



Lawyers' Committee for Civil Rights Under Law's Comments on September 12, 2017 Meeting of the Presidential Commission on Election Integrity

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

President and

Executive Director

Kristen Clarke

The Presidential Commission on Election Integrity (“Commission” or “PACEI”) will hold a meeting on September 12, 2017. In advance of that meeting, the Commission invited public comments “related to laws, rules, policies, activities, strategies, and practices that enhance and/or undermine the American people’s confidence in the integrity of the voting processes in Federal elections.”¹

Pursuant to the Commission’s request, the Lawyers’ Committee for Civil Rights Under Law² submits this preliminary comment.³ We observe, at the outset, our deep concern about this Commission and its activities. This Commission’s scope, structure and agenda stand as grave threats to democracy. From the outset, it has been apparent that the Commission has two interrelated purposes: to support President Trump’s assertion that millions of voters illegally cast ballots in the 2016 general election and to serve as support for the Vice Chair and *de facto* Commission leader Kris Kobach’s quest of amending the National Voter Registration Act (“NVRA”) and promoting new laws to create unnecessary barriers to voting such in the name of preventing alleged voter fraud. Indeed, the repeated drum-beating by Commission members such as Kobach, Von Spakovsky, Adams, and Blackwell of the message of wide-spread voter fraud – a phenomenon repeatedly proven to be illusory – itself undercuts the public’s belief in the integrity of our elections. We also observe that the Commission’s September 12th hearing contemplates a full day of panel discussions and speakers. However, the draft agenda for that meeting did not reflect any racial, gender or ideological diversity, further alienating the Commission from Americans across our country while underscoring the preconceived nature of the Commission’s work. We also note that the September

¹ GSA, Notice-MK-2017-03, Presidential Comm’n on Election Integrity, Upcoming Public Advisory Meeting Notice (Aug. 25, 2017).

² The Lawyers’ Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. Now in its 54th year, the Lawyers’ Committee is continuing its quest to undermine the American people’s confidence in the integrity of the voting processes in Federal elections as part of its effort to “Move America Toward Justice.” The principal mission of the Lawyers’ Committee is to secure, through the rule of law, equal justice for all, particularly in the areas of criminal justice, fair housing and community development, economic justice, educational opportunities, and voting rights.

³ Because the Commission did not make documents publicly available until just a few days before the upcoming meeting, and did so only as a result of litigation brought by the Lawyers’ Committee, this comment is preliminary and may be supplemented.



12 meeting is one that does not allow for meaningful engagement from the public as attendees are prohibited from speaking or offering views of dissent.

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

*President and
Executive Director*

Kristen Clarke

As a result, the Commission itself is “undermin[ing] the American people’s confidence in the integrity of the voting processes in Federal elections” by attempting to confirm President Trump’s baseless claims. Issuing a nation-wide request for the sensitive personal data of every voter in the United States, which has led some voters to “deregister”, appearing to conduct its work largely in secret and without, and refusing to ensure that Commissioners and panelists represent diverse viewpoints. In doing so, the Commission is operating contrary to the letter and spirit of the Federal Advisory Commission Act (“FACA”),⁴ the law that governs PACEI, and is designed to ensure that advisory commissions conduct their work openly and represent a diverse set of views. Moreover, the Commission is a distraction away from the significant and real problems that threaten American democracy today including ongoing voting discrimination faced by African American, Latino and other minority voters, and deflection away from the significant problems that have developed at a Justice Department that is no longer faithfully enforcing laws such as the Voting Rights Act of 1965.

In no uncertain terms, we condemn the formation and continued operation of the so-called Election Integrity Commission.

A. The Commission is Formed to Support President Trump’s Voter Fraud Claims and Vice Chair Kobach’s Quest to Amend the NVRA

It appears that the Presidential Advisory Commission on Election Integrity was created for two reasons: to confirm President Trump’s allegation of voter fraud and to use that manufactured confirmation to justify new restrictions on the right to vote. On November 27, 2016, then President-elect Trump tweeted that, “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.”⁵ Although President Trump’s tweet was repeatedly debunked,⁶ he steadfastly maintained its veracity. In January 2017,

⁴ 5 U.S.C. § App’x. 2 (1972).

⁵ Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en>

⁶ Louis Jacobson, *Donald Trump's Pants on Fire claim that millions of illegal votes cost him popular vote victory*, POLITIFACT (Nov. 28, 2016, 2:44 PM), <http://www.politifact.com/truth-o-meter/statements/2016/nov/28/donald-trump/donald-trumps-pants-fire-claim-millions-illegal-vo/> (“We found zero evidence for Trump’s charge that he ‘won the popular vote if you deduct the millions of people who voted illegally,’ and a lot of reasons to conclude that it didn’t happen.”).



shortly after being sworn in as the 45th President of the United States, Trump told congressional leaders that he would have won the popular vote if not for the 3 to 5 million votes illegally cast.⁷ Then, in a February 9, 2017 meeting with senators, President Trump “claimed that he . . . would have been victorious in [New Hampshire] if not for the ‘thousands’ of people who were ‘brought in on buses’ from neighboring Massachusetts to ‘illegally’ vote in New Hampshire.”⁸ In May 2017, President Trump “made good on a pledge” to confirm his claims “by creating the Election Integrity Commission and giving it a mandate to review the legitimacy of U.S. elections.”⁹

President Trump tapped Vice President Mike Pence to chair the Commission and Kansas Secretary of State Kris Kobach to serve as Vice Chair. It is clear that Kobach is serving as the *de facto* leader with the Vice President’s staff serving as Commission staff.¹⁰ Vice President Pence’s direct involvement seems to be limited to attending some meetings.

