

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

vs.

1:17-cv-1320

PRESIDENTIAL ADVISORY COMMISSION
ON ELECTION INTEGRITY; MICHAEL PENCE,
in his official capacity as Chair of
the Presidential Advisory Commission
on Election Integrity; KRIS KOBACH,
in his official capacity as Vice
Chair of the Presidential Advisory
Commission on Election Integrity;
EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES; OFFICE OF THE
VICE PRESIDENT OF THE UNITED STATES,

Defendants.

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

JULY 7, 2017

Court Reporter:
Richard D. Ehrlich, RMR, CRR
Official Court Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3269

Proceedings reported by stenotype.

Transcript produced by computer-aided transcription.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MARC ROTENBERG
ALAN J. BUTLER
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, NW
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org
butler@epic.org

FOR THE DEFENDANTS:

ELIZABETH J. SHAPIRO
CAROL FEDERIGHI
JOSEPH E. BORSON
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
(202) 514-5302
Elizabeth.Shapiro@usdoj.gov
Carol.Federighi@usdoj.gov
Joseph.Borson@usdoj.gov

1 THE COURT: Good afternoon, everyone.

2 All right. Go ahead and call.

3 THE CLERK: Civil Case 17-1320, *Electronic*
4 *Privacy Information Center vs. Presidential*
5 *Advisory Commission On Election Integrity, et*
6 *al.*

7 Counsel, would you please come forward and
8 identify yourself for the record?

9 MR. ROTENBERG: Your Honor, good afternoon.
10 My name is Marc Rotenberg. I am counsel for the
11 Electronic Privacy Information Center. With me
12 is Alan Butler, also counsel for EPIC.

13 THE COURT: All right. Good afternoon.

14 MS. SHAPIRO: Good afternoon, Your Honor.
15 I'm Elizabeth Shapiro from the Department of
16 Justice, and with me at counsel's table is
17 Joseph Borson and Carol Federighi, also from the
18 Department of Justice.

19 THE COURT: All right. Thank you.

20 All right. I reviewed the motion for the
21 temporary restraining order, the opposition, or
22 reply, a sur-reply, and a very recently sur
23 sur-reply that I just received.

24 So I have to say that the last document
25 I've received I've looked at very quickly but

1 have not been able to look at everything, but I
2 did look at some of the exhibits, et cetera.

3 So, obviously, I will need to take a look
4 at that a little bit more. I've also reviewed
5 the pertinent case law.

6 I'm going to start by stating my overview
7 of what I consider a framework in very summary
8 forms what I would consider in informing my
9 decision when I make it. I will tell you I'm
10 not making it from the bench today. I do need
11 some information, and that's part of the reason
12 for the hearing.

13 So I'm going to start with the standing
14 arguments as I understand them in looking at the
15 case law. I'm going to start with informational
16 standing or injury and the general principles
17 that you start by looking at the statute that's
18 at issue that requires a disclosure of
19 information. It would appear from the cases
20 that there would be no informational standing if
21 the statute has a prerequisite to the disclosure
22 of the information. That has not yet happened.
23 There would be no informational injury because
24 the Government has not yet been obligated to
25 disclose the information; however, if you

1 consider the E-Government Act, which is the
2 statute at issue in this case, it requires that
3 there be a Privacy Impact Assessment and
4 disclosure of that assessment before the, in
5 this case, the election data is collected. So
6 it would appear that it could apply in this
7 particular case.

8 The Commission moved forward in collecting
9 the electronic -- the election data, rather,
10 where the statute requires an impact statement
11 regarding the collection, and it requires also a
12 disclosure of that impact statement before the
13 collection of the data.

14 So I think this case fits more into that
15 category when you look at the E-Government Act
16 itself which requires all of this before you
17 start collecting.

18 So we're talking about -- in this there's
19 been no impact statement done or disclosed prior
20 to collecting the data at issue, which the
21 E-Government Act requires, and the injury here
22 would be the nondisclosure of the impact
23 statement prior to collecting the election data.

24 In terms of organizational standing, there
25 are at least two theories at issue. One is that

1 the -- which the plaintiff argues that their
2 members are injured or will be injured if the
3 privacy impact statement is not done. It's not
4 clear to me what harm there would be to the
5 individual members, what they would suffer where
6 the Commission is collecting, according to them,
7 only publicly available information and would
8 only publish in an anonymous form. So I need
9 more information relating to the membership and
10 harm.

11 Looking at another theory, which is in the
12 PETA case, which is a DC circuit case, the DC
13 circuit recognized a somewhat unique concept of
14 organizational standing; namely, that an
15 organization has standing if it can show, quote,
16 "A concrete and demonstrable injury to its
17 activities mindful that under our precedent a
18 mere setback to abstract social interest is not
19 sufficient."

20 This would mean that EPIC has standing if
21 it can show that its public interest
22 activities -- I'm assuming educating the public
23 regarding privacy -- will be injured by the
24 defendants' failing to abide by the E-Government
25 Act.

1 So the injury here, it's argued, would be
2 its public interest activities, educating the
3 public, or whatever, and they would not have the
4 information from the Privacy Impact Assessment
5 prior to the collection of the electronic data.

6 So the failure would be to provide EPIC
7 important information that they argue vital to
8 its public interest activities. I need more
9 information about this one as well.

10 So those are, in very summary forms, what I
11 see as the arguments and the framework on which
12 to make a decision on obviously the initial
13 decision which is going to be standing.

14 Now, I have a series of questions that I'd
15 like to ask, and at the end of all of the
16 questions, I'll give you an opportunity to
17 respond to my overview, to my two views of the
18 informational injury and the organizational.

19 So I'm going to start with the plaintiff.
20 So why don't you come on up and let me ask a
21 couple of questions here.

22 So I'm going to start with the members.
23 What concrete harms will EPIC members suffer if
24 their publicly available voter information is
25 collected and publicized by defendants in an

1 anonymous form?

2 MR. ROTENBERG: Okay. Thank you, Your
3 Honor. Let me begin by saying that EPIC will
4 take the position that, as a matter of law, none
5 of the information sought by the Commission is,
6 in fact, publicly available to the Commission.
7 I will explain that I believe it is one of the
8 questions you set out in your hearing for today.

9 The information that is sought from the
10 EPIC members is information that is currently
11 protected under state privacy law. Those state
12 privacy laws limit the collection and use of
13 state voter record information to particular
14 parties and for particular purposes. In our
15 view, the Commission falls outside the bounds of
16 almost all of those exceptions found in the
17 state privacy law for the release of the
18 information that the Commission seeks. That's
19 the basis upon which we say that there is
20 nothing as a matter of law that's publicly
21 available to the Commission given the request in
22 the June 28th letter.

23 THE COURT: Well, it seemed to me -- and I
24 only got to look at the chart very quickly as
25 one of the exhibits, but it looked as if a

1 number of states were providing some; a number
2 of states were indicating that they couldn't
3 under their state statutes. There may be some
4 federal statutes relating to Social Security.
5 The Commission has argued that it's only
6 publicly available that they're seeking, and if
7 a state has statutes that would not allow it to
8 produce it, then they are not expecting to get
9 the information.

10 MR. ROTENBERG: Right. We understand that,
11 Your Honor, and we've attached by way of example
12 the response from the Secretary of State of the
13 State of Georgia, which was similar to the
14 responses from many of the states in which the
15 state secretary says simply much of the
16 information that is sought by the Commission we
17 could not release.

