

BEFORE THE ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

In the Matter of Charges Against
ROSS MIRKARIMI,
Sheriff, City and County of San Francisco

City and County of San Francisco
Special Meeting of the Ethics Commission
Thursday, August 16, 2012 - 9:07 a.m.

Reported by: Marlene Puaoi, CSR, RPR

California CSR No. 7370

Bonnie Wagner Court Reporting
Certified Shorthand Reporters
1819 Polk Street, No. 446
San Francisco, California 94109
(415) 982-4849

1 BE IT REMEMBERED that on Thursday, August 16,
2 2012, commencing at the hour of 9:07 a.m. thereof, at
3 CITY HALL, 1 Dr. Carlton B. Goodlett Place, Room 400,
4 San Francisco, California, before me, MARLENE PUAOI, a
5 Certified Shorthand Reporter in and for the State of
6 California, the following proceedings were had of
7 record.

8 ---o0o---

9 APPEARANCES OF COUNSEL

10 For Sheriff Ross Mirkarimi

11 LAW OFFICES OF SHEPARD S. KOPP
12 11355 W. Olympic Boulevard, Suite 300
13 Los Angeles, California 90064
14 BY: SHEPARD S. KOPP, Attorney at Law
15 - and -

16 LAW OFFICES OF DAVID P. WAGGONER
17 2251 Market Street, Suite B
18 San Francisco, California 94114
19 BY: DAVID P. WAGGONER, Attorney at Law

20 For the City and County of San Francisco

21 OFFICE OF THE CITY ATTORNEY
22 1390 Market Street, Fifth Floor
23 San Francisco, California 94102-5408
24 BY: PETER J. KEITH, Deputy City Attorney
25 BY: SHERRI SOKELAND KAISER, Deputy City Attorney

26 For the Ethics Commission Board

27 MOSCONE, EMBLIDGE & SATER, LLP
28 220 Montgomery Street, Suite 2100
29 San Francisco, California 94104
30 BY: G. SCOTT EMBLIDGE, Attorney at Law

31 ---o0o---

1 Commissioners Present

2 Benedict Y. Hur, Commission Chairman
3 Jamiene S. Studley
4 Beverly Hayon
5 Dorothy S. Liu
6 Paul A. Renne

7 Staff Present

8 John St. Croix, Executive Director
9 Catherine Argumedo, Legal Analyst/Ethics Investigator
10 Garrett Chatfield, Legal Analyst/Ethics Investigator
11 Mabel Ng, Deputy Executive Director

12

13

---o0o---

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF PROCEEDINGS

CLOSING ARGUMENTS	Page
By Mr. Keith	1422
By Mr. Waggoner	1466
By Mr. Kopp	1478
By Mr. Keith (Rebuttal)	1497
DELIBERATIVE SESSION	1509

---o0o---

2 ---o0o---

3 P R O C E E D I N G S

4 COMMISSIONER HUR: Good morning, and welcome to the
5 continued special meeting of the San Francisco Ethics
6 Commission relating to the official misconduct charges
7 against Sheriff Mirkarimi.

8 We have a lot to do today, and so I wanted to start
9 by going over my proposed schedule for how we'll
10 proceed. We'd first like to hear the closing arguments
11 from the attorneys.

12 From the mayor's side, have you decided whether you
13 want -- how much you want to use up front and how much
14 you want to use, if any, in rebuttal?

15 MR. KEITH: We'll have 40 minutes up front, five
16 minutes for rebuttal.

17 COMMISSIONER HUR: Okay. During the course of
18 these arguments, I suspect that the commissioners will
19 have questions for you, and so expect to be interrupted.
20 This is obviously for us, so that we can get a good
21 handle on what your positions are and any final
22 questions we may have.

23 Our questions come out of your time, so don't
24 expect more than 45 minutes just because we're spending
25 some of it asking you questions.

1 After that, we'd like to take public comment on
2 the -- this agenda item. Public comment will be
3 strictly limited to two minutes per person. I know
4 there are a lot of people who would like to give public
5 comment, and we look forward to those comments.

6 Because of the volume, though, we are going to have
7 to limit it to two minutes, and I'm going to instruct
8 the staff to turn off the microphones after two minutes.
9 I'll explain this again right before we do public
10 comment, but you will get a warning beep when you have,
11 I believe, 30 seconds, which will allow you to wrap up
12 your comments.

13 After that, I intend to take a lunch break,
14 following which we will deliberate. The commission will
15 address the factual and legal issues that have been put
16 before us, and hopefully, we will come out with a
17 recommendation for the board at the conclusion of today.

18 In addition to the oral findings, we should discuss
19 whether we want to have some written findings. I think
20 one idea is for the attorney for the commission,
21 Mr. Emblidge, to write a summary opinion of what our
22 findings are at the end of today and then for us to
23 either adopt that as a summary in advance or to meet
24 again to officially adopt the written summary of our
25 oral findings today. But I would expect any writeup

1 would merely be a summary of what we've already found,
2 not any sort of new bases for our findings.

3 So those are the things I hope to address. And
4 before we start with attorney argument, let me take the
5 roll.

6 (Roll taken)

7 COMMISSIONER HUR: All commissioners are here, and
8 so let's begin with the mayor.

9 MR. KEITH: Good morning, Commissioners. Now, I
10 have prepared a closing argument in anticipation of not
11 being interrupted, but I understand that things change
12 and we have a compressed amount of time, so I will do my
13 best to cover all the main points and answer your
14 questions as well. So let me proceed.

15 On March 19th, 2012, the City and County of
16 San Francisco and the sheriff's department faced an
17 intolerable situation. Sheriff Mirkarimi had just been
18 convicted of a crime. He'd just been sentenced to three
19 years of probation out of his four-year term of office,
20 and the nature of his crime was troubling.

21 He was convicted of a crime of false imprisonment
22 while at the same time having responsibility to lawfully
23 imprison the prisoners in county jail. Moreover, it was
24 a crime of domestic violence. It was a crime involving
25 the violation of trust in the marital relationship, and

1 any crime involving a violation of trust raises serious
2 questions about whether an individual can carry out the
3 trust that comes with public office.

4 Faced with these facts, the mayor acted. The mayor
5 asked the sheriff to resign. He did not. The mayor
6 therefore filed these charges, and that ultimately
7 brought us to today.

8 Now, under the law before the commission, the
9 official misconduct provision in our charter and the
10 case law the California Supreme Court interprets,
11 similar provisions under other state laws, under the
12 evidence that's been presented to this commission, under
13 the common sense and wisdom of the commissioners, and
14 for what is right for the sheriff's department and for
15 our city, we ask you to recommend sustaining these
16 charges to the Board of Supervisors.

17 Now, the commission has received a great deal of
18 evidence in this case. Most of it has come from the
19 mayor, and most of it has been unchallenged. The mayor
20 presented nine witnesses through written testimony and
21 exhibits. The sheriff exercised his right to
22 cross-examine only two of them. Most of the evidence in
23 this case concerns what the sheriff of the City and
24 County of San Francisco is expected to do and what Ross
25 Mirkarimi did instead.

1 The facts are not very difficult to understand in
2 this case, and I'm going to go over them in a moment.
3 But first, I want to address the law the commission is
4 going to have to apply and address the specific
5 questions that the commission asked the parties to
6 address in the briefing about interpreting our official
7 misconduct provision in the charter.

8 Now, the legal basis for removal is met here. The
9 sheriff seems to argue that "Even if I acted wrongfully
10 and terribly, under the law, a technicality permits me
11 to continue in office."

12 That is not the case. Now, I prepared for the
13 commission something akin to the jury instructions you
14 might have in a civil trial. And if I could ask my
15 co-counsel to provide this to the other side, I'll pass
16 up a copy to the commission.

17 COMMISSIONER HUR: You may want to zoom in on that
18 a little bit if you --

19 MR. KEITH: I will.

20 COMMISSIONER HUR: -- if you can, Mr. Keith. Thank
21 you.

22 MR. KEITH: Now, what this -- what this document
23 is, it's the first sentence of our charter official
24 misconduct provision. And Commissioner Hur had
25 presented Option 1 and Option 2 at the last hearing, and

1 this is very close to Option 2. And the big -- the big
2 question, I guess, that this way of setting out our
3 definition of official misconduct answers is "Does the
4 official misconduct have to have a relation to the
5 duties of office?"

6 It does, but the dispute here isn't about that.
7 It's about what is that relationship. And that's really
8 what the sheriff's legal arguments seem to hinge on is
9 what that relationship has to be. The sheriff claims
10 it's not there, but it is.

11 COMMISSIONER RENNE: Counsel, isn't your reading of
12 Option 2 really too restrictive of what -- it may make
13 no difference in this case, but as I read it, it is
14 talking in the conjunc- -- disjunctive. It first talks
15 about misconduct relating to the office itself. The
16 second is a much more broadly worded -- it says "conduct
17 that falls below the standard of decency, good faith and
18 right action impliedly required of all public officers."

19 There's nothing in that section, that clause, that
20 says the misconduct has to relate to the office. For
21 example, you would agree, would you not, that if, say, a
22 member of the Board of Supervisors became aware that
23 another member was engaged in child molestation, which
24 clearly has no relationship to his office, but chose not
25 to disclose it and to cover it up, that that would

1 constitute a violation of the official misconduct act?

2 MR. KEITH: You know what? That is an issue that
3 I'm glad is not before us today, because that presents a
4 very troubling question.

5 We have serious misconduct that certainly reflects
6 on the moral and ethical judgment of an officer and then
7 whether another officer then has a duty to report that
8 to the city. I think that there's arguably a duty
9 implied under law based on the trust that that
10 individual holds toward the city to maintain the
11 standards of conduct of the body.

12 So I think the reason why that seems like such a
13 difficult hypothetical to us is because it's hard to
14 say, "Well, a supervisor has this as a job," but if you
15 look at the trust that a supervisor has to hold, that's
16 part of what a supervisor is supposed to do. So I think
17 that even in situations like that, they do nevertheless
18 relate to the duties of office. And in this particular
19 case, it would seem to relate to the trust that that
20 supervisor holds for office.

21 I mean, I think -- I mean, in this case, we have a
22 nexus, certainly, between the fact that the misconduct
23 is a crime and, of course, the sheriff is in law
24 enforcement and his conduct has consequences that are
25 related to law enforcement. So it's not a tough

1 question whether the relationship test is met here,
2 whether the official misconduct provision would capture
3 all of the sort of reprehensible conduct that we think
4 that our officials shouldn't be engaged in. That's a
5 question, perhaps, for amendment.

6 COMMISSIONER RENNE: But isn't a fair reading of
7 that that the drafters were focusing on two things? One
8 is performance in office and doing some misconduct
9 relating to that; and the other is some overarching
10 ethical code that any public official ought to abide by.
11 Isn't that what they were concerned about?

12 MR. KEITH: Well, I think that the greater includes
13 the lesser. The duties of office includes that ethical
14 code. And to say -- and part of the duties of office
15 and the relation to the duties of office is maintaining
16 that ethical standard.

17 And I think that that's something that a person
18 could look at the main clause and say, "Well, what's
19 wrongful behavior by a public officer?" It's not
20 upholding what we expect of a particular officer. And
21 then the use of the word "including" tells us that that
22 definition includes things like conduct that falls below
23 the decency standard.

24 It's not limited to that, nor is it limited to a
25 failure to take action to perform a mandatory duty.

1 It's any wrongful behavior in relation to the duties of
2 office, including these things.

3 COMMISSIONER RENNE: You may be going to get to
4 this a little further on, but do you agree that it's
5 sort of a two-step process that we have to deal with?
6 One is was it official misconduct? And two, did the
7 mayor act reasonably in exercising his discretion?

8 MR. KEITH: I think the question -- well, I think
9 that really goes to the question of is there -- is there
10 a minimum level of wrongful behavior that we have to
11 have? For example, jaywalking. That's -- you know,
12 that's wrongful, but does that mean an elected official
13 should be removed? That's -- I mean, that's a tough
14 question.

15 It's doubtful that the people who wrote the charter
16 intended that. And fundamentally, we have a decision
17 that the Board of Supervisors has to make about
18 essentially, knowing the consequence of sustaining the
19 finding is that the sheriff will be removed, is that a
20 consequence that they think is appropriate for this? So
21 I think that there is a determination of are the
22 consequences appropriate for the wrongful conduct?

23 And the conduct here in this case is so wrongful
24 that there's no question that that consequence is
25 appropriate.

1 COMMISSIONER RENNE: But you agree that it's a
2 two-step analysis?

3 One is if we were to find that there was no
4 official misconduct, that would be sort of the end of
5 our hearing and our recommendation to the board, saying,
6 "We find that it wasn't official misconduct." Or we may
7 say, "Yes, it was official misconduct, but we think
8 removal from office was an unreasonable exercise of
9 discretion." Isn't that a two-step analysis?

10 MR. KEITH: I don't think we're really looking at
11 the mayor's exercise of discretion. I think we're
12 thinking is the conduct -- does the conduct here in fact
13 warrant removal? And in fact, that's one of the things
14 under a separate section of the official misconduct
15 provision that deals with felony crimes involving moral
16 turpitude. What's mandatory when that happens, when an
17 official commits a felony crime of moral turpitude, is
18 the mayor must remove. The mayor has no discretion.

19 But nevertheless, it goes to this body to then
20 decide does that offense warrant removal? So there is a
21 judgment being made, I think, about the severity of the
22 conduct. And whether that's considered to be part of
23 the initial misconduct analysis or a separate analysis,
24 one could discuss, but certainly the severity, I think,
25 does matter. But here, I don't think the commission

1 needs to grapple with the question because the conduct
2 is so severe.

3 COMMISSIONER HUR: Mr. Keith, but you would agree
4 that we can decide that it's official misconduct, but
5 make whatever recommendation to the board we think is
6 correct. If we think removal is too significant of a
7 penalty for the act, do you agree it's within our
8 discretion to make a recommendation to the board that he
9 not be removed from office?

10 MR. KEITH: I think that this body's recommendation
11 to the board does embody a judgment about whether or not
12 the sheriff should be removed. So yes, you could -- I
13 think this commission could theoretically find that
14 there is some level of misconduct that meets the
15 definition, but nevertheless doesn't warrant removal.

16 I think that treating that as a two- -- I don't
17 know how sensible it is to treat that as a two-part
18 analysis, but I think that -- because I think that the
19 idea of what is wrongful conduct in relation to the
20 duties of office, I think that -- I think that that
21 suggests that we're measuring the severity of the
22 conduct. So I think it's difficult.

23 I think that we're complicating the task too much
24 to say that, well, we have to figure out whether the
25 basic legal elements are met and then make a separate

1 determination about the severity.

2 COMMISSIONER HUR: And I do want to go back to the
3 point briefly that Commissioner Renne was raising. I
4 think what he was suggesting in the interpretation of
5 the charter is more akin to Option 1. And I understand
6 your view of Option 1 is that it would not be -- it
7 would be unconstitutionally vague.

8 MR. KEITH: Well, it's not that it would be
9 unconstitutionally -- but I think yes, that
10 interpretation probably would not give sufficient notice
11 of the conduct that's prohibited. On the other hand,
12 the interpretation that saves it is, well, you measure
13 that conduct by reference to the standards of that
14 particular office, and the rule is that that
15 interpretation always saves the statute. So that's how
16 these general good-conduct provisions are interpreted.

17 COMMISSIONER HUR: But as far as you -- your
18 position is that the -- what I'm going to -- what you've
19 helpfully labeled "the conduct clause" must relate to
20 the duties of office, that we -- that you don't think we
21 should interpret the charter provision, the conduct
22 clause of the charter provision, to not have to be in
23 relation to the duties of office. Right? You believe
24 there must be some connection.

25 MR. KEITH: Right, of course. But with the proviso

1 that that task is not difficult to meet and it is very
2 broad.

3 COMMISSIONER HUR: Sure. I understand that you
4 have differences --

5 MR. KEITH: Yeah.

6 COMMISSIONER HUR: -- in how strict you think it
7 has to be, but --

8 MR. KEITH: Yes.

9 COMMISSIONER HUR: Okay.

10 MR. KEITH: So now, the sheriff basically says that
11 this relationship test that we've just been discussing
12 is, well, the charter must have a provision that says
13 the sheriff cannot commit a crime. It's there. He
14 says, "These are the five duties in the charter. It's
15 not here; therefore, it's not official misconduct."

16 Well, that argument doesn't make any sense. I
17 don't think that anybody would think that, that the
18 charter meant to allow someone, an official, to do
19 anything on the job, no matter how wrongful, that if it
20 wasn't spelled out as a particular duty in a statute
21 that you couldn't violate wouldn't give rise to official
22 misconduct. That doesn't make any sense.

23 When we talk about wrongful behavior, and again we
24 look at the cases and what they talk about with regard
25 to this relationship test, the California Supreme Court

1 said in the *Cranston* case, dealing with a police officer
2 who engaged in reckless driving while off duty -- it
3 said -- it upheld the termination of that officer, and
4 it said, "The public has a right to expect police
5 officers to obey the laws whether they are on duty or
6 off duty. When police officers violate the laws which
7 they were hired to enforce, they do so at their own
8 peril."

9 The relationship existed there, and that's the same
10 relationship here. So this test, though it does apply
11 to the conduct clause, is fully satisfied here. And I
12 think that we -- you know, it's conceivable that there
13 are situations where there could be terrible conduct
14 where it could be a much harder question. This is not
15 one of them.

16 COMMISSIONER HUR: Let me ask you about *Cranston*.
17 I mean, *Cranston* talks about the specificity may be
18 provided by the common knowledge and understanding of a
19 particular vocation or profession, and so you're using
20 that to suggest that the particular vocation we should
21 have in mind are sheriffs or law enforcement officials.

22 Do I have that right?

23 MR. KEITH: Yes.

24 COMMISSIONER HUR: But when I'm looking at the
25 actual charter provision, I mean, the language, to me,

1 is pretty clear, "falls below the standard." If the
2 people wanted, intended multiple standards, I think they
3 would have understood to use the plural, "standards."
4 So I think it's one standard of decency, good faith and
5 right action impliedly required of all public officers.
6 So I think the vocations that we need to evaluate are
7 not sheriffs or law enforcement, but public officers.

8 Now, we haven't heard a lot of testimony or expert
9 testimony about what the standard is for public
10 officers, but presuming that there is one, that seems to
11 be the standard we need to apply, and not the standard
12 that applies to police officers.

13 MR. KEITH: Well, I mean, let me respond to that in
14 two ways. First of all, it is a question of what "all"
15 means. Does it mean "each" or does it mean "every"?
16 Does it mean that every official is subject to the
17 standard that they should be meeting or does it mean
18 that they're all subject to the same standard? It's not
19 clear under the statute.

20 COMMISSIONER HUR: But isn't it more about whether
21 it's "standard" or "standards"? I mean, if they
22 intended multiple standards, why wouldn't they use the
23 plural?

24 MR. KEITH: In similar provisions, say provisions
25 that govern the conduct of all state employees, similar

1 language is used regardless of the fact that you can
2 have state employees who are corrections officers or
3 lawyers or park rangers or maintenance folks. The same
4 standard is used, and it applies to all of them. And
5 similar language like this is used in those statutes,
6 and nevertheless, the courts interpret it to mean it's
7 what applies to that particular office because that's
8 what makes sense.

9 The other issue here is that the lowest standard of
10 decency is one of the standards that the commission will
11 apply, and that's why the use of the word "including" in
12 this provision is so important. "Including" means "here
13 are some examples"; it doesn't mean that it is limited
14 to this.

15 So when we talk about wrongful behavior by a public
16 officer in relation to the duties of his or her office,
17 that encompasses the professional standard, so we still
18 have a professional standard that applies to the person
19 in the office and we also have -- we want to make clear
20 that there's also a baseline standard of decency that
21 applies. Courts have said that baseline standard in any
22 case has to be interpreted in relation to the office,
23 but it's a separate provision. It's the larger, general
24 definition that includes these things as examples.

25 I think when the voters enacted this, they

1 envisioned that, gee, there probably is a standard of
2 decency that has been to be met by everybody who's in
3 public office, so we want to make sure that's in there.
4 But as a practical matter, meeting that professional
5 standard, that's one of the basic duties. If you didn't
6 have the word "including" here and all the text that
7 follows it, we would -- then it would -- this idea of
8 meeting a professional standard would still be embodied
9 in the general definition.

10 These are just illustrations. So these are really
11 two different standards that could apply, though as a
12 practical matter and as a constitutional matter, we
13 apply the standard of the profession from that second
14 clause.

15 COMMISSIONER HUR: Okay. So you think that
16 everything after the first "including" are mere examples
17 of what could constitute wrongful behavior by a public
18 officer in relation to their duties.

19 MR. KEITH: I won't say "mere." I say
20 "non-exhaustive."

21 "Here are some things that we want to make clear,
22 to the extent that there's any potential for ambiguity
23 as to what this general definition could mean under
24 these particular circumstances that we could foresee
25 coming. You know, we want to make that clear."

1 So I think these are illustrative examples. And I
2 think there's also -- I mean, if you -- well, our brief
3 explains this in greater detail about why we think this
4 makes sense.

5 I want to talk about one of the other legal
6 arguments that the sheriff makes, and this relates to
7 the timing of the misconduct. And I think that we can
8 look at this -- look again at the definition of
9 "official misconduct" and break it down into elements,
10 so let me pass along to the commission another group of
11 jury-instruction type of documents which breaks down
12 "official misconduct" into its elements.

13 All right. So what we're doing here is taking the
14 general definition of "official misconduct," as I said,
15 at the beginning of the first sentence of our definition
16 of "official misconduct" in the charter, and we break it
17 down into the four elements of official misconduct.

18 Now, the sheriff has made an argument that because
19 he committed his misconduct a week before or initiated
20 his misconduct a week before his inauguration, that
21 doesn't count. Well, our response to that is simple:
22 It may have been a week before the inauguration, but
23 it was two months after the election, and that's what is
24 significant.

25 And the definition of "official misconduct" answers

1 the sheriff's claim. It says "Official misconduct means
2 any wrongful behavior" and then the second element, "by
3 a public officer." Now, there's no statement in the
4 charter about what this definition of a public officer
5 means, but there's no reason to restrict who a public
6 officer is and say, "Well, it's somebody -- it includes
7 elected officials, but only after they're sworn in."

8 And the reason for this is the very purpose of the
9 official misconduct provision. The official misconduct
10 provision is meant to deal with wrongdoing that comes up
11 after the voters have voted or after an official is
12 appointed to their position. When the voters went to
13 the polls in November 2011 and they marked their
14 ballots, they did not say, "I am casting a vote for a
15 sheriff who has committed domestic violence and will be
16 on probation for three of the four years in office."

17 These are facts that were unknown to the voters;
18 they came to light after the election. And it's the
19 very situation that official misconduct provisions both
20 in our city and elsewhere are meant to deal with.

21 COMMISSIONER RENNE: Well, Counsel, it may well be
22 that the second portion of it deals with that question,
23 but the first portion -- I don't know how you can read
24 it other than it says, "Official misconduct means any
25 wrongful behavior by a public officer in relation to the

1 duties of his or her office," so that the first
2 paragraph clearly says whatever that wrongful misconduct
3 was, it has to be in relation to his duties to which he
4 was elected.

5 So that if he hasn't taken office -- he may have
6 been elected, but if he hasn't taken office, how can he
7 be guilty of violating that first section?

8 MR. KEITH: Well, let's think about the type of
9 misconduct that could be captured here in relation to
10 the duties of office. A person can be about to take
11 office and they could abuse the power of the office
12 they're about to take by making a threat about what they
13 will use that power for after they take the office.

14 A person can engage in wrongful behavior shortly
15 before taking an office that casts disrepute and
16 discredit on that office as the consequences of that
17 wrongful behavior unfold. And an official that's
18 between election and inauguration can be busy preparing
19 to take that office, and that's why government ethics
20 laws that do define who a public official is define a
21 public official to include -- and this is from the
22 California Political Reform Act. This is cited in our
23 brief. Gov. Code 82020 defines an elected officer as
24 "any person who holds an elective office or has been
25 elected to an elective office but has not yet taken

1 office." And this provision is cited in our brief.

2 COMMISSIONER RENNE: How can an act of domestic
3 violence transfer into saying that is a misconduct in
4 relation to his office? It may well be a violation of
5 the second clause, but how can it be an act that's in
6 relation to the duties of the office to which he's
7 elected?

8 MR. KEITH: Because his own conviction impairs the
9 ability of his department --

10 COMMISSIONER RENNE: He wasn't convicted at that
11 point.

12 MR. KEITH: Well, there is a special rule, and
13 there are some jurisdictions that say you can't take
14 misconduct from a prior term, meaning -- meaning,
15 actually, you can't take misconduct that occurred before
16 an election, and then charge it afterwards. But even
17 those jurisdictions have a principle that when someone
18 is convicted of a crime, it's the date of the conviction
19 that matters, and we look at that, that conduct.

20 And again, the reason for that principle -- well,
21 there's two of them. One of them is the goal here is to
22 protect the office and protect the public, and so having
23 a rule that when you actually have something as serious
24 as a conviction of a crime that occurs during -- where
25 the conviction occurs during the term protects that

1 office. The second reason is because the actual
2 conviction is conclusive evidence that the conduct
3 occurred.

4 Things can be up in the air; things can be unknown;
5 things can be hidden. But this conviction makes it
6 conclusive evidence, and that's exactly what we saw
7 here. The mayor elected to let the criminal process
8 take its course, and when the conviction happened and
9 the sentencing happened, he acted because he had
10 conclusive evidence that this misconduct had occurred.

11 And so in the specific situation of crimes, where
12 even in the jurisdictions that have a rule that say you
13 can't do that, they say there is an exception for a
14 crime, and I'm not aware of any case in which someone
15 said that when you're convicted of a crime during a
16 term, you're -- but it happened before the term, you're
17 off the hook. And it's the similar rule in probation
18 violations, because again, the rule is are you -- did
19 the threat to the public -- did it come to light during
20 the time, during the term that the person is being
21 subject to scrutiny? And in this case, it did.

22 COMMISSIONER HUR: Commissioner Studley?

23 COMMISSIONER STUDLEY: As we're drilling down on
24 the words, the phrase that's used here is "in relation
25 to the duties" when it might have said instead "during

1 the conduct of" or "in carrying out the duties," which
2 would have made our job clearer to know about the
3 timing. Do you think that that, the fact that it says
4 "in relation to" as opposed to a more specific "wrongful
5 behavior in carrying out the duties of the office,"
6 would have set a higher and different kind of standard?

7 MR. KEITH: Well, I think it does, and there
8 are official misconduct provisions that do. The
9 statewide government code provision that outlines the
10 type of official misconduct that's prosecuted for a
11 grand jury is narrower.