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

President and

Executive Director

Kristen Clarke

⁷ Abby Phillip & Mike DeBonis, *Without evidence, Trump tells lawmakers 3 million to 5 million illegal ballots cost him the popular vote*, Wash. Post (Jan. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/?utm_term=.28ced0b3cb04 (“The claim is not supported by any verifiable facts, and analyses of the election found virtually no confirmed cases of voter fraud, let alone millions.”).

⁸ Eli Stokols, *Trump brings up vote fraud again, this time in meeting with senators*, Politico (Feb. 10 2017, 2:35 PM), <http://www.politico.com/story/2017/02/trump-voter-fraud-senators-meeting-234909> (“His persistent and unfounded fraud claim is a sign that Trump, who lost the popular vote by nearly 3 million votes, continues to see himself as a victim of widespread voter fraud.”); *see also* Annie Linskey, et al., *Trump makes groundless N.H. voter fraud claims*, Boston Globe (Feb. 10, 2017), <https://www.bostonglobe.com/news/nation/2017/02/10/trump-makes-groundless-voter-fraud-claims/fcnMJfLgOx0UAVhJeTS8TP/story.html> (“Since Trump’s stunning victory in November, he has frequently called into question the legitimacy of the presidential election, repeating the roundly debunked assertion that millions of votes were cast improperly. Those concerns prompted him to task Vice President Mike Pence with heading a commission that will examine the country’s voting system.”).

⁹ Joseph P. Williams, *Trump Voter Fraud Commission Under Fire*, U.S. News (July 18, 2017, 6:07 PM), <https://www.usnews.com/news/national-news/articles/2017-07-18/trumps-voter-fraud-advisory-commission-on-election-integrity-under-fire>.

¹⁰ *Everything You Need to Know about Trump’s “Voter Fraud” Commission*, Brennan Center: Voting Rights and Elections, <https://www.brennancenter.org/everything-you-need-know-about-trumps-voter-fraud-commission>.



Vice Chair Kobach is one of the country's most dedicated promoters of the theory that widespread voter fraud defines American elections.¹¹ In addition to finding a way to confirm President Trump's claims of mass voter fraud, Kobach will also undoubtedly use the Commission to exaggerate fraud in order to justify voter suppression legislation. The day after the 2016 election, Kobach informed the Trump transition team that he had *already* drafted amendments to federal law that would erect unnecessary burdens on voter registration.¹² Shortly thereafter, Kobach met personally with President-elect Trump to advocate for the proposed amendments.¹³ In that meeting, Kobach brought with him two documents: one included proposed amendments to the NVRA¹⁴ and the other was a Heritage Foundation report discussed below that purports to document more than 1,000 instances of voter fraud.¹⁵

The NVRA has thwarted Kobach's aim to implement proof of citizenship requirements when registering to vote, a requirement that Kobach was successful in enacting in Kansas. Kobach has lost twice in federal circuit courts over the issue of whether Kansas's law requiring documentary proof of citizenship for voter registration could be applied to applicants using the Federal Mail-In voter registration application.¹⁶ A federal circuit court also found that the NVRA

¹¹ Ari Berman, *The Man Behind Trump's Voter-Fraud Obsession*, N.Y. Times Mag. (June 13, 2017), <https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html?mcubz=0>.

¹² Christopher Ingraham, *Vice chair of Trump's voter fraud commission wants to change federal law to add new requirements for voting, email shows*, Wash. Post: Wonkblog (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/vice-chair-of-trumps-voter-fraud-commission-wants-to-change-federal-law-to-make-it-harder-to-vote-email-shows/?utm_term=.ae72da0e06e6 ("I have some [legislative drafts] already started regarding amendments to the NVRA [National Voter Registration Act] to make clear that proof of citizenship requirements [to register to vote] are permitted.").

¹³ Jonathan Shorman, *Kobach took plan for Department of Homeland Security into Trump meeting*, Topeka Capital-J. (Nov. 21, 2016, 12: 16 PM, updated Nov. 22, 2016, 2:22PM), <http://cjonline.com/news/2016-11-21/kobach-took-plan-department-homeland-security-trump-meeting>

¹⁴ Christopher Ingraham, *Federal judge upholds fine against Kris Kobach for 'pattern' of 'misleading the Court' in voter-ID cases*, Wash. Post: Wonkblog (July 26, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/26/federal-judge-upholds-fine-against-kris-kobach-for-pattern-of-misleading-the-court-in-voter-id-cases/?utm_term=.08d4af048461.

¹⁵ Dartunorro Clark (@DartDCClark) Twitter (July 19, 2017, 11:55AM), <https://twitter.com/DartDCClark/status/887747687692595200> (image).