18 But then you see the state secretary goes
19 on to suggest that there are additional
20 conditions prior to the disclosure. So, for
21 example, the method that has been proposed by
22 the Commission to receive the voter data from
23 the State of Georgia, even that could be
24 permissibly disclosed by the State, the State
25 would not accept, and the State said we would

1 have to find a different technique, one that is
2 password encrypted and authenticated to permit
3 the release of the personal data; moreover, the
4 State of Georgia also said to the Commission
5 there are fees associated when requests are made
6 for the release of state voter data.

7 The June 28th letter that was sent to the
8 50 state secretaries provided no indication that
9 the Commission was prepared to pay any of the
10 fees associated with a release of the data it
11 was seeking.

12 So you see, there are three different ways
13 to understand how it is that when the Commission
14 approaches the State and asks for so-called
15 publicly available information, the state
16 secretary properly responds under the terms of
17 this letter, "There's, in fact, nothing we can
18 provide to you."

19 THE COURT: So your idea would be that if
20 they had done an impact -- Privacy Impact
21 Assessment, they would've figured this all out?

22 MR. ROTENBERG: Well, Your Honor, that's
23 the second category of our objection to the
24 Commission's request. Not only do we believe
25 that the states could not release the

1 information to the Commission, we further
2 believe that the Commission could not receive
3 the information from the states, and this has to
4 do with the obligations that fall on the
5 Commission by virtue of being within the
6 Executive Office of the President and subject to
7 the Federal Advisory Committee Act and the
8 E-Government Act to undertake certain steps
9 before it could request any type of personal
10 data. It was expected to undertake the Privacy
11 Impact Assessment, which may very well have
12 revealed that the method of transmission
13 proposed in this instance was simply inadequate.

14 So you see, in requesting the so-called
15 publicly available information, the Commission
16 actually committed two flaws. In the first
17 instance, it did not comply with the requests of
18 the 50 states.

19 In the second instance, it did not fulfill
20 its own obligations to safeguard the information
21 it was intending to collect.

22 THE COURT: Okay. But let's get -- that
23 one gets a little bit more to the merits it
24 seems to me.

25 MR. ROTENBERG: Yes.

1 THE COURT: Let me get back to sort of the
2 standing question. I appreciate the
3 information.

4 What concrete harms -- I'm talking about
5 this is -- the EPIC members would suffer if --
6 assuming that there is any publicly available
7 voter information that can actually be
8 collected. I believe that they've indicated --
9 I mean, if they're not publicly available,
10 they're not going to receive it, and you've
11 indicated that -- I don't know whether anybody
12 has actually sent anything or whether any of the
13 states can say that they can send it. They're
14 meeting all of the requirements. Do you know?

15 MR. ROTENBERG: Well, let me say based on
16 the declaration of Mr. Kobach on July 5th, two
17 days ago, the Commission had not received any
18 data from any of the states.

19 So, at this moment, we're relying on that
20 declaration as to the current status regarding
21 the transfer of the data that's being sought.

22 But to your question, Your Honor, let's
23 understand two different types of information
24 that the State is seeking. So by the terms of
25 the letter, they ask, for example, for the last

1 four digits of the Social Security number.
2 Members of EPIC's voter information may well
3 contain the Social Security number. It is often
4 used in the state administration of election
5 systems to avoid duplication and reduce the risk
6 of fraud, but it is not the case that
7 information is generally made available to the
8 public. If it were made available to the
9 public, the last four digits of the Social
10 Security number have been identified by the
11 Department of Justice and consumer protection
12 agencies as contributing to the commission of
13 identity theft and financial fraud because those
14 last four digits are the default passwords for
15 many commercial services such as cell phone or
16 online banking.

17 So you see, the Commission has asked the
18 states to turn over particular personal
19 information the states would not routinely make
20 available concerning EPIC members that if it
21 were made public could lead to identity theft.

22 THE COURT: But that assumes -- I think
23 they've indicated, however, that publicly
24 available -- they've left it to the states to
25 figure out, or whatever statutes. So if there's

1 a federal statute or some other way that they
2 should not be giving out Social Security
3 numbers, or the last four digits of Social
4 Security numbers, the expectation would be that
5 the states would not provide it.

6 MR. ROTENBERG: I understand your point,
7 Your Honor, but I would add also, I frankly find
8 it striking that a commission on election
9 integrity would make such a broad request to the
10 states for such detailed personal information
11 and then put it back on the states to determine
12 which information the states may lawfully
13 release.

14 Let me take a simple category. Home
15 addresses. So there is agreement, for example,
16 in the report of the National Conference of
17 State Legislatures, the 2016 report which we've
18 appended to our filing, that surveys the privacy
19 laws of all 50 states. And it says, 29 states,
20 as a general matter, will give out home
21 address -- name and address, I should say
22 precisely, name and address information.

23 And you could well say, "Well, that appears
24 to be publicly available information. Why can't
25 they just, you know, send back the name and

1 address information?"

2 And then you read more closely, and you see
3 that, in fact, even though that information may
4 be made available, many people in the states
5 also have the right to restrict the disclosure
6 of name and address information.

7 Texas, in fact, restricts the disclosure of
8 the name and address information from the
9 judiciary.

10 So none of these categories lend themselves
11 to an easy release of state data.

12 THE COURT: Well, it sounds as if there's
13 not going to be any basis for them to get
14 anything. So your request to hold it back, if
15 they're not going to give it, doesn't seem to
16 work.

17 I'm still trying to get in terms -- what
18 are the EPIC -- let me ask it this way: Who do
19 you consider the EPIC members? Their advisory
20 board. What does the advisory board do? I
21 mean, the members that you're talking about, the
22 ones you attached were advisory board members
23 and also voters. So what are the rights and
24 responsibilities of EPIC's advisory board
25 members?

1 MR. ROTENBERG: Okay. So we have
2 approximately 100 members of our advisory board.
3 They are leading experts in law, technology, and
4 public policy that contribute to the support of
5 the organization. They participate in the work
6 of the organization. They help select award
7 recipients for the organization.

8 THE COURT: Do they pay any kind of dues?

9 MR. ROTENBERG: There is no formal dues
10 requirement, but most of the members do
11 contribute in some manner to the work of the
12 organization. And in this particular matter, 30
13 of our 100 members signed a statement to the
14 National Association of Secretaries of State
15 asking state officials not to release the voter
16 data to the Commission.

17 So we are, in effect, also representing
18 their interest when we appear before --

19 THE COURT: Who is their interest?

20 MR. ROTENBERG: I'm sorry?

21 THE COURT: Who is their interest?

22 MR. ROTENBERG: Those members of our
23 advisory board who are actively participating
24 and expressing their opposition to the data
25 collection.

1 THE COURT: Okay. Do they control the
2 activities of the organization?

3 MR. ROTENBERG: They do not directly
4 control the activities of the organization.
5 There is a separate board of directors, but it
6 is not uncommon for an organization such as EPIC
7 to have this structure, and the members of the
8 advisory board actively participate in the
9 program activities and the direction and
10 selection of matters that the organization
11 pursues.

