know is essentially going to be the administrator we  
16 --

17 COMMISSIONER GAZIANO: The administrative  
18 head.

19 MS. TOLHURST: Yes.

20 COMMISSIONER GAZIANO: That's not the  
21 head.

22 CHAIRMAN CASTRO: Let's let her finish.  
23 And then we can ask her whatever questions we want.  
24 Okay?

25 MS. TOLHURST: I think what we have done

1 in the past with Chris Byrnes and with myself was --  
2 and we are very careful, obviously. We did not call  
3 for Chris or I the acting staff director. Instead,  
4 there was this ridiculous, cumbersome, designated blah  
5 blah blah. And that was because of a couple of  
6 things, including case law about acting staff  
7 directors.

8 I was thinking yesterday about the  
9 Ishimaru case. And in that case, there are two steps  
10 for our actual staff director, which, please God,  
11 we'll get sometime. If the President nominates, you  
12 all vote. It's two steps.

13 And so internally to designate anyone on  
14 staff makes perfect sense. We obviously have to  
15 function. It feels a little bit -- to get someone  
16 from outside -- so Ishimaru, I think you all are  
17 familiar with this.

18 The point was that the President couldn't  
19 circumvent the commissioners by appointing an acting  
20 staff director. It had to be two steps. The  
21 President could nominate, but the commissioners had  
22 their right to weight in.

23 If we are going outside, it feels like  
24 we're doing the flip of that. We're taking the  
25 President's role of the nominating and just then the

1 commissioners vote.

2           And so with these concerns, then, I went  
3 to OPM. And while I was out sick, the Chairman's  
4 special assistant talked to OPM. And, you know,  
5 whether there opinion is binding on us or not, they  
6 have some expertise. And I think the PM is for  
7 personnel management. And they thought this was also  
8 dicey. So it gave me a lot of pause.

9           And then at the same time, there is  
10 duality that in the moment, we have one lawyer in the  
11 Office of General Counsel. And they accept you and  
12 the FOIA officer, and I'm submitting the statutory  
13 report.

14           And this might be speaking out of school,  
15 but you all don't have five votes for any detailee.  
16 And I'm not prioritizing a lot of further research on  
17 this if I don't think you do because I have an  
18 inordinate amount of other legal work that no one else  
19 can properly do here.

20           And then, unfortunately, I was out.

21           So is there more research that can be done  
22 on this? Yes. It's not a closed question. But I  
23 think it's in many ways a question of first  
24 impression. And it's hard to find a regulation saying  
25 you can or can't do this. I don't want to be cute

1 about it, and I don't want us to behave in any way  
2 that even appears improper.

3 So that's my --

4 CHAIRMAN CASTRO: Commissioner Heriot?  
5 And Commissioner Gaziano and then the Vice Chair.

6 COMMISSIONER HERIOT: I just wanted to say  
7 that there are a couple of issues I think here that  
8 are pretty easy. And that is staff director is the  
9 director of the staff, not the director of the agency.

10 You know, looking at our statute, those  
11 words were carefully chosen. The statute says the  
12 Commission consists of eight commissioners and the  
13 title that is given to the staff director is staff  
14 director, not Commission director. So I think that's  
15 an easy question.

16 The agency head here insofar as "agency"  
17 is the right word here -- and I actually don't think  
18 it is, but I'm going to go for agency head -- has got  
19 to be either the Chairman of the Commission or, I  
20 think probably more accurately, the Commission. I  
21 wouldn't call it a majority of the Commission,  
22 although, though, you know, in effect, if the agency  
23 head is a member of the Commission, then a majority of  
24 the commissioners directs what that eight-member  
25 commission does. But I don't think it's even close to

1 suggest the staff director is the agency head.

2 The analogy I would give is to the White  
3 House chief of staff. Nobody would say that the  
4 agency head of the White House is the chief of staff.  
5 You know, the President is the President. And that's  
6 just the way it is.

7 As for whether or not this is  
8 circumventing --

9 VICE CHAIR THERNSTROM: Wait a minute  
10 here.

11 COMMISSIONER HERIOT: Pardon me?

12 VICE CHAIR THERNSTROM: I'm sorry. I'm  
13 really lost. Is there equivalent in the President  
14 here?

15 COMMISSIONER HERIOT: The Commission. The  
16 Commission. Just like the staff members in Congress  
17 are not Congress, Congress is Congress. And the  
18 Supreme Court is the Supreme Court. Now, there are  
19 all sorts of collective bodies that work like that.  
20 That is not an unusual configuration at all.

21 The other point is, you know, are we  
22 circumventing the President's power if we go out and  
23 find an acting staff director? I think we already  
24 crossed that bridge. We have methods by which we  
25 confer the staff director's power on an internal



1 member. And so we have done that already. I don't  
2 see that the crucial difference is going inside or  
3 outside the staff as it exists now. You know, I would  
4 be quite shocked if there is not a way to do this.

5 You know, in my message to you, I  
6 analogize this to my vague recollection of an I Love  
7 Lucy episode where Tennessee Ernie Ford is asked how  
8 to get somewhere. And he goes, "Well, you can't get  
9 there from here."

10 You can get there from here. There is a  
11 way that we can get a detailee if that is what we want  
12 to do. I am quite confident of that. It's just a  
13 question of how we do it and whether we want to invest  
14 the time and to figuring out that because we may find  
15 that it is easier to appoint somebody from within.

16 CHAIRMAN CASTRO: Commissioner Gaziano?  
17 Then the Vice Chair. Is there any commissioner on the  
18 phone that wants to ask a question after the Vice  
19 Chair?

20 (No response.)

21 CHAIRMAN CASTRO: No? Okay. Commissioner  
22 Gaziano?

23 COMMISSIONER GAZIANO: I wanted to  
24 position my agreement with Ms. Tolhurst, whatever her  
25 title is, in at least some respects. I mean, those

1 are serious concerns she raises. And I think she  
2 acknowledged, though, that there are serious  
3 alternatives to not crossing those, but I think that  
4 some of those points are persuasive. And there's one  
5 or two maybe minor linkages in the legal chain that I  
6 would want to resolve that I think are a little bit  
7 more open.

8 I, for example, have not found that a  
9 detailee was brought in but something akin to a  
10 detailee was brought in to then serve as the head of  
11 the agency, but I didn't find -- but only a fraction  
12 of the opinions are published.

13 I know when I used to work in the Office  
14 of Legal Counsel we had ten times this many that were  
15 not -- and I would also want to get OPM or someone  
16 else in the Executive Branch to bless it, but I think  
17 the only way to get them to bless it is not to go back  
18 to them right now and say, "Are you sure about your  
19 opinion? We think you're wrong." And then they're  
20 going to dig in their heels.

21 And if the Commission is divided over  
22 that, then that is going to make it less likely.  
23 Particularly presidential appointees are signaling to  
24 the Executive Branch they are uncomfortable with what  
25 some of the rest of us want to do.

1           But I think there may be a way I would  
2 rather not go through that right now because if I say  
3 it, it will preclude it maybe necessarily from  
4 happening, but I concede many of the points that the  
5 Acting General Counsel makes about us wanting to make  
6 sure that there really is clear authority before going  
7 down the road. But I'm willing to spend a little more  
8 time with your all's signature to look into it.

9           CHAIRMAN CASTRO: Madam Vice Chair?

10          VICE CHAIR THERNSTROM: David Kladney, are  
11 you on the phone? Are you on the phone?

12          COMMISSIONER KLADNEY: Yes, I am, Madam  
13 Vice Chair.

14          VICE CHAIR THERNSTROM: I ask because I  
15 think my understanding is you might be a little to  
16 some extent sympathetic with this question. And maybe  
17 it's addressed to Kim Tolhurst. I'm not sure.

18                 In the absence of a detailee, in what way  
19 is this situation failing to function? In her view,  
20 how urgent is it that we have somebody in that chair,  
21 as it were?

22          CHAIRMAN CASTRO: Is that a question to  
23 Ms. Tolhurst?

24          VICE CHAIR THERNSTROM: I think it's best  
25 answered by her.

1 CHAIRMAN CASTRO: Okay.

2 MS. TOLHURST: How urgent that is I think  
3 is for you all to decide versus --

4 COMMISSIONER YAKI: Excuse me. This is  
5 Commissioner Yaki?

6 CHAIRMAN CASTRO: Yes?

7 COMMISSIONER YAKI: Before Ms. Tolhurst  
8 answers, I would like to add sort of a corollary to  
9 what the Vice Chair talked about --

10 CHAIRMAN CASTRO: Sure.

11 COMMISSIONER YAKI: -- which is I am  
12 concerned a bit about the issues of our liability when  
13 decisions are being made in the absence of staff  
14 input, specifically, for example, that we have a move  
15 occurring within a couple of weeks or a month of each  
16 other. And I am concerned about the potential of  
17 things being on time. And I am concerned about the  
18 personal liability issues associated with it.

19 VICE CHAIR THERNSTROM: Let me add one  
20 more sentence to what I was saying. Ms. Tolhurst, you  
21 referred to "a dire situation." So my question is  
22 really, is this a dire situation? I mean, you know,  
23 isn't this in our function?

24 MS. TOLHURST: As I've outlined in past  
25 meetings, there are things that the staff director

1 should do. Under our current rules -- and some of  
2 them are internal rules that could be modified.

3 But under our current rules, we have no  
4 one now -- I issued you all the voting rights  
5 statutory report a week or two ago to check off, to  
6 the checklist, and confirm that we have a balanced  
7 panel that this should be published.

8 We technically have no -- and those rules  
9 were imposed on us by GAO to some extent in trying to  
10 improve our internal practices to show that we were  
11 being balanced and fair. And there's a pretty  
12 extensive checklist. And it's the job of the staff  
13 director to say the general counsel did this properly  
14 and OCRE or whoever is in charge of giving the report.

15 So we want to have someone to do that. We  
16 don't currently have someone putting forth SAC  
17 packages. We don't have someone approving SAC. There  
18 are several. Commissioner Kladney I know had asked  
19 about this, a couple of SAC things requiring staff  
20 director approval. So some SAC reports aren't being  
21 published.

22 VICE CHAIR THERNSTROM: Okay. Are these  
23 problems that can be solved without having to agree?  
24 The chances of us agreeing on a detailee, putting  
25 aside the legal question, are not great. So the

1 question is, are these problems that can be solved or  
2 are they so monumental that the agency in some sense  
3 grinds to a halt?

4 MS. TOLHURST: I don't know who would  
5 approve. So it is already problematic, right, because  
6 I was the acting -- I was designated the authority of  
7 staff director. And I was already going to be  
8 approving that I as acting general counsel had done  
9 everything properly. So we were already in a poor  
10 situation, but it's just gotten one step worse.

11 And any patch we could make it's true we  
12 could make an internal -- some kind of AI thing.  
13 Well, during this time, some other person will do  
14 this. It's just every little patch we do like that I  
15 think starts to chip away at the legitimacy of our  
16 processes. And I don't think it's a good long-term  
17 solution.