12 And there's a case that we cited called *People v.*
13 *Mullin* involving a sheriff in which an incident of child
14 molestation came to light for the sheriff, to the
15 sheriff, and he didn't pursue an investigation and,
16 moreover, he didn't refer it to any other agency. And
17 the court said, "Well, the job of the sheriff is to
18 detect wrongdoing." And he didn't do anything, and this
19 was something that met that sort of that more closely
20 related test under the government code.

21 I think when the voters did this, I mean, they
22 also -- they also said, "We're looking at wrongful
23 behavior, not unlawful behavior." So they meant this to
24 be broader, and I think including provisions like the
25 decency clause showed that the voters wanted this to be

1 a broad provision so that we could hold our elected
2 officials to a higher standard, including being able to
3 deal with situations like this, where you have conduct
4 that relates to the duties of office and clearly bears
5 on the effectiveness of that office and how well that
6 office is going to function where you have consequences
7 that are going forward. They wanted to be able to
8 capture that, and I think that this language does.

9 Now, I want to -- I mean, I think that we -- I
10 think that our brief discusses the difference between
11 wrongful behavior and unlawful behavior closely enough
12 and what that signifies, so I'm not going to dwell
13 further on these elements. What I want to do is turn to
14 the relationship test and talk about how that
15 relationship test is satisfied here.

16 COMMISSIONER LIU: Mr. Keith, may I interrupt you?

17 Going back to the definition, your handout on the
18 broad definition where you broke it down into inaction,
19 conduct, and conflicts clause, so are you reading the
20 charter to say when you look at the conduct clause,
21 "conduct that falls below the standard of decency, good
22 faith and right action impliedly required of all public
23 officers in relation to the duties of his or her
24 office"?

25 Is that -- would that be the way you're

1 interpreting it if that's the standard that we're
2 supposed to apply today?

3 MR. KEITH: I think it has to be. I mean, I think
4 that -- I think that the use of the word "including"
5 followed by illustrative examples tells us that what
6 comes before is the general definition that has the
7 elements that need to be met in every case, and again, I
8 think the dispute here is on what exactly that
9 relationship has to be.

10 COMMISSIONER LIU: Okay. Thank you.

11 COMMISSIONER HUR: And you're only alleging
12 violation of the conduct clause.

13 MR. KEITH: No, we're -- we're alleging a violation
14 of the general definition here. I mean, I think much of
15 the -- some of the conduct here -- all of the conduct
16 that's alleged violates the general definition. Some of
17 it also violates some of the other illustrative clauses
18 here, but what we've been focusing on is that general
19 definition.

20 COMMISSIONER HUR: Okay. But you're not making an
21 allegation that he violated the inaction clause. Right?

22 MR. KEITH: I think some of the conduct related to
23 the investigation could fall under that category, but
24 doesn't necessarily, and that really depends on the
25 facts as this commission sees it.

1 Basically, if this commission concludes based on
2 the evidence that the sheriff initiated the contact
3 between his campaign manager and his wife and he took
4 that action as part of his course of conduct to keep his
5 wife from going to the police, then he's responsible for
6 all the consequences that came from that, all the
7 consequences that came from him bringing in his campaign
8 manager to clean up this mess, in which case he's
9 responsible for the actions that she took later that
10 afternoon as well as with regard to the conversations
11 with Ivory Madison, with regard to the ongoing efforts
12 working with Ms. Lopez to try and stop this police
13 investigation if he initiated it.

14 If on the other hand the commission were to find
15 that the sheriff didn't initiate that contact, but
16 nevertheless found out about these efforts to dissuade
17 Ms. Madison and Mr. Mertens that were going on that day,
18 then I think the inaction clause would come into play
19 because that's -- and I think under the principles of
20 that case, *People v. Mullin*.

21 But other than that, I don't think the inaction
22 clause comes into play, because I think we have
23 affirmative acts taken by the sheriff which are
24 wrongful, which is a different type of thing than just
25 simply not acting when something comes to light.

1 COMMISSIONER HUR: And you're not making an
2 allegation under the conflicts clause. Right?

3 MR. KEITH: Well, I think with regard to the
4 sheriff's threat to use his power, that does certainly
5 violate specific conflict-of-interest laws by the city,
6 but there's also no question that that's wrongful
7 behavior in relation to the duties of office, so I don't
8 think we need to dwell too much --

9 COMMISSIONER HUR: Can you identify to us the
10 conflicts-of-interest law that he violated?

11 MR. KEITH: Yes, it's identified in our brief. He
12 violated 3.218(a) of the Campaign and Governmental
13 Conduct Code. That provision says you can't violate any
14 provision of a statement of incompatible activities, and
15 the sheriff's statement of incompatible activities --
16 like every statement of incompatible activities in the
17 city states and as every statement of incompatible
18 activities is required to state, he used the prestige or
19 power of his office for a private end. That's the
20 violation there.

21 But again, these clauses are illustrative. I don't
22 think we need this clause to know that that kind of
23 conduct constitutes wrongful conduct in relation to the
24 duties of office. But in this case, that clause is also
25 met.

1 COMMISSIONER RENNE: Would it be your position if
2 it wasn't the position of sheriff? If the public
3 official who have been suspended by the mayor was, say,
4 a supervisor, and he or she performed the same acts that
5 you allege were performed by the sheriff or the
6 sheriff's people to try and close off the investigation,
7 that that wouldn't be a violation because the supervisor
8 doesn't have any responsibility insofar as criminal
9 investigations?

10 MR. KEITH: I think that if we had a situation
11 where, say, the person wasn't initiating the contact,
12 but say it came to light to them after the fact that
13 these people were working on his behalf to cover up his
14 crime, I think there's an argument that under that
15 circumstance, the person, as much as we would want them
16 to take action, may not be under an obligation to.

17 COMMISSIONER RENNE: That's the way you read the
18 statute?

19 MR. KEITH: I think that with regard to the -- to
20 specifically the inaction clause, we read it that way.
21 It's another question whether that conduct might be
22 reached by the decency clause and just the general
23 baseline level of conduct that we would expect.

24 COMMISSIONER HUR: Mr. Keith, sometime today, can
25 you show me -- and I may have just missed it -- where in

1 your amended charges you rely on the conflicts clause as
2 a basis for sustaining official misconduct?

3 MR. KEITH: We don't separately state it. We
4 simply state that it's wrongful behavior in relation to
5 the duties of office. We think it also happens to meet
6 that illustration, but again, our concern is that it
7 meets the definition to begin with and we think it falls
8 within there. It's not separately alleged.

9 We do certainly allege that using the power of your
10 office in a custody dispute is wrongful behavior in
11 relation to the duties of office. We don't parse the
12 statute down to that example, down to that illustrative
13 clause.

14 COMMISSIONER HUR: Okay.

15 MR. KEITH: Now --

16 COMMISSIONER LIU: Mr. Keith?

17 MR. KEITH: Yes.

18 COMMISSIONER LIU: When you discuss the evidence,
19 can you discuss the evidence you think supports the
20 general clause and then the evidence that you think
21 supports the conduct clause under your interpretation?

22 MR. KEITH: That's -- I think that what it really
23 is it's applying two different legal principles to the
24 same sets of facts, so I think actually at the very end
25 of our brief, we do address that, the idea of what

1 baseline standards that this conduct might violate.

2 And I think that the argument is, well, committing
3 domestic violence is certainly not something we're
4 willing to tolerate from a sheriff, and there is
5 certainly an absolutely crystal-clear relationship with
6 the duties of office with regard to law enforcement when
7 it comes to domestic violence. On the other hand, from
8 a supervisor alone, I don't think that the voters of San
9 Francisco contemplated that that standard of decency
10 would be -- would permit domestic violence by any
11 official in the City and County of San Francisco.

12 So I think that that would that be an example of
13 where it meets both clauses. And I think we get into
14 more difficult territory when we're talking about that
15 baseline standard, but we don't have to go there to
16 complete the task that we have because with regard to
17 the duties of sheriff, it's clear and the evidence
18 supports it, and I don't think anybody could dispute
19 that there's a relationship there.

20 COMMISSIONER LIU: Okay. Thank you.

21 MR. KEITH: Now, I'll do my best to do some
22 highlights of the evidence here now. We have -- the
23 heart of these charges has always been the sheriff's
24 crime and his conviction and his sentence for those
25 charges and the consequences of that for his office.

1 We also have a course of conduct that followed
2 that included acts of witness dissuasion, threats -- and
3 I should say not just followed, but conduct that was
4 wrapped up in that -- threats to use his official power
5 in a custody dispute, witness dissuasion, and then
6 various actions that -- during the criminal process that
7 were either deceitful or abused his trust or didn't
8 comport with his responsibilities for law enforcement.
9 But the heart of the charges has always been the
10 domestic violence.

11 COMMISSIONER HUR: Can I make a suggestion when you
12 talk about the evidence?

13 I at least don't need to hear your evidence for the
14 physical abuse. It would be helpful for me if you would
15 point me specifically to the non-hearsay evidence of
16 witness dissuasion in particular, and also the evidence,
17 the specific non-hearsay evidence, of using his official
18 powers to try to obtain custody of his child.

19 So those are -- and then, I guess, thirdly, the
20 evidence that his statements to the police were
21 willfully -- what was the term you used? -- willfully
22 misleading. I mean, I want to know what the evidence is
23 that shows that -- you know, I -- I for one credit
24 Inspector Daniele that the sheriff said that to him. I
25 want to know what evidence you have that that was an

1 affirmative lie, that he knew that he had the gun but
2 that he didn't turn it over.

3 So those are sort of for me the three areas that it
4 would be helpful to be pointed to specific non-hearsay
5 evidence.

6 MR. KEITH: I neglected to start my stopwatch, so I
7 don't know how much time I have left, but I will do my
8 best to cover those things.

9 COMMISSIONER HUR: I have you at 32 minutes.

10 MR. KEITH: We're 32 minutes in?

11 COMMISSIONER HUR: Yeah.

12 MR. KEITH: Then I'd better move quickly.

13 All right. With regard to the non-hearsay evidence
14 of the threats, we have the video, of course, which is
15 in, and then we have the contemporaneous statements to
16 Ivory Madison, which are also in. We have the statement
17 of Callie Williams, which, when it came in, was a
18 statement of Ms. Lopez's -- I guess we'll say when it
19 came in, it was hearsay, but Ms. Lopez has since
20 testified, so now it's not hearsay anymore; it's a prior
21 inconsistent statement. So all three of Ms. Lopez's
22 contemporaneous statements are not hearsay.

23 So to the extent that we're concerned about a
24 hearsay problem --

25 COMMISSIONER HUR: Where in the record does

1 Ms. Lopez say, "The sheriff told me that he can take
2 away my son because he is the sheriff and he's got that
3 authority" or something to that effect?

4 MS. KAISER: Ms. Lopez never testified to that.
5 She testified to the opposite, which is what made those
6 other statements admissible.

7 Callie Williams reports that threat that Ms. Lopez
8 made about using the power of office, and likewise
9 Ms. Madison reports it. It's in their written
10 declarations, and that's -- and as well as it's in the
11 video that he said he's very powerful and he can do it
12 immediately after saying that she's doing this because
13 he said he can take away Theo and he said he's very
14 powerful and he can do it.

15 COMMISSIONER HUR: So it's your -- your position is
16 that by saying he's powerful, that implies his power is
17 because he's an elected official and, therefore, we
18 should decide that he used that power to -- used the
19 power of his office to try to take custody of his child
20 or --

21 MR. KEITH: Well, that's how --

22 COMMISSIONER HUR: -- force Ms. Lopez --

23 MR. KEITH: I'm sorry.

24 COMMISSIONER HUR: Or exert force over his wife.

25 MR. KEITH: That's what Ms. Lopez said she

1 understood it as. She said that --

2 COMMISSIONER HUR: Okay. Where's that testimony?

3 MR. KEITH: Well, there's two things. One is a
4 text message she sent on January 4th that said, "Use
5 your power." She was asked during the hearing, "What
6 does that mean?" She says, "It's your power because
7 you've just become sheriff and you're a supervisor."
8 That's in her testimony.

9 So she understood his power to mean that. And of
10 course, that's circumstantial evidence of what she
11 probably meant when she was saying, "He said he's very
12 powerful" in the video and to Ms. Williams and to Ms.
13 Madison, and those sections are cited in our support for
14 the proposed findings of fact.

15 COMMISSIONER HUR: Yeah. You cited a lot, though.

16 MR. KEITH: We did.

17 COMMISSIONER HUR: And I reject a lot of it, but
18 I'm -- okay.

19 MR. KEITH: And I'm happy -- you know, I'm happy to
20 give specific page/line references after I have a chance
21 to sit down and look at the testimony.

22 COMMISSIONER HUR: Thank you.

23 MR. KEITH: Now, I know that there was another
24 question about why we should believe that Sheriff
25 Mirkarimi was being deceitful with regard to the

1 weapons.

2 Now, recall what the sheriff said. The sheriff was
3 confronted with an EPO that required him to turn over
4 his weapons. The police officers have said, or I should
5 say Inspector Daniele has said, "The agreement that we
6 made was that his attorney would call us, meaning me and
7 my partner, Inspector Becker, the next day to turn over
8 the weapons."

9 Now, they went to Sheriff Mirkarimi. They said,
10 "We see you have three weapons."

11 Sheriff Mirkarimi said, "Oh, you know what? I have
12 two of those three weapons. But that third weapon, I
13 sold it in 1996 to a recruit at the police academy."

14 And what was Sheriff Mirkarimi's explanation for
15 that? He said he was thinking out loud. He didn't know
16 where the weapon was, and he wanted to be helpful.
17 Well, if a person doesn't know where his weapon is and
18 he's confronted with an order that says, "Give me your
19 weapon. Give me all your weapons. This is required,"
20 he's going to say, "I don't know where it is." He's not
21 going to say, "I disposed of it on this date and in this
22 way to this person in this transaction," to give details
23 about how this transaction supposedly happened. It's
24 not credible.

25 Now --

1 COMMISSIONER HUR: But what's the -- but the guns
2 get turned over all at the same time.

3 MR. KEITH: They do, but the process for how the
4 guns get turned over also shows us that Sheriff
5 Mirkarimi's account of what that agreement was is not
6 credible.

7 COMMISSIONER HUR: Okay. But if even if it
8 wasn't -- even if he said the words that Inspector
9 Daniele says that he said, what's the motive there to
10 lie about selling the guns 15 years ago if they end up
11 all being in the same place and they all get turned over
12 together?

13 I mean, what was he trying to -- are you trying to
14 make some allegation that he was trying to keep the gun,
15 that -- that one gun from the police so that he could
16 have it for himself? I mean, what's the "there" there?

17 MR. KEITH: I think Sheriff Mirkarimi was
18 confronted with this order, didn't like the idea of
19 having to turn over his firearms. I mean, I don't think
20 anybody likes the idea of having to turn over what they
21 have.

22 And he made a stupid decision that he shouldn't
23 have made and he decided that he -- that, "Well, I've
24 been confronted with this. I don't want to give these
25 to the San Francisco Police Department. I'm suspicious

1 of them. They have -- you know, I don't have a great
2 relationship with them. I want to keep the weapons
3 under my control."

4 I'm not saying the decision was rational, but it's
5 understandable that somebody who doesn't want to turn
6 over his weapons and is suspicious of the agency that
7 he's turning them over to could make that decision. So
8 that would be -- that would be the motive, is that he
9 simply doesn't want these weapons to be in the hands of
10 the police department.

11 And, you know, to me or to you, that may not seem
12 like a very good motive or a very good choice to make,
13 but -- I don't think it was a very good motive or a very
14 good choice for him to make, but he nevertheless did it.
15 There's no explanation for why somebody would -- would
16 essentially make up stories about selling a weapon when
17 they could simply say, "I just don't know where it is."

18 COMMISSIONER STUDLEY: How about -- do you make
19 anything of giving the guns to the sheriff's department
20 instead of the police department? And then let's not
21 forget the witness dissuasion.

22 MR. KEITH: Right. Well, the giving of the weapons
23 to the sheriff's department rather than the police
24 department. So again, I think -- I think we're looking
25 at the same motive here. "I don't want to give" -- you

1 know, "Well, I definitely don't want to give up my
2 guns," and "Okay. Well, maybe I'm going to have to give
3 them up because I don't want to out and out violate a
4 court order, but I still don't want to give these
5 weapons to the San Francisco Police Department. I want
6 to keep them in my agency."

7 And again, this doesn't seem like a very sensible
8 thing to do, but there are a lot of things that Sheriff
9 Mirkarimi did in this course that isn't a very sensible
10 thing to do. And I think if you look at what his
11 testimony was at the hearing to explain this, you're
12 going to find that that testimony was not credible and
13 it's rebutted by the actions that the people took
14 following the agreement that Sheriff Mirkarimi
15 described.

16 Sheriff Mirkarimi said, "We are going" -- said that
17 the agreement was, "Well, my lawyer -- the agreement was
18 my lawyer was going to give the weapons to the sheriff's
19 department and the sheriff's department was going to
20 give them to the police department."

21 That was his testimony before this commission about
22 what the agreement was. Well, what happened next? We
23 know from Inspector Daniele's declaration that the next
24 day, when he spoke on the phone with Captain Gorwood
25 from the sheriff's department, she didn't have any idea

1 that was the plan. He offered to come over and get the
2 weapons. She said, "No, we'll take care of it."

3 So this is the plan that Sheriff Mirkarimi has
4 supposedly made, but he sends over a member of his staff
5 and doesn't inform her of that plan? Because certainly,
6 if she'd known that were the plan, she would have given
7 the weapons to her counterparts at the police
8 department.

9 But then the next thing that happened conclusively
10 disproves Sheriff Mirkarimi's testimony at the hearing,
11 and that is this: There was a court date the following
12 week where Sheriff Mirkarimi's attorney, of course, was
13 present, the same attorney who was present when Sheriff
14 Mirkarimi was served with the order and when this
15 agreement was allegedly made. The district attorney
16 asked the judge to issue an order to the sheriff's
17 department telling the sheriff's department to turn over
18 the weapons to the police department.

19 Now, if the plan was as Sheriff Mirkarimi
20 described, his attorney would have said, "Okay. That's
21 the plan." But his attorney didn't do that. His
22 attorney objected. He tried to stop that order from
23 getting issued. So the explanation that Sheriff
24 Mirkarimi gave of that agreement to this commission is
25 not credible. It's disproven by the actions of the

1 staff who are supposedly part of this agreement and by
2 his own attorney, who was present when this discussion
3 was had.

4 So I think that the commission can conclude from
5 that that Sheriff Mirkarimi's testimony in relation to
6 this gun issue is not -- is simply not credible, and
7 that that lack of credibility with regard to the guns is
8 related to the same poor judgment and poor
9 decision-making that led him to take these deceitful
10 actions in the first place with regard to his guns.

11 And then the last thing I would want the commission
12 to see about why this all matters: We submitted, and
13 it's in evidence, a transcript of this particular
14 hearing where the judge explained that, in a domestic
15 violence case, especially one involving the sheriff,
16 things need to be done by the book and those weapons
17 have to be with the police department. They should not
18 be with the sheriff's department.

19 The Superior Court judge recognized that it's not
20 enough for the sheriff himself to turn the weapons over
21 to his own agency and she issued that order, so that's
22 also evidence that the commission can look at about why
23 this matters.

24 It's the sheriff not doing things by the book, it's
25 the sheriff thinking that the rules don't apply to him,

1 and it's the sheriff using his own staff to try and keep
2 his guns out of the rightful hands where they should be
3 for whatever motive that he had. It was an improper
4 motive, but he did it.

5 Now I want to talk about the witness dissuasion.
6 Commissioner Hur, if you could remind me of what your
7 questions were on that point so I can cover that?

8 COMMISSIONER HUR: So first, who did he dissuade?
9 I mean, your brief mentions Ms. Lopez. It also
10 references a lot of other testimony and evidence that we
11 heard.

12 But are we just talking about the efforts to
13 dissuade Ms. Lopez, or are you -- are you alleging
14 official misconduct based on dissuasion by the sheriff
15 of any other individual?

16 MR. KEITH: Yes, we are, and with regard to Ms.
17 Madison. And this is how they're different. The
18 sheriff worked directly on Ms. Lopez. He coupled his
19 pleas to her to not go to the police with a threat about
20 the consequences that would follow regarding custody and
21 he got his campaign manager involved. This is all in
22 the effort to try and get Ms. Lopez not to go to the
23 police. So that's Ms. Lopez.

24 And then the sheriff became aware of what
25 Ms. Peralta Haynes and what Ms. Lopez were doing on his

1 behalf with regard to Ms. Madison and Mr. Mertens later
2 in the day. Of course, the sheriff did not directly
3 speak with them, but he found out about it. And we
4 spent so much time looking at those records of what
5 happened on January 4th -- how close together, how
6 frequent those calls were, how they were interspersed
7 with Ms. Lopez's communications with Ms. Madison and
8 Mr. Mertens. It's inconceivable that the sheriff didn't
9 know what was going on and didn't act in response to
10 what he had initiated.

11 COMMISSIONER HUR: So the argument is that he found
12 out about it and told Ms. Lopez to tell Ms. Madison that
13 she should not go to the police, that something bad is
14 going happen to her if she does or that he's going to
15 use his -- the power of his office somehow to prevent
16 her from doing -- going to the police or cooperating
17 with them? I mean, where -- what --

18 MR. KEITH: With regard to Ms. Lopez or with regard
19 to Ms. Lopez's efforts?

20 COMMISSIONER HUR: Well, I'm just trying to find
21 out -- I mean, you conceded that the sheriff didn't talk
22 to Ms. Madison.

23 MR. KEITH: Of course.

24 COMMISSIONER HUR: And the two people who
25 apparently did are Ms. Lopez and Ms. Haynes.

1 So for Ms. Lopez, are you alleging that the sheriff
2 told Ms. Lopez that she should tell Ms. Madison to not
3 talk to the police because the sheriff would use his
4 power against Ms. Madison if Ms. Madison did so? I
5 mean --

6 MR. KEITH: No. No, there's no allegation that the
7 sheriff threatened to use his power against Ms. Madison.

8 No, the basis of this -- of this -- of this sort of
9 the latter efforts that happened on January 4th, where
10 Ms. Lopez was essentially turned and started to work on
11 these other witnesses, was that the sheriff knew about
12 it and didn't do anything.

13 COMMISSIONER HUR: Okay. So this --

14 MR. KEITH: And he may very well have encouraged
15 it, but we certainly know he knew about it --

16 COMMISSIONER HUR: This is the inaction.

17 MR. KEITH: -- and did nothing.

18 COMMISSIONER HUR: This is the inaction point, that
19 he should have encouraged Ms. Madison to go to the
20 police, but did nothing? Is that --

21 MR. KEITH: Well, he should have responded to the
22 efforts that his wife and Ms. Peralta Haynes were making
23 with regard to Ms. Madison because it was interfering
24 with an ongoing law enforcement investigation at that
25 point.

1 COMMISSIONER HUR: I guess I'm just not clear
2 what --

3 Okay. So you're saying he should have done
4 something that he didn't do --

5 MR. KEITH: Yes.

6 COMMISSIONER HUR: -- with respect to Ms. Madison.

7 And what exactly should he have done with respect
8 to Ms. Madison?

9 MR. KEITH: Number one, he should have at least
10 tried to persuade his wife not to continue calling
11 Ms. Madison and trying to interfere with it. He
12 actually did the opposite.

13 COMMISSIONER HUR: Okay. So stop there.

14 So he should have tried to convince his wife to
15 stop dissuading Ms. Madison?

16 MR. KEITH: I'm giving an example of an effort that
17 he should have taken. We know he did nothing.

18 COMMISSIONER HUR: And the fact that he didn't do
19 that, and I think the evidence -- my view is that the
20 evidence doesn't show he did that, that he didn't try to
21 dissuade his wife, but you think we should find that he
22 committed official misconduct because he didn't try to
23 convince his wife to stop telling Ms. Madison not to
24 call the police. That's --

25 MR. KEITH: That's one of the things. But there

1 were actually -- there was a text message that he sent
2 to his wife where he told her, "You have to reject
3 Ivory's actions. We both do."

4 So there, he's even encouraging his wife to do it.
5 So that is actually taking action. Now, I think that
6 his duty -- I think he still had a duty to do something,
7 but we do have an action of him encouraging his wife to
8 do that. We also -- we also have his knowledge it's
9 happening.

10 Another thing he could have done is simply called
11 up Ms. Madison and say, "You know, I understand there's
12 a police investigation. My wife may said some things to
13 you about not talking to them. You should cooperate
14 with the investigation. I have nothing to hide."

15 That probably would have -- I mean, that would be,
16 I think, the ideal thing to do, you know, because that
17 is -- after all was the object of those witness
18 dissuasion efforts.

19 COMMISSIONER HUR: So other than Lopez and Madison,
20 is there anyone else that you're alleging he dissuaded
21 from going to the police or cooperating with the police?

22 MR. KEITH: Well, I think -- I mean, I think
23 Mr. Mertens is wrapped up with Ms. Madison, but no. No,
24 yeah.

25 COMMISSIONER RENNE: Did you think he had an

1 affirmative duty to tell his wife or -- that "You ought
2 to cooperate with the investigation"?

3 MR. KEITH: What he, you know -- oh, to tell her to
4 cooperate with the investigation? No, I think he -- I
5 think what he -- I think his duty was about having her
6 not go and try and interfere with the investigation with
7 regard to other witnesses.

8 She can do whatever it is that she -- that she
9 wants, though after -- oh, I'm sorry. You know what? I
10 think I misunderstood the question, because early on, he
11 did make those efforts to --

12 COMMISSIONER HUR: I'm sorry to interrupt you,
13 Mr. Keith.

14 I appreciate that the public is invested in this
15 but we -- it's very important that you not have
16 outbursts, not have any comments or noises, and I'm
17 instructing the sheriff's office right now to please --
18 without me interrupting, if you see someone making
19 noise, please just remove them from the room. Thank
20 you.

21 MR. KEITH: I think with regard to his wife, he had
22 an affirmative duty to not pressure her to not go to the
23 police and to not make threats and to not enlist his
24 campaign manager in efforts to dissuade her. I think he
25 had those duties. Whether or not -- you know, I don't

1 think he had a duty to tell his wife, "Well, I committed
2 a crime. Go to the police."

3 He didn't have a duty to do that. But I think --
4 you know, but that's not what happened here, so we don't
5 have to deal with that. He actually took acts to try to
6 prevent his wife from going to the police.

7 COMMISSIONER HUR: Thank you, Mr. Keith.

8 Unless there are other questions from the
9 commissioners, your time is up. Thank you.

10 MR. KEITH: Okay.

11 MR. WAGGONER: Good morning, Commissioners.

12 I want to begin by thanking you for your service to
13 the City and County of San Francisco for this very
14 unusual proceeding. This has taken an extensive amount
15 of time on everyone's part, and I just want to thank you
16 on behalf of myself, the sheriff, my co-counsel,
17 Ms. Canny, and Ms. Lopez for your careful consideration
18 of the evidence and the law in this case.