12 THE COURT: So exactly what -- the board of
13 directors runs the organization?

14 MR. ROTENBERG: Yes, that's correct.

15 THE COURT: And the advisory board advises
16 on what matters to get involved with?

17 MR. ROTENBERG: Yes, Your Honor, and
18 actively participates in those activities and
19 provides financial support.

20 THE COURT: But it's a voluntary financial
21 support?

22 MR. ROTENBERG: That's correct. But they
23 could not -- to be clear on this point, they
24 could not be a member of the advisory board
25 unless they formally accepted that

1 responsibility, and they may choose to withdraw
2 their participation as an advisory board member
3 as well.

4 THE COURT: Accepted what responsibility?

5 MR. ROTENBERG: Participating in the work
6 of the organization.

7 THE COURT: Okay.

8 MR. ROTENBERG: Contributing to its
9 activities.

10 THE COURT: And the contribution you're
11 talking about is contributing in terms of if you
12 decide to take on a particular task such as this
13 one, this particular case, that they would
14 contribute to providing information, pursuing
15 it? Is that what you're saying?

16 MR. ROTENBERG: Financial support including
17 personal donations are routinely made by members
18 of the advisory board, their time and their
19 expertise.

20 THE COURT: All right. So what
21 informational harms will EPIC suffer if the
22 defendants don't comply with the E-Government
23 Act, which requires disclosure of this Privacy
24 Impact Assessment to be done and then disclosed
25 before the collection of the data?

1 Again, I'm talking about EPIC in the
2 context of either membership or otherwise.

3 MR. ROTENBERG: Right. Well, apart from
4 the individual harm to our members, also as an
5 organization that was specifically established
6 to focus public attention on emerging privacy
7 issues, and has been involved in the voter
8 privacy matter for almost 20 years, this
9 particular controversy directly impacts our
10 mission. This is not a speculative type of
11 arrangement. This is a circumstance where we
12 have for many years sought to advance an
13 interest in voter privacy here in the United
14 States. The actions by the Commission have
15 required us to undertake a number of activities
16 to work with citizen organizations, to discuss
17 with media outlets the impact of the
18 Commission's activity upon the public. That is
19 an educational function which we would not be
20 doing at this point to the extent that we are
21 but for the Commission's request to gather state
22 voter record information.

23 THE COURT: So as you've described it, I
24 take it that's what you would consider your
25 public interest activities?

1 MR. ROTENBERG: Well, yes. I mean, there
2 is, in fact, also related litigation. We are
3 seeking under the Open Government Act to obtain
4 information about the Commission's activity.
5 That is also activity undertaken, a cost to the
6 organization, and in response to the
7 Commission's act.

8 THE COURT: All right. And in terms of
9 educating the public regarding data privacy or
10 other activities, do you use routinely
11 information from the Government?

12 MR. ROTENBERG: Yes, we do, and I should
13 point out also central to our educational
14 activity is the maintenance of one of the most
15 popular websites in the world on privacy issues,
16 which is simply EPIC.org. So for the last week,
17 as a consequence of the Commission's act, we put
18 aside the other work on our website and focused
19 solely on providing public information related
20 to this current controversy.

21 So there are two pages of EPIC.org with
22 extensive information about the Commission as
23 well as this litigation.

24 THE COURT: You started off the discussion
25 by indicating all of the difficulties and

1 barriers there would be to provide -- having the
2 states provide the voter registration data to
3 the Commission based on various statutes,
4 regulations, or whatever. I take it you're
5 really getting to the merits that this is not
6 publicly available for the most part? Is that
7 the point of this --

8 MR. ROTENBERG: Correct, Your Honor. And
9 we thought it was important to state that at the
10 outset. We understood in the questions that you
11 had posed to the parties for today's hearing,
12 and certainly Mr. Kobach in his letter to the
13 state secretaries, uses this phrase, "publicly
14 available." He places a great deal of weight on
15 it. But, in fact, we could not find the phrase
16 in any of the state voter privacy laws that we
17 looked at. The states talk about public records
18 in some instances, or they talk about exemptions
19 which permit the release of voter record
20 information. But we thought it was very
21 important to make clear that this phrase is
22 actually not a phrase that helps us understand
23 the permissible circumstances under which the
24 data may be released.

25 THE COURT: Okay. All right. I have some

1 questions for the defendant. I'll get back to
2 you.

3 MR. ROTENBERG: Okay. Thank you.

4 THE COURT: So my first question is:
5 What's the authority, if any, relied on by the
6 Commission to systematically collect this voter
7 registration information?

8 I didn't see anything in the materials
9 establishing or anything else that talked about
10 it.

11 MS. SHAPIRO: Well, I think the main
12 authority is the executive order which sets out
13 the mission of the Commission and the charter
14 based on the executive order. And in order to
15 carry out the work that is defined in those
16 documents, the Commission needs to collect and
17 analyze information so that it can best advise
18 the president in the report that it's charged
19 with creating.

20 THE COURT: But you would agree that
21 there's nothing in the executive order that
22 suggests that you -- that this data should be
23 collected?

24 MS. SHAPIRO: There's nothing specific
25 about that, but I don't believe that authority

1 would be required because it's not a demand for
2 information. It's a request, and the Commission
3 is not empowered to enforce that. It doesn't
4 have the ability to say you must do it. So it's
5 simply a request to the states and nothing more
6 than that.

7 THE COURT: Do you want to respond to the
8 issue in terms of what he brought up initially
9 relating to the fact that, as it appears that
10 most states, if not all of them, have
11 restrictions, and that there's really nothing
12 that's totally publicly available about the
13 request?

14 MS. SHAPIRO: So I think if I'm
15 understanding correctly, I think what EPIC is
16 saying is that they don't have standing because
17 the way I understand what they're saying is that
18 the states are not going to provide the
19 information because the information is protected
20 under state law, in which case there won't be
21 information going to the Commission. So there
22 can't possibly be any injury because if the
23 information is not going to the Commission,
24 there's no injury. There's no Article III
25 standing.

1 THE COURT: Are you talking about in the
2 context of the EPIC injury to EPIC members? Is
3 that what you're talking about?

4 MS. SHAPIRO: EPIC members.

5 I also wanted to address the alleged
6 organizational injury because I think that they
7 fail standing on numerous levels. Not only do
8 the members not have standing because their
9 states are not providing the information, but,
10 organizationally, everything that EPIC just
11 discussed now relates to its advocacy mission.
12 And I think the cases are quite clear that
13 simply choosing where to allocate resources when
14 advocating --

15 THE COURT: But that's only one piece of
16 what he talked about. I mean, if you look at
17 the PETA case, it certainly is -- the argument
18 would be its public interest activities, which
19 in this case is educating the public is that by
20 not having the information relating to the
21 assessment, the impact assessment, they're not
22 in a position to put that information out.

23 So, I mean -- leaving aside allocating
24 different things. The questions I asked really
25 related to what was the role of the members in

1 order to make a decision as to whether, you
2 know, the first theory of organizational
3 standing based on membership as opposed to the
4 PETA case, which I think is premised on
5 activities, not on membership.

6 MS. SHAPIRO: Correct. Though the PETA
7 case identified a concrete injury to the
8 organization, a perceptible injury they called
9 it, because they were not -- in that case, there
10 was agency -- some agency inaction that
11 prevented the organization from filing
12 complaints with the agency. So there was a
13 perceptible injury to the organization.