¹⁶ *League of Women Voters v. Newby*, 838 F.3d 1 (D.C. Cir. 2016); *Kobach v. United States Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014).

Co-Chairs
James P. Joseph
Teresa Wynn Roseborough

Secretary
Eleanor H. Smith

Treasurer
Andrew W. Kentz

General Counsel
Nicholas T. Christakos

*President and
Executive Director*
Kristen Clarke



preempted the Kansas law as applied for federal elections for applicants who applied at motor vehicle offices.¹⁷ These NVRA cases effectively negated the Kansas law when a Kansas state law judge found that Kansas could not apply different standards for registering to state elections than for registering for federal elections.¹⁸ As a result, Kobach is heavily invested in getting the NVRA amended and the PACEI can serve as an important tool in accomplishing that goal.¹⁹

B. The Commission is Violating the Balance and Transparency Requirements in FACA

The Supreme Court has stated that the “principal purpose” of FACA “was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them.”²⁰ In creating FACA, Congress relied upon decades of experience with advisory committees and concluded that these committees often had a one-sided aim designed to achieve the objectives of particular group of people and they operated in secret.²¹ As a result, Congress included provisions designed to ensure that FACA committees would represent different points of view and would operate transparently.

Regarding diversity of views, in the Congressional findings contained in Section 2(a) of the statute, Congress stated that advisory committees may serve “a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.” Section 5(b)(2) “require[s] the membership of the

¹⁷ *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016).

¹⁸ Tierney Sneed, *Court Blocks Kobach’s Scheme For Proof-Of-Citizenship In Kansas Elections*, TMP Muckraker (Nov. 4, 2016, 4:49PM), <http://talkingpointsmemo.com/muckraker/court-knocks-kobach-in-case-linked-to-ks-proof-of-citizenship-voter-requirement>.

¹⁹ See, e.g., Nick Gosnell, *Next meeting of Election Integrity commission less than two weeks away*, WIBW News (Aug. 31, 2017, 1:00PM), <https://www.wibwnewsnow.com/next-meeting-election-integrity-commission-less-two-weeks-away/> (“One of the issues in the main lawsuit that we’re fighting right now in the U.S. District Court for the District of Kansas [in an NVRA lawsuit] is how significant is the problem of non-citizens registering in the state of Kansas,” Kobach said. “The state has presented in the litigation evidence of 127 specific individuals that we know of, that we’ve found, but the big question is what is the total number? The 127 is just a small subset of whatever the total number is. The commission may or may not be able to shed some light on that.”).

²⁰ *Public Citizen v. Department of Justice*, 491 U.S. 440, 459 (1989).

²¹ See *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov’t Operations on S. 1637, S. 1964, and S. 2064*, 92d Cong., 1st Sess., pt. 1, at 1–2 (1971) (opening statement of Sen. Metcalf).

Co-Chairs
James P. Joseph
Teresa Wynn Roseborough

Secretary
Eleanor H. Smith

Treasurer
Andrew W. Kentz

General Counsel
Nicholas T. Christakos

*President and
Executive Director*
Kristen Clarke



advisory committee to be fairly balanced in terms of the points of view represented,” and Section 5(b)(3) requires “that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment.”

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

*President and
Executive Director*

Kristen Clarke

Regarding transparency, in Section 2(b)(5) of its findings and declarations, Congress stated that “the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.” Section 10(b) of FACA requires that the Commission’s record be open to the public: “[T]he records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.” The DC Circuit has held that communications among less than all commission members are documents that must be made available.²²

The Commission Charter specifically identifies PACEI as a commission created under FACA.²³ But the composition of the Commission and the composition of the panels of the September 12 meeting are inconsistent with the requirements of FACA that the Federal Government be furnished with “diverse viewpoints,” that “the membership of the advisory committee [] be fairly balanced in terms of the points of view represented,” and that the “advisory committee will not be inappropriately influenced by . . . any special interest.”²⁴

President Trump and Vice Chair Kobach have stacked the Commission with Kobach’s comrades-in-arms, who have for years advocated for laws that restrict access to the ballot and materially overstating the issue of voter fraud.

- For almost two decades, Hans von Spakovsky has been one of the nation’s most outspoken proponents of restrictive voter laws and leaders in overstating voter fraud. He served at the Department of Justice during the George W. Bush administration with Commissioners J. Christian Adams and Christy McCormick, and while at DOJ, he authored an article under a

²² *Cummock v. Gore*, 180 F.3d 282, 292 (D.C. Cir. 1999).

²³ Charter, Presidential Advisory Commission on Election Integrity, § 2.

²⁴ 5 U.S.C. § App’x 2 § 5(b)(2)–(3).



Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

*President and
Executive Director*

Kristen Clarke

pseudonym advocating for laws restricting voter access to the ballot.²⁵ He was retained as an expert witness for Kobach in the *Fish v. Kobach* case.²⁶ Von Spakovsky is currently employed by the Heritage Foundation, which produced the report Kobach brought to his meeting with President-elect Trump. The Brennan Center recently analyzed the Heritage Foundation report and found that few of the 1,000 allegations of voter fraud involved the type of fraud that would be prevented by the restrictions Kobach and his allies are seeking.²⁷

- J. Christian Adams is the President of Public Interest Law Foundation, which has intervened in *League of Women Voters v. Newby* and taken the same position as Kobach that the U.S. Election Assistance Commission (“EAC”) must approve Kansas’s request that the Federal Mail-In voter registration applicants comply with Kansas’s documentary proof of citizenship requirement. Adams serves with Commissioners von Spakovsky and Blackwell on the board of the American Civil Rights Union, an organization that has set out to force jurisdictions to purge voter rolls.²⁸
- Commissioner Christy McCormick is currently a Republican appointee on the United States Election Assistance Commission. In that role, she supports Kobach’s position in *League of Women Voters v. Newby*.²⁹
- J. Kenneth Blackwell is the former Secretary of State of Ohio. Along with Kobach, he is considered to be the state election official who has done the most to restrict access to the ballot in the last fifteen years. During the 2004 election, when he simultaneously served as Ohio’s chief election officials and the Ohio chair of President Bush’s election efforts, Blackwell issued a series of directives designed to restrict access, including a directive that

²⁵ Greg Gordon, *Efforts to stop ‘voter fraud’ may have curbed legitimate voting*, McClatchy: DC Bureau (May 20, 2017, 12:22 PM), <http://www.mcclatchydc.com/news/article24463966.html>.

²⁶ *Fish v. Kobach*, No. 16-2105-JAR, 2016 WL 3000356, at *2 (D. Kan. May 25, 2016).

²⁷ Ruby Mehrbani, *Heritage Fraud Database: An Assessment*, Brennan Ctr.: Analysis (Sept. 8, 2017), <https://www.brennancenter.org/publication/heritage-fraud-database-assessment>.

²⁸ Sneed, *Court Blocks Kobach*, *supra* note 18.

²⁹ Press Release, Brennan Ctr., *Voting Rights Groups Ask Federal Court to Move Forward Over Burdensome Voter Registration Requirements* (Aug. 7, 2017), <https://www.brennancenter.org/press-release/voting-rights-groups-ask-federal-court-move-forward-case-over-burdensome-voter>.



forbade local election officials for accepting voter registration forms that were not on paper of a specified weight.³⁰

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

President and

Executive Director

Kristen Clarke

There are numerous election officials and respected scholars who have studied the issue of voter fraud, and unequivocally rejected the conclusions of Kobach, Von Spakovsky, Adams, and Blackwell. Yet not a single one of them has been named to the Commission. Instead, in a superficial nod to bipartisanship, President Trump and Vice Chair Kobach have included four Democrats on the Commission, none of whom has the requisite experience regarding the issues at hand to achieve the fair balance and diversity of views required by FACA.

The composition of PACEI stands in stark contrast to its previous FACA Commission focused on elections. In 2013, President Barack Obama created the Presidential Commission on Election Administration to examine issues arising out of the 2012 election. While PACEI is officially led by two Republicans, Vice President Pence and Vice Chair Kobach, President Obama tapped Mitt Romney's chief campaign lawyer, Benjamin L. Ginsberg, and Obama's chief campaign lawyer, Robert F. Bauer as co-chairs. The truly bi-partisan commission issued a well-received report focusing on decreasing lines, implementing new technologies, and the expansion of online voter registration.³¹

PACEI's diversity issues stretch beyond the composition of the Commission itself. The agenda for the Commission's upcoming meeting offers little hope for an honest assessment of American elections. It includes a lineup of panelists entirely lacking in racial, gender, or ideological diversity. Every one of the ten panelists called to speak is a white male and several are among the nation's most vocal voter suppression advocates.³²

³⁰ Kurtis Lee, *Former Ohio official who accidentally released Social Security numbers is on Trump's voter fraud panel*, L.A. Times (July 9, 2017, 4:00AM), <http://www.latimes.com/nation/la-na-pol-blackwell-voter-commission-20170709-story.html>.

³¹ Rebecca Kaplan, *Presidential commission offers ways to shorten voting lines*, CBS News (Jan. 22, 2014, 10:45 AM), <https://www.cbsnews.com/news/presidential-commission-offers-ways-to-shorten-voting-lines/> ("Our aim was to transcend partisan divisions and view election administration as public administration that must heed the expressed interests and expectations of voters," Ginsberg and Bauer wrote in a joint statement.).

³² Presidential Advisory Commission on Election Integrity, Revised Meeting Agenda: Second Meeting of the Presidential Advisory Commission on Election Integrity, <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-updated-meeting-agenda-09122017.pdf>.



The second panel in particular, entitled “Current Election Integrity Issues Affecting Public Confidence,” is packed with “those with a reputation for pushing restrictive voter laws,” including Commissioner von Spakovsky, among others.³³ Another panelist, Robert Popper of the conservative Judicial Watch, was retained specially by Commissioner McCormick as her lawyer in *League of Women Voters v. Newby* even though the EAC is represented by DOJ.³⁴ Popper is also a former DOJ colleague of Commissioners Adams and McCormick.

