

The Presidential Advisory Commission on Election Integrity

*Electronic Privacy Information Center
v. Presidential Advisory Commission on Election Integrity
(1:17-cv-1320), ACLU v. Trump (1:17-cv-1351),
and Lawyers' Committee for Civil Rights Under Law
v. Presidential Advisory Commission on Election Integrity
(1:17-cv-1354) (Colleen Kollar-Kotelly, D.D.C.) and Joyner
v. Presidential Advisory Commission on Election Integrity
(Marcia G. Cooke, S.D. Fla. 1:17-cv-22568)*

In mid-2017, President Trump created the Presidential Advisory Commission on Election Integrity. The commission's vice chair asked all states to submit extensive voter registration data to the commission. Following states' reluctance to comply and lawsuits challenging the request, President Trump disbanded the commission early in 2018.

Subject: Voting irregularities. *Topics:* Registration procedures; case assignment.

Privacy Impact Assessment

The Electronic Privacy Information Center (EPIC), an organization “established in 1994 to focus public attention on emerging privacy and civil liberties issues,” filed a federal complaint in the District of the District of Columbia on Monday, July 3, 2017, challenging requests to state election officials by the vice chair of President Trump’s Presidential Advisory Commission on Election Integrity for detailed, publicly available voter roll data.¹ EPIC sought an injunction against “collection of personal voter data” and an order that the commission prepare a privacy impact assessment of its requests.² At a hearing, EPIC described its membership as approximately 100 persons on its advisory board.³

President Trump created the advisory commission, chaired by the Vice President, by executive order on May 11.⁴ Kansas’s secretary of state was

1. Complaint, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, No. 1:17-cv-1320 (D.D.C. July 3, 2017), D.E. 1 [hereinafter *Elec. Privacy Info. Ctr. Complaint*]; *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 374, 376 (D.C. Cir. 2017); see Mark Berman & John Wagner, *At Least 44 States Deny Full Data to Voting Panel*, Wash. Post, July 6, 2017, at A10.

2. *Elec. Privacy Info. Ctr. Complaint*, *supra* note 1, at 10–11; *Elec. Privacy Info. Ctr.*, 878 F.3d at 374, 376.

3. Transcript at 15–18, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 7, 2017, filed July 9, 2017), D.E. 22 [hereinafter *Elec. Privacy Info. Ctr. Hearing Transcript*].

4. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 16, 2017); *Elec. Privacy Info. Ctr.*, 878 F.3d at 375; *Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, 377 F. Supp. 3d 428, 430 (S.D.N.Y. 2019); *United to Protect Democracy v. Presidential Advisory Comm’n on Election*

named vice chair.⁵ The vice chair's letters to other secretaries of state, requesting responses by July 14,⁶ were sent out on June 28, and approximately half of the states immediately declined to fully comply with the request.⁷ By a week later, nearly all of the states had balked.⁸ The vice chair reported in litigation, "To my knowledge, as of July 5, 2017, no Secretary of State had yet provided to the Commission any of the information requested in my letter."⁹ On July 6, Arkansas submitted data, but they were subsequently deleted without the commission looking at them.¹⁰

With its complaint against the commission, the Vice President, the Executive Office of the President, and the General Services Administration, EPIC filed a motion for a temporary restraining order to "safeguard the privacy interests of registered voters and maintain the *status quo* while more permanent solutions may be considered."¹¹

Judge Colleen Kollar-Kotelly held a telephonic scheduling conference at approximately 4:50 p.m. on the day that the case was filed, a day before a na-

Integrity, 288 F. Supp. 3d 99, 101–02 (D.D.C. 2017); ; Dunlap v. Presidential Advisory Comm'n on Election Integrity, 286 F. Supp. 3d 96, 100 (D.D.C. 2017); Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 266 F. Supp. 3d 297, 302 (D.D.C. 2017); ACLU v. Trump, 266 F. Supp. 3d 131, 135 (D.D.C. 2017); see John Wagner & Jenna Johnson, *Creation of Voter-Fraud Panel Is Met with Criticism*, Wash. Post, May 12, 2017, at A2.

5. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 303; ACLU, 266 F. Supp. 3d at 135; see Ari Berman, *The Man Behind Trump's Voter-Fraud Obsession*, N.Y. Times, June 13, 2017, Magazine; Wagner & Johnson, *supra* note 4. See generally Allan J. Lichtman, *The Embattled Vote in America* 223–27 (2018).

