UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MATTHEW DUNLAP,

Plaintiff,

- versus -

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; KRIS W. KOBACH, IN HIS OFFICIAL CAPACITY AS VICE CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; ANDREW KOSSACK, IN HIS OFFICIAL CAPACITY AS DESIGNATED FEDERAL OFFICER FOR THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; GENERAL SERVICES ADMINISTRATION; TIMOTHY R. HORNE, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION; EXECUTIVE OFFICE OF THE PRESIDENT; OFFICE OF THE VICE PRESIDENT; OFFICE OF ADMINISTRATION; MARCIA L. KELLY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ADMINISTRATION,

Defendants.

Civil Action No. 17-cv-2361-CKK

PLAINTIFF'S MOTION FOR LEAVE TO SERVE A PRESERVATION SUBPOENA

Pursuant to Fed. R. Civ. P. 26(d)(1), and upon the attached Memorandum of Law in Support of this Motion and the attached exhibits, Plaintiff Matthew Dunlap, Secretary of State of Maine ("Secretary Dunlap"), respectfully moves for entry of an order granting him leave to serve a subpoena upon Defendant Kris W. Kobach seeking the preservation of documents or, in the alternative, the production of documents. Pursuant to Local Rule 7(m), counsel for Secretary Dunlap state that they wrote to DOJ attorneys on the afternoon of January 29, 2018 to determine

whether there is any opposition to the relief sought. As reflected in DOJ's January 30 response, attached as Exhibit 5, DOJ opposes the instant motion.

Dated: January 31, 2018

Respectfully submitted,

By:
/s/ Harry Sandick

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Attorneys for Plaintiff Matthew Dunlap

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PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; KRIS W. KOBACH, IN HIS OFFICIAL CAPACITY AS VICE CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; ANDREW KOSSACK, IN HIS OFFICIAL CAPACITY AS DESIGNATED FEDERAL OFFICER FOR THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; GENERAL SERVICES ADMINISTRATION; TIMOTHY R. HORNE, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION; EXECUTIVE OFFICE OF THE PRESIDENT; OFFICE OF THE VICE PRESIDENT; OFFICE OF ADMINISTRATION; MARCIA L. KELLY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ADMINISTRATION,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR LEAVE TO SERVE A SUBPOENA

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Plaintiff Matthew Dunlap, Secretary of State of Maine ("Secretary Dunlap") hereby respectfully submits this memorandum in support of his motion for leave to serve a subpoena upon Defendant Kris W. Kobach seeking the preservation of documents or, in the alternative, the eventual production of documents.

Good cause exists to grant the motion, which is meant to preserve the status quo. Defendant Kobach is in sole possession of records to which Secretary Dunlap is entitled under the terms of the December 22 Decision.[1] The Department of Justice ("DOJ") has stated in this action that Defendant Kobach is no longer a party to this case and that DOJ has no authority to obligate Defendant Kobach to preserve or return Presidential Advisory Commission on Election Integrity ("Commission") records in his sole possession, many of which were maintained in a private email account. DOJ says that it has informally requested that Defendant Kobach and the other commissioners preserve and return any Commission records in their possession, but DOJ denies that either it or this Court has any authority to compel former commissioners to do so. Moreover, as explained below, there is reason to believe that not all commissioners have been asked to preserve or return relevant Commission records. Finally, Secretary Dunlap will suffer irreparable harm if these Commission records, to which he is entitled, are not returned to the federal government or are destroyed while reconsideration of his right to access such records is litigated.

[1] Plaintiff currently seeks relief against Defendant Kobach only because he was bound by this Court's December 22 Decision and because, as discussed *infra*, both his role as Vice Chair and a review of the *Vaughn*-type index prepared by the Defendants suggest that Defendant Kobach is likely to have custody of a significant number of Commission records not currently in the possession of the federal government. Plaintiff is evaluating whether to seek authority to serve similar subpoenas on the other individual commissioners.

Counsel for Secretary Dunlap conferred with DOJ prior to the filing of this motion. DOJ does not consent to this motion for reasons explained in an email dated January 30, 2018 (attached as an exhibit to this application).

I. BACKGROUND

On December 22, 2017, this Court granted in large part Secretary Dunlap's motion for a preliminary injunction (the "December 22 Decision"). Dkt. 33. The Court described certain documents to which Secretary Dunlap was entitled and ruled that while "[t]he Court shall not monitor every document to be released to Plaintiff, [it] expects Defendants to comply with the guidance set forth in [the] decision." *Id.* at 18. The Court went on to instruct that the Commission "has a clear duty to provide Plaintiff with these documents and any similar documents that exist now or in the future." *Id.* at 18-19.