19 This morning for our closing argument, I'm going to
20 spend a few minutes talking to you about discretion and
21 vagueness, and then I'm going to turn it over to
22 Mr. Kopp, who is going to address official misconduct
23 and the facts as relates to official misconduct.

24 COMMISSIONER RENNE: Before you start,
25 Mr. Waggoner, could I make comment?

1 As somebody who's tried cases for a lot of years
2 and appeared before a lot of judges, you didn't do your
3 client any favor by starting off your brief by saying
4 "At the end of a[n] unnecessarily protracted dog and
5 pony show."

6 Is that what you consider these proceedings to be?

7 MR. WAGGONER: Respectfully, Commissioner, no,
8 absolutely not. I certainly do not consider that your
9 consideration --

10 COMMISSIONER RENNE: You understand that we're
11 mandated. Once the mayor took action, we had no choice
12 whether or not to have such a hearing, and counsel for
13 the sheriff and counsel for the city -- for the mayor
14 got together and said how they wanted it to be
15 conducted.

16 MR. WAGGONER: With all due respect, Commissioner,
17 I apologize for the use of that phrase. It certainly was
18 not meant to describe your consideration, what this
19 commission has been doing under its obligation under the
20 City Charter.

21 That was solely meant to describe the mayor's
22 presentation of evidence and the mayor's bringing of
23 this case, which we have felt from the outset was not
24 called for in any stretch, either under official
25 misconduct or was a reasonable exercise of the mayor's

1 discretion.

2 The test for vagueness is whether or not the
3 statute at issue, in this case 15.105, has sufficient
4 definiteness that ordinary people could understand what
5 conduct is prohibited. That's number one. That's the
6 first prong of the test for vagueness.

7 The second prong is does the manner or the language
8 of the statute encourage arbitrary and discriminatory
9 enforcement? And under both of those prongs, can we
10 understand what conduct is prohibited and does it lend
11 itself to arbitrary and discriminatory enforcement?
12 Under both of those, we would say that the 15.105 is
13 unconstitutionally vague whether we're talking about
14 Option 1 or Option 2.

15 Now, how do we tell if the application of a statute
16 is arbitrary or discriminatory in its enforcement?
17 Well, we look at the context, the consistency. How are
18 other examples of alleged wrongdoing dealt with by the
19 mayor, by the city, by other enforcement bodies? Was
20 the mayor's suspension in this case -- was it arbitrary?
21 Was it discriminatory? Was it consistent with how this
22 mayor has treated other cases of alleged wrongdoing by
23 city officials? Was it consistent with how other mayors
24 have handled similar cases?

25 I respectfully submit to you that no, it was not

1 consistent with how this mayor has dealt with other
2 cases of alleged wrongdoing, and it was not consistent
3 with how the city -- how other mayors have dealt with
4 cases of alleged wrongdoing by elected officials. This
5 was only the third time in the history of San Francisco
6 that a city mayor has suspended an elected official for
7 alleged official misconduct.

8 The first time was in 1932. Mayor Frank Rossi
9 suspended the public defender, Frank Egan, for murder.
10 Mr. Egan went on to spend 25 years in federal prison.
11 The second time was in 2007. Mayor Gavin Newsom
12 suspended Supervisor Ed Jew for perjury and extortion --
13 again, both felonies. Mr. Jew is in prison today.

14 The third time is in the present case. Sheriff --
15 excuse me -- Mayor Lee suspended Sheriff Mirkarimi for,
16 according to his original press release, his plea, the
17 sheriff's plea, to a misdemeanor violation of Penal Code
18 Section 236, misdemeanor false imprisonment. The
19 sheriff spent no time in jail; he was cited and
20 released.

21 So you have three very serious felonies, involving
22 very serious prison time, and then, in this case, a
23 low-level misdemeanor and no jail time or prison time.
24 The facts could not be more different. It's obviously
25 extremely very, very inconsistent to how other mayors

1 have dealt with alleged official misconduct.

2 COMMISSIONER LIU: Mr. Waggoner, in those other two
3 cases that you're referring to, did they involve the
4 office of the sheriff? Did they involve the sheriff
5 himself or herself?

6 MR. WAGGONER: No. In the first case it was a
7 public defender and in the second case it was a
8 supervisor.

9 COMMISSIONER LIU: Thank you.

10 COMMISSIONER RENNE: Counsel, do you agree with me
11 that our job here is a two-step job, and that is first
12 to determine whether or not there was misconduct that
13 reaches the level of official misconduct under the
14 definition and, if we say yes, there was, we still have
15 the question of did the mayor exercise his discretion in
16 a reasonable manner?

17 MR. WAGGONER: Yes, Commissioner. I absolutely
18 agree with that two-step process.

19 And as to whether or not the mayor's decision to
20 suspend was a reasonable exercise of his discretion,
21 you've heard from opposing counsel. And it's absolutely
22 true in 15.105, there are instances where the mayor must
23 suspend. It's not discretionary.

24 If a person is convicted of a felony crime
25 involving moral turpitude and if this commission then

1 determines that that's a crime that warrants removal,
2 then the mayor must remove from office. So that tells
3 us right away that there may be felony crimes involving
4 moral turpitude that would not warrant removal from
5 office.

6 So, however, we -- I agree with the mayor that it
7 is a discretionary decision. And when the mayor came
8 before you and testified before you, he was asked very
9 directly, "Well, Mr. Mayor, are there other crimes that
10 might warrant suspension? For example, a DUI. Would
11 that warrant suspension?"

12 And the mayor said, "Well, I don't know because I
13 haven't thought about it."

14 Well, if the mayor doesn't know what other crimes,
15 misdemeanors, would warrant removal from office because
16 they would constitute alleged official misconduct, then
17 how can any official be on notice? If the mayor doesn't
18 even know what other misdemeanors would constitute --
19 that would warrant removal, that would warrant
20 suspension, how can anyone be on notice? So --

21 COMMISSIONER RENNE: Counsel, can -- in determining
22 whether or not the mayor exercised his discretion in a
23 reasonable manner, can the mayor and/or this commission
24 take into account what the elected official did, what
25 the public official did, between the time that the

1 alleged misconduct occurred and the time when he is
2 removed from office or suspended from office?

3 MR. WAGGONER: You mean can the commission take
4 into account the suspending authority's conduct or the
5 removed official's conduct?

6 COMMISSIONER RENNE: The conduct after. In other
7 words, let's assume in a case that a public official
8 commits an act which would constitute official
9 misconduct. And between the time that he commits the
10 act or she commits the act and when the mayor exercises
11 his discretion, can he take into account what happened
12 in between in regard to that public official's conduct
13 relating to investigation, for example?

14 MR. WAGGONER: Well, I believe, yes, that the mayor
15 can take into account -- he can use -- exercise -- he or
16 she can exercise discretion.

17 The question is is the discretion reasonable? Was
18 it a reasonable exercise of discretion? The mayor can
19 take into account any kind of conduct. But the question
20 is was it reasonable? Is it reasonable to suspend an
21 elected official for any kind of alleged conduct,
22 whether it was the conduct that occurred at one point in
23 time or how the official, the accused official, dealt
24 with that afterwards?

25 COMMISSIONER STUDLEY: Mr. Waggoner, I'd appreciate

1 your explaining in the course of your discussion of
2 vagueness what you think our role and what the ethics
3 committee's responsibility is with regard to vagueness.
4 Some of what I'm hearing sounds to me like this belongs
5 in a court if certain circumstances took place. And
6 that our job is quite explicitly to assemble a record
7 and make a recommendation, so I'm wondering where the
8 vagueness argument fits in.

9 MR. WAGGONER: Thank you, Commissioner.

10 I agree that that question is a very, very
11 important one. And in fact, you probably know that we
12 went to Superior Court prior to this commission process
13 getting started and made that very argument, that 15.105
14 is unconstitutionally vague.

15 The judge at the time said, "Well, let this process
16 play out. If you don't like the result, then come back
17 and see me," basically, and said, you know, the Ethics
18 Commission -- let the Ethics Commission make that
19 determination, whether -- they can decide whether or not
20 it's vague or the other, the merits of the case.

21 So as to your recommendation and your
22 responsibility under the Charter, I would respectfully
23 submit that if you do find that 15.105 is
24 unconstitutionally vague, then you cannot make a
25 recommendation for removal. I don't see how you could

1 do that if you find that the law itself is
2 unconstitutional.

3 COMMISSIONER STUDLEY: I -- well, this will be
4 subject to our discussion. I don't think determining
5 constitutionality is part of what I signed on for as a
6 commissioner, and I don't think we have that authority.

7 I think we have a responsibility to do something,
8 and whether we can or cannot may go to whether it is
9 vague. But we have to see that as we deal with the
10 charge and the facts before us.

11 So I'd really like to know what you think we do
12 today that is related to this vagueness consideration or
13 whether you're alerting us to an argument you made pre
14 and might make post.

15 MR. WAGGONER: Well, the charter requires the
16 commission to make a rec- -- compile a record and make a
17 recommendation. It doesn't say which questions of law
18 that you may consider when -- in making the -- that
19 substantiates or that is the basis of your
20 recommendation.

21 So I would respectfully suggest that the commission
22 can take into account its own interpretation of what the
23 law is and the facts are to make its recommendation to
24 the board. And if that doesn't involve a finding or a
25 conclusion of law as to 15.105, that is certainly within

1 the commission's purview. I believe that if the
2 commission wanted to make such a finding or a conclusion
3 of law as to 15.105, that would also be in your purview.

4 I'd like to move on very -- and wind up here and
5 then turn it over to Mr. Kopp. A few other facts that
6 we know of that would -- I already talked about the
7 inconsistency of the suspension in terms of
8 San Francisco history. I would like to talk for a
9 moment about the inconsistency of how this mayor has
10 dealt with other alleged wrongdoing.

11 The current Department of Public Works head was
12 found to have committed -- by the City Attorney's
13 Office, the current city attorney, to have committed
14 many acts of wrongdoing, and the mayor did not suspend,
15 did not remove from office, but rather promoted that
16 individual, against the strenuous objections, I might
17 add, of City Attorney Dennis Herrera.

18 COMMISSIONER LIU: Mr. Waggoner, is this anything
19 we have in the evidence here?

20 MR. WAGGONER: Yes, it is. I've submitted it with
21 a brief. There was a memo. I don't have the date in
22 front of me, but it was a memo from the City Attorney's
23 Office, from Dennis Herrera's office, regarding Mohammed
24 Nuru.

25 Beyond that, last year, this very commission

1 recommended --

2 MR. KEITH: Commissioners?

3 COMMISSIONER HUR: Are you standing?

4 MR. KEITH: I'm sorry. I'm sorry to interrupt.

5 That document is not in evidence. It was submitted as
6 an attachment to an earlier brief. It has not been
7 admitted before the commission.

8 COMMISSIONER HUR: You know, in my view, the
9 rel- -- the relevance of what you're talking about is
10 tangential at best. It's -- I don't -- my recollection
11 is similarly it's not in evidence. But this is
12 argument. It's mostly legal, I think, so I would be
13 permitted to allow Mr. Waggoner to proceed.

14 If there are objections from my fellow
15 commissioners, perhaps we should discuss.

16 MR. WAGGONER: I can withdraw the comment.

17 I think the point holds, which is that this mayor
18 has treated this case differently than he's treated
19 other cases. I think the record, the public record,
20 shows that and this evidence shows that.

21 Beyond that, what other facts show that the mayor
22 abused his discretion? His charges kept changing. In
23 the original press release, he said he was suspending
24 the mayor for a plea to misdemeanor 236. Then the
25 charging document said it was the plea plus domestic

1 violence plus maybe witness dissuasion. He wasn't clear
2 on that originally in the charging document. It was
3 maybe there might have been witness dissuasion. And
4 then finally, the mayor's amended charges threw in the
5 gun allegations as well.

6 The mayor testified that he talked to Ivory Madison
7 but he never bothered to talk to Eliana Lopez, even
8 after being encouraged to do so by both the sheriff and
9 former Mayor Art Agnes. The mayor admitted he suspended
10 first and asked questions later. The mayor submitted a
11 declaration from Ms. Madison that, in the words of
12 Commissioner Renne, was designed to poison the well.
13 Finally, I -- at the very last hearing, we requested
14 subpoenas regarding whether the mayor's testimony was
15 truthful.

16 All of those facts -- the charges changed, who the
17 mayor talked to, when he talked to them, the fact that
18 he never talked to Ms. Lopez, the questions about his
19 credibility and truthfulness -- all that goes to whether
20 or not he reasonably exercised his discretion. I
21 respectfully submit to you that he did not, and if you
22 find that he did not, then you must recommend to the
23 board that the sheriff be reinstated.

24 And at that, I would like to turn it over to
25 Mr. Kopp to address the definition of official

1 misconduct and the facts. Thank you.

2 COMMISSIONER HUR: Thank you, Mr. Waggoner.

3 MR. KOPP: Thank you. Good morning, Commissioners.

4 I want to start off by addressing the point that
5 you raised, Commissioner Renne, about our comment about
6 this dog and pony show. That was not intended to
7 reflect on anything that you or any of the other
8 commissioners have done. In fact, we appreciate the
9 effort that you have made. That was a comment on what
10 we view as a completely unnecessary and superfluous
11 presentation by the mayor.

12 So if it offended anyone, we apologize for that,
13 but that is our view, and it is a strongly held view.
14 We have objected throughout these proceedings to much of
15 the evidence that they have wanted to put before you
16 because we don't think it bears any relation to what
17 your task is here. So that's the explanation for that
18 line.

19 COMMISSIONER RENNE: Well, Mr. Kopp, I would say,
20 though, that the remark struck me as being akin to the
21 statement that was made by your client that this is a
22 private matter.

23 MR. KOPP: Well --

24 COMMISSIONER RENNE: It shows a certain amount of
25 arrogance about the requirement to follow the law.

1 MR. KOPP: Well, I -- then I want to correct the
2 record and make it clear that we understand and
3 appreciate that the commission must carry out its duty
4 under the charter, and we know that you all try to do
5 that in a conscientious manner.

6 Now, I do want to discuss what we think the meaning
7 is of "official misconduct," and that inevitably leads
8 me to discuss the *Mazzola* case at length. One of the
9 things that I want to say about *Mazzola* is that at that
10 time in 1976, there's no doubt in my mind that Mayor
11 Moscone and the then-members of the Board of Supervisors
12 were intelligent, conscientious public servants and they
13 took their jobs seriously, and I don't think anybody
14 involved in that case or that proceeding took it
15 lightly, and yet they got it wrong.

16 Now, that didn't help Mr. Mazzola. He was able to
17 clear his name several years after the fact, when the
18 Court of Appeal reversed the removal finding, but he was
19 already out as a commissioner. His term had expired.
20 And I think that points out the perils of you making a
21 recommendation for removal and later the board voting to
22 remove, because this is a rarely brought proceeding and
23 it's a proceeding that can have the effect of
24 contravening the will of the electorate.

25 And we see this type of a proceeding and the law

1 that governs it as completely different from many of the
2 cases that have been cited to you by the mayor and his
3 attorneys, some of which are from other jurisdictions,
4 some of which are from other procedural settings. There
5 is a major difference between cases that discuss
6 termination of hired employees and the situation here,
7 which is the attempted removal of an elected official.

8 Now --

9 COMMISSIONER HUR: So is it your view that an
10 elected official should not be subject to the same
11 standards that an employee should be subject to who's in
12 a similar position?

13 I mean, the sheriff's -- the people who work under
14 the sheriff would be subject to the employment standards
15 that some of these cases discuss. Why should the
16 sheriff not be subject to those?

17 MR. KOPP: I don't -- I'm not saying that he should
18 not be subject to the same standards. I just don't
19 think that you can import principles of law from other
20 cases that deal with administrative discipline of
21 employees. I don't see this as an administrative
22 hearing.

23 COMMISSIONER HUR: But what's the legal or logical
24 reason why we should not borrow from those cases?

25 MR. KOPP: Well, I think that you can look to them.

1 You could consult them, but I don't think that they
2 should be the primary authority here.

3 Our contention has always been that the primary
4 authority here is the *Mazzola* case because it is the
5 only higher court decision that deals with official
6 misconduct under the San Francisco Charter.

7 Now, we recognize that at least one commissioner
8 has expressed the view that maybe *Mazzola* doesn't apply
9 because the charter definition changed since the *Mazzola*
10 case was decided. But as I tried to point out in the
11 brief that we submitted, the current definition of
12 "official misconduct" under the charter draws almost
13 entirely from the language used in the *Mazzola* opinion,
14 and what is -- the two points that are most critical
15 about that opinion from our perspective are, number one,
16 that the official misconduct has to occur while the
17 official is in office, and much of what the mayor has
18 alleged here occurred before the sheriff was sworn in.

19 Now, they have presented you with a parade of
20 horribles about why this cannot be the correct
21 interpretation. They have said if an elected official
22 is elected and then robs banks during that period
23 between the election and the time he's sworn in -- well,
24 we can't have that situation.

25 That can't be the definition of the charter. There

1 has to be a way to address pre-swearing-in testimony.
2 Well, the fact of the matter -- sorry. Not
3 pre-swearing-in testimony; pre-swearing-in conduct. The
4 fact of the matter is the charter is an imperfect
5 document.

6 And I would like to make the point here that if
7 the -- there is no removal provision for the mayor. If
8 the mayor is elected and, before he is sworn in, decides
9 to go out and rob some banks, there's nothing in the
10 charter that will allow him to be removed for official
11 misconduct. Okay? So this is not -- I mean, the
12 charter can be amended, perhaps, to plug holes in it.

13 They want to imply this pre-office-holding
14 authority to suspend, but it's not there. And the
15 *Mazzola* case specifically says official misconduct is
16 misconduct that occurs while you're in office, and
17 that's one of the reasons why that case is --

18 COMMISSIONER RENNE: Well, Mr. Kopp, the *Mazzola*
19 case, as you've pointed out, this definition that we
20 have before us now was not before the court in *Mazzola*.
21 Presumably, it was written and drafted after the *Mazzola*
22 decision.

23 And you're right, the first part of it does track
24 the *Mazzola* opinion, but the second part, the "or,"
25 would seem to be filling in a gap that *Mazzola* left out

1 and that is "or conduct that falls below the standard of
2 decency, good faith and right action impliedly required
3 of all public officers," so that one could say reading
4 *Mazzola* what the charter drafters were concerned about
5 is that if we limit it just to what *Mazzola* said, we
6 don't get -- the broader coverage that we want is we
7 don't want our public officials to have conduct which
8 falls below some standard.

9 Now, you're arguing that that standard is so vague
10 that it can't be enforced. But isn't that the logical
11 reading of why *Mazzola* doesn't control us, because we've
12 got language that didn't exist in *Mazzola*?

13 MR. KOPP: Well, my answer to that -- there are a
14 few ways to respond, and I'll try to best address those
15 points.

16 I agree that there is at least one word in the
17 current definition that was not even mentioned in
18 *Mazzola*, and that's "decency." But it is our view, and
19 I believe that the mayor has conceded, that it's Option
20 2 as proposed by the chair that makes the most sense and
21 that has to be applied.

22 Now, of course, you can come to a different
23 determination. Even if the parties agree, you can
24 decide differently. But the parties do agree that you
25 have to couple the decency clause with the wrongful

1 behavior in relation to the duties. So I hope that
2 addresses that question.

3 But we go one step further than the mayor, because
4 we believe that for there to be official misconduct, it
5 has to be while an official is either performing his
6 specified duties or failing to perform those duties, and
7 that there is not a standalone morals clause that can
8 apply to whatever a public official does in his or her
9 private life.

10 So -- and there is another point that I wanted to
11 make on this subject. We do think that *Mazzola* remains
12 good law on these two critical issues: One, that you
13 have to be engaged in the performance of your duties to
14 be guilty of official misconduct; and two, that that
15 misconduct, whatever it is, or conduct has to occur
16 while you're in office, not during the time period when
17 you've been elected but not sworn in. And the reason
18 why --

19 COMMISSIONER HUR: Can I interrupt you on the
20 "while in office"?

21 MR. KOPP: Yes.

22 COMMISSIONER HUR: In *Mazzola*, was the "while in
23 office" meaning performing the duties of office or was
24 it because he wasn't in the official position yet?

25 My understanding was that he was a commissioner at

1 the time. So this -- when *Mazzola* says "while in
2 office," I don't think they're talking about the
3 situation where you're pre-swearing in; they're talking
4 about the position -- the situation where you are not
5 performing the duties of your office when you're leading
6 a strike.

7 MR. KOPP: No, I agree with you. That's correct.

8 COMMISSIONER LIU: So *Mazzola* doesn't address your
9 timing issue.

10 MR. KOPP: Well, it does in the sense of in
11 surveying the various legal authorities that the Court
12 of Appeal decision surveyed, including Black's Law
13 Dictionary, Am.Jur., as well as some other state
14 cases -- and they're cited there, the *Hale* case, the
15 *Harby* case, the *Wachter* case -- it -- it kind of
16 gathered together all these legal authorities, all of
17 which -- I mean, if you look at those cases, they all
18 deal with public officials who are in office at the time
19 there is some misconduct that is alleged.

20 Now --

21 COMMISSIONER LIU: Well, wasn't *Mazzola* really
22 addressing the question of the relationship of his job
23 as a commissioner versus his job as a business agent for
24 the union?

25 I mean, that's a relationship question, not a

1 timing, while-somebody's-physically-in-office question.

2 MR. KOPP: Well, in our view, there were two main
3 issues that were addressed and decided in *Mazzola*, and
4 the primary issue is certainly whether or not as an
5 airport commissioner there was any relationship between
6 that and Mr. Mazzola's actions advising his union to go
7 on strike. That is correct.

8 However, before they could even reach that point,
9 they had to address the void-for-vagueness challenge,
10 and the way that they rejected that void-for-vagueness
11 challenge was by referring to these longstanding
12 definitions of "official misconduct."

13 And so when the court looked at the three cases
14 that I just mentioned as well as the other legal
15 authorities, they decided no, this isn't vague because
16 there's an understood notion of what official misconduct
17 is, and what it is is conduct that occurs while you're
18 in office.

19 Now, to address the Chair's question about did they
20 make any determination as far as a pre-swearing-in time
21 period or a post-swearing-in time period, no, they did
22 not. But I don't think, as the mayor has argued, that
23 this definition of official misconduct is *dictum*. It
24 forms the basis of the opinion.

25 COMMISSIONER STUDLEY: But -- and then the language

1 of the charter was changed by initiative.

2 MR. KOPP: Correct.

3 COMMISSIONER STUDLEY: And what we -- how do we
4 know that the change was in order to reinforce, as you
5 would say, an in-office requirement, that the conduct
6 must be in office, or to make clear that that wasn't
7 what the voters intended?

8 MR. KOPP: Well --

9 COMMISSIONER STUDLEY: The fact that there is a
10 change after something happens doesn't tell you in which
11 direction they intended it to be, and the words "in
12 relation to the duties" are quite -- there were other
13 words available, if the initiative had wanted to say
14 "while you are holding that office" or "while conducting
15 that office," so how do we know which direction we're
16 meant to go?

17 MR. KOPP: Well, I mean, if it's difficult to tell,
18 then I think you have to adopt the interpretation that
19 favors the accused in this situation. But I think that
20 there's an easier way to answer that. You know, any
21 statute -- when you're construing a statute, it has to
22 be harmonized with other laws, if possible, if it won't
23 do violence to the interpretation of the statute.

24 And I think that you have to look at the current
25 charter definition of "official misconduct" that was

1 enacted after *Mazzola*, clearly draws from the *Mazzola*
2 opinion, and say that the drafters, whoever they may
3 have been, were well aware of what *Mazzola* had to say
4 about this issue. And so it has to be interpreted in a
5 way that is consistent with the *Mazzola* decision.

6 And there is one other point that I would like to
7 make, and I'm certainly willing to entertain --

8 COMMISSIONER HUR: Can I stop you, then --

9 MR. KOPP: Sure.

10 COMMISSIONER HUR: -- while we're on this point?

11 As a policy matter, is there any justification for
12 why this should not apply to an elected official who's
13 not yet sworn in?

14 I mean, to say that the charter's imperfect and the
15 people didn't vote in a provision that was perfect is
16 not very compelling to me. I mean, I want to know why,
17 in your view, we should take a restrictive view of
18 "public official" that would absolve him of or immunize
19 him from being suspended for official misconduct prior
20 to his actual swearing in.

21 MR. KOPP: There's a very simple answer to that,
22 and that is the primacy of the will of the electorate.
23 There is a provision in place -- it's called the
24 recall -- that can be used to remove a public official
25 that the voters want to get rid of, and that's the

1 democratic way to do it.

2 Now, admittedly, it can take some time because you
3 have to wait six months until after the official is
4 sworn in to start gathering the signatures, so it can
5 take close to a year to remove the public official, but
6 that's the democratic way to do it. Bringing these
7 proceedings is far too susceptible to the vagaries of
8 politics.

9 COMMISSIONER STUDLEY: But the voters knew all
10 that, in theory. The way we have to read this is that
11 the voters understood that there was a recall option
12 available, and they said, "We need this."

13 It's not as though we or the supervisors or the
14 state said, "You need to do something different and
15 override the recall provision."

16 Why doesn't this harmonize perfectly with the
17 voters' saying, "We want an additional tool and process
18 and we, the voters, will design and put it into place
19 because in our view the recall process is not
20 sufficient"?

21 Whatever the reasons were why they wanted this to
22 do -- it's the voters who said, "We want another tool,"
23 not some third party or our determination that adds this
24 to the armamentarium.

25 MR. KOPP: Well, to be fair, I don't think the

1 voters created this new tool out of whole cloth. It's
2 existed in the charter for almost a hundred years. The
3 power to remove for official misconduct has been in the
4 charter. It's just they changed -- they tweaked the
5 procedure a bit, creating the Ethics Commission.

6 COMMISSIONER STUDLEY: Right. "They refined it and
7 reviewed it repeatedly" is another way to describe the
8 same thing.

9 MR. KOPP: Exactly. But to answer your question, I
10 think you have to assume that the voters were aware of
11 the state of the law, and the state of the law has not
12 been in California, so far as I can tell -- and the
13 mayor has not cited any case to this effect, that allows
14 a person who has been elected but not yet sworn into
15 office to be removed for any act that occurred before
16 they're sworn into office.

17 There's just no such case that exists, and that's
18 why they've had to go to other jurisdictions to try to
19 persuade you that this is the right interpretation. And
20 again, at the risk of beating a dead horse, I'll --

21 COMMISSIONER STUDLEY: Right. We just -- we don't
22 know whether those cases don't exist because nobody
23 tried to discipline situations that arose or whether
24 there were no such factual situations. That's just it.

25 MR. KOPP: Of course. Of course. And I don't want

1 to move away from this if there's anything left
2 unanswered.