6. See *Elec. Privacy Info. Ctr.* Complaint, *supra* note 1, Ex. 3; Transcript at 4, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017, filed July 6, 2017), D.E. 10 [hereinafter *Elec. Privacy Info. Ctr.* Initial Conference Transcript].

7. *Elec. Privacy Info. Ctr.*, 878 F.3d at 375–76; *United to Protect Democracy*, 288 F. Supp. 3d at 102; *Dunlap*, 286 F. Supp. 3d at 101; ACLU, 266 F. Supp. 3d at 136–37; see *Elec. Privacy Info. Ctr.* Complaint, *supra* note 1, at 10–11; *Elec. Privacy Info. Ctr.*, 878 F.3d at 374 (noting that the commission could only request information because it lacked authority to demand information); see also Mark Berman & David Weigel, *States Resist Turning Over Voter Data*, Wash. Post, July 1, 2017, at A2; Michael Wines & Rachel Shorey, *Inside the Uproar Over a Government-Led Search for Voter Fraud*, N.Y. Times, July 8, 2017, at A14.

"The Colorado Secretary of State's Office reported Monday that of the 3,738 people who withdrew their registrations between June 28 and Friday, 367 are Republicans and 1,255 are unaffiliated voters. Just over 2,000 Democrats have also canceled their registrations." Jesse Paul, *Thousands Cancel Registrations*, Denver Post, July 18, 2017, at 3A (reporting that some voters responded to the data requests by canceling their voter registrations).

8. See Berman & Wagner, *supra* note 1.

9. Kobach Declaration at 3, attached to Government Response, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 5, 2017), D.E. 8; see *Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 3, at 12.

10. *Elec. Privacy Info. Ctr.*, 878 F.3d at 376; *Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 3, at 40.

11. Temporary Restraining Order Motion, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017), D.E. 3.

tional holiday.¹² She asked the government to file a response to the motion by noon following the holiday, with a reply due the morning after that.¹³ Arguing a difficulty in reaching the people that she would need to reach, the government's attorney asked for an additional day; following back and forth bids by the judge and the attorney, Judge Kotelly extended the deadline four hours, observing, "I would've assumed that since the reaction was not a positive one by a lot of states, that [the people the government's attorney needs to reach] would've expected that there would be a lawsuit."¹⁴ On the day that briefing was completed, Judge Kotelly scheduled a hearing for the following afternoon, identifying seven specific issues for the parties to address.¹⁵

At a telephonic conference later in the litigation, Judge Kotelly succinctly specified an approach that she used in proceedings throughout the litigation:

I would ask that if you listen to me, there may be an instance where I'm going to interrupt you either because I think you've wandered off what we want to talk about or I've heard enough and we need to move on to something else. So I would ask that you please listen.¹⁶

By the time of the Friday injunction hearing it was determined that the Department of Defense would be maintaining data for the commission,¹⁷ so EPIC amended its complaint to add the department as a defendant,¹⁸ and Judge Kotelly allowed the government an opportunity to file a brief on Monday respecting the adding of the additional party.¹⁹ She allowed EPIC to file a response on the next day.²⁰ The government informed Judge Kotelly and EPIC that the director of White House information technology would develop a system for receiving and maintaining the states' data instead of the Department of Defense, and on Monday the government asked the states not to send data until after Judge Kotelly's ruling.²¹

Following additional briefing, Judge Kotelly granted an unopposed motion to file a second amended complaint adding information technology au-

12. *Elec. Privacy Info. Ctr.* Initial Conference Transcript, *supra* note 6; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 3, 2017) [hereinafter *Elec. Privacy Info. Ctr.* Docket Sheet].

13. *Elec. Privacy Info. Ctr.* Initial Conference Transcript, *supra* note 6, at 8.

14. *Id.* at 8–11.

15. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 6, 2017), D.E. 15.

16. Transcript at 4, *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-2361 (D.D.C. Nov. 17, 2017, filed Nov. 29, 2017), D.E. 29.

17. *Elec. Privacy Info. Ctr.* Hearing Transcript, *supra* note 3, at 58.

18. Amended Complaint, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 7, 2017), D.E. 21; *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 304 (D.D.C. 2017).

19. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 10, 2017), D.E. 23; *see* Government Brief, *id.* (July 10, 2017), D.E. 24.