18 VICE CHAIR THERNSTROM: I'm not talking  
19 about the long term. I'm talking about short term.

20 MS. TOLHURST: Well, it's been 14 months.  
21 It's feeling long to me. So Commissioner Yaki added  
22 on to your question. So the other big crisis if you  
23 want to call it a crisis is there is no alternate  
24 supervisor of the staff. So there are ten staff  
25 members, including myself, who are not being

1 supervised. And I could just go crazy at any time and  
2 there would be no one to stop me.

3 VICE CHAIR THERNSTROM: Any time?

4 MS. TOLHURST: And, you know, that's true  
5 of nine other people here. So in terms of the move,  
6 you know, we have people working on the move, but it  
7 is true we don't have that ultimate administrative  
8 head to be a check on all the many fiscal decisions  
9 that get made before, you know, the low-level budget  
10 things that happen before it comes to you all to take  
11 a look at. That ultimate person who bears serious  
12 responsibility is missing.

13 CHAIRMAN CASTRO: Let me just add that on  
14 the move, I was here yesterday and met with our staff  
15 to talk both about the immigration briefing in Alabama  
16 as well as inquired about the move. And the build-out  
17 of the office space is progressing very well. The  
18 overall project consisted of build-out on the space,  
19 procuring the new office furniture, audiovisual  
20 equipment, relocation of the services, getting rid of  
21 the old and getting new furniture in place, dealing  
22 with the storage issues, the construction projects on  
23 target to be completed on time, the completion of  
24 several major items that have already been completed  
25 by the construction company, like the office walls are

1 up. The electrical data is installed. The lighting  
2 has been installed. Most of the carpet and tile has  
3 been installed. Most of the HVAC is done. We're  
4 waiting on the construction company to put in -- and  
5 they're putting it in now -- stone floors in the  
6 suite, conference rooms, the hallways, the cabinetry  
7 in copy rooms. And painting's being done. So it  
8 looks like sometime around mid to late July, we will  
9 be able to get in there with the delivery of the  
10 furniture.

11 So it's moving along because these were  
12 projects that were authorized. We've got competent  
13 and well-qualified staff that have been working  
14 diligently on that.

15 In addition, the briefing in Birmingham is  
16 going well. Lenore Ostrowsky is working with staff to  
17 have invited and continue to invite individual  
18 panelists. Pam Dunston has identified some potential  
19 locations. So I am very comfortable that that is  
20 moving along as it should.

21 I also made the rounds and talked to a lot  
22 of our staff yesterday just to say hello. And I know  
23 they are all doing their jobs on a daily basis, but  
24 Ms. Tolhurst is right. At the top, there is nobody  
25 there. And that scares me.



1           It's not that I have a fear of what our  
2 staff is doing, but I know that there are things that  
3 the agency is required to do that may come on  
4 someone's desk and no one is at that desk; so, for  
5 example, IPERA. We got that letter from the IG. Now,  
6 the reason we got a letter saying that we were in  
7 compliance was because somewhere along the way,  
8 someone didn't seek a waiver. And that was when we  
9 had staff in place.

10           Even on our strategic plan, we're subject  
11 to this GPRA Modernization Act. But last year someone  
12 should have sought a waiver for that.

13           So my concern is there may be things  
14 happening now that will affect us at some point, but  
15 no one is there to get that letter or that memo that  
16 says, "Hey, you've got to do this by a certain date."  
17 Those are the high-level things that are concerning  
18 me.

19           But, you know, the staff on a daily basis  
20 on those projects that we have authorized, they are  
21 working on that. And they're doing it diligently, at  
22 least from what I have seen and the folks I have  
23 talked to.

24           But I do have a question about the Office  
25 of Legal Counsel. To what extent can we submit this

1 question to the Legal Counsel Office and ask them for  
2 an opinion as to what we do?

3 I know I raised it a couple of times. Mr.  
4 Tolhurst indicates they usually look at only  
5 complicated things. Well, you know what? This seems  
6 pretty complicated to me. So I don't know if --

7 COMMISSIONER GAZIANO: You mean the Office  
8 of Legal Counsel in the Justice Department?

9 CHAIRMAN CASTRO: Yes.

10 COMMISSIONER GAZIANO: Oh, if they follow  
11 their own opinion, they're not allowed to give us  
12 advice.

13 CHAIRMAN CASTRO: Okay. Well, is there  
14 some other --

15 COMMISSIONER GAZIANO: But they sometimes  
16 hint at advice when they are not allowed to give  
17 official advice. In fact, I think --

18 CHAIRMAN CASTRO: Well, that's what OPM  
19 does, too.

20 COMMISSIONER GAZIANO: But that's part of  
21 the process I was talking about. I think that if I  
22 could work with all of the attorneys in the Office of  
23 our General Counsel in all their many capacities --

24 MS. TOLHURST: One of them doesn't like  
25 you, and the others are okay.

1 (Laughter.)

2 COMMISSIONER GAZIANO: Then I would want  
3 to pursue that first and have some of our other  
4 research first. But there are ways of informally  
5 approaching that office. And there are some people  
6 there who I work with. And there is a possible way of  
7 getting them to bless this. But if it's --

8 MS. TOLHURST: It is true that they turned  
9 us down in the past when a previous general counsel or  
10 staff director had gone to them requesting advice.  
11 And they had said we will not --

12 COMMISSIONER GAZIANO: I thought that was  
13 the case. By the way, if you could supply me that  
14 letter? I couldn't find that letter on my --

15 MS. TOLHURST: I hadn't found a letter,  
16 but I know that it happened.

17 COMMISSIONER GAZIANO: The reason that  
18 they did is because of the other stuff I found because  
19 they said, "We're not allowed to give advice to  
20 agencies outside the Executive Branch."

21 MS. TOLHURST: And, in addition to that,  
22 though, even on the main page of their website, they  
23 say --

24 COMMISSIONER GAZIANO: Right.

25 MS. TOLHURST: -- imagine a world where

1 we're clearly in the Executive Branch. They still may  
2 not answer because that's --

3 COMMISSIONER GAZIANO: That's correct.

4 MS. TOLHURST: Their main page says  
5 explicitly "We resolve disputes where there are  
6 conflicts between agencies or between this and this."  
7 You know, it's sort of almost asking for cert.  
8 They're not going to just resolve every little --

9 COMMISSIONER GAZIANO: Well, they also  
10 generally give advice. And about half of the advice  
11 is where there is no interagency conflict. Yes, they  
12 can decline to opine, but the reason they gave for not  
13 giving us advice in the past that seems to me they  
14 would need to reverse -- and I don't think they can --  
15 is that they're not allowed to give us advice since  
16 we're not in the Executive Branch. And that's not a  
17 matter of in the way they view it their discretion.  
18 But there are informal ways that we can get sign-on  
19 that I would rather not go into here. But I think we  
20 should get our ducks in a row first.

21 And, again, the other thing I just want to  
22 emphasize is one of the whatever senior attorney in  
23 the Office of General Counsel's views is is that it is  
24 particularly tricky taking a detailee to exercise all  
25 of the powers. But maybe we would devolve only some

1 of the powers. Maybe it still would be good to get  
2 someone in. And we would still consider someone else  
3 on our current staff to exercise some of the Office of  
4 Staff Director.

5 So I think the research might be worth it.  
6 And we can possibly cross the bridge as to what powers  
7 we would devolve on such detailee at a later stage.

8 CHAIRMAN CASTRO: That is a very --

9 VICE CHAIR THERNSTROM: That was the point  
10 of my question before. Can't we take the various  
11 items that Ms. Tolhurst named as not being done or in  
12 danger of not being done? Can't we split them up  
13 amongst the staff, existing staff, and having, you  
14 know, people do certain essential things? Because I  
15 think the chances of us having somebody in place as  
16 staff director in the near future is not good.

17 MS. TOLHURST: I think it depends on the  
18 task. I mean, staff has particular skills. Staff  
19 members have particular skill sets. Who among them is  
20 qualified to approve SACs leads? Who among them has  
21 experience editing a statutory report and certifying  
22 that it has been balanced and that the research is  
23 supported? And for each task, we may or may not have  
24 someone to do that.

25 So it would be you would have to go down

1 the line of tasks. And we would have to amend our  
2 internal administrative instructions.

3 CHAIRMAN CASTRO: Commissioner Achtenberg?

4 COMMISSIONER ACHTENBERG: Well, without  
5 regard to whether or not we can seek a detail to  
6 become the acting head of the agency, certainly we can  
7 seek a detail for the purpose of adding additional  
8 capacity to the staff on a temporary basis to  
9 discharge some of the obligations that Kim may have  
10 identified for which we do not have currently existing  
11 internal capacity.

12 CHAIRMAN CASTRO: Such as a deputy staff  
13 director.

14 COMMISSIONER ACHTENBERG: And certainly we  
15 could not for the purposes of acting as the staff  
16 director to the extent that that remains a  
17 questionable practice in the eyes of our general  
18 counsel and I think I accept that that -- you know, we  
19 do not want to be too cute about that. I completely  
20 agree with that.

21 But if it were not for exercising those  
22 prerogatives but for actually getting the work done,  
23 there's no question. It seems to me that we have the  
24 ability to undertake that effort, one would think. I  
25 mean, there should be a way to get that.

1                   COMMISSIONER GAZIANO: That's a much  
2 easier lesson, but whether we're going to go down that  
3 route, if five or more of us are in agreement as to  
4 who and I think most of us would want to know, well,  
5 what kind of responsibilities are going to be held on  
6 that --

7                   COMMISSIONER ACHTENBERG: Sure,  
8 absolutely, of course.

9                   CHAIRMAN CASTRO: Madam Vice Chair? Then  
10 Commissioner Heriot.

11                  VICE CHAIR THERNSTROM: Well, as I  
12 understand it, AI1-18C addresses the issue of the  
13 acting general counsel and also acting deputy staff  
14 director. Can we discuss that?

15                  CHAIRMAN CASTRO: Sure. Go ahead.

16                  VICE CHAIR THERNSTROM: Anybody got  
17 anything to say?

18                  COMMISSIONER GAZIANO: Here. Help me out.  
19 I want to return to whether we can elevate the senior  
20 attorney to acting general counsel in --

21                  CHAIRMAN CASTRO: I think that may be what  
22 the Vice Chair is talking about.

23                  COMMISSIONER GAZIANO: Is that what you  
24 are talking about?

25                  VICE CHAIR THERNSTROM: You've got to bet

1 --

2 COMMISSIONER GAZIANO: I have a copy. And  
3 some of this, the senior attorney may not want us to  
4 discuss at this time. Go ahead.

5 VICE CHAIR THERNSTROM: Well, say  
6 something.

7 COMMISSIONER GAZIANO: I didn't parse the  
8 emails with a fine-toothed comb, but it seemed to be  
9 that a pay raise was being requested. And the pay  
10 raise was denied on certain grounds, but I suppose  
11 this is a factual question if Ms. Tolhurst doesn't  
12 mind answering, clarifying for me.

