VOTER PRIVACY, VOTING RIGHTS, AND THE
PRESIDENTIAL COMMISSION ON ELECTION INTEGRITY

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House Judiciary Committee
Congressional Black Caucus
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Good afternoon, my name is Marc Rotenberg. I am president of the Electronic Privacy Information Center. EPIC is a non-partisan organization established in 1994 to focus public attention on emerging privacy issues. We are comprised of legal scholars, technology experts, and specialists in election integrity, dedicated to the protection of democratic institutions and Constitutional values. Our organization includes many of the leading experts in the world in the field of digital privacy.

I would like to thank the House Judiciary Committee Democrats and the Congressional Black Caucus for organizing this event and for the invitation to EPIC. It is an honor to sit at a hearing table with many of the nation's most distinguished civil rights leaders.

I am here today to describe the lawsuit that EPIC filed against the Presidential Advisory Commission on Election Integrity on July 3, 2017. I believe it is now one of the most significant cases in the country.

The Kobach Letter

EPIC's lawsuit responds to a letter that the Vice Chair of the Commission Kris Kobach sent to the state election officials just three weeks ago. In that letter, Mr. Kobach asked the state officials to turn over to the Presidential Commission the personal voting records of registered voters across the country. He asked for home addresses and dates of birth. He asked for party affiliation and voting history. He asked for partial social security numbers. And he asked for records of military service as well as felony convictions.

It was a very odd request for a State Secretary to make. Mr. Kobach must surely have known that almost everything he was asking the states to provide to the federal Commission was protected under state law.

Moreover, the Commission had taken none of the legal, regulatory, or practical steps necessary prior to the request for the nation's voter records. And in our opinion even if the Commission had completed a Privacy Impact Assessment, posted the FACA notice, undertaken a Privacy Act rulemaking, and found a website that did not return error messages, the request

would still have violated the federal Constitution. Given the sensitivity of the data, the request was unreasonable and the privacy safeguards were insufficient.

Every federal agency that collects personal information since passage of the E-Government Act is required to undertake a detailed assessment prior to a collection of records containing personal information. Section 208 of that Act requires agencies to state:

> (I) what information is to be collected;
> (II) why the information is being collected;
> (III) the intended use of the agency of the information;
> (IV) with whom the information will be shared;
> (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;
> (VI) how the information will be secured; and
> (VII) whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the ''Privacy Act'').

That assessment is particularly important for a proposed database containing the nation's voting records because the E-Government Act also requires the agency to "ensure that":

> a privacy impact assessment is commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information;

It is difficult to imagine a database more sensitive for the United States political system than one containing detailed personal information about the nation's voters. And it is certainly conceivable that a proper Privacy Impact Assessment would have led to the conclusion that the Commission simply could not obtain the state voter record information it was seeking.

In other words, if the federal Commission had done what it was required to do under federal law prior to initiating the request, it would have concluded that the proposed collection of state voter records was simply unlawful. And that would have ended the program. But the Commission chose instead to ignore the obligation for a Privacy Impact Assessment.

I want to say a word also about the phrase "publicly available" which has been widely used to describe the Commission's request. As a matter of law, none of the records that the Commission is seeking may be disclosed to the Commission by state election officials under the terms of the June 28, 2017 letter. There are numerous requirements that any organization would have to satisfy before obtaining voter records from the states, including specifying appropriate files, the payment of fees, the completion of paperwork, and the provision of a secure transmission method. The vast majority of information that Kobach sought could not be released under any circumstances. Even for names and addresses, there are confidentiality provisions in state voter records laws across the country that protect the personal data of stalking victims, military families, members of the judiciary, and others.

This explains the very strong oppostion of the state election officials from both parties. There were legal consequences for state officials if they had complied with the letter from the Commission. I urge the Committee members to read the responses from the state election officials to Mr. Kobach's letter. Virtually every statement points to deficiencies and shortcomings in the letter. Considering that Mr. Kobach's expertise is election law, this was extraordinary.