14 Here you have an organization whose mission
15 is advocacy. They may be very, very interested
16 in privacy, and they may be expert --

17 THE COURT: Advocacy but also in terms of
18 informing the public, if I understood. The
19 educational aspect would be informing the public
20 of this information, and they're not getting it.

21 MS. SHAPIRO: Correct, but the information
22 doesn't exist, and I guess that goes to the
23 informational standing because I believe that
24 the cases require that the information actually
25 be in existence in order to --

1 THE COURT: You have to look at the statute
2 first. And if you look at the statute, the
3 E-Government Act requires that before the
4 collection of the data take place, that you
5 would've done this impact statement, which is
6 different than the cases that have indicated
7 where the statute requires. What I said is that
8 the prerequisite to the disclosure hadn't
9 happened in the other case, which I think is --
10 I can't remember which case it is.

11 MS. SHAPIRO: It was Friends of Animals, I
12 think.

13 THE COURT: Yeah, in terms of that one,
14 which is not what we're talking about.

15 E-Government Act doesn't require -- it
16 requires it up front before you would've
17 collected data.

18 MS. SHAPIRO: Yes. But I think, then, it's
19 a question of the Commission not being subject
20 to the E-Government. So it has no requirement
21 to create that --

22 THE COURT: That's why we're getting back
23 to some of these standing things.

24 MS. SHAPIRO: Right.

25 THE COURT: So let's get back to some of

1 the other questions that I had.

2 So your view of it is it's implicit in the
3 executive order that they can collect whatever
4 they think is important for their mission?

5 MS. SHAPIRO: Right. And I would refer
6 back to the Mayer case, which was the Reagan
7 Task Force on Deregulation that was addressed in
8 *Mayer v. Bush*, a similar kind of commission
9 chaired by the vice president also gathering
10 information in order to make recommendations.

11 It's not uncommon to think that in the
12 ordinary task of preparing a report and studying
13 an issue, that you would need information.

14 THE COURT: Okay. I just was curious as to
15 whether there was something I had missed.

16 What services have or will be provided by
17 GSA to the Commission? Because I notice that
18 the executive order says that, "GSA shall
19 provide the Commission with administrative
20 services, funds, facilities, staff, equipment,
21 other support services as be necessary."

22 So have they -- is the Commission fully
23 operational? Have they set up an office? Where
24 is it located? Are you using any GSA services?

25 MS. SHAPIRO: So the Commission is in its

1 infancy. There has not yet been a meeting. GSA
2 is tasked with specific limited administrative
3 support, like arranging travel for the members,
4 maybe assistance with booking meeting locations.
5 Mostly logistical. That's what's envisioned at
6 this stage.

7 THE COURT: Okay. Is that what you're
8 expecting it to do in the future?

9 MS. SHAPIRO: Yes. Of course, the
10 Commission is not really up and running, you
11 know, to any great extent.

12 THE COURT: Where is it located at this
13 point? Does it have an office?

14 MS. SHAPIRO: Well, I don't know that it
15 has dedicated office space. I believe it's the
16 Office of the Vice President, since the vice
17 president is the chair of the Committee.

18 THE COURT: All right. What has been or
19 will be the involvement of Commissioner Christy
20 McCormick and/or the Election Assistance
21 Commission in the decision-making process of the
22 Commission since she heads the Election
23 Assistance Commission?

24 MS. SHAPIRO: She's a member of the
25 Commission but not there as part of her EAC

1 role. It's completely distinct from that.
2 She's there as just a member of the Commission
3 due to her expertise, and she would participate
4 in the decision-making and the deliberations to
5 the extent she's present at the meetings.

6 THE COURT: So there's not going to be any
7 role or any information provided or any role by
8 Election Assistance Commission? Is that what
9 you're saying?

10 MS. SHAPIRO: Well, she would not be there
11 as part of -- in her capacity -- in that
12 capacity as --

13 THE COURT: Well, that's not quite what I
14 asked.

15 MS. SHAPIRO: Okay.

16 THE COURT: What I asked is -- she's maybe
17 not as the head assigned to it like the state
18 secretary of a particular state, but my question
19 is whether the Election Assistance Commission is
20 going to provide assistance to the Commission?

21 So you have her -- I mean, there's cases
22 that talk about dual role of being in sort of a
23 private in the government.

24 MS. SHAPIRO: Right. I'm not aware that
25 they would be providing any assistance. I can

1 double-check that for the Court, but my
2 understanding is that they would not be
3 providing assistance, and she is on the board
4 simply as a member of the Commission.

5 THE COURT: All right. The executive order
6 talks about other federal agencies will, quote,
7 "Cooperate with the Commission."

8 Any other federal agencies currently
9 cooperating with the Commission?

10 MS. SHAPIRO: No. Right now there are no
11 other federal members of the Commission. I
12 don't know of any other federal agencies working
13 with the Commission.

14 THE COURT: So let me move into the website
15 in terms of which -- it appears to be an Army
16 website?

17 MS. SHAPIRO: Yes.

18 THE COURT: So that's not going to be --
19 that doesn't involve a federal agency?

20 MS. SHAPIRO: Well, it's a site that exists
21 to transfer large data sites, but that is more
22 of an IT tool. It's not -- it doesn't involve
23 their -- the military is not engaged in the work
24 of the Commission in any substantive way.

25 THE COURT: Let me ask it this way. Who

1 operates the website that's named in the
2 Commission's request? Is that a component of --
3 it looks -- they did an impact statement
4 themselves about the website, the DOD did, which
5 is obviously a federal agency, or will be
6 considered under the definition.

7 So who is going to actually operate the
8 website? Somebody has to. I assume it's not
9 the Commission. Is it the DOD?

10 MS. SHAPIRO: So the way I understand it
11 works is that the user uploads the data, and
12 then it's downloaded by the Commission; that DOD
13 doesn't play a role in that other than
14 maintaining the site. They don't store the
15 data. They don't archive the data. It deletes
16 after two weeks I believe is the maximum amount
17 of time.

18 THE COURT: So say this again. They
19 maintain it?

20 MS. SHAPIRO: Well, it's their site.

21 THE COURT: Right. So they receive the
22 data and maintain it for the two weeks?

23 MS. SHAPIRO: Well, the person uploading
24 the data can set the time that --

25 THE COURT: And who is uploading the data?

1 MS. SHAPIRO: The states, for example. If
2 they want to upload the data to the site, they
3 can set an expiration date of -- it must be less
4 than two weeks. So a maximum of two weeks that
5 it can remain on the server.

6 THE COURT: So DOD, according to you, has
7 no role?

8 MS. SHAPIRO: That's right, other than, of
9 course, that it runs the SAFE system.

10 I did want to address, since we're talking
11 about that system, the declaration that the
12 plaintiff put in about getting insecure or error
13 messages. If you read through the website for
14 SAFE itself, it's clear that it's tested and
15 certified to work with Windows XP and Microsoft
16 Explorer. So the browsers that EPIC's declarant
17 used were Google and Netscape, I believe, not
18 Explorer. If you plug it into Explorer, it
19 works just fine. And that's in two different
20 places on the website where it makes that clear,
21 that that's the browser that you need to use.

22 I have actually compiled some of the
23 pertinent information from the SAFE site that I
24 can provide to the Court and a copy for the
25 plaintiff as well, if it's helpful.