13 Is your current pay level that -- there  
14 was one bump you received at some point. And then a  
15 second bump was sought. The second bump has been  
16 denied. Are you still at the first bump or are you --

17 MS. TOLHURST: No. My understanding is  
18 that starting Wednesday, I will be at my regular  
19 career salary.

20 COMMISSIONER GAZIANO: That's what I kind  
21 of interpreted. My suggestion was without -- because  
22 ultimately there are other people who probably have to  
23 agree to this, including people who write checks. And  
24 the people who write checks happen to be in the  
25 Executive Branch.



1           Can't we -- I would like to explore a way  
2 to see that you are appointed acting general counsel  
3 since you are the only counsel and at least continue  
4 to receive the pay you were before.

5           There were a couple of sentences in the  
6 communication from the Executive Branch that under pay  
7 freezes, pay increases would not be warranted. But  
8 that doesn't seem to me to preclude you retaining the  
9 pay that you have had for some months. Is that at  
10 least reasonable for us to pursue on your behalf?

11           MS. TOLHURST: I think it should be  
12 pursued with Tina Martin, who would have to process  
13 that HR decision.

14           COMMISSIONER GAZIANO: That may be. I'm

15 --

16           MS. TOLHURST: My understanding is so I  
17 was originally placed as acting general counsel. That  
18 elevated my salary for 120 days. And Tina tells me  
19 there is a limit. One can't keep doing that. So  
20 that's when I went to emergency SES, when those 120  
21 days were over. And that's what OPM has now revoked  
22 since I am no longer designated the authority of staff  
23 director.

24           So I believe there are other routes. And,  
25 again, we would have to check with Tina, but I think

1 it could be posted internally the position of acting  
2 general counsel.

3 COMMISSIONER GAZIANO: Does that mean  
4 anyone in the General Counsel's Office could apply?

5 MS. TOLHURST: But that's more of an HR  
6 question. Particularly since I might be a candidate,  
7 I wouldn't want to weigh in on --

8 COMMISSIONER GAZIANO: I understand. I  
9 was just asking the --

10 CHAIRMAN CASTRO: Then we get into who is  
11 going to hire her because we don't have a head of the  
12 agency.

13 COMMISSIONER GAZIANO: No. I understand  
14 that. I was just asking. Well, never mind. I was  
15 asking, in part, whether you are personally willing,  
16 more on a personal level, rather than a legal level,  
17 us pursuing those options. It sounds like you are.

18 I would like a -- well, I don't know that  
19 we need to formally do this or not or whether we  
20 should --

21 CHAIRMAN CASTRO: Let me just point  
22 something out because I think our AIs indicate that in  
23 the absence of a general counsel, in the absence of an  
24 acting general counsel or deputy general counsel, that  
25 the senior attorney shall assume the role of acting

1 general counsel. And I think that's 18C.

2 But if you look at 18B, it also says the  
3 person who is in the absence of a staff director, in  
4 the absence of a deputy staff director, the person who  
5 is acting as general counsel is the deputy acting  
6 staff director.

7 So wouldn't that make you to be the deputy  
8 acting staff director? And as such, couldn't the  
9 deputy acting staff director sign a detail agreement?

10 VICE CHAIR THERNSTROM: She is the acting  
11 staff director. She can't get out of that.

12 MS. TOLHURST: I can get out of that.  
13 Federal service rules make it the case that I can't --  
14 I have a job description and a salary that befits that  
15 job description. And that does not include running a  
16 federal agency.

17 CHAIRMAN CASTRO: Well, what are we --

18 MS. TOLHURST: People in --

19 CHAIRMAN CASTRO: I'm sorry?

20 MS. TOLHURST: A federal employee cannot  
21 be made to take on extraordinary duties.

22 COMMISSIONER HERIOT: But that means you  
23 are constructing administration as senior  
24 attorney/attorney adviser, but the rule does say  
25 "shall."

1 MS. TOLHURST: But that's a rule that you  
2 all made up. It's not -- I mean, there are --

3 COMMISSIONER GAZIANO: I think it's  
4 reasonable to interpret the ability of the person to  
5 decline the problem maybe, to define the --

6 COMMISSIONER HERIOT: I think that means  
7 that she has declined to be senior attorney adviser in  
8 the General Counsel's Office, then.

9 COMMISSIONER GAZIANO: But isn't it at  
10 least possibly if we can't persuade you to exercise at  
11 certain points the duties of the staff director, that  
12 you might be willing to assume the duties of the  
13 acting general counsel?

14 MS. TOLHURST: I am willing, it seems to  
15 me --

16 COMMISSIONER GAZIANO: Since you are the  
17 entire General Counsel --

18 MS. TOLHURST: -- that I would be asked  
19 these questions in the event, but, again, we would  
20 need to pursue --

21 COMMISSIONER GAZIANO: I see Ms. Martin in  
22 the audience. And we will pursue appropriate  
23 questions with her. But you are at least willing to  
24 exercise the title of general counsel or acting  
25 general counsel. And maybe we will even persuade you

1 to exercise pursuant to our AI the acting staff  
2 director for some short period of time.

3 VICE CHAIR THERNSTROM: Commissioner  
4 Gaziano, it seems to me the question of her  
5 remuneration has to be straightened out before we ask  
6 her to start working 20 hours a day again.

7 COMMISSIONER GAZIANO: Madam Vice Chair,  
8 I'm eager to do that. And I don't hear any other  
9 objection from any other commissioner from that.

10 CHAIRMAN CASTRO: I'm sorry. Could you --

11 COMMISSIONER GAZIANO: Well, I don't hear  
12 any other objection from any other commissioner to at  
13 least pursuing the level of pay that the acting  
14 general counsel is receiving.

15 CHAIRMAN CASTRO: Yes. You know, I also  
16 understand that there is another senior attorney  
17 adviser that starts next week.

18 COMMISSIONER HERIOT: Who is that?

19 CHAIRMAN CASTRO: I don't know. Ms.  
20 Tolhurst hired that person, but --

21 COMMISSIONER HERIOT: I think that makes  
22 that person acting staff director under our rules.  
23 She just declined to do it. I mean, you know, we have  
24 got rules here. It says, "shall." And I am  
25 sympathetic to the notion that we shouldn't be

1 enslaving Ms. Tolhurst.

2 CHAIRMAN CASTRO: Yes.

3 COMMISSIONER HERIOT: But if she declines  
4 to do it, I think I will then say, "Okay. The next  
5 most senior person must be the person who shall be the  
6 acting staff director." And we're running around like  
7 we don't have an acting staff director, and we do.

8 MS. TOLHURST: I disagree.

9 CHAIRMAN CASTRO: Okay. Well, I think we  
10 have had a healthy discussion about some options. I  
11 think we'll pursue how the AIs come into play with  
12 this. And I think there is a consensus that at the  
13 same time, Commissioner Gaziano will interface with  
14 the Office of the General Counsel and try to come up  
15 with additional legal support for a detailee so we  
16 could determine whether that is still an option as  
17 well.

18 COMMISSIONER GAZIANO: Well, regarding  
19 your question, Commissioner Heriot, is the 18B the one  
20 we adopted a year ago?

21 MS. TOLHURST: Yes.

22 COMMISSIONER GAZIANO: And so there is a  
23 question in my mind whether it somehow overrides 18C  
24 in some way. But, anyway, that's the --

25 CHAIRMAN CASTRO: And I think they're

1 right in --

2 COMMISSIONER GAZIANO: Okay.

3 CHAIRMAN CASTRO: They were done at the  
4 same time. I think they are supposed to be read in  
5 conjunction with one another.

6 COMMISSIONER HERIOT: I assume there's a  
7 deputy staff director rule that is similar --

8 COMMISSIONER KLADNEY: I have a question.

9 CHAIRMAN CASTRO: Commissioner Kladney?

10 COMMISSIONER HERIOT: -- to the rules for  
11 the staff director as the deputy staff director.

12 COMMISSIONER KLADNEY: Commissioner Heriot  
13 --

14 CHAIRMAN CASTRO: Move your phone away  
15 from your mouth a little bit. You're unclear.

16 COMMISSIONER KLADNEY: I'm not exactly  
17 sure the policy that was --

18 CHAIRMAN CASTRO: I'm not sure we  
19 understood your question. You're breaking up. I'm  
20 sorry? Nick? Is it that you want to know what the  
21 procedures are for this?

22 COMMISSIONER KLADNEY: Yes. If we could  
23 have an explanation of the procedures.

24 CHAIRMAN CASTRO: Do you know what he's  
25 talking about, Ms. Martin? Yes. Something about a

1 Tina Martin process is what I --

2 MS. TOLHURST: He's just asking if Tina  
3 could, head of HR and head of OAM, could fill  
4 commissioners in on available procedures to create an  
5 acting general counsel for this agency under our  
6 current circumstances.

7 COMMISSIONER HERIOT: But I think his line  
8 dropped.

9 CHAIRMAN CASTRO: Commissioner Kladney,  
10 did we lose you?

11 (No response.)

12 CHAIRMAN CASTRO: Yes. We lost him.

13 VICE CHAIR THERNSTROM: Can we get him  
14 back?

15 CHAIRMAN CASTRO: Well, he'll have to call  
16 in.

17 COMMISSIONER HERIOT: He's got to come  
18 back to us.

19 CHAIRMAN CASTRO: He's got to call in  
20 because I had to call him this morning, and I couldn't  
21 get through to his line.

22 VICE CHAIR THERNSTROM: I see.

23 CHAIRMAN CASTRO: He's somewhere in  
24 Istanbul or I'm not sure where, but

25 VICE CHAIR THERNSTROM: Someplace I don't



1 want to be.

2 CHAIRMAN CASTRO: Ms. Martin, are you  
3 prepared to --

4 COMMISSIONER KLADNEY: I fell off the  
5 call.

6 CHAIRMAN CASTRO: Okay. Ms. Martin is  
7 going to come forward.

8 COMMISSIONER KLADNEY: Thank you.

9 MS. MARTIN: For the acting GC position,  
10 you could select someone within the agency. You  
11 already did it once and gave Kim a 120-day  
12 appointment. And so it couldn't be another 120 days  
13 because it has to be competed. Other employees would  
14 have to have the opportunity to get that experience at  
15 a higher level.

16 We do have another attorney adviser in the  
17 agency. So there is not just one here now.

18 CHAIRMAN CASTRO: Okay.

19 MS. MARTIN: We could advertise it  
20 in-house or if we don't have a good pool of  
21 candidates, we at least want at least three candidates  
22 internally. Staff has been doing it. I'm just saying  
23 it's a low pool. And we can also go outside of the  
24 agency and advertise, but then you would have to give  
25 someone the authority to be the selecting official.

1 CHAIRMAN CASTRO: Right. And that would  
2 be for acting or full-time general counsel?

3 MS. MARTIN: Either one.

4 CHAIRMAN CASTRO: Either one? So we don't  
5 have someone that would do the hire because we don't  
6 have an acting staff director?

7 MS. MARTIN: Right. But you could give  
8 someone in the agency the authority to be selecting  
9 official if you wanted to go that route.