20. Order, *id.* (July 10, 2017), D.E. 26; *see* EPIC Brief, *id.* (July 11, 2017), D.E. 27.

21. Kobach Declaration, *attached to* Government Notice, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 13, 2017), D.E. 12; *see* Rebecca Ballhaus, *States Push Back on Voter Records*, Wall St. J., July 11, 2017, at A3; Spencer S. Hsu, *Trump Voting Panel Asks States to Hold Off on Sending Data*, Wash. Post, July 11, 2017, at A2; Spencer S. Hsu, *Voter Data to Go on White House Computers Under Purview of Pence Staff*, Wash. Post, July 7, 2017, at A4.

thorities as defendants.²² In light of the amended complaints and “substantial changes in factual circumstances since this action was filed,” Judge Kotelly asked EPIC to amend its motion for any injunctive relief that it still sought,²³ which EPIC did on Thursday.²⁴

On July 24, Judge Kotelly denied EPIC immediate relief, without prejudice to later consideration should the factual circumstances change.²⁵ The second paragraph of her opinion is informative to the general public:

Although substantial public attention has been focused on the Commission’s request, the legal issues involved are highly technical. In addition to the Fifth Amendment of the Constitution, three federal laws are implicated: the Administrative Procedure Act, the E-Government Act of 2002, and the Federal Advisory Committee Act. All three are likely unfamiliar to the vast majority of Americans, and even seasoned legal practitioners are unlikely to have encountered the latter two. Matters are further complicated by the doctrine of standing, a Constitutional prerequisite for this Court to consider the merits of this lawsuit.²⁶

Judge Kotelly found that EPIC’s members did not have standing to challenge transfer of the data, because all of the members who submitted declarations lived in states who had refused to comply, and even if the states complied, the risk that their data would be improperly exposed was speculative.²⁷ EPIC did have informational standing to challenge the commission’s failure to prepare a privacy impact assessment, but (1) the E-Government Act did not provide it a cause of action, and (2) the commission was not an agency covered by the Administrative Procedures Act.²⁸

The court of appeals determined on December 26 that EPIC did not have informational standing—because it is not a voter, its privacy interests were not at stake—and affirmed Judge Kotelly’s denial of preliminary relief.²⁹

Three days later, District Judge Rudolph Contreras held that the commission was not an agency with respect to the Paperwork Reduction Act and dismissed a September 29 complaint alleging that the commission “acted without transparency and without providing legally required opportunities

22. *Elec. Privacy Info. Ctr.* Docket Sheet, *supra* note 12; Second Amended Complaint, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 11, 2017), D.E. 33; *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 305.

23. Order, *Elec. Privacy Info. Ctr.*, No. 1:17-cv-1320 (D.D.C. July 11, 2017), D.E. 31.

24. Amended Injunction Motion, *id.* (July 13, 2017), D.E. 35; *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 305.

25. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d 297; see Spencer S. Hsu, *Trump Voting Panel Wins a Round in Federal Court*, Wash. Post, July 25, 2017, at A9.

26. *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 301 (citations omitted).

27. *Id.* at 302, 307–09.

28. *Id.* at 302, 309–19; *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 374, 376 (D.C. Cir. 2017); see Matthew Haag, *Judge Clears Path for Voter Fraud Panel*, N.Y. Times, July 25, 2017, at A14.

29. *Elec. Privacy Info. Ctr.*, 878 F.3d at 376–80; see Rachel Weiner, *Appeals Court Rejects Challenge to Voting Panel*, Wash. Post, Dec. 27, 2017, at A3.

for the public to comment on the appropriateness of the request” to the states.³⁰

Transparency and Balance

The ACLU filed a federal complaint in the District of Columbia on Monday, July 10, challenging the commission’s ideological balance and seeking a judicial order requiring more transparency pursuant to the Federal Advisory Committee Act (FACA).³¹ With its complaint, the ACLU filed a motion for a temporary restraining order and a preliminary injunction.³² The ACLU notified the court that its case was related to EPIC’s,³³ and the court assigned the case to Judge Kotelly.³⁴ She set the case for a chambers telephonic conference the following morning, and negotiated with the parties a completion of motion briefing by the end of the week.³⁵

The Lawyers’ Committee for Civil Rights Under Law also filed a District of Columbia July 10 federal complaint seeking judicially imposed transparency pursuant to FACA.³⁶ With its complaint, the committee filed a motion for a temporary restraining order or a preliminary injunction³⁷ and a notice that its case was related to the other two before Judge Kotelly.³⁸ Judge Kotelly held a courtroom telephonic conference with the parties on the following morning.³⁹

Judge Kotelly ruled in both cases on July 18.