While Commissioner, New Hampshire Secretary of State, and “host” of the upcoming meeting Bill Gardner was involved in selecting the first panel on historical voting trends and election technology, “[h]e did not know who was behind the choice of witnesses on the second panel.”³⁵ Just as with the Commissioners, not a single panelist is known for expressing concerns about the suppressive effects of restrictive voting measures.³⁶ Professor Michael McDonald, a respected voting expert from the University of Florida, was considered for a panel slot, but he has stated he was not chosen because he would not agree that restrictive voter laws do not affect voter participation.³⁷ In short, the panels are similar to the Commission itself: they consist of people who agree with Kobach and his allies or do not address the issues raised by von Spakovsky, Popper, and others. There is no strong dissenting point of view.

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

President and

Executive Director

Kristen Clarke

³³ Tierney Sneed, *What We Know About Next Week’s Bogus Voter Fraud Commission Meeting*, TPM: Muckraker (Sept 7, 2017), <http://talkingpointsmemo.com/muckraker/trump-commission-voter-fraud-second-meeting-preview>.

³⁴ See Pub. App’x Vol. 1 at 28, *League of Women Voters v. Newby*, No. 16-05196 (D.C. Cir. July 18, 2016).

³⁵ *Id.* (“A spokesman for Vice President Mike Pence, who is chair of the commission, did not respond to TPM’s inquiry as to who chose that panel of witnesses.”).

³⁶ See, e.g., *Research on Voter ID*, Brennan Ctr. for Justice (Apr. 11, 2017), <https://www.brennancenter.org/analysis/research-and-publications-voter-id> (providing a comprehensive list of social science research on the impact of voter identification restrictions); Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, Abstract, 79 J. Pol. 363 (2017), (“The proliferation of increasingly strict voter identification laws around the country has raised concerns about voter suppression . . . By using validated voting data from the Cooperative Congressional Election Study for several recent elections . . . [our] analysis shows that strict identification laws have a differentially negative impact on the turnout of racial and ethnic minorities in primaries and general elections.”).

³⁷ Sneed, *What We Know*, *supra* note 33 (“[Gardner] wanted me to say [that] voter turnout is solely voters’ choice. I said [it] is an important factor, but there are other factors like election laws.”).



Moreover, since its inception, the Commission has operated under a shroud of secrecy in violation of FACA. The Commission's first meeting, held via phone on June 28, 2017, was conducted in private and was never publicly announced.³⁸ The second meeting, held on July 19, 2017, prohibited members of the public from attending.³⁹ For that meeting, the Commission did not produce documents as it promised U.S. District Court Judge Kollar-Kotelly in response to the FACA lawsuit filed by the Lawyers' Committee. This resulted in the Commission's lawyer apologizing to the judge.⁴⁰ To date, the Committee has released virtually no documentation to the public. What documentation has been produced, including an agenda for the upcoming September 12 meeting, largely has resulted from the Lawyers' Committee lawsuit.⁴¹

Additionally, the Commissioners have not been given federal emails for their Commission activities, even though federal law requires them to use federal emails.⁴² As a result, there is no comprehensive federal archive of the

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

*President and
Executive Director*

Kristen Clarke

³⁸ Spencer S. Hsu, *Trump voting panel tells states to hold off sending data while court weighs privacy impact*, Wash. Post: Pub. Safety (July 10, 2017), https://www.washingtonpost.com/local/public-safety/trump-voting-panel-tells-states-to-hold-off-sending-data-while-court-weighs-privacy-impact/2017/07/10/c4c837fa-6597-11e7-a1d7-9a32c91c6f40_story.html?utm_term=.0977f036a6a1

³⁹ *Id.*

⁴⁰ Spencer S. Hsu, *Trump voting panel apologizes after judge calls failure to disclose information 'incredible'*, Wash. Post: PUB. SAFETY (Aug. 30, 2017), https://www.washingtonpost.com/local/public-safety/trump-voting-panel-apologizes-after-judge-calls-failure-to-disclose-information-incredible/2017/08/30/675001ba-8d93-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.837da874007a (“U.S. District Judge Colleen Kollar-Kotelly of Washington said the Election Integrity Commission released only an agenda and proposed bylaws before its first meeting at the White House complex last month. But once gathered, commissioners had thick binders that included documents the public had not seen, including a specially prepared report and a 381-page ‘database’ purporting to show 1,100 cases of voter fraud, both from the think tank Heritage Foundation. The group also received a typed list of possible topics to address from the panel vice chairman, Kansas Secretary of State Kris W. Kobach.”).

⁴¹ *Id.* (“Kollar-Kotelly directed the commission to detail what documents it believes are subject to disclosure ahead of its next meeting, set for Sept. 12 in New Hampshire, and how it is identifying and handling them.”).

⁴² See Joint Status Report at 3–6, *Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity*, No. 17-cv-1354 (CKK) (D.D.C. Sept. 5, 2017); see also Zoe Tillman, *Members of Trump's Election Integrity Commission Used Personal Email Accounts*, BuzzFeed News: Politics (Sept. 6, 2017, 1:47 PM, update 5:38 PM), https://www.buzzfeed.com/zoetillman/at-least-one-member-of-trumps-election-integrity-commission?utm_term=.veVo2nW8b#.se9875Ml0; 44 U.S.C. § 2911.