10 CHAIRMAN CASTRO: But as acting, the 120  
11 days have run already for Ms. Tolhurst?

12 MS. MARTIN: Yes, yes.

13 CHAIRMAN CASTRO: Okay. Okay.

14 COMMISSIONER GAZIANO: Now, but the 120  
15 days I think that's a little bit more maybe for one  
16 purpose, she -- it does seem like under our AIs, she  
17 is that for certain of our purposes. And that's --  
18 you know, for one purpose, she may not be able to be  
19 paid at a higher level. And I hope that we can figure  
20 a potential way out if she is really acting as the  
21 general counsel.

22 But it does seem under our rules that that  
23 senior attorney --

24 MS. MARTIN: Yes. I'm not disputing that.  
25 It's just the pay and the competition because you

1 don't want to give one person the upper hand when you  
2 have other attorneys that would like to get that  
3 experience as well. That's why the CFR is written  
4 that way.

5 COMMISSIONER GAZIANO: Sure. Thanks.

6 CHAIRMAN CASTRO: Thank you, Ms. Martin.

7 VICE CHAIR THERNSTROM: Mr. Chairman, have  
8 we entirely answered Commissioner Yaki's question?  
9 Commissioner Yaki, do you think we have answered your  
10 question? Are you there?

11 COMMISSIONER YAKI: I have to think about  
12 this. I am still very concerned about the obligations  
13 we are going to incur being designated basically to  
14 make that decision.

15 VICE CHAIR THERNSTROM: Well, let me just  
16 add to that having I don't know how many of them -- I  
17 mean, I have been on this Commission I guess a long  
18 time, but my experience in field trips is I can't  
19 imagine a field trip without a staff director. It's  
20 a very complicated business -- enterprise, I should  
21 say.

22 CHAIRMAN CASTRO: Well, you know, again,  
23 as I said, I've been meeting with the staff, as has  
24 Marlene, on a regular basis. And we're confident that  
25 it's moving forward appropriately.

1           The project and an amount of funds have  
2 already been appropriated. And they're working within  
3 that budget. So I don't see that there's anything --  
4 if it turns out that it looks like we're going to need  
5 to go over budget, which I don't anticipate, but if it  
6 did, we would come back to the Commission, which is  
7 the entity that authorized the project and the budget  
8 for the field hearing.

9           And I am very confident that the staff has  
10 a plan in place. They shared it with me yesterday.  
11 And I thought it was a good one. So I am not  
12 concerned about that.

13           VICE CHAIR THERNSTROM: Are there any  
14 other commissioners who share Commissioner Yaki's  
15 concern on this, anyone, actually?

16           COMMISSIONER YAKI: Sorry. Cut off.

17           COMMISSIONER GAZIANO: He'll take it back  
18 if I share his concern, but I do. Just I think Kim  
19 put it best, which is -- and I expressed it at the  
20 last meeting. We are failing in our duties as  
21 commissioners not to figure out who is in charge of  
22 the staff.

23           And I think Kim put it best in that there  
24 are -- we have a skeletal staff as it is performing  
25 three to seven jobs each. And to have no one really

1 in charge is certainly worrisome and without  
2 explaining all of the things that a staff director  
3 has.

4 But, again, I think most of us are working  
5 in good faith to try to resolve that, but there may be  
6 some issues that will have to deal with on an ad hoc  
7 basis. Somehow we will have to defer authority on  
8 someone for some things.

9 CHAIRMAN CASTRO: Commissioner Heriot?

10 COMMISSIONER HERIOT: I just wanted to go  
11 back to something that was mentioned a little bit  
12 earlier. And that is that it would be lovely to have  
13 a staff director. It would be lovely if the White  
14 House were to come up with a nomination and we were to  
15 get this done with.

16 But given that the likelihood of our  
17 agreeing on an acting is somewhat limited -- now,  
18 maybe I'm being too pessimistic on that -- it does  
19 seem to me that an easy fix is to just sit down, come  
20 up with the tasks that need to get done that aren't  
21 getting done and delegate to a number of the staff a  
22 certain subset of the tasks. And that could easily be  
23 done.

24 And we are much more likely to come up  
25 with an agreement on that to say, "Look, we need

1 somebody who is going to be in charge of approval  
2 SACs. We need somebody who is going to be the point  
3 person for the field hearing. We need somebody who is  
4 going to be in charge of this and of that" and just  
5 make sure that somebody understands that that is their  
6 task.

7 And I suspect we could come to an  
8 agreement on that, that we could divide these tasks up  
9 between three or four senior staff members and it  
10 would be fine.

11 CHAIRMAN CASTRO: That seems reasonable to  
12 me.

13 COMMISSIONER HERIOT: And then like if in  
14 three months we can come up with a long-term acting,  
15 that would be great or if in three months the White  
16 House acts, that would be great. But, just to make  
17 sure the trains run on time, take several of these  
18 tasks and just make sure that a senior staff person  
19 knows that is their thing.

20 And I just can't imagine that we can't  
21 come up with a slate of senior staff members to divide  
22 these tasks up that a majority of people can get  
23 behind.

24 VICE CHAIR THERNSTROM: I mean, that was  
25 precisely my point before. And I'd like to see,

1 actually, a list, a precise list, of what functions  
2 need to be assigned asap and work from that list.

3 COMMISSIONER HERIOT: How about if we have  
4 the list and the Chairman talks to members of the  
5 Commission over the next week or so and we come up  
6 just by telephone calls and we get our slate and we're  
7 all a little bit happy and nobody is ecstatic?

8 CHAIRMAN CASTRO: Provided we want to run  
9 that by our lawyer and our HR person to make sure that  
10 that is doable.

11 COMMISSIONER HERIOT: Sure, absolutely.

12 CHAIRMAN CASTRO: And at the same time I  
13 think, you know, multi-track, Commissioner Gaziano and  
14 whatever SAs will help him will work with the OGC to  
15 try to flesh out this legal issue on the detail  
16 further. And then we'll also take a closer look at  
17 these AIs and how that would play in.

18 So we are looking at all of these avenues  
19 simultaneously and see where we end up.

20 COMMISSIONER HERIOT: Yes. But the  
21 Commission has the power to delegate and undelegate  
22 and redelegate.

23 CHAIRMAN CASTRO: Sure.

24 COMMISSIONER HERIOT: And so, you know,  
25 it's a quick fix. We would like to be able to get a

1 staff director in there.

2 CHAIRMAN CASTRO: Yes.

3 COMMISSIONER HERIOT: But let's make sure  
4 that at least the plans, the policy of the Commission  
5 gets carried out. And one of those policies is that  
6 we're supposed to have a hearing or whatever it is in  
7 Birmingham in a couple of months. We've got to move.  
8 We've got to get the SACs chartered again. That's  
9 what the statute requires us to do.

10 CHAIRMAN CASTRO: Sure.

11 COMMISSIONER HERIOT: And, you know, it  
12 might not be the first priority of any one of the  
13 eight of us. It is the first priority of the Congress  
14 of the United States of America.

15 CHAIRMAN CASTRO: Sure.

16 COMMISSIONER HERIOT: So we need to do it.

17 CHAIRMAN CASTRO: Okay. It seems like  
18 we've got a game plan in place on this. So we'll move  
19 forward as we have discussed here. Thank you,  
20 everybody. I appreciate it.

21 And also I just want to take a moment to  
22 recognize Ms. Tolhurst and move on to the next item.  
23 While she was home recovering from her illness, she  
24 did actually submit to us a draft of the VRA statutory  
25 enforcement report. As you know, our comments are due



1 to her by May 31st. So I would ask that commissioners  
2 make sure that they do that.

3 I know that she also distributed DOJ's  
4 comments. I believe that it was yesterday.

5 Commissioner Gaziano, I know you said you  
6 had a question about this.

7 COMMISSIONER GAZIANO: Why don't we wait  
8 until -- unless some people on the call want to talk  
9 about it now, I was going to wait until we got down to  
10 management and operations.

11 III. PROGRAM PLANNING UPDATE AND

12 DISCUSSION OF PROJECTS:

13 - STRATEGIC PLANNING PROCESS

14 CHAIRMAN CASTRO: Okay. Sure. Well,  
15 let's move on, then, to program planning. I want to  
16 talk a little bit about the strategic planning  
17 process.

18 I distributed a memo to you all a couple  
19 of weeks ago along with Ms. Tolhurst had also  
20 submitted a memo outlining the requirements, the new  
21 requirements, that we have under the GPRAMA plan for  
22 purposes of strategic plans so that we --

23 COMMISSIONER HERIOT: Have mercy on me  
24 with acronyms.

25 CHAIRMAN CASTRO: Yes. It is the

1 Government Performance Results Modernization Act of  
2 2010, which went into effect in 2011. Apparently  
3 small agencies were eligible for a waiver. We did not  
4 obtain or seek one.

5 I found out about this law when I went to  
6 go meet with the GAO strategic planning people in  
7 March to kind of get a down low from them. And they  
8 indicated to us that they thought that it was  
9 applicable.

10 So I put a request in to our budget folks  
11 and our general counsel just to confirm whether indeed  
12 this bid. And then they got back to me in April and  
13 indicated, yes, we're subject to this. So it's a few  
14 additional hoops we have to jump through, which Ms.  
15 Tolhurst I think outlined very well in her memo, which  
16 include, among other things, OPM will regularly  
17 interface with us, but also we need to get  
18 congressional input on what they think our priority  
19 should be.

20 What I wanted to do was at least begin to  
21 get the input from you all. I don't know if any of  
22 you have had a chance to make revisions or suggest  
23 some priorities because I think the best thing is to  
24 identify what our priorities are and then kind of work  
25 from there as to how we're going to accomplish them.

1           And, as you know, in my memo, I just gave  
2 a few examples of some what I would consider to be  
3 some priorities we want to focus on in the next  
4 four-year cycle. And one would be -- some of it is a  
5 continuation of what was in this existing plan, which  
6 I thought some things were very good, but maybe we had  
7 not yet fully met them. And I thought that we could  
8 continue those.

9           Other things that I thought that we might  
10 be able to extend the relevance of the Commission,  
11 such as continuing to be at the forefront of national  
12 conversations on current and future civil rights  
13 issues and identify civil rights priorities for  
14 policy-makers. That was similar to what was in the  
15 original plan. Engaging in strategic partnerships  
16 with other federal agencies to raise public awareness  
17 of civil rights and better inform the development of  
18 national civil rights policy from a prior plan that I  
19 thought was a great idea, but I don't know that we  
20 really engaged a lot on that. So I think there is  
21 still work that we can do. And I know that there was  
22 some initial groundwork done on that from what I  
23 understand.

24           Then I also suggest that we seek to expand  
25 the Commission's mandate to include human rights

1 issues and become the U.S.'s national human rights  
2 institution. This is based in some writings and some  
3 recommendations that have been floated around about  
4 the fact that and also as a result of my recent trip  
5 to the U.N. as an observer. There are national human  
6 rights institutes in various countries that, in  
7 addition to their civil rights obligations, also have  
8 human rights obligations.