With respect to the ACLU case, Judge Kotelly determined, “The only jurisdictional basis pursued by Plaintiffs is in the form of mandamus. Because the Court concludes that mandamus jurisdiction is unavailable in this case at the present time, Plaintiffs’ motion must be denied.”⁴⁰ Litigation on an amended complaint is stayed pending the results of other litigation.⁴¹

30. *United to Protect Democracy v. Presidential Advisory Comm’n on Election Integrity*, 288 F. Supp. 3d 99 (D.D.C. 2017); Complaint at 2, *United to Protect Democracy v. Presidential Advisory Comm’n on Election Integrity*, No. 1:17-cv-2016 (D.D.C. Sept. 29, 2017), D.E. 1; see 44 U.S.C. §§ 3501–3558 (2016).

This case was initially assigned to Judge Kotelly as related to the EPIC case, Docket Sheet, *United to Protect Democracy*, No. 1:17-cv-2016 (D.D.C. Sept. 29, 2017); Notice, *id.* (Sept. 29, 2017), D.E. 4, and then reassigned to Judge Contreras, Reassignment, *id.* (Oct. 3, 2017), D.E. 9.

31. Complaint, *ACLU v. Trump*, No. 1:17-cv-1351 (D.D.C. July 10, 2017), D.E. 1.

32. Motion, *id.* (July 10, 2017), D.E. 3.

33. Notice, *id.* (July 10, 2017), D.E. 5.

34. Docket Sheet, *id.* (July 10, 2017) [hereinafter *ACLU Docket Sheet*].

35. *Id.*

36. Complaint, *Lawyers’ Comm. for Civil Rights Under Law v. Presidential Advisory Comm’n on Election Integrity*, No. 1:17-cv-1354 (D.D.C. July 10, 2017), D.E. 1.

37. Motion, *id.* (July 10, 2017), D.E. 3.

38. Notice, *id.* (July 10, 2017), D.E. 2.

39. Docket Sheet, *id.* (July 10, 2017).

40. *ACLU v. Trump*, 266 F. Supp. 3d 131, 134 (D.D.C. 2017).

41. *ACLU Docket Sheet*, *supra* note 34; Amended Complaint, *ACLU v. Trump*, No. 1:17-cv-1351 (D.D.C. Jan. 3, 2018), D.E. 30.

With respect to the Lawyers' Committee case, Judge Kotelly concluded that the committee "has not demonstrated that, at the present time, Defendants are out of compliance with FACA's open meetings and document disclosure provisions."⁴²

There is no doubt that the Commission and its request for voter roll information have generated substantial public interest and debate. Nonetheless, Plaintiff has failed to demonstrate that, absent preliminary injunctive relief, its ability to engage in this public debate would be substantially impaired in a manner that is both "certain and great."⁴³

On December 22, Judge Kotelly granted Matthew Dunlap, a member of the commission, relief in an action seeking a judicial order requiring the commission to share with him information that the commission was providing to other members.⁴⁴

Other Privacy Cases

Public Citizen filed a federal complaint in the District of Columbia on July 10 challenging the army's involvement in maintaining the commission's data⁴⁵ with a notice that the case was related to EPIC's case,⁴⁶ so the court assigned the case to Judge Kotelly.⁴⁷ On July 14, Common Cause filed a complaint against the commission, the Department of Homeland Security, and the Social Security Administration seeking "to enjoin Defendants from collecting, maintaining, using, or disseminating [voter roll] data and to destroy or return any such data that has already been collected and is being maintained in violation of the law."⁴⁸ Common Cause also told the court that its action was

42. Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity, 266 F. Supp. 3d 54, 59 (D.D.C. 2017), *interlocutory appeal dismissed*, Order, No. 17-5167 (D.C. Cir. Dec. 20, 2017), 2017 WL 6945782 (granting voluntary dismissal following an order to show cause why the appeal was not moot because of the intervening July 19, 2017, meeting of the commission that was the subject of the injunction motion).

43. *Id.* at 70.

44. Dunlap v. Presidential Advisory Comm'n on Election Integrity, 286 F. Supp. 3d 96 (D.D.C. 2017); Dunlap v. Presidential Advisory Comm'n on Election Integrity, 944 F.3d 945, 947 (D.C. Cir. 2019); see Complaint, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-2361 (D.D.C. Nov. 9, 2017), D.E. 1 ("by obstructing certain commissioners' access to information and failing to allow substantive participation of commissioners with balance in terms of points of view, the Commission and its staff have compromised the legitimacy of any findings that may emerge from this process"); see also Spencer S. Hsu, *Voting Fraud Panel Will Destroy, Not Share, Data*, Wash. Post, Jan. 11, 2018, at A9; John Wagner, *Trump Voting Panel Sued by Democratic Member Complaining of Exclusion*, Wash. Post, Nov. 10, 2017, at A9; Michael Wines, *Voter Fraud Panel Is Sued, This Time by a Member*, N.Y. Times, Nov. 10, 2017, at A18.