1 THE COURT: Certainly.

2 So let me see if I understand it. The
3 computer system that's going to operate in terms
4 of this information, you seem to be saying that
5 the website by DOD is sort of like a conduit,
6 shall we say --

7 MS. SHAPIRO: Yes.

8 THE COURT: -- to a system of your own.

9 So you're going to have your own database
10 at the Commission?

11 MS. SHAPIRO: So I don't know exactly what
12 the Commission -- it will be stored in the White
13 House email, or the White House servers. So it
14 will be on the White House system. But what the
15 Commission is going to do by way of using the
16 data and compiling the data, I can't speak to
17 that yet.

18 THE COURT: So you're assume it's either
19 going to be the Commission or the White House
20 that would own and operate the computer system
21 on which the data is going to be stored?

22 MS. SHAPIRO: Yes. And the email address
23 that was provided in the letter to the states is
24 a White House email address that's maintained by
25 the White House, the same system that supports

1 the president and the vice president and secures
2 their communications.

3 THE COURT: So it gets on the DOD. Then
4 how is it going to be transferred to the White
5 House computer system? Who is doing that?

6 MS. SHAPIRO: So my understanding is that
7 the Commission then downloads the information
8 from SAFE, and then it would be kept in the
9 White House systems.

10 THE COURT: So they have an IT staff that's
11 expected to do this?

12 MS. SHAPIRO: Well, I don't know how
13 they're using or going to use IT staff, but the
14 Office of Administration, which serves the
15 Office of the President generally is also within
16 the Executive Office of the President and
17 maintains the White House systems.

18 THE COURT: You also -- I believe it was a
19 letter that gave an email address. Who owns and
20 operates the computer system associated with the
21 email?

22 MS. SHAPIRO: So that's the White House --
23 the ovp.gov address.

24 THE COURT: So this will be on the White
25 House --

1 MS. SHAPIRO: Yeah.

2 THE COURT: And so any other agencies,
3 federal agencies provide support services for
4 the White House's computer system?

5 MS. SHAPIRO: Well, I think that's a
6 complicated question simply because some of the
7 details about how the -- the mechanics of the
8 White House IT is something that may not be
9 appropriate to say in a public setting
10 because --

11 THE COURT: Well, let me just put it this
12 way. Obviously, I'm trying to see if you're
13 getting any -- your argument is E-Government Act
14 doesn't apply because there's no federal agency
15 that's involved.

16 MS. SHAPIRO: Yes.

17 THE COURT: So I'm exploring whether there
18 actually is a federal agency that's involved.

19 MS. SHAPIRO: I understand, but I think the
20 test is not necessarily to look to see if
21 there's one member or one little piece of
22 support.

23 THE COURT: No. I'm just trying to see in
24 terms of how the data would be -- would come, be
25 collected, stored, whether you're doing a

1 separate database or how you're doing this. You
2 seem to be indicating that DOD's website would
3 maintain it at least for the period of time
4 until it got transferred, right?

5 MS. SHAPIRO: Yes. This conduit system
6 would have it for -- until it's downloaded. So
7 from the time it's uploaded until the time it's
8 downloaded for a maximum of two weeks and
9 shorter if that's what's set by the states.

10 THE COURT: And then you also talked about
11 at some point, although it would be allegedly
12 anonymous, but what system is going to be used
13 to publish the voter information?

14 MS. SHAPIRO: Well, one publication I think
15 is unclear at this point because it's not clear
16 what would be published. I think Mr. Kobach
17 made clear that the raw data would not be
18 published. That's just -- we don't know at this
19 point.

20 THE COURT: So do you know who would be
21 making it anonymous? Who would be involved in
22 doing this?

23 I guess the other question is: Is the
24 White House server in a position to take -- I
25 mean, this is a lot of information. Assuming

1 all these states actually provided you the
2 information, are they going to actually handle
3 it?

4 MS. SHAPIRO: I assume --

5 THE COURT: I could see DOD handling it,
6 but do you know?

7 MS. SHAPIRO: I don't know, but I'm
8 assuming they have a way to handle it.

9 THE COURT: All right. I guess I'll start
10 with you and then work back to EPIC, but this is
11 sort of your best arguments on irreparable harm.

12 How are the defendants harmed if they're
13 required to conduct and disclose a privacy
14 assessment before collecting voter information?
15 Is there any harm to you to do this before you
16 had collected it?

17 MS. SHAPIRO: Well, yes. I mean,
18 because -- our position is that they're not
19 subject to the E-Government Act because they're
20 not an agency, then we would be required to do
21 something that we're not required to do. So I
22 think there's inherent harm there.

23 And, you know, there's also a certain
24 amount of -- you know, the privacy assessment is
25 normally done by specific officers and agencies.

1 So it's set up in a way that doesn't fit very
2 well to the Commission. It talks about chief
3 information officers and positions that are
4 appointed as part of the E-Government Act in
5 agencies. But because the Commission is not an
6 agency, it doesn't have those things. So there
7 would be a certain amount of figuring out what
8 to do with that.

9 THE COURT: Well, I was provided -- I
10 didn't get a chance to look at all of the
11 exhibits, but it looks as if the Government, or
12 DOD, has already done a -- pursuant to the E-Gov
13 Act -- a privacy impact statement for the
14 website issued by DOD that you plan on having
15 all of this data at least be maintained
16 initially?

17 MS. SHAPIRO: We got the exhibits 30
18 minutes before we came here. So I haven't
19 studied them, but that's what it appears to be.
20 But DOD is an agency but the Commission is not.

21 THE COURT: Okay. And any public interest
22 in foregoing this privacy assessment?

23 MS. SHAPIRO: I'm sorry. Public interest?

24 THE COURT: Any public interest? I mean,
25 it's one of the things you have to weigh.

1 What's your public interest in not doing it?

2 MS. SHAPIRO: Well, I think --

3 THE COURT: This is around doing a privacy
4 assessment.

5 MS. SHAPIRO: I understand.

6 I think initially plaintiff is seeking
7 extraordinary emergency relief. So, really, the
8 burden is on them, but I think --

9 THE COURT: I'm going to ask them the same
10 thing, but I'm just asking you. I mean,
11 balancing public interest, is there anything in
12 your perspective?

13 MS. SHAPIRO: I mean, I think the public
14 interest is that there's, you know, been a
15 priority that there's important work to be done
16 by this commission, and that it should be
17 permitted to go forward, and, you know, do the
18 mission that the president thinks is important
19 to have done. That's in the public interest, to
20 be able to carry on that work.

21 So, you know, I think there's a public
22 interest in proceeding versus we believe no
23 public interest in the contrary because there's
24 no standing and because there's not an agency
25 involved that's required.

1 THE COURT: Then, obviously, I have to find
2 standing before we got to this issue.

3 MS. SHAPIRO: Yes.

4 THE COURT: I just wanted to see what your
5 answer would be.

6 Okay. Thank you.

7 MS. SHAPIRO: I wanted to say one more
8 thing before I forgot.

9 THE COURT: Certainly.

10 MS. SHAPIRO: When Mr. Kobach filed his
11 declaration, his first declaration I think on
12 July 5th, we said that no information had come
13 into the site. But yesterday the State of
14 Arkansas did transmit information, and it has
15 not been downloaded. So it hasn't been
16 accessed, but it is in the SAFE site.