9 And there has been discussion about  
10 creating such a national human rights institute for  
11 the United States. It would make sense to me that if  
12 the government is going to do that, that it should be  
13 us, rather than creating a whole new bureaucracy and  
14 agency to do that.

15 And I think that would also increase our  
16 relevance and maybe even our ability to get more  
17 budget and staff to do some of our work.

18 I want to make the Commission more  
19 accessible to the use of technology as well as  
20 improving resources for limited English-proficient  
21 person. I think we have all talked about a need to  
22 restructure the Commission to better align it to our  
23 strategic goals and objectives, especially since we're  
24 still structured as an agency that had a couple of  
25 hundred or more staff. And if you look at our org

1 chart, it looks that way, but we're not that way now.  
2 So we need to readjust the way we are to meet the  
3 needs that we have and, of course, continue in our  
4 strong financial and operational and technology  
5 infrastructure.

6 And then, as we talked often, re-engaging  
7 and reinvigorating the work we do with our SACs. And  
8 we also did get comments from Ms. Tolhurst and Ms.  
9 Martin and Mr. Ratcliffe about what they thought.

10 So what I am hoping to do is to be able to  
11 get input on those so that we can put together a  
12 strategic plan according to our budget office, the  
13 plan has to be in place in order for us to submit our  
14 budget.

15 So what we really need to do and what I  
16 would suggest that we do is -- hopefully today we can  
17 talk about some other strategic priorities that some  
18 of the other commissioners have today, but we would  
19 need to submit the strategic plan with our budget to  
20 Congress in September. So we want to have a final  
21 version of the strategic plan completed by August.

22 So what I would suggest is that we would  
23 have a draft plan for initial review at our June  
24 meeting and a further revision and a final draft for  
25 further discussion at our July 6 meeting so that by

1 August, we have a final version that we can then  
2 submit in September with the budget.

3 So there are a number of ways to  
4 accomplish this. We could create a committee of the  
5 whole of the Commission. There could be a couple of  
6 volunteer commissioners with their essays that might  
7 be willing to be the repository for this information  
8 and begin the draft.

9 I know Marlene Sallo, my assistant, has  
10 experience in strategic planning and strategic plan  
11 drafting. And I know that she would be willing to  
12 take a laboring role on that.

13 But I want to open that up for discussion  
14 and then put, particularly on any thoughts you all  
15 have -- in addition, as I said, we need to get input  
16 from Congress, which would be our authorizing agency,  
17 the appropriators, and then any of the other of the  
18 congressional committees that would have some demand  
19 on us.

20 Yes, Madam Vice Chair?

21 VICE CHAIR THERNSTROM: Well, two  
22 comments. One starts with a question. Partnerships  
23 with federal agencies it seems to me could pose a  
24 conflict of interest. For example, we're supposed to  
25 monitor civil rights enforcement agencies, such as DOJ

1 and EEOC. The question is, would strategic  
2 partnerships with those agencies compromise our  
3 investigative role? Okay. That is the first point.

4 And the second point is not going to make  
5 you happy, but I don't know what "human rights" means.  
6 I can't get my arms around a definition. And I'm  
7 afraid that the definition that I'm going to hear is  
8 not one that's going to go down very well with me.

9 CHAIRMAN CASTRO: Well, I can provide you  
10 with more details on that. I actually made further  
11 revisions to the entire body of the strategic plan,  
12 which I didn't necessarily want to circulate to  
13 everybody, but I'm happy to do that. And that goes  
14 into a little greater detail on what that is.

15 COMMISSIONER HERIOT: Do you want to go  
16 into it now?

17 CHAIRMAN CASTRO: Sure.

18 COMMISSIONER HERIOT: Because I agree with  
19 the Vice Chair --

20 CHAIRMAN CASTRO: Yes.

21 COMMISSIONER HERIOT: -- on both the  
22 points she made here.

23 CHAIRMAN CASTRO: Well, ultimately what a  
24 national human rights -- well, there are both domestic  
25 and international issues here, right? There are, for

1 example, in our trafficking briefing, some would argue  
2 that that could be a human rights issue. We looked at  
3 it, however, from --

4 COMMISSIONER HERIOT: All rights are human  
5 rights issues --

6 CHAIRMAN CASTRO: Well, you know, there is  
7 a distinction between a human right and a civil right.

8 COMMISSIONER HERIOT: -- let alone insect  
9 rights.

10 CHAIRMAN CASTRO: A human right is  
11 something -- well, we're not going to talk about  
12 insect rights today, but, you know, that certainly  
13 could be a priority you suggest.

14 Human rights are rights that all of us  
15 have, regardless of where we are in terms of the  
16 country. These are inherent rights that humans have.  
17 Civil rights, for example, are conferred upon us by  
18 our countries. So there are distinctions.

19 COMMISSIONER HERIOT: And you're using an  
20 Eighteenth Century definition of civil rights now.

21 VICE CHAIR THERNSTROM: Yes. And it  
22 appears to me we are deep into the weeds of natural  
23 law.

24 CHAIRMAN CASTRO: Well, you know, you  
25 wanted me to begin the discussion.



1                   COMMISSIONER HERIOT: You're basically  
2 talking like an Eighteenth Century natural law person.  
3 The Nineteenth Century has a different definition of  
4 civil rights. And the Twentieth Century as a --

5                   CHAIRMAN CASTRO: You know, let me --

6                   COMMISSIONER HERIOT: -- has yet another  
7 --

8                   CHAIRMAN CASTRO: Let me --

9                   COMMISSIONER GAZIANO: And the  
10 Twenty-First Century has a very different definition  
11 of human rights, --

12                  CHAIRMAN CASTRO: So let me continue.

13                  COMMISSIONER GAZIANO: -- you know,  
14 whatever people feel good about.

15                  CHAIRMAN CASTRO: So let me move from the  
16 Hobbesian to the U.N. So what happens is that for a  
17 national human rights institution, various -- and the  
18 United States already goes through the process of  
19 providing the United Nations with an annual review on  
20 civil and human rights in the United States. It is  
21 done by the State Department. And comments are  
22 provided by the EEOC.

23                  As far as I know, our agency has never  
24 been asked to give the input on the civil rights  
25 issue. But national human rights institutes

1 designated by their governments are responsible for  
2 also ensuring that the country, in this case the  
3 United States, would be complying with whatever human  
4 rights treaties that the United States has become  
5 party to to ensure that the human rights laws that are  
6 encompassed in those treaties that we become  
7 signatories to are being followed in the United  
8 States.

9           So there is talk by the State Department  
10 and the U.N. about designating and creating an NHRI.  
11 If that is going to happen, I believe it should be us  
12 and not some other agency because of what we are doing  
13 already.

14           Plus, if you look at other NHRIs across  
15 the world, that is what has been happening there as  
16 well. Their existing civil rights commissions have  
17 played that role, but that would require ultimately a  
18 congressional mandate to do it.

19           So it's not something we alone can do.  
20 This is something that Congress would need to do to  
21 give us that mandate.

22           COMMISSIONER GAZIANO: I want to pursue at  
23 the end your suggestion regarding process. Since we  
24 don't get together that often --

25           CHAIRMAN CASTRO: Do you want to meet more

1 regularly?

2 COMMISSIONER GAZIANO: You know, to --  
3 well, no.

4 COMMISSIONER HERIOT: I can't get enough  
5 of this stuff.

6 COMMISSIONER GAZIANO: We used to have  
7 mid-month telephone meetings. But, anyway, let's not  
8 go there.

9 VICE CHAIR THERNSTROM: Please let's not  
10 go there.

11 COMMISSIONER GAZIANO: But I wanted to at  
12 least react to the previous conversation. I share the  
13 concern about the definitional slippage that would  
14 occur if we were granted our request and we were made  
15 a human rights commission. One question that congress  
16 --

17 CHAIRMAN CASTRO: No, but not to the  
18 exclusion of civil rights.

19 COMMISSIONER GAZIANO: No. I understand.  
20 My response is some might reasonably question whether  
21 we can't cover the traditional civil rights in our  
22 Twentieth Century statute well enough to appoint an  
23 acting staff director and focus on those issues  
24 without deluding our attention. And I would share  
25 that concern. So I am at least tentatively skeptical,

1 let's say, about us seeking to even apply that  
2 jurisdiction from Congress.

3 The other thing that I noted in some of  
4 your summary -- by the way, I should begin with thanks  
5 for following the duties that are -- you get to work  
6 extra hours than us. So lucky you.

7 CHAIRMAN CASTRO: Yes. Lucky.

8 COMMISSIONER GAZIANO: But, you know,  
9 thank you for --

10 VICE CHAIR THERNSTROM: He gets paid for  
11 it.

12 COMMISSIONER GAZIANO: I know, yes, but  
13 the princely sum we all get paid. So he's due a few  
14 thanks, even if I disagree.

15 Another one I'm skeptical about is  
16 restructuring the Commission without -- you know, we  
17 can declare we want to restructure the Commission.  
18 I'm not sure what good it would do unless we agree on  
19 how we're going to restructure the Commission.

20 But turning now to your process, I think  
21 that, you know, a subcommittee of whoever wants to be  
22 involved and their special assistants might work. And  
23 I think that maybe that is the way to proceed.

24 CHAIRMAN CASTRO: Commissioner Heriot, did  
25 you have your hand up?

1                   COMMISSIONER HERIOT: I just want to get  
2 back to what are human rights, what are civil rights,  
3 you know, what are human rights, what are civil rights  
4 stuff. You know, your distinction between human  
5 rights basically fitting the natural rights, the  
6 Eighteenth Century natural rights definition, versus  
7 civil rights, rights that are conferred by a  
8 particular polity, that is not what we are.

9                   The Commission on Civil Rights does not  
10 define civil rights in that way. Congress defines  
11 civil rights for us. And they define it the Twentieth  
12 Century way. And that is --

13                  CHAIRMAN CASTRO: Well, that's right. And  
14 that's what I meant by it because --

15                  COMMISSIONER HERIOT: Hold on. Hold on.  
16 Hold it. Hold on. We're defining it that way, the  
17 notion here being, you know, you have a right not to  
18 be discriminated against on a particular basis.

19                  CHAIRMAN CASTRO: Absolutely.

20                  COMMISSIONER HERIOT: We already have  
21 jurisdiction over what you would call human rights  
22 insofar as they dovetail with the congressional  
23 definition. And that is insofar as we are talking  
24 about race discrimination, gender discrimination,  
25 disability discrimination. We have already got

1 jurisdiction over that.

2 If we were to be expanded to concern what  
3 the U.N. would term "human rights," that's a lot of  
4 rights. And a lot of them have nothing to do with  
5 what we do.

6 For example, you know, there are actually  
7 some rights in the declaration of universal human  
8 rights that dovetail with the Nineteenth Century  
9 definition of civil rights. And that is quoting from  
10 the declaration. Everyone has the right to own  
11 property alone as well as in association with others.  
12 No one shall be deprived arbitrarily of his property.