3 But one other point that I want to make about this:
4 The mayor has argued that law enforcement can -- should
5 never -- a law enforcement officer should never run
6 afoul of the law, should never commit anything that can
7 be charged as a crime, and a law enforcement officer
8 should never be convicted. As a matter of fact, their
9 expert witness said, you know, you get convicted, you
10 should be fired immediately.

11 That's not the case here in San Francisco. There
12 are many, many law enforcement officers who have been
13 convicted of misdemeanors and remain on duty and serve
14 honorably.

15 And this goes to the point that I think
16 Commissioner Renne raised. There's a two-part process
17 here: You determine whether or not there's official
18 misconduct and then you decide whether or not this was a
19 correct use of the mayor's discretion.

20 I would maybe add something to that, as suggested
21 in our brief. I think if you did find that there was
22 some level of official misconduct, you could make the
23 recommendation that it doesn't warrant removal.

24 And the mayor has argued any -- you know, law
25 enforcement has a special duty because they're required

1 to investigate, they're required to do certain things.
2 I mean, you could look at what happens with judges who
3 can be fairly said to be bound to uphold the law and
4 apply it fairly, and I personally know several judges
5 who have been convicted of misdemeanors and who are not
6 removed from office.

7 I mean, the fact of the matter is it has to be
8 recognized that people sometimes make mistakes and they
9 sometimes run afoul of the law. It doesn't necessarily
10 warrant removal. And clearly, the facts of this case,
11 in our view, do not warrant removal.

12 Unless the commissioners have further questions, I
13 would submit.

14 COMMISSIONER HUR: I want to talk to you about a
15 couple of facts.

16 MR. KOPP: Sure.

17 COMMISSIONER HUR: We're -- in my view, I'm going
18 to credit Inspector Daniele's testimony because he
19 submitted a declaration and he was not cross-examined on
20 it. So in my mind, it's credible that the sheriff told
21 Inspector Daniele that he sold his gun in 1996 to some
22 cadet.

23 In your view, I assume you don't think that's
24 official misconduct. But what's the justification for
25 making this untrue statement to Inspector Daniele?

1 MR. KOPP: Well, I think that the question assumes
2 something that's not necessarily -- okay. It may be an
3 untrue statement, but as you yourself, I think, focused
4 in on when you were asking Mr. Keith some questions, how
5 do you know that it was made with any wrongful intent or
6 intentionally? Perhaps the sheriff just didn't remember
7 what happened with the gun.

8 You know, I can't really give you a proper answer
9 on that. I can't give you a proper explanation. But I
10 can reiterate what the mayor said, which is that by
11 itself isn't anything that would warrant removal. If
12 it's not, then the question is why are we even
13 discussing it? Is it to make weight because the rest of
14 the allegations aren't sufficient?

15 So in my view, whether or not the sheriff made a
16 truthful or untruthful statement regarding the guns
17 really doesn't have much relevance. I mean, the point
18 of an EPO is to get guns out of the hands of the person
19 who's accused and into law enforcement's hands. That's
20 the point, and that's what was done here. And whether
21 it went to the sheriff's department first and was then
22 turned over to the police department is really
23 immaterial.

24 I mean, who knows why his lawyer objected to that
25 transfer? I don't.

1 COMMISSIONER RENNE: Staying to the facts a little
2 bit, and I've been troubled by the question, and I asked
3 Mr. Waggoner that, as to whether or not, in determining
4 whether or not the mayor acted reasonably in exercising
5 his discretion, he could take into account the events or
6 the acts that occurred between the time of December
7 31st and the March 19th date when he acted.

8 And one of the troubling things is Ms. Lopez's
9 assertion of the attorney-client privilege. Based upon
10 her testimony, it was absolutely clear to me and it was
11 clear to the court that ruled against her on that point
12 that she wasn't talking to her as a lawyer. She had
13 talked to her over a period of a year about problems
14 with her marriage and said she talked to her as a
15 friend.

16 And when she talked to Ms. Haynes and told her
17 about her discussions with Ms. Lopez, she didn't say, "I
18 went to Ms. Madison as my lawyer." It was clear she was
19 saying, "I went to Ms. Madison, and I didn't think she
20 would disclose it. I thought it would be confidential."

21 But there was never -- there's not a scintilla of
22 evidence in the record that supports a claim of
23 attorney-client privilege. And that troubles me, that
24 in an investigation -- it would have been one thing if
25 Sheriff Mirkarimi had said on January 4th, when this

1 thing first arose, "You know, I did a terrible thing.
2 It was a mistake. I -- I'm sorry about it, and I" --
3 you know, but that isn't the course of conduct that they
4 took for the next three months, which was -- or two
5 months, was essentially stonewalled.

6 MR. KOPP: Well --

7 COMMISSIONER RENNE: Can the mayor take that into
8 account?

9 MR. KOPP: Well, in my view, no, and primarily for
10 the fact that Ms. Lopez had a different attorney than
11 the attorney who presented Sheriff Mirkarimi.

12 If there was one lawyer representing the two of
13 them, it might be a different situation, but whatever
14 actions were taken by Ms. Lopez in asserting the
15 attorney-client relationship between herself and
16 Ms. Madison can't be attributed to the sheriff. There's
17 no evidence that he --

18 COMMISSIONER RENNE: Well, it could be attributed
19 to the sheriff to the extent that he could have said,
20 "Hey, I don't want that raised. I want to just get this
21 over with. I want to lay the facts out, not let the
22 newspapers tell what the facts are. I'm going to tell
23 you what the facts are," as he told us here.

24 If he'd have done that on January 5th, I don't
25 think any of us would be here.

1 MR. KOPP: Well, but that assumes, then, that
2 Ms. Lopez -- again, that assumes she's going to do what
3 he tells her to do. That assumes that Ms. Canny will do
4 what he tells her to do. It assumes a lot of things
5 that may not be provably true.

6 So I do agree with you that the mayor can take into
7 account events that happened after he was sworn in up
8 until the time of the plea. I also think that you
9 should take into account what the sheriff was able to do
10 during the time period that he did serve, and it's clear
11 from his testimony that he was in the midst of
12 accomplishing significant progress in the sheriff's
13 department.

14 COMMISSIONER HUR: I want to ask you about the
15 Ms. Lopez video. In there, she refers to the sheriff as
16 having said he's a powerful man. Now, the mayor is
17 arguing that that demonstrates a concerted use of his
18 power as sheriff to dissuade Ms. Lopez or get advantage
19 in a custody dispute.

20 Why isn't that the most logical reading of that
21 testimony? I mean, what else could he have meant?

22 MR. KOPP: Well, here's what I see as the problem
23 with this whole powerful-man argument. There isn't any
24 specific -- there's no specific language. I mean,
25 saying you're a powerful man can mean any number of

1 things. Yes, it is -- one reasonable interpretation
2 could be that he's an elected official and he has or
3 believes himself to have more power than the average
4 person.

5 I mean, I think there's a real question about the
6 truth of that statement. You know, I don't know that if
7 you go into court in a custody dispute, you're going to
8 be treated any differently by a bench officer just by
9 virtue of the fact that you hold a public -- public
10 office.

11 But getting back to your question, I think that
12 that is a reasonable interpretation, but I think that
13 having heard the explanations from both the sheriff and
14 Ms. Lopez, it is clear and it's equally reasonable that
15 he was talking about child-custody laws and how they may
16 favor the person who has citizenship here, and certainly
17 that they are going to -- you know, I mean, we've come a
18 long way from the days when the custody of a child was
19 pretty much automatically awarded to the mother. The
20 father has significant rights that are recognized in
21 family court.

22 COMMISSIONER HUR: Thank you, Mr. Kopp.

23 MR. KOPP: Thank you.

24 MR. KEITH: Thanks, Commissioners. I'll see how
25 much I can cover in five minutes.

1 And what I'm going to do is I'm going to talk about
2 the facts, because I think some of the facts here make
3 these legal questions that we're facing easier because
4 we're making a decision here by reference to facts that
5 we actually have in a real record before the commission.

6 And I think one; thing that's crucial here is that
7 a course of conduct is pled. It's a course of conduct
8 that began on December 31st, 2011, and continued until
9 the day that the sheriff was suspended. It includes his
10 missteps and his misbehavior in the investigation, his
11 public statements, and most significantly, the discredit
12 and the dysfunction that he would bring to the sheriff's
13 department were he to continue as a convict in that
14 office after March 19th, 2011.

15 I think when we look at this as a course of
16 conduct, the timing issues go away. I think that the
17 commission was spot on on the significance of *Mazzola* on
18 this point, which is that it didn't speak to the timing
19 issues. And all the policy reasons favor a timing issue
20 that doesn't create this period of immunity for an
21 elected official.

22 But you know what? We don't have to go there
23 because we have a course of conduct where many of the
24 consequences that spun out of this conduct were
25 preventable, but Sheriff Mirkarimi, by his actions and

1 his errors and his conduct, invited those consequences.

2 COMMISSIONER HUR: Let me ask you about *Mazzola*
3 because I -- I didn't -- I kind of find both of you a
4 little bit off on what *Mazzola* means, because I'm
5 looking at page 149 of the opinion, and the court goes
6 into this assertion that official misconduct under
7 attack is virtually the same as misconduct in office.
8 It then refers to the Black's Law Dictionary and the
9 Am.Jur.

10 And in both, in the Am.Jur. def- -- I'm sorry. In
11 the Black's Law Dictionary, it does have this language,
12 "by a public officer in relation to the duties of his
13 office," and then the court, using that, finds that that
14 means that it has to be misconduct that occurs that has
15 a direct relationship of the alleged wrongdoing to the
16 office held. And it also says the violation or omission
17 must be "committed while in office."

18 Now, and I understand that you are now saying that
19 this -- *Mazzola* dealt with unlawful conduct and we're
20 dealing with wrongful conduct, and I appreciate that
21 distinction. But *Mazzola* -- but the charter uses that
22 same "in relation to the duties of office" that we use
23 in our charter.

24 So why should we not follow how *Mazzola* interpreted
25 "in relation to the office" the way -- and apply it to

1 our charter, since it's the same language, the same
2 words, and *Mazzola* requires a much more direct
3 relationship than you're suggesting is required?

4 MR. KEITH: Okay. That's a good question, and
5 there's an easy answer and a hard one.

6 And the easy answer -- I don't mean to be flip --
7 was that *Mazzola* dealt with a charter provision
8 regarding official misconduct that forbade official
9 misconduct, no definition whatsoever. They had to come
10 up with a definition.

11 COMMISSIONER HUR: Okay. But you understand --

12 MR. KEITH: Right. No, I mean --

13 COMMISSIONER HUR: -- we're in a situation where
14 there's very little case law, so we're --

15 MR. KEITH: Then in '95, the voters came up with a
16 definition, and they took part of from Black, they
17 took -- changing it; they took part of it from Am.Jur.,
18 changing it; and they've changed it since.

19 Now, I have here -- and I'm sorry I don't have
20 multiple copies of this for the commission. What I have
21 here is the Black's Law definition that was quoted in
22 *Mazzola* and then the beginning of the charter
23 definition. We don't go on to add the "decency"
24 language, but it continues to add the "decency"
25 language.

1 So the thing about *Mazzola* -- the thing about the
2 Black's language is it didn't get into the decency
3 issues; it didn't get into the professional standards
4 issues like -- in the same way that the Am.Jur.
5 definition did. So the Am.Jur. definition has that. We
6 get those decency issues. And the relationship test for
7 a decency test is the standard required of an official
8 who holds that office.

9 COMMISSIONER HUR: That's a fair point, but you've
10 conceded that the "decency" clause is limited by the
11 "relation to the duties" clause.

12 So I can't see any reason why you'd read clause --
13 the -- how did you label it? -- the inaction clause to
14 have a certain type of relation to the duties, but the
15 conduct clause to have a different one. I think they've
16 got to be the same. I mean, if it's going to relate to
17 the duties, any one of the subclauses has to relate to
18 the duties in the same way.

19 MR. KEITH: They don't. They don't have to relate
20 to the duties in the same way, and the reason why is
21 this: We look at the professional licensure cases --
22 real estate agents, lawyers, you name it -- you can
23 commit a wrongful act that shows that you don't have the
24 qualities to be in that profession, and that alone
25 satisfies the nexus requirement. It satisfies that

1 relationship test.

2 So the relationship test does mean very different
3 things when you're talking about sort of the strictly
4 construed legal duties of office, which again is what
5 Black's was focused on. But then the charter -- pardon
6 me -- widened that definition to include all wrongful
7 behavior, and "wrongful behavior" encompasses violation
8 of that office-specific standard.

9 So I don't think the relationship test means the
10 same things, particularly when we think how much *Mazzola*
11 was focused on unlawful behavior. You know, what are
12 the -- you know, there was no violation of a statutory
13 duty here.

14 But we have a new definition now, so I think we
15 need to look at *Mazzola's* discussion of the relationship
16 test and the need for something tied closely to
17 statutory duties as something that was also tied to its
18 definition of unlawful behavior.

19 So the issue is different. The relationship test
20 is different. I mean, that's why it's okay, for
21 example, for a real estate agent to have a conviction
22 for possession of drugs, but it's not okay for a peace
23 officer to have a conviction for possession of drugs.
24 They're both indecent conduct, but one of them has a
25 relationship with the duties of office; the other one --

1 the duties of the position; the other one doesn't.

2 And we interpret these kind of morals clauses,
3 let's call them, in relation to what are the qualities,
4 the ethics, the morals that we expect a person in this
5 particular position to hold based on the kind of trust
6 that's at issue.

7 COMMISSIONER HUR: So -- and you've advocated a
8 common-sense test for this relationship test. Right?

9 MR. KEITH: That's what the law says, and that's
10 what we've advocated.

11 COMMISSIONER HUR: And so explain to my why I as a
12 commissioner on the Ethics Commission should be
13 comfortable applying a common-sense test. And whose
14 common sense should I be applying?

15 MR. KEITH: Well, the common-sense test is what do
16 people in this position do?

17 And of course, as commissioners, we don't know
18 that, so we have witnesses who come in and say, "Here's
19 what a chief law enforcement officer is expected to do."
20 We have declarations from the sheriff, outlining -- or
21 from the acting sheriff, outlining all the different
22 responsibilities of the sheriff, whether policy
23 responsibilities, operational responsibilities; we have
24 exhibits, we have documents from the sheriff's
25 department outlining these responsibilities, the rules

1 and regulations that govern everybody in the department.

2 So it's a common-sense test, but it's one that --
3 it's a fact-based test, fundamentally, about what people
4 in this office do. And one of the functions of the
5 commission has been to collect that evidence, and that's
6 the evidence that supplies what is in relation to the
7 duties of office. So it's a common-sense relationship
8 in that sense.

9 COMMISSIONER HUR: I have one other question, and I
10 apologize for monopolizing your time. At page 9 of your
11 brief, you appear to agree that there's a difference
12 between personal misconduct and official misconduct.

13 Is that -- do I have that correctly?

14 MR. KEITH: In that there are some things you could
15 do that are completely personal that wouldn't be a
16 proper basis for removal. That's right.

17 COMMISSIONER HUR: Okay. I just wanted to make
18 sure I understood that.

19 MR. KEITH: Yes. Yes.

20 Now, Commissioners, again, I think, again, the
21 facts help us. Much as they help us with this issue of
22 what the relationship test is, they help us in
23 understanding does this warrant removal, because the
24 sheriff's fundamental argument is -- I mean, it begins
25 with a premise that this is just a nonviolent

1 misdemeanor, a fact that we know not to be true based on
2 the testimony that came in at this hearing. That's
3 their initial premise. But then they say, "Well, even
4 if it was, you know, it's still not enough. There needs
5 to be more."

6 And I think that the evidence that came in on the
7 conduct showed it was more. But beyond that, the
8 consequences that have followed from that conduct for
9 this department, for law enforcement in this city, and
10 for domestic violence law enforcement in particular, the
11 sheriff has made statements that alienated victims, that
12 discouraged -- he's engaged in conduct that would
13 discourage any witness from coming forward and reporting
14 a crime that's committed by a high official.

15 These are things that a sheriff just cannot do. He
16 did them, and he did these things as a consequence of
17 what happened, but he made choices along the way. These
18 choices as well were wrongful conduct. They may have
19 begun with a terrible, terrible incident, but the
20 sheriff consistently took actions that caused negative
21 further consequences for his department and for this
22 city.

23 There's no question that this type of conduct
24 warrants removal. He committed a violent crime against
25 his wife. He violated that trust.

1 MR. WAGGONER: I'm going to object at this point.

2 MR. KEITH: He is not suited to fulfill the trust
3 of this office.

4 MR. WAGGONER: They're way over time.

5 COMMISSIONER HUR: Mr. Waggoner, overruled.

6 MR. KEITH: I've concluded. I thank the commission
7 for its time and attention.

8 COMMISSIONER HUR: I want to say a couple things.

9 First, I want to thank the parties for their
10 argument and for their cooperation throughout these
11 proceedings. As you and the public know, this was
12 somewhat of a novel endeavor that we engaged in, and
13 your cooperation was very helpful in getting us through
14 it.

15 I also wanted to thank Mr. Emblidge, who has
16 donated his and his firm's time *pro bono* to help us
17 negotiate some of these issues, and of course the
18 commission staff for their help, as well as the public.
19 We -- your interest has been significant, and we
20 certainly appreciate the role you play in the commission
21 doing its work.

22 So here's the plan: Let's take a short break and
23 then, after the break, we will begin with public
24 comment. Again, public comment will be limited to two
25 minutes.

1 Is there a procedure that you would like us to
2 follow as far as people lining up or how should we --

3 DEPUTY SHERIFF: We do have a line outside.

4 COMMISSIONER HUR: -- do this? Okay.

5 DEPUTY SHERIFF: And we can have people -- because
6 we've got people in the north light court --

7 COMMISSIONER HUR: Okay.

8 DEPUTY SHERIFF: -- they can start coming in
9 through the right here -- actually, go around and then
10 straight out.

11 COMMISSIONER HUR: So your idea would be to start
12 with the people outside and then have people inside do
13 public comment at the end? What are you saying?

14 DEPUTY SHERIFF: Would you rather have the people
15 who are in here? They stood in line first, the people
16 who are in here.

17 COMMISSIONER HUR: Should do public comment first?

18 DEPUTY SHERIFF: Yeah, they stood in line. They
19 got here first.

20 COMMISSIONER HUR: Right. Okay. And then they --
21 you want them to file out after they have given their
22 comment and then have to come back in?

23 DEPUTY SHERIFF: They could actually stay. The
24 people that are here, they stood in line. I would
25 suggest -- it's up to you -- but if they could just go

1 retain their seat.

2 And then after that, we could start form- -- we
3 already have a line set up outside, sir. And then we
4 can start escorting people from the north light court up
5 here.

6 COMMISSIONER HUR: Okay. Okay. Do you have any
7 estimate of how many people are lined up outside?

8 DEPUTY SHERIFF: One second, please.

9 DEPUTY SHERIFF TWO: There's only about --

10 DEPUTY SHERIFF: How many people in the north light
11 court? In the north light court, how many people do we
12 have?

13 DEPUTY SHERIFF TWO: One twenty-two.

14 COMMISSIONER HUR: Okay. Given those numbers --
15 and I want to ask my fellow commissioners -- should we
16 take a ten-minute break, go through public comment, and
17 then take a lunch break, even if that means lunch
18 occurs, you know, around 1:00 o'clock or later? Or
19 would you prefer to try some other means of proceeding?

20 COMMISSIONER HAYON: Take a break.

21 COMMISSIONER HUR: Take a short break now, go
22 through public comment, and then take a lunch break?

23 Okay. Let's do that. So let's take ten minutes.
24 So let's come back at 11:10, and then we'll begin the
25 public comment.

1 (Recess taken from 11:02 a.m. to 11:15 a.m.)

2 (From 11:15 a.m. to 2:33 p.m., public comment,
3 contained in a separate transcript, was
4 elicited)

5 (Lunch recess taken at 2:33 p.m.)

6 ---o0o---

7 DELIBERATIVE SESSION 3:35 p.m.

8 COMMISSIONER HUR: Okay. We are back in session
9 after the lunch recess.

10 We're now going to enter the deliberation phase of
11 this hearing, and I want to remind the public that -- I
12 should probably warn the public, this will be no
13 surprise to you, that given the divergent views that we
14 heard during public comment, I can almost assure you
15 that you will hear something that you don't like coming
16 out of the mouths of the commissioners.

17 I ask, however, that you respect the process, that
18 we don't get any clapping or jeering or really any
19 sounds from the audience. We really need to sort of
20 focus here and try to reach a resolution in this matter.

21 As a result, I'm again instructing the sheriff
22 to -- sir? Excuse me. Sheriff, the law enforcement in
23 the room? If you see anybody make an outburst, please
24 remove them from the room. I would actually prefer if
25 you had somebody else in here too so that you had four

1 eyes on it. And we're going to have to have a
2 no-tolerance policy on this. I apologize in advance,
3 but this is really what we have to have.

4 Okay. My proposal for how to go about deliberating
5 on these issues is to start with the factual issues,
6 then move to the legal issues, and then ultimately
7 discuss our views on the ultimate issue of whether the
8 facts as applied to the law constitute official
9 misconduct.

10 Does that sound acceptable to my fellow
11 commissioners?

12 COMMISSIONER LIU: Yes.

13 COMMISSIONER HUR: Okay. I will introduce each of
14 what I consider to be the salient facts. I will express
15 a quick summary of my view and invite discussion on
16 whether we think this particular fact was established.

17 I think there are -- obviously, there were a number
18 of facts that were presented in front of us over the
19 course of the last several months, but I think we should
20 hone in on the ones that could possibly sustain the
21 charge of official misconduct.

22 And I think those facts that we should discuss are
23 as follows: First, whether the physical abuse of
24 Sheriff Mirkarimi against Eliana Lopez occurred; second,
25 whether there's evidence that -- a preponderance of the

1 evidence that the sheriff abused his office by
2 threatening to use his power as the sheriff to take away
3 custody of his child; third, I think we should address
4 the dissuasion of witnesses, Ms. Lopez and Ms. Madison;
5 fourth, I think we should address the gun issue; and
6 finally, I think we should address the support -- the
7 sheriff's failure to support and encourage victims to
8 come forward.

9 First, the physical violence against Eliana Lopez.
10 I think it's beyond dispute that that occurred. I think
11 that that conduct was clearly wrongful. It was clearly
12 unlawful. And frankly, I found it disturbing that the
13 sheriff got up here and testified in a way that sought
14 to minimize the severity of that conduct.

15 Is there any discussion as to whether or not the
16 mayor was able to establish that the sheriff willfully
17 abused his wife on December 31st, 2011? The --

18 COMMISSIONER LIU: I would just echo what you said.
19 I agree that, to me, the evidence shows that a more
20 serious incident occurred than just what has been
21 characterized as "an arm grab." I think there was a
22 tremendous amount of evidence that shows the severity
23 and the seriousness of the incident that took place.

24 We have the video that was a more or less
25 contemporaneous account of what happened, which was

1 corroborated by what Ms. Lopez told her neighbors
2 shortly thereafter and which the sheriff's own witness,
3 the campaign manager, did describe as a domestic
4 violence incident, so I do think the evidence, to me,
5 shows a more serious incident than what the sheriff has
6 sought to minimize in these proceedings. So I would
7 echo and agree with Chair Hur on that fact.

8 COMMISSIONER HUR: Commissioner Studley.

9 COMMISSIONER STUDLEY: I think this is in addition
10 to what Commissioner Liu was saying.

11 For me, the video is also the more credible source
12 as to whether there were previous acts of physical
13 abuse, to use your phrase, because I thought that they
14 were the contemporaneous and clearer articulation than
15 the testimony here about whether physical acts had taken
16 place before, than the testimony that we got in this
17 proceeding.

18 COMMISSIONER HUR: Any other views from the
19 commissioners?

20 COMMISSIONER HAYON: Let me add my views as a
21 layperson following all the legal issues that have been
22 discussed.

23 To me, it's very simple. Number one is the video
24 that we have seen that Ms. Lopez taped, albeit with the
25 assistance of her friend and neighbor, Ivory Madison.

1 But there's no way to look at that video and not believe
2 that something serious occurred regardless or despite
3 whatever she may say now. But at that moment, that's a
4 very emotional and, quite frankly, disturbing video, an
5 indictment of her husband. Now, she's an actress. I
6 don't know. Was it an act? I have no way of knowing.
7 I believe what I saw. And so that is number one.

8 And number two, in the end, Ross Mirkarimi pleaded,
9 you know -- made a plea bargain. So he pleaded guilty
10 to perhaps something lesser. I don't know if it would
11 be lesser or greater in terms of false imprisonment.
12 But in any plea deal, there's a lot of discussion, and
13 perhaps by pleading to this, he avoided a much more
14 serious issue. I don't know. We didn't hear what those
15 discussions were between all the attorneys in coming up
16 with that plea deal.

17 But I think those two things are an indictment of
18 what occurred. It's true none of us were there. We
19 don't know what took place. But based on those two
20 things, something serious did take place, and the
21 sheriff ultimately pleaded guilty to it.

22 COMMISSIONER HUR: The second fact that I think we
23 should discuss is the alleged abuse of office, the
24 sheriff's threat to use the power of his office to take
25 away custody of his child from Ms. Lopez.

1 These allegations are disturbing. There was
2 evidence about the use of the term "powerful" in terms
3 of what the sheriff said to Ms. Lopez. My preliminary
4 view, though, is that there's not enough to sustain a
5 charge of official misconduct based on this allegation.
6 I do not think that the mayor has proven by a
7 preponderance of the evidence that the -- there was a
8 threat by the sheriff to use the power of his office to
9 take away his child. I think the allegations are too
10 vague to be proven in this case.

11 I welcome the views of my fellows commissioners.

12 COMMISSIONER RENNE: I would agree.

13 COMMISSIONER STUDLEY: Yeah. I would agree with
14 you. I found the testimony unconvincing. I was not
15 convinced by the explanation that it meant the power of
16 the custody laws. But even if I read the "I'm a
17 powerful man" or "I have power," that it wasn't
18 connected enough to anything else to make it a ground
19 for a conduct violation.

20 I was troubled by it. I didn't like the sound of
21 it, but it may have -- but there are a number of ways to
22 interpret it, even if I leave aside the unconvincing
23 power of the custody laws -- power of my connections,
24 financial power, citizenship power. Some of them -- you
25 know, articulateness, English-language speaker, whatever

1 it was. But I think we would need more crispness or
2 more of a nexus to think that it was abuse of office by
3 threatening to use that specific kind of power in a
4 judicial setting.

5 COMMISSIONER HUR: The next fact that I think we
6 should consider is the dissuasion of witnesses. There
7 were two witnesses who the mayor identified as being
8 dissuaded. The first was Ms. Lopez, and I think we
9 should take them one witness at a time.