Commission's activity. Additionally, some of the Democratic Commissioners appear to have been left in the dark as to the Commission's activities. They claim to have received little communication, aside from a note from Commission leadership after the July 19 meeting, asking them to keep September 12 open.⁴³ In contrast to the Commissioners who knew little of the September 12 meeting other than it was going to happen, on August 31, Kobach discussed the nature of testimony that would be offered at the hearing.⁴⁴ Commissioner King recently stated: "It's clear to me that there is an agenda to deprive people of the right to vote and that is wrong."⁴⁵ In the same article, he stated that he had not been informed of the Commission's process: "Who is going to write this recommendation, when will the recommendation be written and will all members of the commission have input into the final recommendation?"⁴⁶

It has become readily apparent that the Commission is not satisfying the requirements of transparency and openness required by FACA.

C. The Commission's Actions Have Had the Actual Effect of Undermining Confidence in American Elections

Additionally, the Commission has acted affirmatively to "undermine the American people's confidence in the integrity of the voting processes in Federal elections." In his first public act as Vice Chair of the Committee, Kobach attempted to collect critically sensitive personal information on every registered voter in the United States. On June 28, 2017, Kobach sent a letter to election officials in all 50

⁴³ Kira Lerner, *Democrats on Trump's voting commission iced out since first meeting*, ThinkProgress (Aug. 22, 2017, 4:53 PM), <https://thinkprogress.org/democrats-voting-commission-ceec3ea98a33/> ("I have not received much information nor been working on much," said West Virginia county clerk and Democratic Commissioner Mark Rhodes."); *id.* ("The only information I have received was at the first meeting. Nothing else," said David Dunn, a Democratic Commissioner and former Arkansas state legislator."); *id.* ("A third Democratic commissioner, Maine's Secretary of State Matt Dunlap, told ThinkProgress that has received the same amount of information as Rhodes and Dunn. 'I've had no more communication than them,' he said.").

⁴⁴ [Gosnell, supra note 19](#) ("This will be the first meeting where you see the presentation of a significant amount of research and evidence," said Kobach. "Statistical research and things like that.")

⁴⁵ Sam Levine, *Democrat On Trump Voter Fraud Probe Slams Voting Restriction Efforts*, Huffington Post: Politics (Sept. 9, 2017, 2:41 PM), http://www.huffingtonpost.com/entry/alan-king-trump-voter-fraud-probe_us_59b42303e4b0b5e531068520?on.

⁴⁶ *Id.*

Co-Chairs
James P. Joseph
Teresa Wynn Roseborough

Secretary
Eleanor H. Smith

Treasurer
Andrew W. Kentz

General Counsel
Nicholas T. Christakos

*President and
Executive Director*
Kristen Clarke



states requesting, among other things, the names, addresses, political party affiliations, and last four digits of the social security numbers of all 200 million registered voters in America.⁴⁷ The letter did not specify any purpose in requesting that information. Election officials overwhelmingly rejected the request, citing grave privacy concerns and questioning the Committee's true intent.⁴⁸ In total, 44 states refused to provide some or all information requested by Kobach.⁴⁹

The Commission's actions have actually undermined the public's faith in the integrity of elections. For example, after the Colorado Secretary of State announced that he would comply with some of Kobach's request, thousands of Coloradans, out of fear that the Commission would use their personal data for odious ends, called election officials to have their names removed from the rolls. In Boulder, 329 voters withdrew the registrations during the first ten days of July. During the

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

President and

Executive Director

Kristen Clarke

⁴⁷ Christopher Ingraham, *Trump's voter-fraud commission wants to know voting history, party ID and address of every voter in the U.S.*, Wash. Post: Wonkblog (June 29, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/29/trumps-voter-fraud-commission-wants-to-know-the-voting-history-party-id-and-address-of-every-voter-in-america/?tid=a_inl&utm_term=.9f02441709e2.

⁴⁸ See Max Greenwood, *Kentucky secretary of state: 'Not enough bourbon in Kentucky' to make me release voter data*, The Hill (June 30, 2017, 8:11 PM), <http://thehill.com/homenews/state-watch/340331-kentucky-secretary-of-state-not-enough-bourbon-in-kentucky-to-make-me> (Kentucky Secretary of State Alison Grimes: "[There is] not enough bourbon here in Kentucky to make this request seem sensible . . . Not on my watch are we going to be releasing sensitive information that relate to the privacy of individuals."); Pam Fessler, *Amid Skepticism And Scrutiny, Election Integrity Commission Holds First Meeting*, NPR: Morning Edition (July 19, 2017, 4:46 AM), <http://www.npr.org/2017/07/19/537910132/amid-skepticism-and-scrutiny-election-integrity-commission-holds-first-meeting> (Mississippi Secretary of State Delbert Hosemann: "They can go jump in the Gulf of Mexico, and Mississippi is a great state to launch from."); Pam Fessler, *White House Panel Asks States For Their Voter Rolls*, NPR: America (June 29, 2017, 5:43 PM), <http://www.npr.org/sections/thetwo-way/2017/06/29/534901343/white-house-panel-asks-states-for-their-voter-rolls> (Connecticut Secretary of State Denise Merrill: "Given Secretary Kobach's history we find it very difficult to have confidence in the work of this commission."); *id.* (California Secretary of State Alex Padilla: "California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud made by the President, the Vice President, and Mr. Kobach.").