13 I would get a big kick out of a  
14 jurisdiction over that issue. But that is a really  
15 broad expansion of our jurisdiction. And it's quite  
16 different from what we have been doing up to now. So  
17 I don't think we want to just say that this would be  
18 expanding our jurisdiction to include, you know,  
19 international declared rights of one sort or another  
20 that dovetail without our jurisdiction in the first  
21 place.

22 CHAIRMAN CASTRO: Right.

23 COMMISSIONER HERIOT: Again, we have  
24 already got that jurisdiction. It would be a very,  
25 very large change in what we do.

1                   CHAIRMAN CASTRO: Well, you know, I'm glad  
2 that you think we've got the jurisdiction. I think  
3 that we have jurisdiction over some of those issues  
4 because, as I said, for example, with trafficking, I  
5 think we brought it in as a gender discrimination.

6                   COMMISSIONER HERIOT: As racial and gender  
7 discrimination.

8                   CHAIRMAN CASTRO: But I'm not talking  
9 about every international norm or treaty. I'm talking  
10 about only those documents that this country has  
11 already become a signatory to. And some of those  
12 documents, there are --

13                   COMMISSIONER HERIOT: Right. The --

14                   CHAIRMAN CASTRO: There are exceptions  
15 that have been made. And I don't have them in front  
16 of me, but I know that there have been carveouts that  
17 the United States has made when they have signed some  
18 of these U.N. treaties. And some of them do relate to  
19 the existing work we have now.

20                   But I would want this to occur only if we  
21 had -- obviously it has to be congressional  
22 authorization but also congressional appropriations to  
23 do it. This is not something I would envision us  
24 seeking with the existing staff and resources we have  
25 because I do agree that that would be overwhelming.

1                   But I think if it's going to happen, if  
2 the direction of the government is that they are going  
3 to designate an NHRI or create one, I think it should  
4 be us and not some other agency. I don't know that  
5 there is another agency that would be appropriate  
6 because the NHRIs have to be independent. And we are  
7 independent. But ultimately it would require that we  
8 would have additional appropriations and additional  
9 staff. So for me that would be a contingency in us  
10 even doing that.

11                   VICE CHAIR THERNSTROM: Why don't we just  
12 add it to Kim --

13                   (Laughter.)

14                   CHAIRMAN CASTRO: We could amend the AI.  
15                   But what I would like to do is flesh that  
16 our further in the subcommittee. You know, those are  
17 good points you raise. And I understand this is a big  
18 piece of an apple to bite off of, but I really do feel  
19 that it can enhance the relevance and reputation of  
20 our Commission provided that we have congressional  
21 support and authorization of funding to do it.

22                   And maybe there is some way we could talk  
23 about how we would define it that would be comfortable  
24 for folks. But I appreciate this conversation and the  
25 discussion. And I would like to be able to continue



1 that in whatever subcommittee that we have.

2 VICE CHAIR THERNSTROM: Mr. Chairman, I  
3 think this notion of congressional authorization is a  
4 fantasy.

5 CHAIRMAN CASTRO: Well, you know, that's  
6 why we need input from Congress on this, too, but  
7 ultimately there are things that we can do on our own  
8 as commissioners and there are things that only  
9 Congress can do for us. And that's one of them.

10 Just because it may be a fantasy doesn't  
11 mean that we should not try to aspire to it. And I  
12 don't know that it's a fantasy, but, you know, we'll  
13 find out.

14 Madam?

15 COMMISSIONER ACHTENBERG: Mr. Chairman, I  
16 want to offer my gratitude since you are the only one  
17 who put forward anything meaningful vis-a-vis a plan.  
18 So at least you're to be congratulated for that for  
19 sure.

20 And all of the things that either any of  
21 us put forward or if we adopt this subcommittee, it  
22 will give us an opportunity to chew on some of these  
23 substantive issues. And ultimately we may think that  
24 in the end, it shouldn't become part of our strategic  
25 plan because it's unworkable, for whatever reason.

1           We certainly haven't dissected the  
2 proposal sufficiently to come to any conclusion  
3 whatsoever, let alone a conclusion that it's not  
4 feasible.

5           So it may be that the exercise of a  
6 subcommittee of us looking at the strategic plan and  
7 talking could bring us closer together, as it were.  
8 And, you know, I, quite frankly, would look forward to  
9 the opportunity to talk about in some way the future  
10 of the agency, both structurally and with regard to  
11 mandate and operationally and otherwise.

12           CHAIRMAN CASTRO: Commissioner Kirsanow?

13           COMMISSIONER KIRSANOW: Yes. I agree with  
14 Commissioner Achtenberg. And I appreciate that the  
15 Chair has taken the time to put together -- we have to  
16 do a strategic plan. And I think it is something that  
17 we need to talk about.

18           I also seem to agree with almost everybody  
19 here. I also agree with Vice Chair Thernstrom. In my  
20 experience on the Commission, any prospect that we  
21 would be a human rights organization has got maybe a  
22 -5 percent chance of getting off the ground. But if  
23 anyone is going to do it, I think maybe we should do  
24 it. I just don't think it's going to happen.

25           I would, frankly, be opposed to it for a

1 whole host of reasons, not the least of which is, even  
2 if we got the appropriations, I still am very  
3 skeptical about the whole notion of whether or not we  
4 should have an agency within the United States  
5 government dealing with human rights and dealing with  
6 the U.N. on this, which I think has absolutely no idea  
7 what human rights are, including their assertion that  
8 Zionism is a form of racism, as I recall.

9 And also with respect to the notion of us  
10 partnering with other agencies, I think it's worthy of  
11 discussion here. And I agree with Commissioner  
12 Achtenberg that we should have that discussion  
13 internally, but I do think it presents a significant  
14 conflict of interest.

15 Our charge is to make sure that we review  
16 in terms of an enforcement report what other agencies  
17 are doing. And if we are, you know, happily skipping  
18 down the pathway with different agencies and trying to  
19 ford a particular endeavor, I think we would be  
20 hopelessly compromised in our ability to oversee those  
21 agencies. But, again, I think it's worthy of  
22 discussion.

23 CHAIRMAN CASTRO: Let me just make one  
24 quick distinction. The comment you made about design  
25 as an issue, I believe that was made by the Human

1 Rights Council of the U.N. This entity, if we were to  
2 become an NHRI, we would be coordinating with the  
3 International Coordinating Committee of NHRIs, which  
4 is a different entity than the Human Rights Council.

5 So we would not be representing the United  
6 States on the Human Rights Council. I believe there  
7 is someone the administration has designated to do  
8 that. This is a different entity within the United  
9 Nations that is made up of organizations like us. And  
10 they have not made that policy.

11 COMMISSIONER KIRSANOW: I think I  
12 understand. I appreciate, Mr. Chair. I just have a  
13 great deal of skepticism, to some extent some aversion  
14 with the notion of dealing with the U.N., 80 percent  
15 of whose members are dictatorships.

16 CHAIRMAN CASTRO: I just want to make that  
17 distinction because --

18 VICE CHAIR THERNSTROM: Or worse.

19 CHAIRMAN CASTRO: -- if we were an entity,  
20 that is who we would deal with.

21 So I think Commissioner Gaziano indicated  
22 he would be willing to have a subcommittee. And that  
23 seems to be the case.

24 COMMISSIONER GAZIANO: I didn't say I  
25 would serve. I want Pete to serve.

1 (Laughter.)

2 CHAIRMAN CASTRO: Come on, Commissioner  
3 Gaziano.

4 COMMISSIONER GAZIANO: Well, my special  
5 assistant has no level of limit to the amount of work  
6 he can do. So I suppose that --

7 CHAIRMAN CASTRO: So good. Commissioner  
8 Gaziano has just volunteered. Commissioner  
9 Achtenberg, did you volunteer?

10 COMMISSIONER ACHTENBERG: I'll volunteer.

11 VICE CHAIR THERNSTROM: I'll volunteer my  
12 special assistant.

13 CHAIRMAN CASTRO: Yes. And, of course, I  
14 volunteered my special assistant and myself. So  
15 that's four of us. If anyone else wants to  
16 participate, you're welcome to, but I think four is a  
17 good number. It's balanced. So hearing any other  
18 volunteers?

19 (No response.)

20 CHAIRMAN CASTRO: No? Okay. Well, thank  
21 you for that. I very much appreciate it.

22 Next we have on the agenda a discussion of  
23 the --

24 VICE CHAIR THERNSTROM: Repeat the  
25 subcommittee for the record.

1 CHAIRMAN CASTRO: Yes. Commissioners  
2 Achtenberg, Castro, Thernstrom, and Gaziano and our  
3 respective special assistants.

4 COMMISSIONER KIRSANOW: I think that's  
5 universal.

6 CHAIRMAN CASTRO: Pardon me? What was  
7 that?

8 COMMISSIONER GAZIANO: Special assistants  
9 and --

10 CHAIRMAN CASTRO: Oh, okay. I see.

11 COMMISSIONER GAZIANO: -- respective  
12 commissioners.

13 CHAIRMAN CASTRO: Okay. Well, you'll have  
14 to deal with that in the minutes next time.

15 - DISCUSSION ON 2013 STATUTORY REPORT

16 SELECTION PROCESS

17 CHAIRMAN CASTRO: Next we move on to a  
18 discussion of our 2013 statutory report selection  
19 process. As you know, Ms. Tolhurst disseminated the  
20 statutory report rankings on the 11th of May.  
21 Hopefully everyone has had a chance to look at those,  
22 based on the schedule that was set and disseminated by  
23 Ms. Tolhurst on March 19th.

24 Today we are going to discuss the concept  
25 papers and the ranking results, but the vote on which

1 of the topics we will select won't occur until the  
2 June 8th business meeting.

3 So what I will do is go down the list  
4 based on the list that was circulated by Ms. Tolhurst  
5 and ask those commissioners who wish to speak to their  
6 concept papers to make your pitch. So the first one  
7 we have is "Assessing Civil Rights" -- I don't know if  
8 these are -- are these scheduled by the vote? I'll  
9 just go down the list. "Assessing Civil Rights  
10 Enforcement in the Department of Agriculture's Farm  
11 Services Agency." That's Commissioner Kirsanow.

12 COMMISSIONER KIRSANOW: Thank you, Mr.  
13 Chair.

14 I have already discussed this in a  
15 previous meeting. So I will just make this very  
16 brief.

17 We have over the last several years seen  
18 that the Department of Agriculture has been a party to  
19 lawsuits, both in terms of black farmers, female  
20 farmers, Native American farmers, dealing with  
21 discriminatory application of certain grant processes  
22 and certain programs within the Department of  
23 Agriculture.

24 To my knowledge, there has not been an  
25 assessment, a thorough outside assessment, of whether

1 or not those types of discriminatory processes have  
2 been remedied, whether they still exist in any regard.

3 And the purpose of this is to, first of  
4 all, look at how this originated, the alleged  
5 discrimination originated, the impact of it, and also  
6 to what extent the Department of Agriculture is taking  
7 even remedial efforts to make sure it doesn't happen  
8 again.