10 Now, Ms. Madison does testify in her declaration
11 that Ms. Lopez told her that the sheriff instructed her
12 not to go to the police and not to tell anyone about the
13 abuse. Now, Ms. Lopez, of course, contradicts this in
14 her testimony. Given that the sheriff chose not to
15 cross-examine Ms. Madison on this point, I do think we
16 need to take it as credible, but subject to the fact
17 that I do think it's hearsay, and I did not see any
18 non-hearsay evidence from the mayor's side to show that
19 the sheriff made attempts to dissuade Ms. Lopez from
20 going to the police.

21 Now, the mayor primarily made his case on the
22 inferences caused by the telephone messages, the text
23 messages, and the e-mails. And one could certainly
24 infer from those messages that the sheriff called --
25 told his wife to call Ms. Peralta Haynes, that he

1 instructed Ms. Peralta Haynes to try to dissuade
2 Ms. Lopez from talking to the police or reporting this
3 incident, that Ms. Peralta Haynes was successful in that
4 effort. That is a plausible -- I think that is a
5 plausible read of the facts, but I don't think
6 "plausible" is enough to prove by a preponderance of the
7 evidence that those actions in fact occurred.

8 Of course, I also would like to say that I didn't
9 find Ms. Lopez's testimony with respect to the
10 conversations with Ms. Haynes to be particularly
11 credible at times, but still I think, on balance, the
12 mayor was not able to sustain this piece of evidence.

13 I welcome the views of my fellow commissioners.

14 COMMISSIONER RENNE: Mr. Chairman, I take it when
15 you say that, you're talking about as a separate charge
16 of misconduct.

17 COMMISSIONER HUR: Correct.

18 COMMISSIONER RENNE: Because as we get further in
19 discussion, I do think there is some relevance to at
20 least the conclusions I reached about the pattern of
21 phone conversations between Ms. Peralta Haynes,
22 Ms. Lopez, and the sheriff. And when I pressed her on
23 saying, "Were there any discussions about sort of how
24 you would strategize?"

25 "Oh, no, no. All we were doing was to support

1 Ms. Lopez."

2 Well, in the real world, the sheriff was facing the
3 fact that this was going to go public and how do you --
4 how do you spin it? And that's what those
5 conversations, I believe, were probably about, and that
6 they were more "How can we deflect what's going to be
7 obviously our political enemies' using it to their
8 advantage?"

9 But I wouldn't -- I don't think there's evidence to
10 support a separate charge of misconduct under the
11 charter based on that.

12 COMMISSIONER HUR: Any other views from the
13 commissioners?

14 Yeah, I too -- I mean, that was really the part of
15 the testimony that I found not credible as well, this
16 notion that they had these conversations, that the
17 sheriff was clearly involved in those conversations, and
18 that they weren't -- that Ms. Peralta Haynes was somehow
19 not interested in protecting the sheriff as well as
20 Ms. Lopez. I did not find that credible.

21 COMMISSIONER HAYON: Well, in addition to which
22 Ms. Peralta Haynes testified that she couldn't remember
23 the substance of many of those phone conversations. And
24 I don't recall how many there were, but during the
25 course of the day there were -- what? -- 20, 30, 40

1 phone calls or something? And so to say that you don't
2 remember what you were talking about is completely
3 non-credible. She may believe that she doesn't remember
4 it, but I was not convinced at all.

5 COMMISSIONER STUDLEY: I would -- I would agree
6 with your conclusion. I think there is a very plausible
7 or possible chain that would explain why -- explain
8 better than Ms. Lopez calling someone she didn't know
9 very well and remembering her domestic violence
10 background over that long that would be different from
11 the testimony, but I don't think what we have is enough
12 to sustain a separate charge.

13 COMMISSIONER HUR: I next think we should discuss
14 the witness-dissuasion charges with respect to
15 Ms. Madison.

16 Here, I don't think it's particularly close. I
17 mean, again, it's plausible that the sheriff instructed
18 Ms. Haynes to talk to Ms. Madison and tell her not to
19 cooperate with the police during the brief call, during
20 the brief conversation they had at -- on the telephone,
21 but I do not think we're close to the kind of evidence
22 we would need to find that the sheriff sought to
23 dissuade Ms. Madison or Mr. Mertens from cooperating
24 with the police or reporting the incident.

25 I welcome the views of my fellows commissioners.

1 COMMISSIONER LIU: I would agree with that. I
2 mean, I think there is an unbelievable -- there was an
3 unbelievable amount of texts and phonecalls during that
4 day, January 4th. We counted it up, I think, over 20
5 calls and texts between the campaign manager,
6 Ms. Peralta Haynes, and Sheriff Mirkarimi, and then over
7 30 calls and texts with Ms. Lopez throughout the day.

8 But at the end, it looks like the campaign manager
9 was really at the hub and the center of all of the
10 activity that day, and I did not think that there's -- I
11 do not think that there's enough evidence to take that
12 and infer by a preponderance of the evidence that the
13 sheriff was orchestrating it, necessarily.

14 I do think there was some interesting coincidence
15 that after a number of these texts or phonecalls,
16 shortly thereafter, Ms. Lopez would send a text or call
17 Ms. Madison and say, "Don't call the police. Forget
18 everything I told you," but I don't think there's enough
19 to connect it with the sheriff orchestrating it or
20 directing it.

21 COMMISSIONER STUDLEY: And I would concur with
22 these two, but like Commissioner Renne on another point,
23 I want to leave aside the atmosphere that was created
24 later and the whole sense of -- for the moment, call it
25 respect or disrespect for the participation of witnesses

1 and whether that was sort of a conduct and tone that
2 were being -- in which the sheriff was engaged. But on
3 this point, I agree with you.

4 COMMISSIONER HUR: Okay. The next issue I think we
5 should address are the guns.

6 You'll probably recall that when we first -- when
7 this first came up in the Daniele declaration, I
8 suggested we strike it, that it seemed very tangential
9 to what was going on in front of us.

10 Frankly, the sheriff doesn't help -- didn't help
11 himself when he got up on the stand and testified
12 inconsistently with what he told Inspector Daniele.
13 Again, he was not -- Inspector Daniele was not
14 cross-examined, meaning that we need to take his
15 admissible testimony, the portions that are admissible,
16 as -- I think we need to consider them credible. And so
17 I do think the mayor was able to establish that the
18 sheriff told Inspector Daniele that he sold his gun in
19 1996 to a fellow cadet, or I can't remember the exact
20 individual for whom the sheriff said he sold the gun to.

21 So the question then is whether that was simply a
22 mistaken statement or whether that was in fact a willful
23 attempt to deceive the inspector. This was a closer
24 call in my mind than I thought it would be when the
25 evidence came in. I do think, though, that in light of

1 the fact that all the guns were collected at the same
2 time that -- I do not think the mayor has sustained by a
3 preponderance of the evidence that the sheriff was
4 willfully attempting to deceive Inspector Daniele when
5 he suggested -- when he said that he had sold the guns
6 in 1996 or sold one of the guns in 1996.

7 Both -- sort of both sides of the argument require
8 some, you know, trying to connect the facts with
9 argument, but as with some of these other facts, I do
10 not think that it was able -- it was sustained by a
11 preponderance of the evidence.

12 And I welcome the views of my fellow commissioners.

13 COMMISSIONER STUDLEY: I'd be interested in -- and
14 maybe you are subdividing these pieces related to the
15 guns, but the matter of -- do you think of it as a
16 separate question about the matter of providing the guns
17 to the -- returning the guns to the sheriff's office and
18 not to the police department and the related
19 potential --

20 COMMISSIONER HUR: I do. I was thinking of them as
21 separate.

22 COMMISSIONER STUDLEY: Okay.

23 COMMISSIONER HUR: Separate issues.

24 COMMISSIONER STUDLEY: Okay. I wish I had been
25 told, for example, whether there was another gun as to

1 which that description applied, and so that it was, you
2 know, a mistake about somebody who held many -- several
3 licenses or whether it was -- which would tell me more
4 about whether it was an intentional effort to mislead.

5 But we didn't have that. We didn't know whether
6 there was a gun that met that description, it just
7 wasn't the third gun --

8 COMMISSIONER HUR: Right.

9 COMMISSIONER STUDLEY: -- in this setting.

10 COMMISSIONER HUR: Right.

11 COMMISSIONER STUDLEY: So it's hard to connect the
12 dots.

13 COMMISSIONER HUR: It is. And I think if the gun
14 was not collected at the time of the other guns, I would
15 probably have found that it was willful because then I
16 could see the basis --

17 COMMISSIONER STUDLEY: The motive.

18 COMMISSIONER HUR: Yeah, the motive for the
19 misstatement. As it stands, I think it's equally likely
20 that the sheriff misremembered having disposed of the
21 gun as it is that he intentionally tried to deceive
22 Inspector Daniele.

23 Okay. With respect to turning over the guns to the
24 police department, you know, again, I -- frankly, I
25 think it was childish. I think this idea that you're

1 going to have a dispute with the court and between
2 departments about who should have the guns is -- it's
3 not something I would expect from our sheriff. I would
4 hope that our sheriff would comply with the letter of
5 the law and would follow the instructions of the court
6 and ensure that the weapons were turned over to the
7 police.

8 But I don't think that whether the guns were with
9 the sheriff or with the police can amount to something
10 that could lead to official misconduct. I mean, the
11 guns were with law enforcement; they were not within the
12 sheriff's custody and control. And so I do not think
13 that the fact that the sheriff's office had the guns
14 rather than the police department can support a charge
15 of official misconduct.

16 COMMISSIONER LIU: I would agree with that. I
17 think the testimony was inconclusive and actually pretty
18 confusing on that point. There was some testimony about
19 whether he was supposed to turn it over to his attorneys
20 and who was even present when that conversation took
21 place. It was -- I don't think the testimony was very
22 conclusive.

23 And then at the end of the day, the sheriff -- the
24 attorneys are correct that the mayor testified that he
25 did not think that that in and of itself could sustain a

1 charge of misconduct.

2 COMMISSIONER HUR: Commissioner Studley?

3 COMMISSIONER STUDLEY: I agree with your result and
4 I also agree, however, with your comment about behavior,
5 a way of acting that I find uncomfortable. I hadn't
6 thought of "childish," but that applies.

7 I think putting members of the staff of the
8 sheriff's department into the position that the sheriff
9 did, while he was their supervisor, to return the guns
10 to sheriff's department staff and expect them to hold on
11 to them and not give them to the police department and
12 the inconsistent instructions that we heard testimony
13 about is inapprop- -- is insensitive to the dilemma that
14 he puts his line officers in, and I think that was
15 troubling. But this is not a -- we're not here judging
16 people's judgment, although I think it was poor
17 judgment.

18 COMMISSIONER HUR: Okay. The last factual issue
19 that I think could sustain a charge of official
20 misconduct is the efforts to -- the failure to support
21 and encourage potential victims and witnesses to the
22 domestic violence.

23 I think the standard here for official misconduct
24 with respect to these allegations is higher. I think
25 the mayor has in some ways conceded that. The failure

1 clause requires that the officer fail to perform any
2 duty enjoined on him or her by law.

3 I do not think that the sheriff was required by law
4 to make public statements supporting Ivory Madison. He
5 was at that point a criminal defendant, and I could
6 not -- I am not comfortable with suggesting there's some
7 duty that a criminal defendant needs to go out and make
8 public statements supporting someone who is a witness in
9 the criminal matter against them.

10 Even aside from the criminal matter, I think it's a
11 dangerous precedent to say that an elected official can
12 be held to have committed official misconduct by failing
13 to support individuals who are, at least from his
14 perspective, attacking him. So I do not think that this
15 course of conduct where he failed to encourage and
16 support victims and witnesses can sustain a charge of
17 official misconduct.

18 And I welcome the views of my fellow commissioners.

19 COMMISSIONER LIU: I think I would agree with that,
20 and particularly with respect to himself being the
21 criminal defendant at that point in the process. It
22 would be -- I don't know that we would require or that
23 the law would require him to encourage witnesses to come
24 forward against himself in a criminal process where
25 he's -- where he is the defendant. I think that would

1 be an awkward precedent to set.

2 COMMISSIONER STUDLEY: I agree that it is a higher
3 bar and that an individual has a right to mount a
4 defense. That said, there -- I wish -- this -- this
5 element broken out this way wasn't explored as
6 thoroughly as some others, and what I'm left not knowing
7 is whether others, who were mounting a much more
8 aggressive, public campaign of criticism, were doing so
9 at -- with the -- at the direction of, the invitation
10 of, the I-can't-do-it-but-would-you-do-it guidance of
11 the sheriff.

12 It was -- it is not a pretty picture of what
13 happened, and I think it has led the public to see this
14 in a much more political and aggressive light than it
15 would have been had that commentary about witnesses not
16 taken place. The press, of course, has its own
17 attraction to certain stories that you can't put at --
18 lay at the feet of any of the participants either.

19 But I don't see the steps to be able to support it
20 rising to the level of either failure to perform a duty
21 enjoined on the sheriff or falling beneath the standard
22 of decency, good faith and right action required by a
23 public officer, particularly when that person is
24 defending on criminal charges.

25 COMMISSIONER HUR: I appreciate your emphasis on

1 the second clause as well, because I think you're right,
2 it could conceivably fall under that. And I agree with
3 your points. And I also want to echo something you've
4 just said, which concerned me when I heard the sheriff
5 testify to it.

6 I mean, these are -- these really are disturbing
7 allegations, that the sheriff makes an apology to
8 Ms. Madison in his plea statement and gets up on the
9 stand and can't really explain what he's apologizing
10 for. I mean, these are the sorts of things that make
11 clear to me that the conduct was poor.

12 I'm just saying that I don't think it amounts to
13 official misconduct, but I don't want there to be any --
14 any illusion about my view as to whether it was
15 appropriate conduct or not in terms of what I would
16 expect from an elected official. But I do not think it
17 rises to official misconduct.

18 COMMISSIONER STUDLEY: You're talking about just
19 this particular item of --

20 COMMISSIONER HUR: Yes.

21 COMMISSIONER STUDLEY: -- encouraging of witnesses?

22 COMMISSIONER HUR: This particular item, yes.

23 Any other views with respect to the factual
24 allegations?

25 Now, of course, the parties submitted a joint

1 statement, which was somewhat helpful in us trying to
2 determine what facts we really need to find and discuss
3 here. We've addressed, I think, the most salient ones.
4 There are a couple, though, that I think we may want to
5 address just so that we can ensure that we've
6 established the predicate for our discussion of the law
7 and the application of the law to the facts.

8 I think it is undisputed that the sheriff was
9 elected on November 8th, 2011, and that he was sworn
10 in on January 8th, 2012. I also think that there
11 is -- it was proven by a preponderance of the evidence
12 that he did engage in actions at the sheriff's office,
13 that he was getting up to speed on what his duties would
14 be in the interim between November 8th and
15 January 8th. Let's see. I also think that it was
16 established by a preponderance of the evidence that he
17 pled guilty to false imprisonment.

18 Yes?

19 COMMISSIONER STUDLEY: Can I just ask, since you're
20 going through it, was there an agreement as to -- he
21 continued to serve as supervisor until he was sworn in
22 or until the end of the year? What was the transition?
23 Was he in office as supervisor or was that not addressed
24 by the parties?

25 I'm not trying to add in a new issue, but I

1 thought --

2 COMMISSIONER HUR: Sure. I don't remember the
3 testimony about when he finished his duties as --

4 COMMISSIONER STUDLEY: Perhaps people here would
5 know.

6 COMMISSIONER HUR: -- sheriff.

7 Mr. Keith or Mr. Waggoner, do you recall the
8 testimony?

9 MR. KEITH: There was documentary evidence
10 submitted showing the sheriff's letter of resignation as
11 a member of the Board of Supervisors that essentially
12 was concurrent with his becoming sheriff.

13 COMMISSIONER HUR: So January 8th.

14 MR. KEITH: January 8th, more or less.

15 COMMISSIONER STUDLEY: So he held public office on
16 December 31st.

17 COMMISSIONER HUR: He did. I think that's an
18 important fact that we should -- that also was
19 established.

20 COMMISSIONER LIU: And I think it looks like it's
21 undisputed between the parties on that point too.

22 COMMISSIONER HUR: The parties apparently disagree
23 as to whether the sheriff restrained Ms. Lopez and
24 violated her personal liberty in paragraph 5, here, but
25 I think that was established.

1 Any disagreement regarding that?

2 COMMISSIONER LIU: No. I think that was
3 well-established by the sheriff's testimony and by his
4 guilty plea.

5 COMMISSIONER HUR: Okay. We then invited the
6 parties to submit additional findings of fact, and we
7 gave each of them five.

8 I did not find any of them relevant to our
9 determination, but if any of my fellow commissioners
10 would think that any of them should be discussed or
11 addressed, I -- I welcome that.

12 You know what? I should say one other thing
13 about -- I think -- I take that back. Fact 12, which
14 was identified by the mayor, I think is relevant and one
15 that -- but I think one that we addressed. I think that
16 has to relate to the gun charges.

17 I think the remaining -- for example, 13, I think,
18 is a legal conclusion; 14, to the extent that it hasn't
19 been discussed, I think is irrelevant.

20 COMMISSIONER STUDLEY: I'm looking at No. 9. I say
21 that because it relates somewhat to the issue in 14.
22 No. 9 indicating that the matter was a private matter
23 and denying ever verbally or -- being verbally or
24 physically abusive are at least troubling to me in light
25 of the later admissions or at least later plea and

1 comment and testimony here.

2 COMMISSIONER HUR: Let's talk about that, because
3 both you and Mr. Renne have raised -- raised sort of the
4 course of conduct after the arrest.

5 Are you of the view that statements that were made
6 that are reflected in paragraph 9 and also reflected in
7 paragraph 14 have been proven by a preponderance of the
8 evidence?

9 COMMISSIONER RENNE: I'm sorry. I didn't hear.
10 What?

11 COMMISSIONER HUR: Have they been proven? And do
12 you think that they are relevant to our determination?

13 COMMISSIONER RENNE: You mean as to whether he made
14 that statement?

15 COMMISSIONER HUR: Yes.

16 COMMISSIONER RENNE: That it was a private matter?

17 COMMISSIONER HAYON: You said paragraph 9 and what?

18 COMMISSIONER HUR: Paragraph 9 and 14.

19 COMMISSIONER HAYON: Fourteen?

20 COMMISSIONER RENNE: My understanding is it wasn't
21 denied, that it wasn't disputed that that statement was
22 made and what -- the response that the defendant gives
23 was that it was -- it says, "The sheriff's 'private
24 family matter' comment was in a statement given to him
25 by his attorney at the time."

1 Well, it's still his statement.

2 COMMISSIONER STUDLEY: Really.

3 COMMISSIONER RENNE: It isn't disputing that he
4 made the statement. Maybe he got bad legal advice.

5 COMMISSIONER HUR: Any dissenting view towards
6 that? For that? I'm not asking about the "bad legal
7 advice" comment. I'm asking about in general.

8 Okay. Yeah, I mean, I guess in my view, 9 and 14,
9 to the extent they're factual allegations, some of
10 them -- some of them are not -- I think we were -- the
11 mayor did establish that the sheriff made a joke about
12 the press coverage he was receiving at his inauguration.
13 You know, I don't -- I personally did not think that
14 that was a joke about domestic violence.

15 Ultimately, I don't think it -- I don't think it
16 matters. I don't think any of these allegations,
17 whether proven or not, could sustain a charge of
18 official misconduct. But I certainly could see if
19 someone thought that the joke was about domestic
20 violence. I don't think it's outside the realm of
21 possibility, but I just didn't think that's what he was
22 saying.

23 COMMISSIONER HAYON: I didn't feel that it was a
24 joke about domestic violence *per se*. I think it was a
25 humorous reference to his personal situation, the one in

1 which he found himself *vis-à-vis* the media and legal
2 situations. So perhaps it was inappropriate and, you
3 know, ill-advised, but I don't think he was making fun
4 of domestic violence as an issue.

5 COMMISSIONER HUR: Are there any other facts that
6 were in the joint submission that any commissioner would
7 like to address?

8 COMMISSIONER LIU: Chair Hur?

9 COMMISSIONER HUR: Yes.

10 COMMISSIONER LIU: I would like to address the
11 sheriff's proposed fact No. 18.

12 The sheriff had proposed the factual finding that
13 many individuals have served honorably in San Francisco
14 law enforcement agencies who have been convicted of
15 crimes, citing to Sheriff Michael Hennessey's
16 declaration, and I did want to address it because when I
17 first read Sheriff Michael Hennessey's declaration, it
18 did give me pause for that very reason.

19 But his declaration was so conclusory and was not
20 very fact-specific, and in this case, as many people
21 have said, facts do matter, and it is a very
22 fact-specific inquiry. And then Sheriff Michael
23 Hennessey did not make himself available for
24 cross-examination. After the commissioners had asked
25 repeatedly about whether he would make himself available

1 for cross-examination, he chose not to, and so I was not
2 able to give his statement very much weight.

3 So I did want to address that, that although it did
4 give me pause, I really couldn't give it much weight
5 when he wasn't making himself available to testify.

6 COMMISSIONER HUR: I would agree with that.

7 COMMISSIONER STUDLEY: I think there's no way we
8 can judge this one as a matter of fact, nor is it our
9 obligation to do so. There's been -- if it has any
10 relevance at all, it would be to appropriate response or
11 discipline for a matter of -- an act -- a wrongful
12 behavior or act of official misconduct, if one were
13 found, not to whether somebody did it or didn't.

14 I have found a lot of what we've been offered with
15 regard to assertions that other people have done other
16 things to be a lot like the comment to the state police,
17 "But other people were going faster than I was." That's
18 not the trooper's responsibility. "What did you do?"
19 And "We're the ones in conversation right now."

20 So I don't think that there's a relative standard
21 here, and so I find that's both unhelpful and
22 unprovable.

23 COMMISSIONER HUR: Are there any other facts that
24 the commissioners think we need to discuss?

25 I think we've discussed all of the ones that are

1 relevant. Like Commissioner Studley just said, I think
2 there are certainly many in here that are not relevant.

3 But anything -- anything else factually that we
4 need to discuss in order to establish?

5 Okay. Next I think we need to address the legal
6 issues, some of which are likely more -- potentially
7 more thorny than the factual issues. It seems to me
8 that the parties have agreed that we need to read the
9 charter provision at issue consistent with the Option 2
10 that we proposed at the last meeting. Option 2 requires
11 that every subclause following the first "including" in
12 the provision has to relate to the duties of his or her
13 office.

14 Is there any disagreement among the commissioners
15 as to whether that should be the framework with which we
16 should -- by which we should inform our discussion?

17 COMMISSIONER RENNE: As I think I've made clear, I
18 do not agree with that interpretation of that statute.
19 I think that there are two distinct provisions that they
20 are defining as "official misconduct."

21 COMMISSIONER HUR: So Commissioner Renne, do you --
22 you do not think that it's a fair reading of the statute
23 to put the colon after the first "including"? Have the
24 first clause begin with "any failure" and the second
25 clause to begin with "conduct that falls below"?

1 COMMISSIONER RENNE: No. I think --

2 COMMISSIONER HUR: Why not?

3 COMMISSIONER RENNE: I think the "or" is
4 disjunctive and the -- everything that goes before the
5 "or" relates to wrongful behavior relating to the public
6 office; that the second clause provides for misconduct
7 being any conduct that falls below the standard of
8 decency, good faith and right action impliedly required
9 of all public officials.

10 And I gave the example that the -- you take the
11 Penn State matter with Joe Paterno. One could say he
12 didn't violate any law, but he had a moral obligation,
13 the standard of the position he was in, to report what
14 he had found out, not to let it just go or say "Don't
15 come back."

16 And that's -- and my belief is that's what the
17 framers were intending, is saying that we've got some
18 standard. Now, the question has been raised, well,
19 that's so vague and ambiguous, and I guess my answer to
20 that is and the cases said that it may be ambiguous, but
21 if the act that you are claiming violated that section
22 and if any reasonable public official would know that
23 act violates it, the vagueness is not really a defense.

24 COMMISSIONER HUR: I mean, it's the mayor's
25 position that your reading is unconstitutional.

1 COMMISSIONER RENNE: I understand that.

2 COMMISSIONER LIU: But Commissioner Renne, then
3 if -- if you're looking at Option 1 as the
4 interpretation, which I do have to say that was my --
5 that has been my initial take on it, that I think that
6 is likely what the framers intended, would we be reading
7 into it that the phrase "required of all public
8 officers" -- the phrase "required of all public
9 officers" to relate to the position in question? And
10 perhaps that's why it's not vague as applied.

11 COMMISSIONER RENNE: But the statute -- I -- I
12 think it could be well read that you look at the
13 particular position, public official, and say, "Did he
14 or she have -- conduct themselves in a manner which
15 violates a sense of decency, good faith and right
16 action?" Or say "Regardless of what the position was,
17 is the action or the conduct -- does it fall under some
18 general belief that it would be -- it would be
19 considered to violate the standards of decency and good
20 faith and right action?"

21 So I mean, I don't think in this -- frankly, I
22 don't think in this case it makes a lot of difference
23 whether you apply it to the office or whether you apply
24 it generally, saying that no public official should
25 conduct themselves in the manner that occurred on

1 December 31st.

2 COMMISSIONER STUDLEY: I have for a long time had
3 the thought that it was a very tough decision which of
4 these two it was.

5 And when I look at Option 1 -- the question came up
6 this morning about whether if it were intended to apply
7 to each position of all or each public offices and why
8 "standard" was singular instead of plural -- I think you
9 could get to the same place. So I'm agreeing with
10 Commissioner Renne here. If you're trying to make that
11 one make sense, the standard of decency, good faith and
12 right action required of all public officers could
13 include to carry out a number of things and carry out
14 the duties of your particular office.

15 So I think that it's torturing it to try and figure
16 out the "all" or the "each" because there's another
17 logical both substantive and grammatical way to get
18 there, because the standard could be do all of these
19 things that are common and then do the things that your
20 office calls upon you to do when you're an ethics
21 commissioner or a sheriff or a school superintendent or
22 a supervisor.

23 That doesn't help you with the whether we're all on
24 the Option 2 question.

25 COMMISSIONER HUR: Yeah. But I mean, I had

1 actually, Commissioner Studley, that similar thought in
2 mind as well. I mean, the only way to read -- to -- I
3 think one plausible way to read the section like
4 Commissioner Renne does, but to find it constitutional,
5 would have to, almost by definition, require some
6 relationship to the duties of office, so -- and I think
7 that's Commissioner Liu's point as well.

8 And so in light of the fact that I think both
9 readings are -- based on the language of the statute,
10 both readings are plausible, I think we should accept
11 the reading that directly requires this relationship
12 through the meaning of the word, since we'd have to
13 imply it anyway in order to interpret it in a
14 constitutional manner, which is why I think we should
15 agree with the parties and apply Option 2.

16 And I understand that there will likely be
17 significant debate as to what the nexus has to be, but I
18 do think that is the most correct reading, perhaps, in
19 this case.

20 Commissioner Hayon, do you have a view as to which
21 reading is appropriate?

22 COMMISSIONER HAYON: Well, I kind of agreed with
23 Commissioner Renne, but again, I mean, this falls beyond
24 my area of expertise.