45. Complaint, Public Citizen, Inc. v. U.S. Dep't of the Army, No. 1:17-cv-1355 (D.D.C. July 10, 2017), D.E. 1.

46. Notice, *id.* (July 10, 2017), D.E. 2.

47. Docket Sheet, *id.* (July 10, 2017); Transcript at 3, Common Cause v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-1398 (D.D.C. Aug. 1, 2017, filed Aug. 3, 2017), D.E. 19 [hereinafter *Common Cause Transcript*].

48. Complaint, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 14, 2017), D.E. 1.

related to EPIC's,⁴⁹ so the court assigned this case also to Judge Kotelly.⁵⁰ The court's calendar committee later determined that these two new cases were not related to EPIC's, so they were reassigned to Judge Royce C. Lamberth on July 19.⁵¹

Public Citizen dismissed its action voluntarily on July 25.⁵² At 8:10 p.m. on Friday, July 28, two weeks after filing its complaint, Common Cause filed a motion for a temporary restraining order or a preliminary injunction.⁵³ At a hearing on Tuesday morning, Judge Lamberth denied Common Cause immediate relief and gave the plaintiff guidance on amending its motion for a preliminary injunction.⁵⁴ On Thursday, Common Cause withdrew its motion instead.⁵⁵

Challenge by Voters

Five Florida voters, Florida's branch of the ACLU, and the Florida Immigrant Coalition filed a federal complaint in the Southern District of Florida on July 10 challenging the legality of the commission's request of the states on behalf of Florida voters and voters throughout the United States.⁵⁶ Named as defendants were the commission, its chair, and its vice chair; the executive offices of the President and the Vice President, the General Services Administration Administrator, and Florida's secretary of state.⁵⁷ With their complaint, the plaintiffs filed a motion for a temporary restraining order.⁵⁸

The court assigned the case to Judge Marcia G. Cooke,⁵⁹ who was relieved that as emergency election cases go this one did not have the time pressure presented by cases involving legal issues arising while voters are at the polls.⁶⁰

49. Notice, *id.* (July 14, 2017), D.E. 1-2.

50. Docket Sheet, *id.* (July 14, 2017); *Common Cause* Transcript, *supra* note 47, at 3.

51. Reassignment, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 19, 2017), D.E. 6; Reassignment, *Public Citizen, Inc.*, No. 1:17-cv-1355 (D.D.C. July 19, 2017), D.E. 6; *Common Cause* Transcript, *supra* note 47, at 3.

52. Notice, *Public Citizen, Inc.*, No. 1:17-cv-1355 (D.D.C. July 25, 2017), D.E. 7.

53. Motion, *Common Cause*, No. 1:17-cv-1398 (D.D.C. July 28, 2017), D.E. 10.

54. *Common Cause* Transcript, *supra* note 47; Order, *Common Cause*, No. 1:17-cv-1398 (D.D.C. Aug. 1, 2017), D.E. 18; see Spencer S. Hsu, *Common Cause's Effort to Block Trump Voter Panel Is Denied*, Wash. Post, Aug. 2, 2017, at A15.

55. Notice, *Common Cause*, No. 1:17-cv-1398 (D.D.C. Aug. 3, 2017), D.E. 20.

56. Complaint, *Joyner v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-22568 (S.D. Fla. July 10, 2017), D.E. 1.

57. *Id.*

58. Temporary Restraining Order Motion, *id.* (July 10, 2017), D.E. 4; see Corrected Temporary Restraining Order Motion, *id.* (July 13, 2017), D.E. 6.

59. Docket Sheet, *id.* (July 13, 2017) [hereinafter *Joyner* Docket Sheet].

Tim Reagan interviewed Judge Cooke and her law clerk Alex St. Pierre for this report by telephone on March 27, 2018.