9 CHAIRMAN CASTRO: Okay. Any questions for  
10 Commissioner Kirsanow?

11 (No response.)

12 CHAIRMAN CASTRO: None? Okay. We'll move  
13 on to the next item, which is also Commissioner  
14 Kirsanow's concept paper on "Assessing the Impact."

15 COMMISSIONER KIRSANOW: Right. And I  
16 spoke to this in a previous meeting also.

17 CHAIRMAN CASTRO: "Criminal Background."

18 COMMISSIONER KIRSANOW: This is I think a  
19 very relevant topic insofar as the EEOC has recently  
20 issued guidance on this, I know from my own personal  
21 experience started as a matter of significant concern  
22 to the employer community. It's a matter of  
23 significant concern, not just to the EEO but a number  
24 of other stakeholders beyond the employer community.

25 It is something light in our wheel house.



1 And there are some studies that we can at least begin  
2 to take a look at to see whether or not the EEOC's  
3 guidance needs to be tweaked, whether that makes any  
4 sense whatsoever, whether it should be scrapped,  
5 augmented, what have you.

6 But, again, I think this is one of the  
7 more relevant topics that we have in our list of  
8 enforcement topics to be considered.

9 CHAIRMAN CASTRO: Okay. Any questions on  
10 that from anybody?

11 (No response.)

12 CHAIRMAN CASTRO: Hearing none, we then  
13 have Commissioner Yaki's concept paper on federal  
14 efforts to end gender-based discrimination in state  
15 and local law enforcement as a response to sexual  
16 violence. Commissioner Yaki?

17 COMMISSIONER YAKI: Yes. Well, this is  
18 just for discussion. I think that the paper speaks  
19 for itself. I just wanted to talk about something in  
20 the previous discussion, which -- that is that I think  
21 part of what I wanted to see happen, Mr. Chair.

22 I think, first and foremost, we have to  
23 figure out ask not how we -- shuffling the chairs on  
24 the Titanic. The Commission has been in there for  
25 quite some time performing an investigatory function

1 and the other things that we do.

2 CHAIRMAN CASTRO: Thank you. So you don't  
3 want to say anything else your paper, then?  
4 Commissioner Yaki?

5 (No response.)

6 CHAIRMAN CASTRO: Okay. Well, so next we  
7 move on to my paper on the civil rights conditions at  
8 immigration detention centers. And detention centers  
9 right now are actually very relevant.

10 Just yesterday Georgia issued a report on  
11 detention center in Georgia that are actually run in  
12 private for profit and have found a number of civil  
13 and human rights violations that are occurring in  
14 these facilities in Georgia.

15 My paper would propose to look at not only  
16 those that are for profit but those that are being run  
17 at the federal government's request by state and local  
18 governments as well as federal facilities because  
19 there have been widespread complaints and lawsuits  
20 that have been filed over violations of civil rights  
21 and, in particular, in these immigration detection  
22 centers violations of federal laws, such as the Prison  
23 Rape Elimination Act. And there's a number of people,  
24 probably about 400,000 immigrants and asylum seekers  
25 that each year are being detained by ICE in these

1 facilities. And you have some folks who are  
2 nonviolent criminals who are being held with violent  
3 criminals. You have children who are being held in  
4 some of these facilities. And the government has even  
5 through GAO launched an investigation of some of the  
6 civil rights violations.

7 So I think this is a very germane topic  
8 that impacts both how the federal government is  
9 overseeing the issues from a federal enforcement  
10 report perspective that we have jurisdiction. Also  
11 under our jurisdiction is the administration of  
12 justice issues. And, again, I think this is something  
13 that is very relevant in the current issues that  
14 people are considering in terms of incarceration.

15 Commissioner Gaziano?

16 COMMISSIONER GAZIANO: Yes. Just a  
17 question. I think that you are certainly right that  
18 this is a worthy topic for certainly someone to study.  
19 And some of it is very clearly within our jurisdiction  
20 to the extent that we can look at any federal program,  
21 the civil rights violations that occur thereunder.

22 But at least I question, even under the  
23 administration of justice, whether some of the issues  
24 that were raised in your concept paper don't seem to  
25 be squarely within our jurisdiction.

1           Whether the federal government is using  
2 contract services may increase the civil rights, but  
3 if that is the only aspect we're looking at -- some of  
4 the other issues that seem to be raised are -- and, by  
5 the way, immigration detention is generally supposed  
6 to be civil. That's still I suppose the  
7 administration of justice but of a different nature.

8           So I am just wondering if you would  
9 explain a little bit more how important the focus is  
10 in your mind on the civil rights violations that we  
11 might investigate or the potential civil rights  
12 violations in this, in the detention facilities, and  
13 how much of a focus you think there should be on the  
14 detention system itself, how it's contracted, you  
15 know, whether the private contractor state -- I forget  
16 what the agreements are. Can you tell me?

17           CHAIRMAN CASTRO: Sure. As I mentioned in  
18 the paper, ICE currently directly owns and operates  
19 six secure detention facilities. That houses about 13  
20 percent of the detention population. The remaining 87  
21 percent of the detainees are housed in either those  
22 facilities that are run by independent contractors on  
23 behalf of ICE or by state and local governments  
24 through intergovernmental agency agreements.

25           So my focus here is really on the civil

1 rights violations and conditions of those detainees in  
2 each of those types of facilities. So to the extent  
3 that the facility they're in may increase or decrease  
4 the likelihood of civil rights violations, that's  
5 something that's germane, I'm not looking to go and  
6 talk about from a large policy perspective whether  
7 it's good or not to do for profit, but I think the  
8 issue of a for profit versus a government will come  
9 into play by nature of the fact that these individuals  
10 are housed in different locations.

11 So there will be some reference to and  
12 some discussion, I would imagine, about the nature of  
13 the type of prison, but, really, the focus here is  
14 what sorts of civil rights violations are occurring  
15 because ultimately it rolls up to ICE.

16 ICE is the responsible federal agency,  
17 regardless of whether it's a state facility, a  
18 contracted prior facility or an ICE-run facility  
19 because the buck stops with ICE. So it's really a  
20 study of ICE and how people, immigrant detainees in  
21 which ever type of detention center, how their civil  
22 rights are being violated.

23 COMMISSIONER GAZIANO: Thank you.

24 CHAIRMAN CASTRO: You're welcome.

25 Commissioner Heriot, did you have a

1 question?

2 COMMISSIONER HERIOT: I did, but  
3 Commissioner Gaziano asked it.

4 CHAIRMAN CASTRO: Okay. Great. Any other  
5 questions?

6 (No response.)

7 CHAIRMAN CASTRO: If not, we will move on  
8 to Commissioner Kladney, "Protecting Domestic Violence  
9 Victims Against Housing Discrimination." Commissioner  
10 Kladney? Commissioner Kladney, are you there? Are  
11 you on mute?

12 (No response.)

13 CHAIRMAN CASTRO: No? Okay. Well, we'll  
14 come back to you in a minute if you're not.

15 So, Commissioner Heriot, do you want to  
16 talk about your "Potential Misuse of Settlement  
17 Agreements and Consent Decrees in Civil Rights  
18 Enforcement"?

19 COMMISSIONER HERIOT: Cy Pres topic. This  
20 is a topic that has been getting some attention in the  
21 legal academy and particularly people who study class  
22 actions. And in the civil rights area, that extends  
23 not just to class actions but to actions brought by  
24 the government.

25 And, you know, I talked about this topic

1 before. This is not a new proposal. So I don't think  
2 I need to go into any great detail here. But  
3 basically the point here is that somebody's job has to  
4 be to conduct a systematic investigation, production  
5 of information so that policy can be made. And I  
6 think we are in a very good position to find out  
7 exactly what kind of organizations are getting money  
8 through the Cy Pres settlements, to what extent are  
9 victims of discrimination not being given the  
10 opportunity they should be given to get their part of  
11 the recovery because the monies, instead, go into  
12 charitable, so-called charitable, organizations? Some  
13 of them are very valid charities.

14 For example, my very dear employer, the  
15 University of San Diego, has been known to get Cy Pres  
16 settlements, not in civil rights cases but in other  
17 kinds of cases.

18 But it's a kind of practice that sounds so  
19 nice to say, "Well, money is going to charities."  
20 That's a wonderful thing. But I think people lose  
21 track sometimes on very significant issues of justice.  
22 And I think that we are in the best position to look  
23 at this insofar as we are talking about civil rights  
24 cases.

25 CHAIRMAN CASTRO: Any questions for

1 Commissioner Heriot?

2 (No response.)

3 CHAIRMAN CASTRO: If not, I have not  
4 missed any of the concept papers, have I? No?

5 (No response.)

6 CHAIRMAN CASTRO: So what I would  
7 encourage us to do is give some thought to these  
8 papers. And if there are conversations that occur  
9 among commissioners, have any other questions in  
10 advance so that we can come on June 8th and be  
11 prepared to select one of these topics for our  
12 statutory enforcement report, that would be great.

13 Madam Vice Chair?

14 VICE CHAIR THERNSTROM: Will there be a  
15 choice of one and backup or just one?

16 CHAIRMAN CASTRO: Well, ultimately, as we  
17 did with the VRA report, I think we will set up the  
18 voting processes as we did so that ultimately the  
19 highest vote getter will be selected.

20 That does not again preclude folks from  
21 raising these topics either for future statutory  
22 enforcement or for a briefing for fiscal year 2013.  
23 So this would be just selecting one for fiscal year  
24 2013 statutory enforcement report.

25 VICE CHAIR THERNSTROM: That's what I --



1                   COMMISSIONER GAZIANO: Just a  
2 clarification. I think we either need a majority vote  
3 to approve a specific topic or --

4                   CHAIRMAN CASTRO: Yes.

5                   COMMISSIONER GAZIANO: -- a majority vote  
6 to do something --

7                   CHAIRMAN CASTRO: Absolutely. The  
8 majority vote, yes --

9                   COMMISSIONER GAZIANO: You have five or  
10 more --

11                  CHAIRMAN CASTRO: Exactly and not only  
12 does it need to have the most votes, but it needs to  
13 have five votes, yes.

14                  COMMISSIONER GAZIANO: Okay. A majority  
15 of those present in the --

16                  CHAIRMAN CASTRO: Exactly. That's exactly  
17 right.

18                  COMMISSIONER GAZIANO: Okay.

19                  CHAIRMAN CASTRO: So no further questions  
20 on that.

21                  IV. MANAGEMENT AND OPERATIONS (CONTINUED)

22                  CHAIRMAN CASTRO: We will now move on to  
23 management and operations and the Chief of Regional  
24 Programs report. So Mr. Minarik?

25                  - CHIEF OF REGIONAL PROGRAMS

## 1 COORDINATION UNIT REPORT

2 MR. MINARIK: Good morning, commissioners.  
3 Three-part report here: first, a response to a  
4 question I got from Commissioner Kladney earlier in  
5 the week; second, a monthly report that I sent on to  
6 the Vice Chair and the Chair; and, third, a comment  
7 about chartering.