⁴⁹ Liz Stark & Grace Huack, *Forty-four states and DC have refused to give certain voter information to Trump commission*, CNN: Politics (July 5, 2017, 5:49 AM), <http://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>



same period in June, before Kobach sent his request, only 15 did.⁵⁰ Denver experienced a 2,150 percent increase in cancelled registrations.⁵¹ In describing voters' response, the Denver County Clerk stated that, "There's confusion, there's hysteria. In over 12 years of administering elections I never expected to see a day in the office where we would have more withdrawals than new registrations—and that happened yesterday."⁵²

A number of voters submitted public comments to the Commission expressing concern that their privacy rights would be compromised. The Commission's response was to publish their comments, including the personal information of the commenters, further fueling privacy concerns.⁵³ The personal information of the commenters was only redacted after a public outcry.

More recently, on September 7, 2017, Kobach published an op-ed in Breitbart maintaining that thousands of voters with out-of-state IDs fraudulently cast ballots in New Hampshire and potentially swung the U.S. Senate election to Democrat

Co-Chairs

James P. Joseph
Teresa Wynn Roseborough

Secretary

Eleanor H. Smith

Treasurer

Andrew W. Kentz

General Counsel

Nicholas T. Christakos

*President and
Executive Director*

Kristen Clarke

⁵⁰ Brian Eason, Hundreds of Colorado voters clamor to unregister in wake of Trump administration's request for information, *Denver Post: Colorado Politics* (July 11, 2017, 7:29 PM; update July 12, 2017, 12:03 PM),

<http://www.denverpost.com/2017/07/11/colorado-voters-unregister-donald-trump-integrity-commission/>.

⁵¹ Blair Miller, Hundreds withdraw Colorado voter registrations in response to compliance with commission request, *ABC 7: Denver* (July 7, 2017, 10: 41 PM), <http://www.thedenverchannel.com/news/politics/hundreds-withdraw-colorado-voter-registrations-in-response-to-compliance-with-commission-request>; *see also* Lauren Pearle & Dakshayani Shankar, *What to know about Trump's election commission as it faces pushback, legal challenges*, *ABC News* (July 19, 2017, 2:16 PM), <http://abcnews.go.com/Politics/trumps-election-commission-holds-1st-meeting-amid-pushback/story?id=48713462> ("Between June 28 and July 13, 3,394 Coloradans had withdrawn [their voter registrations].").

⁵² Aidan Quigley, *Trump Voter Fraud Probe Sparks Wave of Canceled Registrations in Colorado*, *Newsweek* (July 17, 2017, 5:33 PM), <http://www.newsweek.com/thousands-colorado-democrats-and-independents-cancel-voter-registration-after-637996>; *see also* Eason, *supra* note 50 (quoting one voter as saying, "[The Commission] seems like an assault on our personal freedoms – of speech and privacy first and foremost.").

⁵³ Scott Neuman, *Vote Fraud Commission Releases Public comments, Email Addresses And All*, *NPR* (July 14, 2017, 5:21 PM), <http://www.npr.org/sections/thetwo-way/2017/07/14/537282309/vote-fraud-commission-releases-public-comments-email-addresses-and-all>.



Maggie Hassan over Republican Kelly Ayotte.⁵⁴ Election experts denounced the allegation as patently false given that these voters complied with New Hampshire requirements and that thousands of college students, who attend college in New Hampshire, spend the majority of the year in New Hampshire, but maintain out-of-state identification.⁵⁵ One reporter found four legitimate voters in the group cited by Kobach in an hour. All were college students at the time of the November 2016 election.⁵⁶

D. The Commission's Objectives Will Further Undermine Public Confidence in Elections, Especially Among Voters of Color

There is little doubt that Kobach and his allies on the Commission are committed to ensuring that Commission will find the mass voter fraud demanded by President Trump and use that false finding to underpin efforts to suppress eligible voters. Indeed, Kobach's longstanding mission has focused on promoting false voter fraud narratives and advocating for restrictive voting legislation.⁵⁷

As discussed above, Kobach and others claim that documentary proof of citizenship requirements exist to prevent non-citizens from casting ballots. Yet, the U.S Court of Appeals for the District of Columbia recently found that "there is precious little record evidence" of fraudulent registration by non-citizens.⁵⁸ According to Kansas's own data, a mere eighteen non-citizens had attempted or successfully registered to vote over a twelve-year period.⁵⁹ In contrast, in 2016

⁵⁴ Kris W. Kobach, *EXCLUSIVE – Kobach: It appears that Out-of-State Voters Changed the Outcome of the New Hampshire U.S. Senate Race*, Breitbart (Sept. 7, 2017), <http://www.breitbart.com/big-government/2017/09/07/exclusive-kobach-out-of-state-voters-changed-outcome-new-hampshire-senate-race/>.