60. Interview with Hon. Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

Three days after the case was filed, the government notified Judge Cooke of the three actions pending before Judge Kotelly.⁶¹

On July 17, Judge Cooke ordered the plaintiffs to show cause why their motion for a temporary restraining order should not be regarded as a motion for a preliminary injunction because of a failure to show why relief should be granted before the defendants could be heard.⁶²

Judge Kotelly issued her July 18 decision while Judge Cooke was conducting a telephonic hearing in her own case.⁶³ Government attorneys received notice of Judge Kotelly's ruling during the hearing, so Judge Cooke took a break in the proceeding so that she and the parties could review the other judge's ruling.⁶⁴

Judge Cooke decided to "defer to the United States District Court for the District of Columbia's July 18, 2017 Order and Memorandum Opinion for the limited purpose of determining whether to grant a temporary restraining order against the Federal Defendants," and Judge Cooke therefore denied the plaintiffs immediate relief against the commission.⁶⁵

Termination of the Commission

On January 3, 2018, President Trump disbanded the commission.⁶⁶

On April 2, the District of Columbia Circuit's court of appeals denied EPIC's motion to vacate as moot the affirmance of Judge Kotelly's denying EPIC preliminary relief.⁶⁷

61. Notice, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. July 13, 2017), D.E. 12; see *Joyner* Docket Sheet, *supra* note 59 (noting assignment of the case to Judge Cooke, D.E. 2).

62. *Joyner* Docket Sheet, *supra* note 59 (D.E. 17).

63. Order at 2, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. July 20, 2017), D.E. 31 [hereinafter July 20, 2017, *Joyner* Order], 2017 WL 3113486; Interview with Hon. Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

64. Interview with Hon. Marcia G. Cooke and her law clerk Alex St. Pierre, Mar. 27, 2018.

65. July 20, 2017, *Joyner* Order, *supra* note 63.

66. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 8, 2018); see Notice, *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-2361 (D.D.C. Jan. 3, 2018), D.E. 34; Notice, *United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-2016 (D.D.C. Jan. 3, 2018), D.E. 34; Notice, *Common Cause v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1398 (D.D.C. Jan. 3, 2018), D.E. 42; Notice, *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1354 (D.D.C. Jan. 3, 2018), D.E. 39; Notice, *ACLU v. Trump*, No. 1:17-cv-1351 (D.D.C. Jan. 3, 2018), D.E. 29; Notice, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1320 (D.D.C. Jan. 3, 2018), D.E. 57; see also Michael C. Bender, *Trump Ends Voter Fraud Commission*, Wall St. J., Jan. 4, 2018, at A3; John Wagner, *Panel Studying Alleged Voter Fraud Is Dismantled*, Wash. Post, Jan. 4, 2018, at A1; Michael Wines & Maggie Haberman, *Voter Fraud Commission Started by a Tweet Is Ended by Another*, N.Y. Times, Jan. 5, 2018, at A1.

67. Orders, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-5171 (D.C. Cir. Apr. 2, 2018), *cert. denied*, 586 U.S. ___, 139 S. Ct. 791 (2018).

The Florida Action Continued

In Florida, litigation over voter roll data continued. In a January 5 motion for emergency relief, the plaintiffs alleged,

New, disturbing developments have arisen, requiring emergency Court intervention. On January 3, 2018, the President executed an Executive Order, terminating the Commission. Within hours, Kansas Secretary of State Kris Kobach, the Commission's Vice Chair and notorious vote suppressor, gave statements to the media that he and the White House are working together to transfer private, protected voter data to Immigration and Customs Enforcement ("ICE") so that Secretary Kobach, the White House, and ICE can work together to purge voter rolls. Secretary Kobach called this a "tactical shift," saying "[t]he investigations will continue now, but they won't be able to stall [it] through litigation." Using Commission data, the Federal Defendants seek to "Stop Aliens From Voting," without complying with FACA and other laws.⁶⁸

According to the government, "As of September 29, 2017, the Commission had received data from nineteen states, including Florida, and one county."⁶⁹ On January 18, 2018, Judge Cooke ordered the government to address the plaintiffs' concerns:

Federal Defendants shall submit a declaration from Kris Kobach, or another member of the Commission with knowledge of the Commission's activities and authority to speak on the Government's behalf, stating what information was collected or created by the Commission and/or its members on behalf of the Commission, where that information was and is being stored, by whom the information has been accessed, and what plans were made by the Commission to maintain or dispose of the information, including the voter information data held by the [Director of White House Information Technology], upon termination of the Commission.⁷⁰

A January 16, 2018, letter from Kobach to government counsel stated, "I never accessed the state voting data that the [commission] collected, and I do not now have access to it."⁷¹ On January 26, the former commission's executive director declared, "The state voter data has never been provided to, or accessed by, the former Commissioners, or any agency."⁷²

Reviewing amended pleadings, Judge Cooke affirmed and adopted on March 19 Magistrate Judge Jonathan Goodman's February 6 recommended

68. Emergency Motion at 2, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Jan. 5, 2018), D.E. 69 [hereinafter Jan. 5, 2018, *Joyner* Emergency Motion]; see Report and Recommendation, *id.* (Feb. 6, 2018), D.E. 97 [hereinafter *Joyner* Report and Recommendation].