8 COMMISSIONER KLADNEY wrote an email to me  
9 earlier this week and asked why SAC activities were on  
10 hold. And I don't know if he shared that email, but  
11 I wrote back to him. And I said, "As to your inquiry,  
12 I understand that three activities are on hold." And  
13 I told him that I thought the appointments to SACs  
14 were on hold and I gave him the administrative  
15 instruction that read, "Under no circumstances should"  
16 -- sorry. "SAC chartering. The staff director is  
17 responsible for submitting SAC appointments and  
18 reappointments to commissioners for approval."

19 So I responded to Commissioner Kladney  
20 that in the absence of a staff director, I didn't  
21 think chartering activity necessarily stopped, but it  
22 didn't go through for approvals.

23 COMMISSIONER YAKI: I'm back.

24 CHAIRMAN CASTRO: Okay.

25 MR. MINARIK: The second thing that I told

1 him that I thought would stop would be --

2 CHAIRMAN CASTRO: I'm sorry. Could you  
3 repeat that, Mr. Minarik?

4 MR. MINARIK: The public release --

5 CHAIRMAN CASTRO: Can you put your mute  
6 on, Commissioner? It's raising a lot of feedback.  
7 Thank you.

8 COMMISSIONER YAKI: Okay.

9 MR. MINARIK: Again, the AI reads, "Under  
10 no circumstances should SAC or regional reports be  
11 released to the public or forwarded to the  
12 commissioners without the staff director approval."

13 So I just reported that it's my  
14 understanding that there are four such reports up in  
15 headquarters. And until there is a staff director,  
16 those are on hold.

17 And, finally, I told him that SAC  
18 proposals are also on hold. The AI reads, "The staff  
19 director is responsible for approving project  
20 proposals." I said I know of two that have been  
21 approved by the Southern regional office's SACs. And  
22 those are on hold.

23 But that doesn't mean all SAC activities  
24 are on hold. I know that regional offices are  
25 continuing chartering work. And I have a completed

1 SAC package from South Carolina. We are moving  
2 forward with Washington and Oregon. And when there is  
3 a staff director, we will move it through that  
4 channel.

5 It doesn't mean that we're not doing  
6 background research. It doesn't mean that completed  
7 reports for the report on the ex-felon voting rights  
8 in Kentucky and ex-felon voting rights -- and I know  
9 that the Connecticut committee is going to report on  
10 that next week.

11 And it doesn't mean the SACs aren't  
12 meeting. There has been in the past a staff director  
13 who insisted that SACs' meetings get their approval.  
14 And I saw nothing in the AI. So in the absence of  
15 staff director, when the regional director has a  
16 meeting planned and it's passed along to me, I issue  
17 a Federal Register notice. And so there are meetings.  
18 So I know that Connecticut and Florida are meeting  
19 next week. Illinois is going to meet in the next  
20 couple of weeks. So that is how I responded to  
21 Commissioner Kladney.

22 The second item is without a staff  
23 director, as the RPCU chief, I put together the  
24 regional report of activities. And I wasn't quite  
25 sure what to do with it. So I sent it to your Chair

1 and your Vice Chair.

2 CHAIRMAN CASTRO: And we circulated it --

3 MR. MINARIK: Good. Okay. Yes.

4 CHAIRMAN CASTRO: -- to all commissioners.

5 MR. MINARIK: And the comment about that  
6 is that it's in a format that the staff director has  
7 approved in the past. So if you wanted a different  
8 format, but the previous staff director has basically  
9 said they wanted three parts to keep it focused:  
10 projects, the meetings, and the charter activity. So  
11 it's streamlined because of the staff director  
12 presence.

13 And the third is something that I always  
14 have in hand is the SAC chartering list. And that was  
15 forwarded as well. We are at 37 -- without my reading  
16 glasses, 38 now are chartered. And I've got this  
17 expansive list, but the SAC charter packages can't go  
18 forward without a staff director under our current  
19 regulations. And by the end of this fiscal year, if  
20 that continues, we'll be down to 23 SACs that are  
21 chartered. But I assume something will happen in the  
22 interim. That's where we are on that.

23 CHAIRMAN CASTRO: Thank you. And, by the  
24 way, I thought that chart was very helpful. I've  
25 never seen the data in that format. It makes it a lot

1 easier to be able to tell who is chartered and who is  
2 not. So hopefully in the future, whomever is the  
3 staff director, we can direct them to make sure that  
4 we also get a copy of that because, again, I thought  
5 it was very useful to be able to track the data that  
6 way.

7 MR. MINARIK: If you like, that can be  
8 part of the monthly report. It could be.

9 CHAIRMAN CASTRO: I would like that.

10 MR. MINARIK: That was Mr. Dannenfelser  
11 who kept insisting upon this.

12 CHAIRMAN CASTRO: Okay.

13 MR. MINARIK: And he kept changing it  
14 until he finally liked it.

15 CHAIRMAN CASTRO: Yes. And I like the  
16 other report as well, but, you know, it's -- that  
17 format is very helpful, too.

18 Any questions for Mr. Minarik from any of  
19 the commissioners?

20 (No response.)

21 CHAIRMAN CASTRO: Hearing none, you are  
22 relieved of duties for the day, for the day, for the  
23 day. You are welcome to stay in the audience, though.

24 So let's see. I think we already talked  
25 about the agency staffing.

1 COMMISSIONER GAZIANO: We added to the  
2 agenda the report from the senior attorney and the --

3 CHAIRMAN CASTRO: VRA report.

4 COMMISSIONER GAZIANO: -- general counsel.

5 CHAIRMAN CASTRO: Yes. Ms. Tolhurst?

6 COMMISSIONER GAZIANO: Or are you still  
7 acting as general counsel until Wednesday?

8 MS. TOLHURST: I understand as of this  
9 past Wednesday.

10 COMMISSIONER GAZIANO: Oh, okay.

11 MS. TOLHURST: I'm the only one working  
12 here to work on this. So in that capacity --

13 COMMISSIONER GAZIANO: I understand.

14 - VOTING RIGHTS ACT DRAFT REPORT UPDATE

15 MS. TOLHURST: So I sent you all according  
16 to the approved timeline the draft of the statutory  
17 report. I sent that on May 8th. And, as the Chairman  
18 indicated, your comments are due back to me on May  
19 31st.

20 I sent out just yesterday the affected  
21 agency comments. That would be Department of Justice.  
22 And they had actually blown their deadline by two  
23 weeks. So usually I would have incorporated their  
24 comments before you got your draft, but I didn't want  
25 to blow my deadline. So I sent you all the draft and

1       then --

2                   CHAIRMAN CASTRO:  I think it's just a  
3       two-day --

4                   MS. TOLHURST:  Yes.  And so now you all  
5       have their comments.  You can see they are actually  
6       very brief.  And to the extent that they are relevant,  
7       they will be incorporated as well.

8                   So the next step is your comments on May  
9       31st.  And then those will be incorporated by me by  
10      June 11th.

11                   CHAIRMAN CASTRO:  Commissioner Gaziano?

12                   COMMISSIONER GAZIANO:  Thank you very  
13      much.  And thank you for taking this on, which  
14      normally is done most affably -- your lawyers in your  
15      office will at least be -- you said someone would  
16      begin when?

17                   MS. TOLHURST:  On Monday.

18                   COMMISSIONER GAZIANO:  On Monday?  Okay.  
19      You answered one of my questions, which is I think the  
20      DOJ letter was just two days before you -- but you did  
21      not attempt to incorporate any of their comments.

22                   But there is another couple of quick  
23      questions, one of which is I know several of us at  
24      least and maybe all of us were disappointed that the  
25      Department of Justice did not follow our request,



1 which they're commanded to do, and send a witness to  
2 our briefing. And it seemed like the excuse they gave  
3 then wasn't even a valid one because there was some  
4 hearing that didn't even take place.

5 But then I think I heard -- maybe it was  
6 at the last meeting -- that Commission staff did talk  
7 with Department of Justice. My question -- and I'm  
8 not sure it rises to the level of a concern -- is that  
9 staff were then able to ask questions of the  
10 Department but commissioners were not. Commissioners  
11 were not allowed to pursue lines of questioning with  
12 them.

13 Could you -- and if you could give just a  
14 general answer and then maybe follow up in an email  
15 with more detail if there is -- who spoke with DOJ if  
16 they did and when? Were there notes taken -- I doubt  
17 that it was recorded -- so that we have a sense as to  
18 who was contacted in the Department. They also missed  
19 their deadline for answering interrogatories.

20 Let me pause there before I ask my next  
21 question.

22 MS. TOLHURST: So we requested a meeting  
23 with Department of Justice. And they did not want to  
24 offer any career staff from the Voting Rights section  
25 or otherwise to discuss the project with us.

1                   They offered us one person, which was  
2 Matthew Colangelo, who is the Deputy Assistant  
3 Attorney General. And he is the signatory to the  
4 letter that I sent to you all.

5                   COMMISSIONER GAZIANO: And how long was  
6 that meeting?

7                   MS. TOLHURST: It was quite brief. I had  
8 about five follow-up questions, maybe ten. It was  
9 myself and David Snyder, who was previously attorney  
10 in the Office of General Counsel. And what would be  
11 available would be if I can find them on my desk my  
12 notes on that call.

13                   COMMISSIONER GAZIANO: That may be  
14 helpful. And that was my other question. There are  
15 persons of the draft that seem very good. I have a  
16 question about one or two. And this isn't an  
17 essential question, but I assume that Mr. Snyder  
18 before he left, was he -- did you all divide the  
19 duties of drafting the report? Did he contribute  
20 significantly to --

21                   MS. TOLHURST: He contributed  
22 significantly to the first draft. I had a distinct  
23 section or two. And I can't remember which section I  
24 had taken on, but -

25                   COMMISSIONER GAZIANO: Yes. I think that

1 may be helpful.

2 MS. TOLHURST: It is very fair to say he  
3 significantly reported in this report. In fact, as  
4 you know, there are ongoing matters that I am trying  
5 to incorporate to the extent that there is still time  
6 --

7 COMMISSIONER GAZIANO: Sure.

8 MS. TOLHURST: -- that he was managing.  
9 And then I am going to have to get up to speed on to  
10 be able to make sure our report is as fresh as  
11 possible.

12 COMMISSIONER GAZIANO: Okay. Thank you.

13 CHAIRMAN CASTRO: Any additional questions  
14 for Ms. Tolhurst?

15 (No response.)

16 CHAIRMAN CASTRO: Hearing none, I move  
17 that we adjourn the meeting. Is there a second?

18 VICE CHAIR THERNSTROM: Second.

19 CHAIRMAN CASTRO: All in favor?

20 (Chorus of ayes.)

21 CHAIRMAN CASTRO: The meeting is adjourned  
22 at 11:30 a.m. Eastern Daylight Time. Thank you,  
23 everyone.

24 (Whereupon, the foregoing matter was  
25 concluded at 11:30 a.m.)

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In the matter of: Commission Meeting

Before: US CCR

Date: 05-18-12

Place: Washington, DC

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Court Reporter

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