EPIC v. Commission

In response to the Kobach letter, on June 30, 2017 EPIC sent a letter to the National Association of State Secretaries, urging state election officials to oppose the request. That letter was signed by 50 experts in voting technology from EPIC and Verified Voting, as well as 20 organizations across the political spectrum who also opposed the attempt to gather state voter records in a national database.

Then on July 3, EPIC filed for a Temporary Restraining Order in federal district court. Essentially, we made three arguments. First, the Commission had failed to conduct and publish a Privacy Impact Assessment prior to the collection of the voter data. Second, the Commission had failed to post a Federal Advisory Committee Act notice describing the Privacy Impact Assessment. Third, the request for personal data was unreasonable and lacked privacy protections and was therefore unconstitutional. Also, during our research, EPIC determined that the Commission had gone around the General Services Administration, which was the federal agency designated in the Executive Order to provide "facilities," "equipment," and other "support services" for the work of the Commission. The Commission chose instead to establish an insecure server at the Department of Defense that was not certified to receive personal information from the general public.

Of all the very many privacy issues we've confronted over the years – from the Clipper Chip and Total Information Awareness, to the warrantless wiretapping program and the airport body scanners – I cannot recall a government program that was so ill-conceived and poorly executed.

Not long after EPIC filed its complaint setting out our factual allegations and legal arguments, the Commission sent a letter to state election officials which said that the Commission would (1) suspend the data collection program, (2) no longer receive state voter data at the military web site, and (3) delete the data from Arkansas, the one state that had responded to Mr. Kobach's request. However, the Commission also expressed interest in resuming the program. As the Commission revealed in EPIC's lawsuit, they are setting up a server in the White House to gather the nation's voting records.

There was additional briefing. Yesterday the Commission filed an Opposition to EPIC's amended motion, and we filed our reply. EPIC made clear the Court should prevent the Commion from restarting the program,.

We are now waiting for the Court's decision.

The Commission Should Simply End the Data Collection Program

I would like to conclude by saying directly that the Commission's program to gather state voter data was ill-conceived, poorly executed, and most likely unconstitutional. It should simply end. I hope the Commission will announce the termination of the program this week. If it does not, EPIC will pursue its case until we obtain a favorable outcome. And we welcome the many organizations across the country that have also filed lawsuits.

I recall when Admiral John Poindexter sought to establish "Total Information Awareness" after 9-11. Admiral Poindexter's ambition was to gather up all of America's personal data to try to prevent future terrorist attack. Americans across the country and Congressional leaders of both parties opposed Mr. Poindexter's undertaking. That would be the right outcome here. We do not protect freedom by building a national database on citizens.

And as we now know, the collection of personal data also places our nation at risk. We have learned since Mr. Poindexter's effort that it is precisely the collection of this type of data that leaves Americans vulnerable to identity theft, financial fraud, and cyber-attack. Our banks, our universities, and our government agencies are all subject to attack precisely because of the data they have gathered.

At this moment, much of the Congress is focused on another issue of great concern to EPIC – the scope and impact of Russian influence in the 2016 Presidential election. At least twenty-one state election systems were attacked by a foreign adversary. It is no small matter that those with expertise in cyber security, such as former DHS Secretary Michael Chertoff, have opposed the creation of a national database of voter information.

So, my hope is that this Forum marks the beginning of the end of the Commission's attempt to gather state voter data. At a time of partisan divide, we must surely agree that to safeguard election integrity we begin by respecting the privacy rights of America's voters. There is no issue less partisan in our nation than safeguarding our democratic institutions.

Thank you again for the opportunity to speak with you today. I will be pleased to answer your questions.

References

EPIC v. Commission, No. 17-1320 (D.D.C. filed July 3, 2017)

"Voter Privacy and the PACEI" (provides subject matter background)
https://epic.org/privacy/voting/pacei/

"EPIC v. Commission" (includes all litigation documents)
https://epic.org/privacy/litigation/voter/epic-v-commission/

EPIC, "51 Reasons -- Protect Voter Data" (launched July 17, 2017)
http://www.epic.org/voter-data/