⁵⁵ David Weigel, Election Integrity Commission members accuse New Hampshire voters of fraud, Wash. Post (Sept. 8, 2017), ("Both voters and election experts say . . . accusing thousands of voters of criminal activity simply for living in New Hampshire but holding out-of-state driver's licenses [is] baseless.").

⁵⁶ *Id.* ("Jonah Cohen, 20, was [] studying at Dartmouth when he used his New York ID to vote in New Hampshire's 2016 election. 'I did not end up getting a N.H. license, but I never needed one to vote.'").

⁵⁷ *See Berman, supra note 11* ("Kobach . . . us[es] elections, and advocate[es] voting restrictions that make it easier for Republicans to win them, as the vehicle for implementing policies that protect the interests and aims of a shrinking white majority.").

⁵⁸ *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016).

⁵⁹ *Id.* ("When the requests of Arizona and Kansas to add their proof-of-citizenship requirements to the Federal Form were rejected in 2014, it appeared that only a tiny fraction of one percent of registered voters were non-citizens.").

Co-Chairs
James P. Joseph
Teresa Wynn Roseborough

Secretary
Eleanor H. Smith

Treasurer
Andrew W. Kentz

General Counsel
Nicholas T. Christakos

*President and
Executive Director*
Kristen Clarke



alone, more than 26,000 Kansans had their applications suspended because of the proof of citizenship law advocated by Secretary Kobach.⁶⁰

Secretary Kobach also operates the Interstate Crosscheck program (“Crosscheck”) by which participating states submit their voter files to Kansas to detect supposed cases of double voters. However, Crosscheck’s lax matching criteria produces an overwhelming number of false positives that put legitimate voters at risk of being removed from the rolls.⁶¹ The program flags apparent duplicates when only three fields match: first name, last name, and date of birth. Middle name, suffix, and social security number mismatches are effectively ignored. As a result, Crosscheck’s own 2014 Participation Guide admitted that, “Experience in the crosscheck program indicates that a significant number of apparent double votes are false positives and not double votes.”⁶² Florida, Oregon, and Washington ended their participation in Crosscheck after concluding that the data was error-ridden.⁶³ Despite its glaring defects, Kobach praised Crosscheck in the Commission’s July 19 meeting as “illustrat[ing] how a successful multistate effort can be in enhancing the integrity of our elections and in keeping our voter rolls accurate” and expressed confidence “that this [C]ommission will be equally successful on the national level.”⁶⁴ Indeed, the Commission’s request for information from the states appears to be an attempt to create a national version of Crosscheck.

Kobach has also promoted the virtues of strict photo voter identification laws.⁶⁵ Like documentary proof of citizenship requirements and Crosscheck, strict voter ID laws disenfranchise eligible voters under the guise of mass voter fraud. More than 600,000 registered Texans lack the required ID, many of them Latino and African American.⁶⁶ While the Governor of Texas called voter fraud an “epidemic”,

⁶⁰ Sarah Pitts & Andrew Clark, *Courts Will Rule Whether Thousands of Kansas Residents Can Vote*, NBC News (Aug. 31, 2016, 1:52 PM), <https://www.nbcnews.com/news/us-news/courts-will-rule-whether-thousands-kansas-residents-can-vote-n639396>.

⁶¹ Christopher Ingraham, *This anti-voter-fraud program gets it wrong over 99 percent of the time. The GOP wants to take it nationwide.*, Wash. Post: Wonkblog (July 20, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide/?utm_term=.61bd8894ffb4

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Zachary Roth, *Federal Court Hears Challenge to Voter ID Law*, NBC News (May 24, 2016, 4:42 PM), <https://www.nbcnews.com/politics/elections/federal-court-hears-challenge-texas-voter-id-law-n579671>.



there were just two convictions for voter impersonation fraud out of 20 million votes cast in Texas in the decade leading up to the passage of the photo ID law.⁶⁷

Similarly, in North Carolina, a court found that a strict voter ID law, and other suppressive measures, “disproportionately affect[] African-Americans” and that the voter ID law in particular “retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African-Americans.”⁶⁸ The court also found that the state “failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina.”⁶⁹

Proof of citizenship, Crosscheck, and voter ID laws are examples of the restrictive measures supported by Kobach and his allies on the Commission. Americans should fully expect him and his cohorts to write a report where the Commission endorses and advocates for similar restrictions on the right to vote. Such restrictions exclude eligible voters, who are disproportionately minorities and low-income, from the political process.

E. Conclusion

Perpetuating the notion of widespread voter fraud creates a vicious cycle. It fosters the public perception that fraud exists, and then politicians like Kobach and his allies on the Commission point to this public perception as supportive of their suppressive efforts. The big lie of voter fraud itself undermines the integrity of our elections.

Charged with examining “laws, rules, policies, activities, strategies, and practices that enhance and/or undermine the American people’s confidence in the integrity of [] voting”, the Commission should take a long look in the mirror. While the Commission operates in a shroud of secrecy and with pre-cooked conclusions, the Lawyers’ Committee calls on the Commission to reverse course and make every effort to ensure that all eligible voters are able to fully participate in our democracy.

⁶⁷ *Id.*

⁶⁸ *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214, 227 (4th Cir. 2016).

⁶⁹ *Id.* at 235.