

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON
ELECTION INTEGRITY; MICHAEL PENCE, in his
official capacity as Vice 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; GENERAL SERVICES ADMINISTRATION

Defendants.

No: 1:17-cv-01320-CKK

ADDENDUM

**PLAINTIFF’S REPLY TO DEFENDANTS’ RESPONSE TO
THE COURT’S JULY 5, 2017, ORDER**

The Commission’s response to this Court’s Order of July 5, 2017, Dkt. 9, further underscores that EPIC is likely to succeed on the merits of its claims and that EPIC is entitled to a Temporary Restraining Order. *See* Second Declaration of Kris W. Kobach, Dkt. 11-1.

First, as the Defendants concede, Commission member Christy McCormick is also a member of the Election Assistance Commission (“EAC”). Kobach Second Decl. 2. The EAC is an agency under the APA. *Id.* at 2259. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 5 (D.C. Cir. 2016) (citing *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013)) (noting that a plaintiff could “challenge the [Election Assistance] Commission's denial [of the plaintiff’s request] under the Administrative Procedure Act

(‘APA’).”) By virtue of serving as a Commissioner of an APA-covered agency, Ms. McCormick is subject to the strictures of the APA in all official exercises of her authority—including while sitting on a presidential advisory commission. *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 39–40 (D.D.C. 2002) (citing *Ryan v. Dep’t of Justice*, 617 F.2d 781 (D.C. Cir. 1980)). (“Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA’s definition of ‘agency action’ does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President.”)

It is implausible to claim, as Mr. Kobach does, that the choice of Ms. McCormick to serve on the Commission was unrelated to her membership on the EAC—a “bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.” *About EAC*, U.S. Election Assistance Comm’n (2017).¹ Also, Mr. Kobach does not discount the possibility that additional federal agency officials will be named to the Commission. *See Kobach Second Decl.* 2.

Second, Mr. Kobach’s claim that the Commission has “no plans” to “collect or store any voter registration or other elections-related data” using General Services Administration (GSA) facilities does not diminish the GSA’s ordained role as the provider of “administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.” 82 Fed. Reg at 22,389; *see also* Def. Opp’n Ex. 2 (GSA “shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission” (emphasis added)). Because the GSA is *required* to provide such facilities to the Commission, the GSA is accountable as an

¹ <https://www.eac.gov/about-the-useac/>.

agency for the Commission's use and misuse of those facilities. GSA is thus properly named as a Defendant and may be enjoined under the APA.

Finally, Mr. Kobach's representations concerning "Safe Access File Exchange (SAFE)" are alternately misleading or meritless. "SAFE" is not, in fact, a secure system. Second Lewis Decl., Ex. 11. Further, the claim that "States will upload data to the SAFE website" is undermined by Mr. Kobach's letter to state election officials, inviting them to transmit personal voter data via email. Kobach Letter 2. Lastly, Mr. Kobach wrongly represents that the White House is to be "responsible for collecting and storing data for the Commission," when the Executive Order establishing the Commission clearly states that it is the GSA's obligation to provide such services to the Commission. 82 Fed. Reg at 22,389.