25 And I guess my question in terms of pertaining to

1 or as it relates to the duties of office -- my question
2 would be then since the sheriff -- in this case, while
3 this took place in that twilight zone, if you will,
4 between when he actually -- you know, when he was
5 elected and between the time he actually took office,
6 nonetheless, as sheriff-elect, his duties as sheriff
7 relate to areas of domestic violence and, you know,
8 really quite a swath that San Francisco has cut
9 nationally in terms of what we do.

10 So it seems to me that if we read it that way, to
11 me, that still means that what he did relates to the
12 duties of office. Now, I don't know if that falls under
13 the legal discussion that we're having, but that's how I
14 would interpret it.

15 COMMISSIONER HUR: Okay.

16 COMMISSIONER RENNE: Well, let me ask you this
17 question: At the time of the incident, he was a member
18 of the Board of Supervisors, which made him a public
19 official, which meant he was subject to the language of
20 this section.

21 Now, if the office -- if he had -- hypothetically,
22 if he had run for reelection and been reelected to the
23 board, do you read that to say that, well, because this
24 doesn't relate to the activities of the board -- in
25 other words, it's one thing to talk about a sheriff, and

1 you say because of all of the supervision of domestic
2 violence and law-breakers.

3 Are you saying that an act of domestic violence by
4 a member of the Board of Supervisors could not be
5 official misconduct?

6 COMMISSIONER HUR: You're asking me?

7 COMMISSIONER RENNE: Yes.

8 COMMISSIONER HUR: Well, so I think there are two
9 parts to your question. One part is the timing. Are
10 you asking about the timing?

11 COMMISSIONER RENNE: No.

12 COMMISSIONER HUR: The fact that he's pre-swearing
13 in?

14 COMMISSIONER RENNE: No, I'm asking about if you
15 interpret it that it has to relate to the office. If he
16 had been reelected to the Board of Supervisors, are you
17 saying that he would not be subject to a claim of
18 official misconduct because of domestic violence?
19 Because you wouldn't have the same arguments that you
20 would have about the duties of sheriff.

21 But as I read the statute, it certainly would be an
22 indication of conduct that did not meet the standard of
23 decency, good faith and right conduct.

24 COMMISSIONER HUR: My answer to your question is
25 that no, I do not think it would be official misconduct.

1 And the reason is because I think the precedent that we
2 have that actually talks about, albeit in *dicta*, what
3 "relation to the duties of office" means is pretty clear
4 that there has to be a direct relationship of the
5 alleged wrongdoing to the office held.

6 COMMISSIONER RENNE: But that *dicta* was before this
7 ordinance was ever passed.

8 COMMISSIONER HUR: Well, it was -- the ordinance
9 had been passed, and the language that is now in the
10 ordinance, this "in relation to the duties" language, is
11 the same precise language that *Mazzola* addressed.

12 COMMISSIONER RENNE: Yes, the first part. But the
13 second lang- -- the second section, the "or" clause, was
14 not before the *Mazzola* court, and the *dicta* has no
15 relationship to what was the meaning of the "conduct
16 which falls below the standard of decency, good faith
17 and right action."

18 COMMISSIONER HUR: Certainly if we were to read --
19 if we were to follow Option 1, which is what you're
20 advocating, then I would agree with you that yes, then
21 there would not be a nexus requirement to the relation
22 of the duties, and in that case, in my common-sense view
23 is the domestic violence -- does domestic violence fall
24 below my standard of decency that I expect of public
25 officials?

1 Yes. But I don't think that's what we are being
2 asked to apply. I think if we don't find a nexus to the
3 relation of the duties, then we are opening this
4 provision up to abuse and manipulation down the road
5 by -- in a way that we're not really going to like.

6 I mean, I have grave concerns about what the next
7 case looks like unless we interpret this in a way that I
8 think the voters intended and also that is narrow and
9 understandable for elected officials.

10 COMMISSIONER HAYON: If I may just add one thing, I
11 think one issue that has been brought up consistently,
12 particularly in public -- in public testimony is the
13 issue of fairness. And I think we all agree that life
14 is not fair, and certainly government and politics least
15 of all. But I mean, I think it is an issue that we do
16 have to at least think about and include in our
17 deliberations.

18 I mean, there's certainly all kinds of misconduct,
19 and some of it has been referred to specifically, on the
20 part of other elected officials in San Francisco as well
21 as other places. So I mean, we see plenty of official
22 misconduct across the board in this country. Not
23 everybody gets hauled up on charges. And I think an
24 issue of fairness is of course who's going to bring
25 charges. So charges were brought in this case, which is

1 why we are looking at it, and so in terms of some
2 element of fairness, I do think that this particular
3 charge as it relates to this particular office is very
4 relevant.

5 It isn't just some elected official acting out, you
6 know, taking his clothes off on a tweet or what have
7 you, but something that really speaks to something of
8 which San Francisco is a leader. And the sheriff is a
9 leader in law enforcement and in the area of domestic
10 violence. And so I think that there is a direct
11 correlation between these charges and what the sheriff
12 of the City and County of San Francisco does, and that
13 is important to me.

14 COMMISSIONER HUR: Mr. Emblidge.

15 MR. EMBLIDGE: If I may make one suggestion just
16 for you to consider, if there's a disagreement on the
17 commission about whether Option 1 or Option 2 is the
18 appropriate interpretation, you might consider reaching
19 a conclusion under each option. And I say that because,
20 obviously, your recommendations are going to go to the
21 Board of Supervisors.

22 If you were to make a recommendation under Option
23 1, but the board believed that Option 2 was the better
24 interpretation of the charter, the board might
25 justifiably say, "Well, what would the Ethics Commission

1 have done under Option 2?"

2 I don't want to make your job any more complicated
3 than it is, but I think you might want to consider
4 making findings under each option.

5 COMMISSIONER HUR: Views of my fellow
6 commissioners?

7 I think -- ideally, I would like to make a
8 recommendation to the board that is a single
9 recommendation. I think we're making the board's job
10 harder if we don't come up with one recommendation. And
11 although I think it would be easier for us to sort of
12 have a number of permutations of our recommendations and
13 then send them all up -- and we may need to do that if
14 we can't reach a majority on some of these things. But
15 my preference would be if we could make -- figure out
16 what we think the right option is and to make a
17 recommendation.

18 COMMISSIONER STUDLEY: Well, I have a--
19 Go ahead, Scott.

20 MR. EMBLIDGE: Well, and I wasn't presupposing that
21 your recommendation would be different. It may very
22 well be -- and I don't want to prejudge what I'm hearing
23 here, but it may very well be that the recommendation
24 you make, you might make the same recommendation under
25 either option.

1 COMMISSIONER HUR: I see. I see.

2 COMMISSIONER STUDLEY: And I think as a matter of
3 process, we might see where we are aligned and where we
4 have differences and whether they're differences under
5 the same option, different views, or different views
6 depending on which option we perceive.

7 So we might get closer by doing it, and we might --
8 yet I think you're right that we would still have a
9 preferred pathway or a recommended analysis. It may be
10 that there's a footnote that says "Even if you go this
11 way" or "If you were to go that way, here's how we
12 thought about it," because that could become part of the
13 later interpretation and could help people who -- if the
14 supervisors go back to try and parse it themselves.

15 So it may get to where you --

16 COMMISSIONER HUR: I think that's a good point.

17 COMMISSIONER STUDLEY: -- as close as we can to
18 what you want, but may be a way to find what's common
19 and what's different.

20 COMMISSIONER RENNE: As I have said, I'm not sure
21 the result in this case is any different. What I'm
22 concerned about that this commission sends a message to
23 the elected officials is "You can do anything you want
24 if it isn't in relation to your duties," and I think
25 there's a provision that puts a higher standard on our

1 elected officials than just how do they conduct
2 themselves *vis-à-vis* their official duties.

3 COMMISSIONER HUR: I think that's a fair point.

4 The countervailing view there is this: I have not
5 seen any evidence suggesting to me that the mayor had
6 any improper motive in bringing these charges. This, to
7 me, is a statute that is subject to a number of
8 interpretations. I think the mayor, in light of the
9 seriousness of the allegations, had every right to file
10 the charges.

11 Now, we, I think, need to interpret it. And I
12 think we're going to do future -- this mayor, future
13 mayors, and elected officials a service if we interpret
14 this in a way that is clear. And I have a lot of
15 concern about where you draw the line if you don't
16 relate it to the duties.

17 The other thing I want to say about this is this is
18 not the only provision in law to protect the public from
19 elected officials doing wrong, doing wrong things.
20 There's a criminal process, there's a recall process,
21 there is a process within one's own department whereby
22 an official can be reprimanded. So I think the voters
23 intended official misconduct to be something narrow,
24 because it provides the mayor with a very strong tool
25 that really could disrupt an elected official.

1 And I don't -- like I said, I do not think the
2 mayor engaged in anything improper here or that there's
3 any improper political motive, but you could certainly
4 see that possibility, especially if we interpret this in
5 a way that's so broad as to encompass any number of --
6 any amount of personal misconduct that doesn't relate to
7 one's job duties.

8 COMMISSIONER LIU: So maybe we should take the
9 more -- Option No. 2, the tougher, higher standard, and
10 then see where we are with that and then see if we need
11 to discuss Option No. 1 some more.

12 COMMISSIONER HUR: I think that's a good idea.
13 So under Option No. 2, I think that -- I'm
14 guessing, based on what I'm hearing, that the debate is
15 going to be about whether the relationship to the duties
16 has to be a direct relationship, meaning something
17 that's performed on the job or purporting to be on the
18 job, essentially under color of law, or whether it must
19 instead just merely affect the elected official's
20 abilities to perform the duties.

21 I probably shouldn't have used the word "merely."
22 I don't mean to suggest that it's a less -- a lesser
23 option by any means.

24 But is that pretty much what we're -- what the
25 parameters are if we're considering what "relation to

1 the duties" means in Option 2?

2 COMMISSIONER STUDLEY: I think it's a good start.

3 And let me start with something that seems to me
4 pretty clear to help us go down this road. I don't
5 think that the duties of office can be limited to the
6 handful of specific affirmative tasks enumerated in the
7 charter. I think that's just a poor reading of "the
8 duties of office."

9 COMMISSIONER HUR: Completely agree.

10 COMMISSIONER STUDLEY: There are a whole lot of
11 affirmative and negative instructions or explanations of
12 "duty."

13 What the charter, as I understand it, attempted to
14 do was enumerate some of the specific responsibilities
15 at the charter level for those jobs, like operate the
16 jail, so that you could tell the job of supervisor from
17 the job of mayor, who has another set of things
18 enumerated in the charter.

19 But nowhere does it say "Do not lie and cheat and
20 steal," because I don't think we expect the charter to
21 do that. That's either implied or in the SIA. But it
22 is a part of the obligation of office, and I think the
23 duty and obligation of the office are related.

24 So at least the argument offered to us, that the
25 limit of what the sheriff has to do is in that handful

1 of specified tasks and nothing else identified by the
2 mayor, assigned by the Board of Supervisors, selected by
3 the office-holder him- or herself as a good way to
4 advance the purposes of that office are not part of the
5 job just seems to me thin.

6 And if anybody challenged that, I would say, "If
7 you drove your official car to it, it's not just the
8 limit of those five items." The sheriff's job is much,
9 much broader than what the charter says specifically for
10 all time that person must do.

11 So not that it's easy after that, but I just want
12 to, for my part, scoop away that argument constraining
13 us, and then we can figure out what the duties of the
14 officer of sheriff are, if people agree with me.

15 COMMISSIONER HUR: I agree with that.

16 Okay. So given that we've -- I think we agree that
17 the duties are broader than what is described in the
18 charter, what then are we to make of the relationship
19 test?

20 You know, I am torn in some ways, because, you
21 know, I am troubled that there are -- there is case law
22 that addresses what is expected of, you know, an
23 officer. I think those cases could have some relevance
24 to what we are discussing.

25 Now, of course, there are no cases that connect

1 whether that standard should be imported into an
2 official misconduct analysis, and that's sort of where I
3 am a bit stuck and why I come out in my view that the
4 relationship has to be direct.

5 The -- but I again welcome the views of my fellow
6 commissioners as to whether this relationship does have
7 to be done while performing your duties or -- purporting
8 to perform your duties or whether there can be a
9 different type of relationship that could meet this
10 official misconduct standard.

11 COMMISSIONER LIU: Well, I don't think it has to be
12 while carrying out or while -- I don't think the conduct
13 or the misconduct, the wrongful behavior itself, is
14 constrained to being performed while carrying out your
15 duties. I don't think -- I don't read the provision to
16 be that narrow.

17 And I agree with Commissioner Studley that the
18 duties are not just simply the ones enumerated in the
19 charter. I think that there's been a lot of testimony
20 and evidence that the duties of the sheriff are much
21 broader than that and, as Commissioner Hayon very aptly
22 put it, that the sheriff should be overseeing a lot of
23 anti-domestic programs and overseeing that relationship,
24 so I agree that there would be a correlation between
25 that function of the sheriff and being convicted of a

1 domestic-violence crime.

2 COMMISSIONER HUR: I guess the problem I have with
3 tying the relationship to the effect or the -- you know,
4 the ability of the sheriff to perform the job going
5 forward is that it doesn't seem to work from a timing
6 perspective. I mean, we're talking about -- this -- to
7 me, this provision is talking about wrongful behavior
8 that at the time you're doing it is in relation to your
9 duties.

10 And I think a lot of the testimony that we heard is
11 about whether or not the sheriff is going to be
12 effective down the road. He very well may not be
13 effective as a sheriff. But I don't think that's sort
14 of our -- I don't think that's in our purview.

15 And if we're going to say that -- essentially, what
16 his expert said, what the mayor's expert said, was that
17 any misconduct by a sheriff is official misconduct, and
18 that -- and that, again, is something that troubles me,
19 because it seems the parties concede that there is a
20 difference between personal misconduct and official
21 misconduct, and the evidence we heard does not give me
22 any comfort that we can pick that line.

23 COMMISSIONER LIU: Go ahead.

24 COMMISSIONER STUDLEY: I'm just wondering how
25 you're getting to that time issue, because within Option

1 2, "any wrongful behavior . . . in relation to the
2 duties of . . . office, including conduct that falls
3 below the standard of decency . . . and right action . .
4 . required," and the standard required could well have a
5 going-forward element to it.

6 The standard that we expect is so that you can do
7 your job going forward. It's not either historic or at
8 one moment in time. So you may be looking at something
9 that I'm just not seeing in the second line or in the
10 other case law, which I know you know better than I do.

11 COMMISSIONER HUR: Well, I mean, it's a good point.
12 I mean, I do think a standard is something that you
13 should be able to look at now and know is fixed. And if
14 the standard is we expect you to act in a way that, in
15 the future, you will still be effective even if you do
16 the act --

17 COMMISSIONER STUDLEY: Yeah. Let me try this.

18 COMMISSIONER HUR: -- it bothers me.

19 COMMISSIONER STUDLEY: Making up hypotheticals on
20 the fly is always risky. But if I held public office
21 and I admitted to or were convicted of perjury in
22 another jurisdiction in a matter not related to my city
23 responsibilities -- I lie in my family's estate
24 matter -- that is wrongful behavior.

25 And say I'm the district attorney. Is that -- if

1 you think that the standard that I should be held to as
2 a law enforcement officer is related to not perjuring
3 myself, then would it be in relation to the duties even
4 though it is not -- even though both the time and the
5 substance are distant from my job here in San Francisco?

6 COMMISSIONER HUR: I would say that is not in
7 relation to your duties. And again, the reason being
8 that it's -- I do think there has to be a greater
9 connection. I mean, you know, there's another line
10 between perjury and lying.

11 If you lie to your husband, if you lie to your
12 friend, is that conduct that falls below the standard of
13 decency that I --

14 COMMISSIONER STUDLEY: But if I per- --

15 COMMISSIONER HUR: -- would expect of a public
16 official? Maybe.

17 COMMISSIONER STUDLEY: But if I perjure myself
18 while I'm in a legal proceeding and my job is legal,
19 does that go to the standard of decency?

20 COMMISSIONER HUR: Well, again, I've always read
21 this to be a standard, which is why I think it has to
22 tie to the relationship of the duties. To read it to
23 mean multiple standards, given -- and to change "all" to
24 "each" to me is difficult in light of the words --

25 COMMISSIONER STUDLEY: Well, in Option 2, we may

1 not need to do that, but -- so even if we have a single
2 standard, and I'm a public official and I -- my perjury
3 is in a public proceeding, do you think the voters when
4 they passed this wanted me to come back, having been
5 convicted of perjury, and continue to hold my office on
6 the same terms as before? Or would they believe that
7 there had been official misconduct?

8 Or no, because that's the term we're trying to --
9 would they believe that I had committed any wrongful
10 behavior in relation to my duties?

11 COMMISSIONER HUR: So I don't think that -- in
12 other words, that -- your scenario, I don't think it
13 matters whether you're the district attorney or a Board
14 of Supervisors or any other public official.

15 COMMISSIONER STUDLEY: Okay.

16 COMMISSIONER HUR: I mean, it's -- but I mean, I
17 guess you're right. I mean, for me to be consistent in
18 my view, I would have to find that that is not official
19 misconduct in the performance of your duties. And
20 what --

21 COMMISSIONER STUDLEY: Any of your duties.

22 COMMISSIONER HUR: Right. And so -- but I can also
23 make up a hypothetical that, you know, pushes the other
24 way. Is private -- if you're in a bar and you're
25 intoxicated in public, is that official misconduct?

1 Certainly if you're in your office and you're
2 intoxicated repeatedly, I think that, to me, is clear
3 that that could constitute official misconduct. But is
4 it below the standard of decency and good faith and
5 right action that one could deem to be publicly
6 intoxicated in a bar? Is that what we expect of our law
7 enforcement officials?

8 COMMISSIONER STUDLEY: I don't want to be flip and
9 say "not in San Francisco."

10 It doesn't -- no, but I'm trying to figure out why.
11 So what we're trying to do is get closer and closer --

12 COMMISSIONER HUR: Right.

13 COMMISSIONER STUDLEY: -- to figure out what the
14 line is between the things that we're describing.

15 Justice Renne is pondering.

16 COMMISSIONER LIU: Chair Hur? So I think that I
17 see -- I definitely see what you mean, the
18 interpretation that you're giving it in relation to the
19 duties of the office.

20 I read the second provision, "conduct that falls
21 below the standard of decency," to relate to the office,
22 to relate to the office of sheriff, but not necessarily
23 to mean that it has to happen while carrying out the
24 duties of sheriff. I think there still has to be a
25 nexus and a relationship to the office. I don't read it

1 as restricting it to while carrying out the duties of
2 the office. So I think maybe that's where --

3 COMMISSIONER HUR: I think you're right.

4 COMMISSIONER LIU: -- we differ on the
5 interpretation.

6 COMMISSIONER HUR: I think you're right.

7 And my interpretation is a little bit broader than
8 that. I would say it's -- "in relation to the duties"
9 means while you're performing your duties or purporting
10 to perform your duties, sort of acting under color of
11 law. If, for example, the sheriff had in fact used his
12 authority as sheriff to dissuade a witness, even though
13 he wasn't the sheriff at the time and wasn't in office
14 or at the office when he was doing it, I still think
15 that would sustain a charge.

16 What I don't -- what I am worried about is a
17 relationship that is so general that what we're talking
18 about is the effect it has on his ability to do the job
19 going forward. I do not think that's what the voters
20 had in mind when they wanted to remove someone for
21 official misconduct.

22 COMMISSIONER LIU: And I agree with that, so I'll
23 clarify.

24 That is not what I intended. I wasn't saying that
25 it's -- we have to find whether or not he would be

1 effective or ineffective as a sheriff going forward,
2 just that there would be -- for instance, here, applying
3 the facts here, whether being convicted of the crime of
4 false imprisonment, being convicted of a
5 domestic-violence crime falls below the standard of
6 decency that we expect of a sheriff, the office of
7 sheriff, not that -- necessarily that he would be
8 ineffective going forward in carrying out the duties of
9 a sheriff, but just simply taking this prong that, as
10 Commissioner Renne pointed out, was not dealt with in
11 the *Mazzola* case, does that prong -- you know, would
12 that -- would that meet the facts here to sustain the
13 charge?

14 COMMISSIONER HUR: Mm-hmm. And while I can agree
15 with the point about *Mazzola* if we're talking about
16 Option 1, and in light of the dearth of case law that we
17 have at our disposal, I think that if we're following
18 Option 2, *Mazzola* pretty clearly talks about this
19 definition of unlawful behavior by a public officer in
20 relation to the duties of his office. It's the same
21 language.

22 And *Mazzola* then goes on to say that the acts --
23 they must be committed while in office, there must -- it
24 requires -- official misconduct requires a direct
25 relationship of the alleged wrongdoing to the office

1 held, and explains why Mazzola's was not because he
2 wasn't performing his duties. So that's I guess that's
3 where I get hung up is how to reconcile those.

4 COMMISSIONER LIU: Right. And I think I'm just
5 reading *Mazzola* as pertaining to the first prong, and
6 that makes sense to me that that's a more narrow and
7 restrictive view, but not addressing the second prong,
8 which I think Commissioner Renne pointed out was the gap
9 that the voters decided to fill because it was not
10 addressed prior to --

11 COMMISSIONER HUR: But if we're going to say the
12 second prong has to relate back to this
13 in-relation-to-duties portion, then I don't see how the
14 second prong, if it has to relate to the duties, should
15 be interpreted any differently than in *Mazzola*. I mean,
16 we're still talking about the same -- the same language.
17 But maybe I'm missing what you're --

18 COMMISSIONER RENNE: Why have the second sentence
19 if it doesn't mean something other than what *Mazzola* was
20 talking about?

21 COMMISSIONER HUR: What I'm saying is that I think
22 *Mazzola* is explaining what "in relation to the duties"
23 means.

24 Now, "conduct that falls below the standard of
25 decency" could be broader than, for example, a refusal

1 to perform a duty enjoined by law, but they still both
2 have to relate to the duties. So I'm only relying on
3 *Mazzola* to the extent that it helps me understand what
4 kind of nexus is required between the conduct and the
5 relationship to the duties of office. I agree with both
6 of you that 2 is broader, that the decency standard is
7 broader than, for example, the failure-to-act standard.

8 Can we -- again, I'm just trying to figure out ways
9 to -- for us to move the ball forward. Are we in
10 agreement that there is this distinction between
11 personal misconduct and official misconduct?

12 COMMISSIONER LIU: I'm sorry. How do you mean?

13 COMMISSIONER HUR: Is there a difference? Can
14 you -- can a sheriff engage in misconduct that is not
15 official? Wrongful behavior that is not official
16 misconduct?

17 COMMISSIONER STUDLEY: Yes.

18 COMMISSIONER LIU: Yes.

19 COMMISSIONER HUR: What would be an example of such
20 a thing?

21 COMMISSIONER STUDLEY: I promise my husband I will
22 be home this time by 7:00 o'clock. I am not. That is
23 personal misconduct. I have broken a promise to a
24 family member. I don't think it's actionable at work.

25 Just to get the ball started.

1 COMMISSIONER LIU: You mean conduct that is
2 unlawful that would not constitute official misconduct?
3 Is that what you mean?

4 COMMISSIONER HUR: Well, what is conduct that would
5 fall below the standard of decency that would not relate
6 to the duties of sheriff or what is -- and then perhaps
7 Commissioner Studley's example in a good one.

8 COMMISSIONER STUDLEY: Breaking a promise to a
9 friend or family member. It's not unlawful, so if you
10 want unlawful ones, we have to search further.

11 COMMISSIONER LIU: Perhaps just conduct that does
12 not end up being unlawful if there's no criminal
13 conviction at issue, but it's something that was
14 tasteless.

15 COMMISSIONER HUR: Mm-hmm. So --

16 COMMISSIONER STUDLEY: There are all sorts of
17 speech acts that might not be appropriate or tasteful or
18 respectful that are not -- that are wrongful behavior
19 but not official misconduct.

20 COMMISSIONER HUR: So then what is the principle
21 you use to draw the line?

22 COMMISSIONER LIU: Well, to be honest, I don't -- I
23 don't think we need to set a bright-line rule,
24 necessarily, unless you're uncomfortable with the facts
25 as they are and you need to set a bright-line rule. I

1 just think we need to figure out whether the facts here
2 rise to that level. I'm not sure we need to set just a
3 bright-line rule for any time this comes up.

4 COMMISSIONER HUR: I would agree with that. I just
5 ask because I'm trying to get comfortable with this idea
6 that there -- what I like about bright lines is that
7 it's easy for the next people -- the next person to
8 follow, and I think in a vacuum, bright lines are better
9 than not-bright lines.

10 COMMISSIONER STUDLEY: It's hard to find a
11 bright --

12 Go ahead.

13 COMMISSIONER HUR: But I understand that that's
14 not -- our task is not to sort of create a -- you're
15 right. We could -- we probably could decide without
16 establishing a bright-line rule, but I'm just trying to
17 get comfortable with not having bright-line rule and
18 where you would -- how you would decide similar issues
19 if we went with a more vague rule.

20 COMMISSIONER STUDLEY: I was just going to say it's
21 hard to draw a line with only one dot. And part of our
22 problem is we have just this one matter, and we -- we
23 don't know whether we're worried about a slippery slope
24 or a floodgate problem if we don't provide enough
25 guidance or if we do something that's hard for

1 subsequent -- this or subsequent mayors to interpret.

2 But it's asking a lot to try and intuit a line and
3 a formula for something that happens so rarely. So we
4 shouldn't do it willy-nilly. We should do it in a -- as
5 coherently as we know how. But I'm with Commissioner
6 Liu that we may be overburdening an already complex
7 process by trying to imagine all the other possibilities
8 when there's no population to reflect on.

9 COMMISSIONER HAYON: Well, I have a question. The
10 last time this even came up, I guess, was with
11 Supervisor Jew, although it didn't actually come to, you
12 know, a hearing, and it was an actual criminal
13 misconduct. And then prior to that, *Mazzola* was the
14 only previous case; is that correct?

15 COMMISSIONER HUR: I think there was --

16 COMMISSIONER HAYON: That we know of?

17 COMMISSIONER HUR: Mr. Waggoner said there was one
18 in 1932.

19 COMMISSIONER HAYON: Okay. Well, *Mazzola's* been
20 since then.

21 COMMISSIONER HUR: Right.

22 COMMISSIONER HAYON: So I guess what I was trying
23 to say earlier in terms of the fairness issue, I mean,
24 so you have this description or this definition of
25 "official misconduct" on the books or in the charter,

1 but the fact is it isn't used very often. It's used
2 subjectively or even arbitrarily, dare I say?

3 So I mean, it's not a matter of law that because
4 someone in elective office misbehaves in some way that
5 they will automatically be charged with official
6 misconduct and then go through some kind of a process,
7 be it something before the ethics committee or even
8 criminal. And if it's criminal, then that's a whole
9 different matter.