69. Government Brief at 8, *id.* (Jan. 26, 2018), D.E. 89.

70. Order, *id.* (18, 2018), D.E. 83, 2018 WL 481880.

71. Kobach Letter, *attached as* Ex. D, Government Brief, *id.* (Jan. 26, 2018), D.E. 89 [hereinafter Jan. 26, 2018, *Joyner* Government Brief].

72. Kossack Declaration, *attached as* Ex. D, Jan. 26, 2018, *Joyner* Government Brief, *supra* note 71; see Hsu, *supra* note 44.

denial of immediate relief.⁷³ And Judge Cooke dismissed the case as moot on May 30.⁷⁴

A Commissioner's Entitlement to Documents

Judge Kotelly decided on June 27 that Commissioner Dunlap was still entitled to the relief that she had granted him in December.⁷⁵ First, “The Commission’s termination does not affect the premise of the Court’s December 22, 2017, opinion”⁷⁶ Second, “Only upon Plaintiff’s review of the documents generated by the Commission will the extent to which his participation was thwarted become clear.”⁷⁷ Third, Judge Kotelly regarded evasion of her order as a possible motivating factor in terminating the commission as a lack of respect for the tribunal: “Were it not so, the Court would have expected Defendants to pursue an interlocutory appeal, rather than termination of the Commission twelve days after this Court’s preliminary injunction compelling a document production. They shall not be permitted to further postpone compliance with a preliminary injunction.”⁷⁸

Documents were produced on July 18,⁷⁹ as ordered by Judge Kotelly.⁸⁰ Dunlap reported in a status report that the production may not be complete,⁸¹ and the commission filed an appeal.⁸² A second appeal from a subsequent production order also was heard on November 18, 2019.⁸³ The court of appeals decided on December 20 that it was improper for Judge Kotelly to use mandamus authority to order production of “emails between the Vice

73. Order, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Mar. 19, 2018), D.E. 105, 2018 WL 1859347; *Joyner* Report and Recommendation, *supra* note 68; see Jan. 5, 2018, *Joyner* Emergency Motion, *supra* note 68; Amended Complaint, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. Dec. 29, 2017), D.E. 65.

74. Opinion, *Joyner*, No. 1:17-cv-22568 (S.D. Fla. May 30, 2018), D.E. 108, 2018 WL 4776089.

75. *Dunlap v. Presidential Advisory Comm’n on Election Integrity*, 319 F. Supp. 3d 70, 83–90, 110 (D.D.C. 2018); see *Lawyers’ Comm. for Civil Rights Under Law v. Presidential Advisory Comm’n on Election Integrity*, 316 F. Supp. 3d 230, 232 (D.D.C. 2018).

76. *Dunlap*, 319 F. Supp. 3d at 86.

77. *Id.* at 87.

78. *Id.* at 89 (citing the commission vice chair’s description of the termination as an “option play” in response to litigation).

79. Notice, *Dunlap v. Presidential Advisory Comm’n on Election Integrity*, No. 1:17-cv-2361 (D.D.C. July 18, 2018), D.E. 53 (“relevant documents that *any* of the former commissioners generated or received”).

80. *Dunlap*, 319 F. Supp. 3d at 78, 110.

81. Status Report, *Dunlap*, No. 1:17-cv-2361 (D.D.C. July 27, 2018), D.E. 54.

82. Docket Sheet, *Dunlap v. Presidential Advisory Comm’n on Election Integrity*, No. 18-5266 (D.C. Cir. Aug. 31, 2018).

83. Docket Sheet, *Dunlap v. Presidential Advisory Comm’n on Election Integrity*, No. 19-5051 (D.C. Cir. Mar. 5, 2019); [www.cadc.uscourts.gov/recordings/recordings2019.nsf/6C6EF3E04D6AF1D6852584B6006408DE/\\$file/18-5266.mp3](http://www.cadc.uscourts.gov/recordings/recordings2019.nsf/6C6EF3E04D6AF1D6852584B6006408DE/$file/18-5266.mp3) (audio recording of oral argument); see Order, *Dunlap*, No. 1:17-cv-2361 (D.D.C. Jan. 28, 2019), D.E. 64.