17 THE COURT: So it's on the DOD site?

18 MS. SHAPIRO: Yes.

19 THE COURT: That you called a SAFE site.

20 MS. SHAPIRO: Yes.

21 THE COURT: Okay.

22 MS. SHAPIRO: Would Your Honor want a copy?

23 THE COURT: Yes. If you pass it up to
24 Ms. Patterson, I'd appreciate it, and give it to
25 plaintiffs.

1 MS. SHAPIRO: Your Honor, I have one more
2 handout, if Your Honor wants it, that relates to
3 standing. It's simply a copy of a decision from
4 2014, from Judge Amy Berman Jackson that
5 involves EPIC. It's called *EPIC vs. Department*
6 *of Education*, and it addresses the
7 organizational standing really in very
8 closely analogous circumstances.

9 THE COURT: Yeah. I'm familiar with the
10 case. I know what it is.

11 MS. SHAPIRO: I know you are. Okay.

12 THE COURT: Thank you.

13 But let me just ask one last question.
14 Since DOD is maintaining -- their website is
15 maintaining the data, why shouldn't they do the
16 assessment? They're a federal agency, and
17 they're basically involved in at least
18 maintaining of the data that's being collected.
19 So why shouldn't they, as a federal agency, do
20 an impact statement relating to the data that
21 they have on their website?

22 MS. SHAPIRO: So I understand that they've
23 done an assessment for the site, and it can't --

24 THE COURT: But for the site in general.

25 MS. SHAPIRO: Right. But it can't be the

1 case that when you have a sharing site like
2 this, it acts as a conduit, that every time
3 information is uploaded, that you have to have a
4 separate Privacy Impact Assessment.

5 THE COURT: I don't know that that's
6 necessarily true. I mean, it seems to me --
7 I'll have to go back and look at the E-Gov Act,
8 but it seems to me if you were dealing with
9 issues of data and privacy, certainly election
10 registration data may be different than some
11 other data in terms of what it would -- what
12 would be done, why they wouldn't be obliged to
13 do one.

14 MS. SHAPIRO: Because there are very
15 specific requirements. Even in the E-Government
16 Act, they have to be collecting the information.
17 And I think when they are passive --

18 THE COURT: Well, aren't they collecting
19 it?

20 MS. SHAPIRO: Well, no, because they're a
21 passive website that -- I mean, a passive site
22 that people upload the information to. You
23 know, DOD is not monitoring what information is
24 being uploaded. It is a way to be able to send
25 large data sets.

1 THE COURT: But that's true of anything
2 that they use this website for, but they went
3 ahead and did one.

4 MS. SHAPIRO: They did one for the system.

5 THE COURT: Right. But, obviously, they
6 thought that it was appropriate to do it. I
7 don't understand the distinction.

8 MS. SHAPIRO: So I think the distinction is
9 to do it for the security of the site. Writ
10 large is one thing, but to do it every time a
11 user anywhere in the country happens to upload
12 information into it, I don't think it's either
13 required or would be rational.

14 THE COURT: Well, it may depend on what the
15 information is that's, you know, that's being
16 collected and maintained on the website.

17 MS. SHAPIRO: I don't think DOD would even
18 know that.

19 THE COURT: I mean, it may be that they
20 would say their impact statement says there
21 isn't anything further to be said. It's safe as
22 we said before. But I'm just saying, I don't
23 understand why you wouldn't do it if the
24 information is of this type of nature, the
25 nature of this voting registration information.

1 MS. SHAPIRO: DOD is not monitoring the
2 substance of the information that's coming in.
3 They're not going to know people are uploading
4 different data sets.

5 THE COURT: Well, it does make a
6 difference. The information is going to sit
7 there. Certainly people could potentially have
8 access to it. It could be hacked or whatever
9 else. Why would you not -- why would they not
10 be required to do one?

11 MS. SHAPIRO: I think for the reason that
12 the operation of the system, one doesn't fit
13 within the definition of when they're required
14 to do one because they're not collecting as the
15 passive site, but also the practicality of any
16 time somebody uploads information to that site,
17 be it for a day or for the maximum of two weeks,
18 DOD is not monitoring that. They don't know
19 that. They don't know what's in the data. It's
20 a secure passageway.

21 So the idea --

22 THE COURT: So are you relying on the E-Gov
23 Act to say that they would not need to do it
24 based on their role in this particular case?
25 I'm trying to figure out what you're relying on.

1 MS. SHAPIRO: Well, I think that's part of
2 it, yes. So we haven't -- that issue was not
3 before us, so we haven't fully analyzed the
4 requirements of the E-Government Act as applied
5 to DOD, but it does require some active
6 collection.

7 THE COURT: Okay. All right.

8 MS. SHAPIRO: Thank you.

9 THE COURT: Thank you.

10 MR. ROTENBERG: Your Honor, if I may. I
11 think I have the precise answer to the question
12 you just posed to counsel.

13 THE COURT: All right.

14 MR. ROTENBERG: We attached in our
15 supplementary motion this afternoon Exhibit 5,
16 which is, in fact, the Privacy Impact Assessment
17 for the SAFE system, and the very first question
18 asks regarding who the information will be
19 received from. The first box, which is "yes" --

20 THE COURT: Hold on one second. This is
21 the very last one you put in the file, right?

22 MR. ROTENBERG: Yes. This is the Notice of
23 Filing of Supplemental Exhibits --

24 THE COURT: Okay.

25 MR. ROTENBERG: -- relevant to the

1 questions raised in the Court's order.

2 THE COURT: I'm sorry. And you're looking
3 at -- which exhibit number is it?

4 MR. ROTENBERG: We're looking at Exhibit 5,
5 the very first page.

6 THE COURT: Okay. I see it.

7 MR. ROTENBERG: And do you see, there are
8 different scenarios. In fact, the DOD is very
9 much aware of who makes use of the website. The
10 first option refers to receiving information
11 from members of the general public. That box is
12 not checked. It's the subsequent box which says
13 from federal personnel and/or federal
14 contractors. That box is checked. And state
15 secretaries would not qualify on that basis.

16 Moreover, if I may point out, these are
17 pages 32 and 33 in the ECF, the PIA sets out a
18 fairly narrow set of circumstances under which
19 it may be used for the transfer of official
20 information. And as to the question do
21 individuals have the opportunities to object,
22 the basis of saying "yes" is by not sending
23 personally identifiable information through the
24 transfer system.

25 So we would say by the terms of the

1 agencies' own Privacy Impact Assessment, it is
2 not suitable for the purpose that the Commission
3 proposes.

4 But if I may make one other point that is
5 also relevant to this. We actually don't
6 believe that the Commission had the authority to
7 turn to the military agency to receive the
8 information because if you look at both the
9 executive order and the Commission's charter, it
10 is the GAO that is described as providing not
11 only administrative services but also --

12 THE COURT: GAO or GSA?

13 MR. ROTENBERG: GSA. Thank you.

14 It is the GSA that provides not simply
15 administrative services, this is not just, you
16 know, arranging travel plans, this is also
17 facilities and equipment. Those words appear in
18 the president's executive order. And in the
19 charter implementing the work of the Commission,
20 paragraph 6 describes, quote, "The agency
21 responsible for providing support."