10 So I guess your concern is you don't want this to
11 be -- the next time this comes up, you want it to be
12 clearer and not as murky as what we've had to deal with.

13 COMMISSIONER HUR: I think it's --

14 COMMISSIONER HAYON: But there's a lot of personal
15 misconduct that goes on that falls below the standard of
16 decency. Some of it has been already referred to in
17 this room. But, you know, no one did anything about it
18 or nobody said anything or brought it up.

19 So I don't know what bearing that has, exactly, on
20 how we should decide this definition, but it seems to me
21 that it still needs to be as broad as possible because
22 that's the only way that it can -- it's going to be
23 used, if -- if I understand that.

24 COMMISSIONER HUR: But if it's as broad as
25 possible, then you -- I think you put the mayor in a

1 tough spot if it's too broad, because then every time
2 the mayor uses it, he's going to be accused of using it
3 for political purposes. Because it's so vague and
4 broad, it's going to be -- it's always to be going to be
5 subject to that challenge.

6 And he's always -- he may always feel like he has
7 to bring it up because he wants -- he doesn't want to be
8 looked at as, you know, letting official misconduct go.
9 Or, on the flip side, that the defendant is always going
10 to say, "Well, look at all these people who do all sorts
11 of bad things. Why did you choose my bad act?"

12 COMMISSIONER HAYON: Right. But obviously, it
13 doesn't come up very often.

14 COMMISSIONER HUR: But it may come up a lot more if
15 we don't create a bright line or interpret it in a way
16 that can be easily understood. And, you know, I agree,
17 we don't have to come up with a bright-line rule, but I
18 think we owe it to the public to really try our best to
19 come up with an interpretation that is clear and can be
20 followed, even if it's not perfectly bright-line.

21 COMMISSIONER HAYON: Just to say parenthetically --
22 and I don't know if this is appropriate or not -- but
23 often, when there is a case of misconduct, and usually
24 it's personal misconduct in the political arena across
25 the country, usually those individuals on their own

1 resign without having to force any kind of public, you
2 know, process such as we've had to go through.

3 So because there -- we know of many, many, very,
4 very well-known cases of misconduct, but those
5 individuals at least resigned in a timely manner.

6 COMMISSIONER HUR: That is true.

7 COMMISSIONER STUDLEY: Or took more affirmative
8 steps to mitigate or demonstrate that they could carry
9 out the responsibilities or cooperate in other ways
10 reflecting the seriousness of the problem.

11 COMMISSIONER LIU: Well, Chair Hur, I'm not
12 necessarily advocating this as the rule to adopt your
13 quest for a bright-line rule, but one fact that was
14 compelling to me that I think differentiates from the
15 examples that the public gave of why other types of
16 personal misconduct didn't amount to charges and rise to
17 this level is the fact that this resulted in a criminal
18 conviction.

19 And when we took in the evidence to look at the
20 facts, there were a lot of disturbing facts that went
21 along with that criminal conviction, and so that's what
22 I find compelling about this that perhaps differentiates
23 when, you know, members of the public talked about
24 officials having affairs or so on and so forth. That's
25 the distinction that I see.

1 COMMISSIONER HUR: So that any -- any criminal
2 conviction would inherently be relating to the duties of
3 the office and fall below the standard of decency?

4 COMMISSIONER LIU: Well, I think there would still
5 have to be an inquiry about what office that was and
6 what the duties were and what relationship that office
7 might have to the crime, but I'm not saying it's
8 automatic, necessarily. I just think it's something --
9 it's a factor to definitely be considered.

10 COMMISSIONER HUR: I think that's interesting.
11 What do people think about taking a short break and
12 then maybe reconvening and sharing our views on the
13 ultimate issue?

14 Okay. Let's take ten minutes.

15 (Recess taken from 5:10 p.m. to 5:20 p.m.)

16 COMMISSIONER HUR: Okay. We are back in session.

17 Before the break, we had been discussing our views
18 on the legal application of the facts in this case.
19 We've had, I think, a robust discussion.

20 I think at this point it may be useful to take a
21 straw poll of how various commissioners would apply the
22 law to the facts in this case assuming Option 2, and
23 then perhaps we can address Option 1 after that.

24 Yes. So just to be clear, Option 2 --

25 You know, actually, do the parties have the --

1 Or Ms. Ng, you have Option 1 and Option 2 there,
2 don't you? Can you put it on the overhead?

3 MR. EMBLIDGE: Two?

4 COMMISSIONER HUR: Option 2, please.

5 Thank you, Mr. Emblidge. Maybe we can make that a
6 little bigger.

7 COMMISSIONER STUDLEY: He's trying.

8 COMMISSIONER HUR: Mr. Keith, didn't you
9 effectively use this earlier today? Can you help out?

10 MR. KEITH: All right. Unless somebody stands here
11 and keeps doing that --

12 COMMISSIONER HUR: Okay. Well, I'm not sure
13 anybody can read that, but the --

14 COMMISSIONER RENNE: Maybe somebody could read it
15 out loud so that they understand what the language is.

16 COMMISSIONER HUR: Sure. The way we -- I read
17 Option 2 is "OFFICIAL MISCONDUCT. Official misconduct
18 means any wrongful behavior by a public officer in
19 relation to the duties of his or her office, willful in
20 its character, including: (1) any failure, refusal or
21 neglect of an officer to perform any duty enjoined on
22 him or her by law, or (2) conduct that falls below the
23 standard of decency, good faith and right action
24 impliedly required of all public officers and including
25 any violation of a specific conflict of interest or

1 governmental ethics law."

2 COMMISSIONER RENNE: That's Option 2.

3 COMMISSIONER HUR: That's Option 2. That's Option
4 2.

5 So if my fellow commissioners will indulge me, I'll
6 sort of summarize my view. I think you understand it,
7 but perhaps I can give one last shot at explaining it.

8 I think this charter provision was meant to be
9 narrow. I think it provides the mayor with an
10 extraordinary tool that can be very useful and very
11 consistent with how the public intended it to be used.
12 Given the -- but given the force of the tool, I think
13 the people wanted it to be interpreted narrowly, and I
14 think to me, the -- the best way to interpret this
15 provision is to have as clear a line as we can as to
16 what it means to relate to the duties of his or her
17 office.

18 And while I appreciate the suggestions that perhaps
19 this could be limited to unlawful conduct and thereby
20 create some kind of line or that we could import rules
21 that are used in the employment context, I think the
22 only principled way to limit this provision is to have a
23 direct nexus between the wrongful behavior and the
24 relationship to the duties. I don't think the provision
25 can be fairly limited to unlawful conduct, given the

1 purposeful word that was used, "wrongful" rather than
2 "unlawful," and I don't think that it can be read to
3 import multiple standards when it refers to only one.

4 The misconduct in this action -- in this particular
5 case, I think was egregious. For all those
6 domestic-violence advocates who came here and spoke
7 today, I appreciate your attendance, and I don't want
8 you to interpret what I'm saying to suggest that
9 domestic violence is a private matter or not a very
10 serious matter. But "private" and "public" does not
11 mean the same as "personal" and does not mean the same
12 thing as "official." And I firmly believe that the
13 people intended official misconduct to be something
14 limited because of the concern that it could be used in
15 the political process.

16 I also understand that the evidence likely showed
17 that the sheriff is going to have a hard time performing
18 his duties going forward. And yes, a sheriff who
19 commits an act of violence, I think, in my mind does
20 fall below the standard of decency that I would expect
21 of a public official. But again, I don't think it's our
22 job to determine what his level of efficacy is going to
23 be going forward, and I would implore my fellow
24 commissioners to take a narrow and principled view of
25 this clause that will enable those who use it going

1 forward to apply it in a consistent way.

2 You know, there's a reason why we've only gone
3 through this once. And I do have concern that a broad
4 reading of the statute is going to lead -- could
5 potentially lead to hearings like this that are
6 potentially used for improper purposes.

7 I welcome the views of my fellow commissioners.

8 COMMISSIONER LIU: Well, I do agree that there must
9 be some relationship to the office, that the wrongful
10 behavior has to have some relationship to the office,
11 but I do believe that the intent of the voters was to
12 add a clause that was not there at the time of the
13 *Mazzola* case because they knew, presumably, what the law
14 was at the time and they chose to add a second clause.

15 So I would read the clause in this very similar
16 vein, also in a narrow vein, as relating to the office,
17 but I would read that second clause as "conduct that
18 falls before the standard of decency, good faith and
19 right action impliedly required of all public officers"
20 and, in that vein, that it be connected to the office of
21 the sheriff.

22 So I would read it as, as applied to this case,
23 "conduct that falls below the standard of decency, good
24 faith and right action impliedly required of the
25 sheriff" and that's how I would interpret that

1 provision.

2 COMMISSIONER HUR: And would you find that official
3 misconduct occurred in this case?

4 COMMISSIONER LIU: Yes, as to what's alleged in
5 counts One and Four as to the -- One and Four.

6 COMMISSIONER HUR: Physical.

7 COMMISSIONER LIU: Right, the physical conduct,
8 basically.

9 COMMISSIONER RENNE: Well, I've expressed my view
10 as to what I think that second provision provides. And
11 I think the voters would be shocked if we were to say a
12 public official who pleaded guilty to false imprisonment
13 was not -- had not engaged in official misconduct; that
14 is, they would say clearly a public official who has
15 pleaded guilty, particularly given the circumstances of
16 this case, that that conduct clearly falls below
17 anybody's standard of decency, good faith and right
18 action. I believe that's what the overwhelming majority
19 of voters would say.

20 Now, that doesn't address the second part that we
21 talked about, but I think for us to say that a public
22 official who's pleaded guilty has not committed an act
23 of official misconduct because it wasn't directly in
24 performance of his duties, but it took place in a
25 domestic setting, so I -- that I clearly would vote to

1 recommend that we find that there was a violation, that
2 there was a violation of the section of official
3 misconduct.

4 COMMISSIONER HUR: Commissioner Studley?

5 COMMISSIONER STUDLEY: I think your points are very
6 well-taken and the potential abuse is real.

7 I look, though, at the way the voters developed and
8 amended this and think that they did not mean a very --
9 did not mean to create a very specialized and narrow
10 tool. I look, for example, at the fact that it says
11 "any wrongful behavior" when there were lots of other
12 words that could have been used that would talk about
13 degree of wrongfulness; and again, "that falls below the
14 standard of decency" when there are ways to have said
15 "falls well below" or "egregious" or some other way of
16 making those tests tougher.

17 And so I take those as saying something about the
18 voters' expectation that this was -- that we were
19 setting a high bar and that they wanted to create an
20 effective tool and, I think, balance -- take care of
21 risks that you were describing by creating a series of
22 protections, and that's where this can't be effectuated
23 by the act of a single officer.

24 It's not just the mayor acting alone. There is
25 this three-step process that I think is important to --

1 as a series of checks and balances and different roles
2 and different kinds of expertise.

3 There is no doubt -- and the public has made this
4 point many times -- there is a significant investment in
5 time, in attention, in disruption, in risk in doing this
6 instead of something else for a number of people that is
7 a high public cost of trying to maintain the standard
8 that I think is set by the public.

9 We may get more efficient at it if it comes up
10 again. The experience may let us get more quickly to
11 the resolution. I think there is also a lesson in this
12 that a mayor would act very carefully in using this tool
13 because there are extralegal considerations -- public
14 reaction, press considerations -- that would also
15 militate against overuse or at least suggest caution in
16 overuse.

17 I'll cut to the chase. I do see that for me, I
18 would find official misconduct under Option 2 because I
19 think that there is sufficient relationship between the
20 standard and the duties of the office.

21 I may be reading *Mazzola* a little bit differently,
22 but it's partly the same way Commissioner Liu does, that
23 part two -- when I said that the law is different than
24 it was, it's the addition of part two must mean
25 something or the voters would not have revised it to add

1 it later. So there you are.

2 COMMISSIONER HUR: Commissioner Hayon?

3 COMMISSIONER HAYON: Am I the only one left?

4 Yeah, I'm willing to -- to support Option 2 and add
5 a somewhat more narrow definition for the reasons that
6 you have advocated. And I appreciate all of the thought
7 and effort that you put into the thinking behind all of
8 these options, Commissioner Hur. I mean, really, it's
9 a -- it's a formidable challenge, and you have been more
10 than up to the task, and I thank you for that,
11 especially being -- you know, as a layperson, some of
12 this can get a little murky for me.

13 But with this definition, I certainly do see that
14 there is a relationship to the duties of this office of
15 sheriff and also that it is behavior that falls below, I
16 think, the common standard of decency. Domestic
17 violence is something that we take very, very seriously,
18 and just because it wasn't, you know, the most extreme
19 form doesn't mean that it isn't domestic violence.

20 And the sheriff is the head of a law enforcement
21 agency, and I don't think the sheriff should be an
22 example of reformative justice. I think the sheriff
23 should be an example of someone who follows the letter
24 of the law and is someone that we can all emulate. So
25 therefore, yes, I would certainly feel that this has

1 been violated.

2 COMMISSIONER HUR: Okay. I think probably the -- I
3 appreciate the views of my fellow commissioners. I
4 appreciate also that I am clearly in the minority here,
5 but -- I mean, I think they're very informed and wise
6 views.

7 I will say one thing in response to Commissioner
8 Studley. You're right. The language of this thing is
9 all over the place. It could be interpreted as the
10 people wanting to be broad. One of the reasons, though,
11 that I think the people didn't want to be so broad is
12 because the power it gives the mayor to suspend an
13 elected official without pay while this entire process
14 goes on, I think, is pretty extraordinary.

15 And we may become more efficient going forward, but
16 it's still going to be disruptive. And I just -- I want
17 to protect this mayor, future mayors, and elected
18 officials from a provision that I am concerned is going
19 to be too vague to be applied. But I think -- you know,
20 I think we've pretty much setted the -- whether or not
21 official misconduct occurred.

22 I think the next thing we should discuss is what
23 our recommendation should be and whether the
24 recommendation should include a request that the sheriff
25 be removed from office or not.

1 Mr. Emblidge -- I shouldn't -- I'm going to put you
2 on the spot here. Is that within our purview, to make a
3 recommendation of official misconduct and also make a
4 recommendation as to whether removal is appropriate or
5 not?

6 MR. EMBLIDGE: The charter says that the Ethics
7 Commission should make a recommendation as to whether
8 the charges should be sustained.

9 I think that's probably open to interpretation as
10 to whether -- whether, as Commissioner Renne has put it,
11 that there's two elements to that, whether there's a
12 finding of official misconduct and whether that could
13 result in removal from office, although a finding of
14 official misconduct, the charter seems to presume would
15 result in removal from office.

16 So I -- I guess I'm being a lawyer and am going to
17 tell you you can go either way, that you could just --
18 you certainly would be within the charter to make simply
19 a recommendation that the charges be sustained and leave
20 it up to the Board of Supervisors to decide whether to
21 agree with you and, if so, what the penalty is. Or if
22 you want to make a recommendation as to the penalty as
23 well, I think you're within your rights to do so.

24 COMMISSIONER HUR: Commissioner Studley?

25 COMMISSIONER STUDLEY: The page that we were having

1 trouble seeing goes on to say that "When any City law
2 provides that a violation of the law constitutes or is
3 deemed official misconduct, the conduct is covered by
4 this definition and may subject the person to discipline
5 and/or removal from office."

6 That addresses a very particular circumstance.
7 That "when. . . a violation of law" includes within it a
8 determination that if this ever happens, this would be
9 official misconduct. As to those, it says "discipline
10 and/or removal from office," and I wonder whether
11 there's any -- is that the only reference to a range of
12 different results? Or -- and even if it is, might we
13 import it to say that removal from office or suspension
14 without -- you know, up till now, suspension without
15 pay, if I recall, is not mandated. The mayor could have
16 suspended with pay.

17 So we have -- does this give us any either
18 authority or just a reminder that if in those
19 circumstances there's a range -- should we consider that
20 we could recommend as to a range if we find official
21 misconduct apart from this mechanism where it is
22 inherent within the law expressing the violation?

23 MR. EMBLIDGE: I guess I would read that section,
24 that sentence, as applying to a specific violation of
25 the law that provides that a violation of that law

1 equals official misconduct.

2 The section that gives the mayor the power to do
3 what he did in this case gives him the power to suspend
4 and remove, not necessarily to suspend for a limited
5 period of time or to do some lesser -- impose some
6 lesser consequences than removal.

7 There is another section in 15.105 that provides
8 for automatic disqualification from office, but I'm not
9 sure that really informs you here.

10 COMMISSIONER LIU: Well, I throw this out just for
11 consideration here. In the amended charges, the charges
12 are that he be suspended based on engaging in official
13 misconduct. And then in the prayer of relief, the
14 charges ask that the Board of Supervisors -- upon the
15 vote of the Board of Supervisors sustaining the charges
16 that the sheriff be removed from office.

17 So I'm not sure that even the charges contemplate
18 that we determine what the appropriate penalty might be;
19 that that's for the board to decide.

20 COMMISSIONER HUR: And it's all for the board to
21 decide.

22 COMMISSIONER LIU: Well, correct.

23 COMMISSIONER HUR: It's all for the board to
24 decide.

25 COMMISSIONER LIU: Correct.

1 COMMISSIONER HUR: I almost read that as suggesting
2 that we should make a recommendation as to removal.

3 I mean, if anything, they have to sustain seems
4 like should be subject -- it should be something we
5 recommend on, although I think it could be read either
6 way.

7 MR. EMBLIDGE: If I just may, it does say that if
8 the board sustains the charges, the officer shall be
9 removed from office.

10 COMMISSIONER HUR: Ah!

11 MR. EMBLIDGE: So I -- perhaps we're just parsing
12 words here. It may be theoretical, that if you think
13 there is a realm of official misconduct that you might
14 find that doesn't justify removal from office, that
15 probably you should also say you're not sustaining the
16 charges because recommending sustaining the charges
17 seems to mean you're recommending removal from office.

18 COMMISSIONER HUR: So you could -- let me see. So
19 you could -- you could --

20 Are you saying that we could find official
21 misconduct and recommend that the charges not be
22 sustained?

23 MR. EMBLIDGE: Before tonight, I hadn't thought of
24 it as a two-step inquiry. Before tonight, I assumed if
25 you found official misconduct, that would be the

1 recommendation; you'd pass that on to the board, and the
2 board would then decide whether to sustain the charges.

3 The charter -- the charter says that if the board
4 sustains the charges, the suspended officer shall be
5 removed from office. So I'm trying to square that
6 language with the two-step inquiry you're talking about,
7 because I'm not -- I'm not sure how that fits together.
8 I feel that we're trying to pound a bit of a round -- a
9 square peg into a round hole.

10 COMMISSIONER HUR: Mr. St. Croix?

11 MR. ST. CROIX: Commissioners, I -- with all due
12 respect, I think you're overcomplicating your
13 requirement here.

14 It says that you make a recommendation to the board
15 of whether the charges should be sustained. That's all
16 you need to do. "We recommend that they be sustained"
17 or "We recommend that they be overturned." I think it's
18 that simple. You don't have to --

19 COMMISSIONER STUDLEY: But the charges were a
20 package. I under- -- I appreciate that.

21 There were a package of charges. There was a
22 charging document with a number of provisions that the
23 mayor thought supported suspension without pay.

24 We have found one out of a half-dozen or so of
25 those, so we've already made it more complicated in the

1 sense of saying instead of finding all six -- and if
2 that's sustaining the charges, then we didn't. We found
3 that five or so, some of them quite serious, were not --
4 did not rise -- we did not even find facts for, let
5 alone official misconduct.

6 So we've done something different than what the
7 mayor sent us already. And after having done all this,
8 I -- I at least would prefer -- or see what the other
9 commissioners would like to do -- would prefer to say
10 something to the supervisors about the actions they
11 might consider than -- than simply say, "We found one;
12 you have only -- you, the supervisors, only have one
13 choice," because I think at the very least there was a
14 big difference between what came to us and what is going
15 forward from us.

16 COMMISSIONER LIU: So are you saying then maybe we
17 should just specify what our -- the recommendation that
18 charges be sustained as to certain counts only or a
19 certain count?

20 COMMISSIONER STUDLEY: Mm-hmm. Right. And then
21 what meaning we think that might have -- and I have some
22 thoughts on that that I'll save -- if people think we
23 should do more than just pass it forward.

24 COMMISSIONER HUR: I mean, I'm in favor of that.
25 I'm just trying in my mind to square it with the

1 automatic removal if there's a finding of official
2 misconduct. So maybe you can explain what you had in
3 mind and we can --

4 COMMISSIONER STUDLEY: Well, give me a minute to
5 think about it.

6 Well, one is that -- I guess I'm -- one strand is
7 the automatic removal if the supervisors agreed with us.
8 They first have to reach that or fail to act within 30
9 days, and then things happen.

10 But there were members of the public who said, and
11 I found this -- it got me thinking in a variety of
12 additional ways when they said it's unfortunate that
13 this has come this far. Commissioner Hayon said
14 something similar. Why don't we see more situations
15 like that here or elsewhere?

16 Because people take action. They either resolve
17 things with their supervisor or they resign or somebody
18 works out something to protect the interest that's at
19 stake. And we did not -- we, I think correctly, didn't
20 think that we had the ability to try to negotiate a
21 solution, but the supervisors might feel that they
22 could.

23 If they could -- I'm torn here. I'm balancing
24 several different things, and I do think there was under
25 these terms official misconduct. But I -- I think that

1 the domestic-violence issues raised here were serious
2 and responsibilities of the sheriff for domestic
3 violence are important.

4 At the same time, so is the voters' decision to
5 choose somebody for an office. The struggle is they
6 then said, "Once we vote, we have only this very extreme
7 measure, the recall provision, to allow us to go back
8 and say, 'We have new information since the election and
9 we want to do something different.'"

10 They created another pathway for a particular kind
11 of reason to recall that they wanted to have in place,
12 and I'm just wondering whether it's worth reminding the
13 supervisors -- and maybe by just talking about it, we
14 remind them -- that they may have alternatives if we
15 think that they did, or if we think that one charge is
16 different from the whole set of charging provisions
17 here.

18 So I am trying to work this through. I'm not
19 positive.

20 COMMISSIONER HUR: Mm-hmm. I mean --

21 COMMISSIONER STUDLEY: I don't have a fixed picture
22 of what I would suggest.

23 COMMISSIONER HUR: Commissioner Hayon?

24 COMMISSIONER HAYON: Well, I would just say we need
25 to send a written recommendation to the board. And then

1 when they have their proceedings, my understanding is
2 that the Ethics Commission will have an opportunity to
3 make a presentation, however short, and perhaps that's
4 the time to refer to some of these other issues.

5 Because otherwise, I agree with Mr. St. Croix. I
6 mean, why -- I don't think that we should complicate it
7 further. I think we should make a simple
8 recommendation.

9 And from what you said the charter said, if they
10 find -- if they all vote in agreement with a
11 recommendation that the individual is guilty, then
12 automatically, that person is removed from office; is
13 that correct?

14 MR. EMBLIDGE: Yes.

15 COMMISSIONER HAYON: That's how you read the
16 charter?

17 MR. EMBLIDGE: It says, "If, after reviewing the
18 complete record, the charges are sustained by not less
19 than a three-fourths vote of all members of the Board of
20 Supervisors, the suspended officer shall be removed from
21 office; if not so sustained. . . , then the suspended
22 officer shall be . . . reinstated."

23 COMMISSIONER HAYON: I mean, that seems pretty
24 straightforward, unlike some other parts of the charter.

25 COMMISSIONER HUR: When Commissioner Renne raised

1 this two-step inquiry idea, I liked it in part because I
2 think one of the -- one of the difficulties here is in
3 some ways the sheriff was the guinea pig.

4 And if the charter provision was so difficult for
5 us to parse, then in some ways, it does seem -- it gives
6 me some pause for him to be removed based on a provision
7 that we took quite a while and had a hard time in
8 deciding exactly what it meant.

9 But Commissioner Hayon, I'm kind of -- I think
10 you're right. I mean, based on what Mr. Emblidge just
11 read, I'm not sure we have any leeway to do anything
12 other than sustain or not sustain the charges. I don't
13 know.

14 Commissioner Renne, did you have any further
15 thoughts on the matter?

16 COMMISSIONER RENNE: Well, we could address the
17 question of whether or not we think that the mayor
18 exercised his discretion in filing the charges and in
19 proceeding in an unreasonable manner. Now, whether that
20 would assist the board at all, I don't know, because as
21 Mr. Emblidge has pointed out, it's either the charge of
22 official misconduct is sustained by us on our
23 recommendation or it's not.

24 COMMISSIONER STUDLEY: But if four of us are
25 inclined to believe that there was official misconduct,

1 doesn't that validate the mayor's action on at least
2 that one provision, that there was a basis, that he had
3 found the same result that four of us would also see,
4 that there was an official misconduct element?

5 I've always thought -- as you've been talking about
6 the two-part, I've always thought that this was a
7 going-forward issue, that it -- once the mayor put it in
8 our jurisdiction, put this in our lap, that it didn't
9 matter what or why he did it. For this process, that
10 becomes the voters' issue. That we should be looking at
11 the merits of an issue and looking forward at the
12 consequences and not questioning how it got here.

13 I thought Commissioner Hur was very -- you know,
14 put it in a very crisp way the last time we talked about
15 this part of it.

16 But there is one piece that people aren't reading,
17 by the way, just for the completeness and those who are
18 not burdened with the 15 inches of documents. There are
19 two elements: The commission transmits the record to
20 the Board of Supervisors with a recommendation as to
21 whether the charges should be sustained.

22 Mr. Emblidge read this: ". . . , after reviewing
23 the complete record, the charges are sustained by not
24 less than a three-fourths vote of all members of the
25 Board of Supervisors, the suspended officer shall be

1 removed from office; if not so sustained, or if not
2 acted on by the Board of Supervisors within 30 days
3 after the receipt of the record from the Ethics
4 Commission, the suspended officer shall thereby be
5 reinstated."

6 So the board has somewhat more complicated options
7 before them. After either vote by three-fourths or
8 better to sustain the charges, in which case the officer
9 is removed, but if they do not act at all for 30 days,
10 the officer's reinstated. Have I -- did I say that
11 right?

12 MR. EMBLIDGE: Yes, that's correct.

13 COMMISSIONER STUDLEY: So there is a real
14 crossroads for the supervisors.

15 COMMISSIONER HUR: Yeah. I'm not sure there's much
16 we can say. I mean, I do think we should have a written
17 opinion for the board, but I am inclined to vote, to
18 have a vote as to whether to sustain the charges, and
19 then send that recommendation to the board.