President's staff and individuals who were then commissioners discussing potential appointees to the Commission."⁸⁴

On May 29, 2020, Judge Kotelly terminated the action, finding that Dunlap had received by then all documents to which he was entitled.⁸⁵

Satisfying Litigation by Destroying Data

On July 19, 2018, the plaintiffs in the pending actions notified Judge Kotelly that they did not object to the government's proposal to destroy the state voter data that was collected by the commission.⁸⁶ Expressing a "view that no further adjudication in this matter is necessary," Judge Kotelly ordered a notice filed by August 20 confirming the planned deletion of data.⁸⁷ On that date, the government certified that the files had been deleted, and remaining fragments and backups had been overwritten.⁸⁸

Judge Kotelly dismissed the EPIC case on August 22.⁸⁹ Common Cause stipulated to a dismissal on August 29,⁹⁰ and Judge Kotelly approved the Lawyers' Committee for Civil Rights Under Law's voluntary dismissal on September 7.⁹¹

Other Actions

A July 18, 2017, action filed in the Southern District of New York to enjoin the cooperation of the commission as created for an improper purpose was voluntarily dismissed.⁹²

An August 21, 2017, action under the Freedom of Information Act (FOIA) filed in the Southern District of New York seeks records from government agencies about the commission so as to discover the true purpose of the commission.⁹³ On April 30, 2019, Judge Alvin K. Hellerstein ordered

84. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 944 F.3d 945, 947 (D.C. Cir. 2019).

85. Opinion, *Dunlap*, No. 1:17-cv-2361 (D.D.C. May 29, 2020), D.E. 94.

86. Notice, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1320 (D.D.C. July 19, 2018), D.E. 62; see Notice of Compliance, *id.* (July 17, 2018), D.E. 61.

87. Order, *id.* (July 19, 2018), D.E. 63.

88. Notice, *id.* (Aug. 20, 2018), D.E. 64.

89. Order, *id.* (Aug. 22, 2018), D.E. 65.

90. Stipulation, *Common Cause v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1398 (D.D.C. Aug. 29, 2018), D.E. 54.

91. Order, *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1354 (D.D.C. Sept. 7, 2018), D.E. 47.

92. Order, *NAACP Legal Def. & Educ. Fund, Inc. v. Trump*, No. 1:17-cv-5427 (S.D.N.Y. Feb. 28, 2018), D.E. 94; see Second Amended Complaint, *id.* (Oct. 20, 2017), D.E. 66; First Amended Complaint, *id.* (Sept. 5, 2017), D.E. 39; Complaint, *id.* (July 18, 2017), D.E. 1; see also John Wagner & Sari Horwitz, *Trump Voter Panel Has Rocky Start Before First Meeting*, Wash. Post, July 19, 2017, at A15.

93. Supplemental Complaint, *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, No. 1:17-cv-6335 (S.D.N.Y. May 7, 2018), D.E. 53; Amended Complaint, *id.* (Sept. 11, 2017), D.E. 12; Complaint, *id.* (Aug. 21, 2017), D.E. 1; see Opinion at 2, *id.* (Jan. 31, 2018), D.E. 42, 2018 WL 637424 (denying immediate relief); see also *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 377 F. Supp. 3d 428, 431-32 (S.D.N.Y. 2019).

agencies using more restrictive search terms to expand their searches according to search terms specified in the order, and Judge Hellerstein decided that private emails needed to be searched for agency officials conducting substantial government work using private email accounts.⁹⁴

A January 26, 2018, FOIA action is pending in the District of the District of Columbia.⁹⁵

94. *Brennan Ctr. for Justice*, 377 F. Supp. 3d 428; *id.* at 434 (“Where challenged, agencies have to explain why certain search terms, clearly relevant, were not used.”); *id.* at 436 (“In an environment of widespread use of personal devices for official work, there is danger of an incentive to shunt critical and sensitive communication away from official channels and out of public scrutiny.”); *see* Opinion, *Brennan Ctr. for Justice*, No. 1:17-cv-6335 (S.D.N.Y. June 28, 2019), D.E. 111 (denying reconsideration).

95. Docket Sheet, *Lawyers’ Comm. for Civil Rights Under Law v. U.S. Dep’t of Justice*, No. 1:18-cv-167 (D.D.C. Jan. 26, 2018); Complaint, *id.* (Jan. 26, 2018), D.E. 1.