As the Court is well aware, a flurry of activity followed the December 22 Decision. First, on January 3, 2018, in an apparent attempt to avoid this and other proceedings surrounding the work of the Commission, President Trump issued an Executive Order dissolving the Commission (Dkt. No. 34). This led to Secretary Dunlap's motion for a temporary restraining order that would enjoin Defendant Kobach and the other Defendants from destroying Commission records during the pendency of this action and directing that Secretary Dunlap be permitted to play a part in the wind-down of the Commission (Dkt. No. 35) and to DOJ's motion for reconsideration of the Court's December 22 Decision (Dkt. No. 39).

It is of great concern that in recent filings DOJ has taken the position that the "former" members and staff of the Commission are no longer parties to this suit. Dkt. No. 44 at 3. It has also argued that the Court cannot compel any "remaining" Defendants to place restrictions on former Commission members (*id.* at 12), and, astonishingly, that the Court itself "lacks the authority to enter an injunction against any former Commission members" (*id.* at 2). After tying

its own hands by dissolving the Commission without having complied with the December 22 Decision, DOJ represents that it only has the authority to make a non-binding and unenforceable "request" that the former Commission members forward documents in their sole possession to the White House for preservation purposes. *See* Dkt. No. 45-1. This belated "request" is inadequate to protect Secretary Dunlap's rights, which should not be subject to the voluntary compliance of the other commissioners. Although Defendant Andrew Kossack has stated that he "ha[s] been advised that [the Director of White House Office of Records Management] sent that letter on January 17, 2018", ***as of the morning of January 31, 2018, Secretary Dunlap—one of the commissioners—has not received such a letter***, raising serious doubts as to its effectiveness. *See* Kossack Decl., *Joyner v. Presidential Advisory Comm'n on Election Integrity*, No. 17-cv-22568, Dkt. 89-5 at 66 (S.D. Fl.). Even if the letter has been received by the other commissioners, there is no evidence that any of the commissioners have complied with the request or, in fact, that the Government has collected ***any*** documents from Defendant Kobach or the other individual commissioners since September 2017 (except, of course, those that directly copied federal officials).[2]

Secretary Dunlap maintains that this Court has the authority to directly order Defendant Kobach to preserve and produce Commission records in his possession, as discussed in recent court filings. Nonetheless, out of an abundance of caution, should the Court determine that other relief is unavailable, we bring this motion for leave to serve a subpoena seeking the preservation of documents, or in the alternative, the production of documents.

[2] Counsel for Secretary Dunlap has also sought other means of protecting against spoliation. For example, counsel asked the Archivist of the United States to take legal action, such as a lawsuit for replevin, to obtain the documents in the possession of the "former" commissioners, but the Archivist has stated that it has no intention to take steps to pursue such documents. *See* Exhibit 1 (Jan. 18 Letter to Archivist); Exhibit 2 (Jan. 25 Response from Archivist).

II. APPLICABLE LAW

Federal Rule of Civil Procedure 26(d) provides that parties may seek discovery prior to a Rule 26(f) conference, "when authorized by . . . court order." Fed. R. Civ. P. 26(d)(1). This Circuit has held that Rule 26 "vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Malibu Media, LLC v. Doe*, No. 15-cv-886 (CKK), 109 F. Supp. 3d 165, 167 (D.D.C. 2015) (granting motion to serve third-party subpoena prior to Rule 26(f) conference) (quoting *Watts v. SEC*, 482 F.3d 501, 507 (D.C. Cir. 2007)); *see also Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996). This District has applied a "good cause" standard when evaluating requests for discovery prior to a Rule 26(f) conference. *See Warner Bros. Records Inc. v. Does 1-6*, 527 F. Supp. 2d 1, 2 (D.D.C. 2007) (granting motion to serve third-party subpoena).

Given that this application is being made to protect the status quo while the litigation is pending, Plaintiff would be satisfied with a subpoena to preserve documents under Federal Rule of Civil Procedure 45. Such subpoenas are expressly permitted in the context of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B), which imposes a stay of discovery until after resolution of any motion to dismiss. In that context, courts routinely permit document preservation subpoenas to be served when the statutory standards are met. *See e.g.*, *In re Smith Barney Transfer Agent Litig.*, 2012 U.S. Dist. LEXIS 58070, at *11 (S.D.N.Y. Apr. 25, 2012) (permitting service of document preservation subpoena; noting that "status as a non-party significantly increases the risk that evidence may be lost"); *Koncelik v. Savient Pharm., Inc.*, 2009 U.S. Dist. LEXIS 73607, at *8 (S.D.N.Y. Aug. 6, 2009) (permitting service of document preservation subpoena); *Neibert v. Monarch Dental Corp.*, 1999 U.S. Dist. LEXIS 22312 (N.D. Tex. Oct. 20, 1999) (granting plaintiffs' motion to serve document preservation subpoenas on third parties, even though a motion to dismiss was not pending).