20 Let's talk about this written summary. You know, I
21 think one proposal could be that Mr. Emblidge draft a
22 summary opinion, essentially, of the bases for the vote
23 to sustain the charges. One option is for a member of
24 the majority on the commission to draft that. I
25 think -- and then subsequently, we could either simply

1 adopt it as a summary -- you know, there have been
2 summary -- we have summarized the proceedings previously
3 without having to vote on them and ratify them -- or, if
4 this document is more in the form of an opinion, then I
5 think we would probably want to come back, have a look
6 at it together in another special meeting, and then vote
7 to adopt it.

8 Do my fellow commissioners have views as to which
9 of these potential options for a written summary or
10 opinion would best suit the situation?

11 COMMISSIONER RENNE: Would it be sufficient to just
12 transmit the transcript of our discussion and our
13 determination without anything else?

14 COMMISSIONER HUR: That could certainly be done. I
15 think it makes the board's job harder because there's a
16 lot more, a lot more to read.

17 But anybody else have -- what do people think about
18 Commissioner Renne's proposal?

19 COMMISSIONER LIU: I suppose that that's what I was
20 envisioning, Commissioner Renne's proposal.

21 But as you said it, were you envisioning in terms
22 of a written summary simply how we came out on the
23 findings of fact and then the vote itself? Is that what
24 you're envisioning as a summary or --

25 COMMISSIONER HUR: Well, I think we'd want to

1 explain to the board exactly how we interpreted the
2 statute. I think if they receive this transcript, it's
3 going to be difficult for them to determine, really,
4 what the basis was. Obviously, we're deliberating in
5 public, which is a highly unusual thing if you're
6 adjudicating a matter, at least in my experience.
7 But -- so I guess I worry that your -- the nuance of the
8 arguments that have been provided will be lost if we
9 simply send them a 5,000-page transcript, 300 pages
10 today.

11 COMMISSIONER LIU: So are you then envisioning,
12 perhaps, the salient points we found from the findings
13 of fact, the specific findings of fact, how we came out
14 on that, and then what we decided on the two options?

15 COMMISSIONER HUR: I mean, I guess I'm envisioning
16 either something very summary, that says this is the
17 fact that we found -- these are the facts that we found
18 to support the charges; this is the law, how we
19 interpreted the law; this is the application of the law
20 to the facts. I think that's a possibility.

21 Another possibility is more an order that we would
22 see from a court that probably has more detail and, you
23 know, would provide perhaps even, I guess, just more
24 detail as to this decision.

25 Do the parties have views on this?

1 COMMISSIONER STUDLEY: While they think about it
2 for just a second, I -- many people have talked about
3 the passage of time. And getting to the point where the
4 supervisors can initiate their consideration, I think
5 would be just for all concerned.

6 You might want to also think about how that relates
7 to the presentation by the commission to the board which
8 we will make. Is that the opportunity to make some of
9 this clear? It may not substitute for a writing, but it
10 could complement it. And do we have any way of knowing
11 whether the supervisors would want to inquire of either
12 the representative commissioner who takes that part or
13 all of us at that point?

14 COMMISSIONER HUR: The risk of a representative or
15 even the entire commission, frankly, appearing in front
16 of the board and having a substantive discussion with
17 the board about our findings --

18 Pardon me?

19 COMMISSIONER STUDLEY: I thought -- I thought that
20 was expected. Was that not agreed on yet?

21 COMMISSIONER HUR: Mr. Emblidge, maybe you can
22 explain the board's expectation.

23 MR. EMBLIDGE: The Board of Supervisors had a
24 meeting where they discussed the procedure that they
25 intended to follow when the matter gets to them.

1 They -- it's my belief that they do expect to have
2 a presentation of up to ten minutes from the Ethics
3 Commission, and I certainly had the sense from them that
4 they expected to ask questions of the representative of
5 the Ethics Commission.

6 The difficulty that I explained to them is if there
7 is one commissioner there, for example, trying to
8 explain the process and the reasoning that went into
9 whatever recommendations you make, that person is put in
10 a difficult position trying to put into words what was
11 in the mind of his or her fellow commissioners.

12 So I think it will be a bit of a delicate task, but
13 I do think the board is expecting some presentation from
14 the commission and some explanation of how the
15 commission got from point A to point B.

16 COMMISSIONER HUR: And the reason a written
17 document may be helpful is that the risk of the
18 representative straying outside of what was actually
19 decided is less if there's a written document that
20 formalizes --

21 COMMISSIONER STUDLEY: Right. It really narrows.

22 COMMISSIONER HUR: Right. And the representative
23 could be talking more about the procedure that was
24 followed and, you know, could answer more procedural
25 rather than substantive questions.

1 Mr. Keith, Mr. Waggoner, any thoughts on this?

2 MR. KEITH: Commissioners, I think that -- in light
3 of the problems that Mr. Emblidge has discussed in terms
4 of the commission speaking as a body, I think the scope
5 of the questions at the Board of Supervisors is likely
6 to be restricted to things like basic procedural
7 matters -- who showed up for cross-examination, what
8 procedures did you follow -- and I doubt that there
9 would be much of substance.

10 On the other hand, and this really supports just
11 making a simple recommendation here, the board is
12 mandated to review the complete record, which means they
13 will be reviewing the transcript of this proceeding.
14 And I think the commissioners have discussed the
15 evidence in a way and discussed the charges in a way
16 that they're going to be viewing anyway. And I think
17 trying to reproduce in another document and to have a
18 special meeting for that would require a lot of effort
19 that may not be needed.

20 And so I think in the interests of just moving this
21 along, we'd say let's not have a separate sort of
22 opinion. Let's treat this transcript of the -- of this
23 hearing as the commission's discussion of the evidence.

24 That would be the mayor's position.

25 MR. WAGGONER: Thank you, Commissioners, and I

1 appreciate the consideration you're giving these issues.

2 I just want to make a couple of brief points on
3 this issue. The charter already says, and that's been
4 reviewed today, that there can be official misconduct
5 that does not warrant removal. A felony crime of moral
6 turpitude, which requires removal by the mayor, but then
7 also, for it to be permanent, has to go before the
8 Ethics Commission and the Ethics Commission can
9 determine whether or not that felony crime of moral
10 turpitude rises to the level that warrants permanent
11 removal or not.

12 So we already know that the charter contemplates
13 the possibility of official misconduct that does not
14 warrant permanent removal.

15 So I would also like to refer you to --

16 COMMISSIONER HUR: How do you reconcile that with
17 the provision that Mr. Emblidge read?

18 MR. WAGGONER: This is how I reconcile it, because
19 the charter says -- with all due respect, the charter
20 says that if you sustain the charges, plural, then
21 removal has to happen.

22 Well, here, you've already determined, to go to
23 Commissioner Studley's point earlier, that it appears
24 from my hearing of what your discussion that you're
25 going to reject at least some if not most of the counts.

1 So if you're rejecting some of the counts, then by the
2 clear language of the charter, you're not going to
3 sustain all of the charges. And therefore, if you're
4 not going to sustain all of the charges, then you
5 can't -- there can't be a removal. By the clear
6 language of the charter, "the charges," it doesn't give
7 you the option to pick one charge and not another one.

8 So then, if you're not prepared to accept that very
9 narrow reading of what the language is, then it seems to
10 me that Commissioner Renne's point that you can make --
11 your recommendation can be as nuanced as you would like
12 for it to be. You can recommend that three charges be
13 sustained and three be rejected; that yes, those three
14 charges are official misconduct, but it does not warrant
15 removal; or one warrants removal, but not the others; or
16 none of them warrant removal, but yes, one of them may
17 be official misconduct or wrongful conduct.

18 In other words, I would respectfully submit that
19 your recommendation can be as nuanced as your discussion
20 has been, and you've spent several hours discussing what
21 this provision means. And as I argued earlier, that
22 very ambiguity should be read in the light most
23 favorable to the sheriff.

24 And so in that regard, I believe giving the Board
25 of Supervisors more options, not less, is consistent

1 with due process, consistent with respecting the intent
2 of the charter provisions, and also with your
3 discussion.

4 Reading the charter in the most narrow way, that
5 you either have to say yes, up or down, and if it's yes,
6 then it's removal, period, that's not -- that's not
7 consistent with the overall rest of the charter
8 provision that clearly says there can be official
9 misconduct that doesn't warrant removal.

10 COMMISSIONER HUR: What is your position on the
11 written document?

12 MR. WAGGONER: I think there, again -- you know, I
13 was -- I was actually -- I appeared before the Board of
14 Supervisors.

15 We were notified by the clerk of the board a couple
16 of weeks ago that they were going to be discussing their
17 procedure, that they already had a draft procedure in
18 place, presumably that Mr. Emblidge drafted, that we got
19 very short notice of and had all of three minutes to
20 address before the board during their public-comment
21 period.

22 So there was already a draft procedure, and we
23 objected, actually, at the time. I objected --

24 COMMISSIONER HUR: My question is what is your
25 position on whether we should create a written document

1 summarizing our findings or whether we should just
2 transmit the record as is with all our, you know, views
3 on the transcript?

4 I mean, obviously, we're going to do that, too.
5 But what is your view on whether we need a written
6 summary of our findings?

7 MR. WAGGONER: I think the more information that
8 the board has to help them make a decision the better,
9 so that a written summary is certainly going to be more
10 helpful to the board than have them pore through 15-plus
11 pages -- or inches of documents. Knowing your rationale
12 and having that very clearly stated in a written
13 document, I think the board would very much appreciate,
14 and we would respectfully request that as well.

15 COMMISSIONER HUR: Okay. Thank you.

16 Commissioners? Views on the written document?

17 COMMISSIONER RENNE: Well, I -- you made what you
18 said was sort of a draft or a poll of the board, of the
19 commission, and four of us seem to agree that there was
20 a violation of the official misconduct statute.

21 But going to the charging document, I -- looking at
22 it and wondering which one of the charges is or which
23 one of the charges did we -- are we saying we're
24 sustaining? Because the way they drafted this, they
25 sort of incorporated all the paragraphs, some of which

1 included the impeding witnesses, things of that nature,
2 which we have found -- which we have found there wasn't
3 sufficient evidence.

4 So that it seems to me that we've got to have -- in
5 fairness to the sheriff and in fairness to the board, we
6 have to have some clear statement of the charge that we
7 say we are sustaining.

8 And I go through -- going through the charges, One
9 through Six, and there are a number of -- certainly,
10 counts Two and Three, we have said we didn't think
11 there were -- there was sufficient evidence.

12 And the others are -- as I say, they've sort of
13 commingled a lot of their factual statements, many of
14 which we've rejected; whereas I was suggesting that I
15 believe that the conviction and the circumstances that
16 led up to it is what is the official misconduct.

17 COMMISSIONER HUR: So is that more Count Four?

18 COMMISSIONER RENNE: Well, Count One, which they
19 call domestic violence, it looks like. Count -- Count
20 Four, except for the fact they incorporate 1 through 46
21 paragraphs, which has a lot of statements about which we
22 have said there was not sufficient foundation.

23 COMMISSIONER HUR: But when we sustain a count,
24 we're not sustaining -- I mean, we're just making a
25 finding that each of the elements --

1 COMMISSIONER RENNE: But the charge. We're
2 recommending the charges be sustained. Well, the counts
3 are their charges, aren't they?

4 COMMISSIONER HUR: Right. So -- but I mean, just
5 because a complaint incorporates by reference every
6 paragraph, that doesn't mean sort of the decision on the
7 charge has to incorporate every paragraph. I mean, you
8 and I are used to jury instructions that tell us exactly
9 what the elements are --

10 COMMISSIONER RENNE: Right.

11 COMMISSIONER HUR: -- and we can identify those
12 clearly.

13 But you raise -- I mean, you raise a good point. I
14 mean, even in Count One, I'm not sure we found that --
15 or I'm not sure we're inclined to find that he engaged
16 in domestic violence. I mean, obviously, we -- we agree
17 he committed an act of violence. I don't actually have
18 in front of me the elements of domestic violence.

19 But I mean, there certainly are portions of this
20 where even the four who agree that there's official
21 misconduct may not -- may not agree with every
22 allegation in these -- in Count One, at least.

23 So what are you suggesting, Mr. Renne?

24 COMMISSIONER RENNE: Well, I guess what I'm
25 suggesting is that the written document, if we prepare

1 one, should be a clear articulation of what the charges
2 were that we found supported, sustained the mayor's
3 action in suspending him. And --

4 COMMISSIONER HUR: In your view, what is that?
5 What -- having heard what your fellow commissioners have
6 said, what should that -- what should that document say?
7 Which of these were sustained or is there sufficient
8 evidence to sustain? One and Four? Is that parts of
9 One and Four?

10 COMMISSIONER RENNE: Yes.

11 COMMISSIONER HUR: Anything else?

12 COMMISSIONER STUDLEY: I'm pausing on One. Four is
13 a clear factual statement. But committing domestic
14 violence against his wife imports a very complicated,
15 you know, area of expert analysis, and I wonder if it
16 complicates things to add that or whether it is what we
17 really mean. We're just staring at it over here.

18 I'm not saying that it might not be. I'm just not
19 sure that we -- that I'm in a position to say that that
20 happened, whereas No. Four --

21 COMMISSIONER HUR: Right.

22 COMMISSIONER STUDLEY: -- I can.

23 COMMISSIONER HUR: And I don't think the commission
24 has to find domestic violence *per se* for it to be
25 official misconduct. I mean, in light of the rationale

1 that's been provided. So it may not be essential to the
2 recommendation in any event.

3 COMMISSIONER STUDLEY: Right. Which is not to say
4 that it doesn't exist or that it's not very real.

5 COMMISSIONER HUR: Correct.

6 COMMISSIONER STUDLEY: But it may be cleaner and
7 more useful for us to opine on what we know. And to the
8 extent that it is within -- that those things happened
9 within that context, that's beyond my ability to be
10 certain about.

11 COMMISSIONER LIU: So perhaps it's also Count Five
12 instead of Count One, because Count Five captures the
13 discussion we had about prong two, which is conduct that
14 falls below the standard of decency required of a
15 sheriff and a sheriff-elect.

16 COMMISSIONER HUR: I guess except for the reference
17 to paragraphs 19 to 31.

18 COMMISSIONER LIU: Correct.

19 COMMISSIONER HUR: Yeah, that --

20 COMMISSIONER STUDLEY: So are we saying in a sense
21 that Count Four is the basis for Count Five?

22 The wrongful behavior consisting of that crime or
23 that crime and the facts related just to that are what
24 we determined falls below the standard.

25 Is that what you were saying?

1 COMMISSIONER LIU: Yes. Thank you.

2 COMMISSIONER HUR: What this discussion has
3 suggested to me is that I think something in writing is
4 going to be helpful to the board. If we were -- so --

5 Commissioner Studley, is there something else?

6 COMMISSIONER STUDLEY: No.

7 COMMISSIONER HUR: So I think the question is what
8 form that should take.

9 I think something that is as simple as "Here are
10 the facts that we found could constitute official
11 misconduct; here's the law we applied; here's our
12 application of that law to these facts; here are the
13 charges that we think should be sustained in light of
14 our findings and why," I think is sufficient.

15 I mean, I am kind of, again, thinking out loud that
16 whatever this -- however this document comes out, I am
17 wondering whether we will need a special meeting for the
18 commission to adopt it. We have devoted a lot of time
19 to this, and I know this means more time, but given its
20 complexity, it seems hard to see us doing -- tying it up
21 without an approved, written document.

22 Now, I don't think this is going to cause,
23 actually, that much delay, because the record has to be
24 prepared. The board is in recess currently anyway. So
25 perhaps we can schedule something in early September to

1 adopt whatever findings and then send that with the rest
2 of the package to the board.

3 Commissioner Studley?

4 COMMISSIONER STUDLEY: I don't know if this is what
5 you want, but I'm out of the country from September 4th
6 to 14th -- the 2nd to 14th, 16th. We had a meeting date
7 on the 27th. I don't know if it's too late to notice
8 for that, if that would -- was a window we could do
9 this.

10 COMMISSIONER HUR: Mr. St. Croix, what do you -- do
11 you have thoughts on this?

12 MR. ST. CROIX: We could do -- we could still use
13 that meeting date on the 27th if you wanted to.

14 COMMISSIONER HUR: August 27th?

15 MR. ST. CROIX: Yeah.

16 COMMISSIONER HUR: Yeah, I'm going to be out of the
17 country on business the next two weeks.

18 MR. ST. CROIX: Well, we'll have to look for
19 another one.

20 I would recommend that you make a finding tonight
21 as a basis for that --

22 COMMISSIONER HUR: Yeah.

23 MR. ST. CROIX: -- document to be prepared. But
24 we're going to have to work out a follow-up time. The
25 alternative is you can just empower Mr. Emblidge to do

1 the drafting on behalf of the commission and trust that
2 he will put together a correct document. It's up to the
3 commissioners if you want to have a final approval or
4 not.

5 COMMISSIONER STUDLEY: Could --

6 COMMISSIONER HUR: Commissioner Studley, please.

7 COMMISSIONER STUDLEY: I'm just going to ask if we
8 could delegate this to the Chair and Mr. Emblidge.

9 MR. ST. CROIX: Certainly.

10 COMMISSIONER STUDLEY: It's a lot to ask --

11 MR. ST. CROIX: Yeah.

12 COMMISSIONER STUDLEY: -- somebody to do without
13 the commission review. And I don't need to be here if
14 we've taken a vote now. I'm happy -- I don't mind
15 missing the resolution of the document if that's not
16 necessary.

17 COMMISSIONER HUR: And I don't -- by the same
18 token, I don't need to be here either. So
19 Commissioner --

20 Or Mr. Emblidge?

21 MR. EMBLIDGE: Two points. One is if you're going
22 to delegate some drafting to me, I'm going to need the
23 transcript, so there's going to be some time before that
24 can be prepared. And then in my other life as running a
25 law firm, I've got depositions Monday, Tuesday,

1 Wednesday, and Friday of next week, so I don't think I'm
2 going to have too much time for drafting next week.

3 COMMISSIONER HUR: Okay.

4 COMMISSIONER HAYON: Well --

5 COMMISSIONER HUR: Commissioner Hayon?

6 COMMISSIONER HAYON: Well, as has been said, I
7 think tonight we need to vote on our findings so that
8 the ball can get rolling, since the Board of Supervisors
9 has to get the entire transcript and all of the records
10 anyway. And then they can schedule their hearing,
11 whenever that's going to be.

12 And then you already have, I would imagine, an idea
13 of what this document should look like in outline form.
14 Am I right? Somewhat?

15 COMMISSIONER HUR: Other than what I've spoken --

16 COMMISSIONER HAYON: You've said some things that
17 kind of outlined what it might consist of, and you could
18 give Mr. Emblidge some guidelines on that.

19 And when you have the opportunity to begin drafting
20 it, then you can proceed, if that makes sense to you.
21 And then we as a commission can approve that document
22 without delaying any proceedings at whatever meeting is
23 set up for us to do so.

24 COMMISSIONER HUR: I have no objection to that.

25 Okay. Well, we can schedule it. We don't have to

1 schedule it right now. But I do think we should prepare
2 some sort of summary document. I will work with
3 Mr. Emblidge to put it together for approval by the
4 commission at large.

5 Is there any objection to that procedure from the
6 parties?

7 MR. WAGGONER: No.

8 MR. KEITH: No.

9 COMMISSIONER HUR: Okay. Okay. So I think --
10 unless there's anything else, are we prepared to make
11 the motion for a recommendation to the board?

12 Is there a motion to sustain the charges relating
13 to the physical abuse for the reasons that we discussed
14 here today; secondly, to adopt all of the interim
15 rulings that have been made throughout these
16 proceedings; and finally, to authorize the preparation
17 of a summary document of the findings made by the
18 commission, to be subsequently ratified by the
19 commission as a whole?

20 COMMISSIONER RENNE: So move.

21 COMMISSIONER HAYON: Second.

22 COMMISSIONER HUR: All in favor?

23 COMMISSIONER STUDLEY: Aye.

24 COMMISSIONER LIU: Aye.

25 COMMISSIONER HUR: I oppose the first portion, but

1 agree with the second and third portions.

2 Okay. The motion is adopted.

3 Anything else from the parties?

4 MR. KEITH: So Commissioner, when is the next
5 meeting going to be held?

6 COMMISSIONER HUR: We need to figure it out. We'll
7 be in touch with you.

8 MR. KEITH: Okay.

9 MR. WAGGONER: I'm a little bit unclear as to --
10 So are you rejecting all of the counts, but then
11 creating a new count of official misconduct? I'm a
12 little unclear as to exactly what action the commission
13 is taking.

14 COMMISSIONER STUDLEY: You know, that's --
15 I wonder if that question suggests that our motion
16 should be in terms of Count Four or Four and Five so
17 that what we adopt tracks something that was going
18 forward.

19 COMMISSIONER HUR: I mean, the problem with that is
20 that Four and Five contain, as Mr. Renne suggested,
21 allegations that we did not --

22 COMMISSIONER STUDLEY: Allegations in the
23 paragraphs?

24 COMMISSIONER HUR: In the paragraphs, and which are
25 incorporated by reference.

1 COMMISSIONER STUDLEY: So maybe if we narrow it to
2 point 49, or sentence 49, and read that and see if we --
3 if that's what we mean, and revise 54 so that it -- so
4 that it tracks the formal basis that we have?

5 COMMISSIONER HUR: I mean, I think the motion was
6 clear enough. I mean, the whole purpose of the written
7 document is to summarize what the findings are. You
8 know, we clearly made a finding of official misconduct
9 based on the physical violence that occurred.

10 I think that suggests we also rejected a number of
11 findings, and I -- I mean, I suppose we could make it
12 more specific if the commissioners would like to, but --

13 COMMISSIONER STUDLEY: I'm just wondering, before
14 Mr. Waggoner has to say it, whether there could be some
15 criticism that the crime of falsely imprisoning is
16 different from physical violence, and while they might
17 have something in common, that we would be vulnerable to
18 not having acted on one of the charges that was brought
19 before us.

20 COMMISSIONER HUR: Okay.

21 COMMISSIONER STUDLEY: Not a criminal lawyer,
22 but --

23 COMMISSIONER HUR: We can remake the motion. Would
24 you like to remake the motion, Commissioner Studley?

25 COMMISSIONER STUDLEY: Do you want to make it?

1 COMMISSIONER RENNE: I'm not sure what the
2 amendment is that you were suggesting.

3 COMMISSIONER STUDLEY: That we -- well, tell me if
4 this is -- what I'm thinking is that when we -- when we
5 said "sustain the charge re physical abuse," by adopting
6 point 49 and 54 subject to specific references within
7 the paragraphs, that we adopt the substantive content of
8 those two as the charges that we will -- that we are --

9 COMMISSIONER HUR: You know, I --

10 COMMISSIONER STUDLEY: -- defining as official
11 misconduct. I guess maybe we're doing something
12 different, but this may help us.

13 COMMISSIONER HUR: Sure. And I obviously did not
14 vote with the majority on this, but I mean, if I were in
15 the majority, I would be concerned that that might be
16 too narrow given the breadth of the discussion that
17 ensued. And --

18 I mean, the charter only says that we have to make
19 a recommendation as to whether official misconduct
20 should be sustained or not, and I'm wondering whether
21 you're going to be limiting the authority of the
22 drafting if we limit it so specifically to two specific
23 paragraphs in the charges.

24 COMMISSIONER STUDLEY: I think it really depends on
25 what part the count, the allegations, played. And I

1 never quite understood why we had an amended charge of
2 official -- amended charges and particulars in the first
3 place, why it wasn't just we figure out what troubled us
4 and what we thought was official misconduct.

5 So I really defer to the counsel and Mr. Emblidge.
6 If -- if we have to stand on those counts, then I think
7 we should stand firmly on the ones that we're adopting;
8 otherwise, does it look like these were the counts and
9 we did something else? And if they don't converge
10 sufficiently, our process would be unhelpful to the
11 supervisors.

12 COMMISSIONER HUR: Mr. Emblidge?

13 MR. EMBLIDGE: What I'm hearing from the commission
14 is that you have voted four to one to sustain the
15 charges of official misconduct based on the sheriff's
16 conduct on December 31st and his subsequent conviction
17 as reflected in Counts Four and Counts Five of the
18 charging document.

19 If I'm correct, you might want to amend your motion
20 to incorporate that language, so that it's clear that
21 you are sustaining it both on the actions that occurred,
22 the conviction that resulted from those actions, and
23 that you believe that those are related to Counts Four
24 and Counts Five.

25 COMMISSIONER HUR: Any objection to that?

1 Okay. Would someone like to make the motion?

2 COMMISSIONER HAYON: I move that we adopt
3 Mr. Emblidge's recommendation for the charges.

4 COMMISSIONER STUDLEY: Second, unless you'd like us
5 to restate it.

6 COMMISSIONER HUR: Okay. Well, I think we also
7 need to add the adoption of the interim rulings and the
8 empowering of the written summary. Maybe I'll take a
9 shot to just tie it all together.

10 Is there a motion to sustain the charges as to the
11 conduct that occurred on December 31st, 2011, and the
12 subsequent conviction as reflected in counts Four and
13 Five of the amended charges of official misconduct;
14 second, to adopt the interim rulings of the commission
15 made throughout the course of these proceedings; and
16 third, to empower a written summary to be subsequently
17 reviewed and ratified by the commission?

18 COMMISSIONER STUDLEY: So moved.

19 COMMISSIONER RENNE: Second.

20 COMMISSIONER HUR: All in favor?

21 COMMISSIONER LIU: Aye.

22 COMMISSIONER HAYON: Aye.

23 COMMISSIONER RENNE: Aye.

24 COMMISSIONER STUDLEY: Aye.

25 COMMISSIONER HUR: Opposed? I oppose as to the

1 first part, but agree as to the second and third parts.

2 Okay. Any other objections or concerns from the
3 parties?

4 MR. WAGGONER: I would only add that I don't think
5 the charter authorizes the commission to create new
6 language of official misconduct. What the language that
7 you just adopted, at a four-to-one vote, says, "We
8 sustain official misconduct for the incident on
9 December 31st as reflected in Four and Five." It does
10 not say "We sustain Four and Five."

11 The charter says you either sustain the mayor's
12 charges or not. It does not authorize the commission to
13 draft new language or new charges that are reflected in
14 other charges. So I would just state that for the
15 record. Thank you.

16 COMMISSIONER HUR: I think it was clear enough.
17 Any dissenting view?

18 COMMISSIONER STUDLEY: No. The motion was, I
19 think, clear enough to say that we were adopting the
20 heart of counts Four and Five.

21 COMMISSIONER HUR: Okay? Thank you very much.
22 With that, the meeting is adjourned.

23 (Proceedings adjourned at 6:33 p.m.)

24 ---o0o---

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I hereby certify that the foregoing proceedings in the within-entitled cause took place at the time and place herein stated and were reported by me, MARLENE PUAOI, a Certified Shorthand Reporter and disinterested person, and were thereafter transcribed into typewriting;

And I further certify that I am not of counsel or attorney for either or any of the parties nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my signature this 26th day of August 2012.

MARLENE PUAOI, CSR, RPR
California CSR No. 7370