22 And in that paragraph, these terms
23 "administrative services, facilities, and
24 equipment" appear as well.

25 So it's entirely unclear to us upon what

1 legal basis the vice chair had to direct the
2 state secretaries of state to send this
3 information to the proposed military website.
4 And this, by the way, is entirely apart from the
5 factual concerns that have been raised about the
6 adequacy of the security techniques that are
7 deployed with this site for personal
8 information.

9 THE COURT: All right. Let me get back,
10 then, in terms of looking at the -- back to the
11 standing issues in terms of -- you've
12 indicated -- if you want to respond to what she
13 indicated, why you would not be under the theory
14 that it requires that there be this assessment
15 before you collect -- no, it's the
16 organizational. Excuse me. The organizational
17 in terms of your public interest activities.

18 She indicated that -- and there was a
19 distinction in terms of what are considered in
20 that Public Interest Activities, what are
21 allowed and what are not allowed in terms of
22 providing you under this PETA case theory
23 organizational standing.

24 If you want to respond to -- that's where
25 your activities don't fit it.

1 MR. ROTENBERG: Right. Well, I think we've
2 done this, Your Honor, in our reply brief, if I
3 can just point to pages 20 and 21. In fact, we
4 are relying on PETA in making the argument that
5 we do have organizational standing and the
6 activities we describe is the participation and
7 work of our experts and to seek records from the
8 Commission and to respond to the requests that
9 had been made by the public.

10 What the language from PETA is relevant on
11 this point is that our activities are, quote,
12 "In response to and to counteract the effects of
13 defendant's alleged unlawful conduct."

14 That's page 20 in the reply.

15 THE COURT: All right. The other question
16 that I had is -- obviously, there needs to be
17 some sort of federal agency connection to the
18 Commission in order for the E-Gov Act to apply.
19 So what is your best argument as to what federal
20 agency is associated with it?

21 MR. ROTENBERG: Well, we think the
22 Commission itself is an agency for purposes of
23 the E-Government Act. That agency tracks the
24 definition of the Freedom of Information Act and
25 includes the Executive Office of the President.

1 So, therefore, the obligation to complete the
2 Privacy Impact Assessment would fall upon the
3 Commission as an agency.

4 THE COURT: You know, there is a case that
5 talks about -- and I forgot which of the -- it
6 was in the, I believe, the vice president's
7 office, and it indicated that they provided
8 basically personnel issues, those kinds of
9 assistance. It was the executive office of
10 either the president or the vice president. I
11 forgot which, and it was -- that commission had
12 not viewed itself as a federal agency.

13 MR. ROTENBERG: I'm not familiar with the
14 case, Your Honor. If we could find the cite, we
15 would be happy to provide a response.

16 I do want to point out, also --

17 THE COURT: Let me find it for you. It was
18 *Crew vs. The Office Of Administration*. It was
19 the Office of Administration within the
20 Executive Office of the President. In fact, it
21 was one of my cases relating to disclosure of
22 documents to the White House's alleged loss of
23 millions of emails, and they found that that
24 commission, based on its functions, was not --
25 you know, was not considered a federal agency

1 for different purposes.

2 MR. ROTENBERG: All right. But I don't
3 think that case implicated either the
4 E-Government Act or the Federal Advisory
5 Committee Act. So at least in the first
6 instance, we would need to look at whether those
7 statutes are relevant in Crew. I would be happy
8 to look more closely, Your Honor.

9 THE COURT: Okay. So besides indicating
10 that you think the Commission itself is a
11 federal agency, any other argument?

12 MR. ROTENBERG: Well, yes. The GSA, in
13 providing functional services to the Commission,
14 which, as we set out we believe is the
15 expectation contained within the executive order
16 and also the charter of the Commission, would be
17 subject to the agency status. And as you have
18 also suggested, the member of the EAC, by virtue
19 of the association with the EAC, could raise
20 agency concerns.

21 We found it interesting, for example, that
22 the Election Assistance Commission, not this
23 commission, but the one that Ms. McCormick is a
24 member of, has been subject to scrutiny under
25 the Privacy Impact Assessment by that agency's

1 Office of Inspector General for similar
2 activity.

3 Now, there's no wrongdoing. That's not
4 what I'm suggesting. But, rather, the point
5 being with far less data collection at the EAC,
6 for more than 10 years the Office of Inspector
7 General has paid careful attention to the
8 E-Government obligation. That is my point.

9 THE COURT: But the problem, at least as
10 she presents -- as Ms. Federighi presents it, is
11 that the person that's on the Commission is not
12 there in her official capacity.

13 MR. ROTENBERG: That's the representation.

14 THE COURT: Well, I know, but do you have
15 something to counter it?

16 MR. ROTENBERG: Well, the person who is on
17 the Commission is also affiliated with the most
18 significant election commission apart from the
19 president's commission that would address these
20 issues.

21 THE COURT: Do you think -- the Department
22 of Defense is not a defendant in this case, but
23 is there any argument as we pursued this issue
24 of the DOD having basically the website and all
25 of this material uploaded to it and maintaining

1 it at least for a period of time until it gets
2 transferred?

3 MR. ROTENBERG: Well --

4 THE COURT: Is that an agency that you
5 would argue is involved with the Commission or
6 not? Do you agree with the argument that it's
7 not?

8 MR. ROTENBERG: We would say that, in fact,
9 it is involved by virtue of the letter from the
10 vice chair. But by law, under the executive
11 order, it should not be involved. The fact that
12 it is receiving data, and is most certainly
13 subject to the Government Act as is evidenced by
14 the fact they've already had a Privacy Impact
15 Assessment, that is relevant. But the Privacy
16 Impact Assessment reveals that the military
17 website is not set up to receive the personal
18 data that the vice chairman is seeking.

19 THE COURT: Well, I'm trying to see
20 whether there is -- you agree with her argument
21 that you view that it shouldn't be there. That
22 doesn't get me anywhere in terms of your
23 argument that the Commission is subject to the
24 E-Gov Act. I still need a connection to a
25 federal agency. So I'm just trying to figure

1 out whether that's an argument you're making or
2 not making.

3 MR. ROTENBERG: Yes. Well, I would rely in
4 part on opposing counsel's comment that the
5 State of Arkansas has, in fact, transmitted
6 voter data to the military website. So the fact
7 that the military website is now in possession
8 of that data beyond what the authorities
9 provided in the Privacy Impact Assessment under
10 which it is currently operating, and we would
11 argue as well beyond the authority set out in
12 the executive order in the Commission charter,
13 necessarily makes it relevant to the proceeding.

14 THE COURT: All right. Anything else
15 either one of you wants to say? I'm going to
16 take a very short break. I know we're at 5:00,
17 but I need to take a short break and figure out
18 what additional questions, if any, I want to
19 make because I would like to have this be the
20 only hearing, and I'll go through all the
21 information that you've got and then make a
22 ruling.

23 MR. ROTENBERG: Thank you, Your Honor.

24 Just very briefly. We raised five counts.
25 There is the Privacy Impact Assessment that

1 should've been completed. There's the Privacy
2 Impact Assessment that was required as a
3 condition of receiving the data. There is the
4 obligation to publish that privacy impact under
5 the Federal Advisory Committee Act, and we
6 believe the informational privacy constitutional
7 claims are actually quite strong here, and we
8 would like the opportunity at some point to be
9 able --

10 THE COURT: At this point, to make a
11 constitutional argument I don't think you're
12 going to do well in this circuit.

13 MR. ROTENBERG: I understand, Your Honor.
14 Thank you.

15 THE COURT: Okay.

16 Anything you want to say at the end? I'm
17 going to hear whatever you have to say, and then
18 I need to take a quick break and look through
19 and make sure -- I did a scramble of a bunch of
20 notes because you've been filing things one
21 after the other in terms of my being able to
22 look through it to make sure that this is it and
23 I have the information I need.

24 MS. SHAPIRO: Yes. Just very briefly. I
25 just wanted to make two points. One is that

1 using the SAFE site as a tool I don't think
2 makes that part of the Commission's work. It
3 would be like saying that the Commission can use
4 the post office to mail letters because that
5 would make the post office somehow part of the
6 Commission. It is a tool for getting the
7 information.

8 THE COURT: Well, it's not getting the
9 information. I mean, as a practical matter --
10 are you talking about the computer? The DOD
11 thing?

12 MS. SHAPIRO: Yes.

13 THE COURT: Well, you're uploading it.
14 They're maintaining the information. I don't
15 know that I'd call it a tool as the post office
16 would be.

17 I would agree, mailing things through the
18 post office is not going to make them a federal
19 agency as part of the Commission.

20 MS. SHAPIRO: And my second point is I
21 wanted to just make clear the cases that set out
22 the tests for the agency requirements, in other
23 words, the functional test. The case that you
24 referred to, the *Crew vs. Office Of*
25 *Administration*, the case that Your Honor

1 handled, that involved the Office of
2 Administration within the Executive Office of
3 the President, was determined not to be an
4 agency subject to FOIA. And the E-Government
5 Act uses the same definition. That's the point
6 I wanted to make clear, that the definition of
7 agency is the same that's in FOIA. So the whole
8 including the Executive Office of the President,
9 we go back to the line of cases of *Soucie v.*
10 *David, Mayer v. Bush*, which I think is the task
11 force that Your Honor was referring to. That
12 was the deregulation Reagan task force with the
13 vice president as chair. So you have the *Mayer*
14 *v. Bush*, the *Soucie vs. David*.

15 So all of those cases mean that the
16 E-Government Act has to apply that same body of
17 case law, and there's -- the functional test
18 that's described in our papers, and we think is
19 very clear that it's not satisfied here.

20 And the Armstrong case, in addition, makes
21 it clear that just the mere participation of one
22 person doesn't change the character.

23 THE COURT: Okay. Let me take a short
24 break. I'll figure out if there's anything
25 else, and I'll come back out.

1 MS. SHAPIRO: Thank you.

2 (Break.)

3 THE COURT: I have just one last question.
4 I have not had an opportunity to review really
5 carefully the last missive that I received from
6 plaintiffs. I did look quickly through and
7 noticed the DOD impact statement. So I need to
8 go through and look at all of it more carefully.
9 But if on reflection, in looking at it and
10 reviewing the cases again and considering the
11 arguments that were made and the answers that
12 were given, if I decide that DOD is the federal
13 agency connection to the Commission, since DOD
14 is not a defendant, does it have to be a
15 defendant in order for the Court to basically --
16 assuming I find standing -- to be able to issue
17 any kind of order since they're the ones at this
18 point maintaining the data on behalf of the
19 Commission?

20 They're not a defendant now. Would they
21 have to be if I made that decision? I'm not
22 saying I'm going to. I'm just saying if I
23 decided to do it.

24 Anybody have a position on that?

25 MR. ROTENBERG: Of course, we just learned

1 this afternoon that the DOD now possesses data.
2 So we could quickly amend our complaint and add
3 the DOD as a named defendant.

4 THE COURT: Okay. Any position from DOJ on
5 this?

6 MS. SHAPIRO: Our position would be that
7 the Court would not be empowered to enter relief
8 against a nonparty so that --

9 THE COURT: Right. Okay. He would have to
10 make a decision as to whether he wanted to amend
11 the complaint. Let's assume he filed a motion
12 to amend the complaint which would include DOD,
13 what would your position be?

14 MS. SHAPIRO: That it --

15 THE COURT: I mean, presumably, at this
16 point they possess data, right? And they're
17 maintaining it, at least at this point?

18 MS. SHAPIRO: For some ephemeral amount of
19 time.

20 THE COURT: But they still have it at this
21 point. So if they decided to amend it, I mean,
22 then the Court would have to see whether that
23 works anyway. But I'm just saying that it's
24 clear that if they're not a party, I would not
25 be able to act if I thought that was the -- or

1 concluded that that was the federal agency
2 connection.

3 So if they filed a motion to do it, what
4 would your answer be?

5 MS. SHAPIRO: Well, I think we would
6 respond with arguments similar that the DOD tool
7 that is being used does not convert -- make any
8 difference to the agency -- to the Commission's
9 status as a non-agency or a requirement to do a
10 Privacy Impact Assessment.

11 THE COURT: So that would -- all right. In
12 terms of doing it, but it doesn't get to
13 whether -- even if he decided to put it in, it
14 doesn't mean that he necessarily will decide
15 that.

16 So it seems to me, since at this point they
17 do have the data, and they're maintaining it,
18 that they could certainly have grounds to put
19 them in as a party. It doesn't mean I
20 necessarily am going to find, as they would
21 hope, that that is the federal agency
22 connection. But I just wanted to make sure if I
23 started to go down that path, it actually
24 could -- it could be any ruling.

25 MS. SHAPIRO: I'm sorry. I didn't

1 understand the last --

2 THE COURT: All right. I brought this up
3 because this has been a more developed argument
4 about DOD and its role, since that's come out
5 really only in recent times, and the exhibit I
6 got at 3:00. So I haven't had too long to look
7 at it in terms of what's involved with it. And
8 you have indicated that it, at this point, holds
9 data from the State of Arkansas. So it has the
10 information, and it's maintaining it on behalf
11 of the Commission. So that presumably would be
12 their reason to amend it. The Court would still
13 have to make these other decisions. It doesn't
14 change it.

15 MS. SHAPIRO: Correct.

16 THE COURT: I just want to see that if I
17 decided to do that, that I actually would be in
18 a position to do it.

19 MS. SHAPIRO: Okay.

20 THE COURT: All right. So if you're going
21 to amend it, you need to move swiftly. All
22 right. I don't have anything else, and so I
23 will excuse you.

24 I will not be doing an oral ruling.
25 Obviously, it's very complicated. I will be

1 doing something in writing. I will get it out
2 as quickly as I can understanding the time lines
3 that have been set out.

4 All right? Thank you. Take care.

5 (Hearing concluded.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2
3 I, Richard D. Ehrlich, a Registered Merit
4 Reporter and Certified Realtime Reporter,
5 certify that the foregoing is a true, complete,
6 and accurate transcript of the proceedings
7 ordered to be transcribed in the above-entitled
8 case before the Honorable Colleen
9 Kollar-Kotelly, in Washington, DC, on July 7,
10 2017.

11
12 s/Richard D. Ehrlich July 10, 2017

13

Richard D. Ehrlich, Official Court Reporter
14
15
16
17
18
19
20
21
22
23
24
25