However, there is no reason why the authority of district courts to permit the issuance of a document production subpoena pursuant to Rule 45 should not also encompass the lesser authority to issue a document preservation subpoena where appropriate, which would impose a lesser burden on the third party than production. Indeed, district courts have issued such document preservation subpoenas, even outside of the context of the PSLRA. *See District of Columbia v. Trump*, No. 17-cv-1596, Dkt. No. 64 (D. Md. Nov. 28, 2017) (granting motion for leave to serve document preservation subpoena) (attached as Exhibit 3); *Johnson v. United States Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 120111, at *1 (S.D. Ohio Dec. 3, 2009) (applying good cause standard and granting plaintiff's motion to serve document preservation subpoena on non-party).

Finally, in order to address any concern over the Court's authority to issue a document preservation subpoena, we make this application in the alternative for a document production subpoena, *see Malibu Media*, 109 F. Supp. 3d at 167, and we seek a sufficiently remote return date that can be extended as needed in order to spare Defendant Kobach the burden of producing documents before the Court determines that Plaintiff is entitled to such documents.

III. ARGUMENT

For the following reasons, good cause exists for Secretary Dunlap's request to authorize the immediate issuance and service of a subpoena on Defendant Kobach.

A. A Preservation Subpoena Is Amply Justified—By Good Cause and Necessity—On This Record

Based on all available information (including the *Vaughn*-type index), there is a strong likelihood that Defendant Kobach has documents to which the Court has already determined that

Secretary Dunlap is entitled. *See* Dec. 22 Decision at 18-19.[3] As set out more fully in the briefing on Plaintiff's motion for a temporary restraining order, the Government seemingly took no steps to collect documents in the two-week period between the Court's December 22 Decision and the dissolution of the Commission, and took only inadequate steps to collect documents since September 2017 (when the *Vaughn*-type index was created). *See* Dkt. No. 45 at 2-5. Accordingly, there is a strong likelihood—undisputed by DOJ—that the White House is not in possession of all documents to which the Court's December 22 Decision applies, or which might otherwise be relevant to this litigation.

Nor can DOJ represent that Defendant Kobach is not in ***sole*** possession of a subset of documents to which Secretary Dunlap is entitled. Indeed, the *Vaughn*-type index lists hundreds of documents sent to or from Defendant Kobach's personal email address; there is no indication or evidence that he did not continue this practice through the date of the Commission's dissolution. The only logical conclusion—absent any evidence to the contrary—is that Defendant Kobach maintains sole possession of highly relevant documents, including numerous Commission records. Serving a preservation subpoena would be neither "unreasonably cumulative or duplicative" nor could the documents it targets be "obtained from some other source that is more convenient, less burdensome, or less expensive[.]" *See* Fed. R. Civ. P. 26(b)(2)(C).

Added to this, in recent weeks, DOJ has made crystal clear that it no longer believes that DOJ, as counsel to Defendant Kobach, or the Court, has any power to control the documents in the possession of the individual commissioners. It further asserts that the Court's December 22

[3] Whatever the result of the motion to dissolve the December 22 Decision, there is no question that the documents in Defendant Kobach's sole possession constitute relevant and discoverable evidence.

Decision no longer applies to the Defendants who are (or were) commissioners or Commission staff, despite the fact that these Defendants have not yet complied with the requirements of that order. In short, DOJ has disavowed any authority to legally obligate individual commissioners to preserve or return Commission records in their sole possession, and—though Secretary Dunlap rejects these contentions—based on its own position, DOJ believes it is currently powerless to prevent the destruction or loss of documents and information. This is despite the fact that DOJ concedes that Defendant Kobach's "litigation preservation obligations" survive his service on the Commission. *See* Dkt. No. 44 at 5.

DOJ also suggests that the purported January 17, 2018 letter obviates any need for this relief. Setting aside the fact that Secretary Dunlap has not received such a letter and there is no evidence before the Court regarding what that letter purports to seek, this letter cannot stand in the place of judicial process that creates legally-enforceable obligations. Indeed, DOJ itself has taken the position that the compliance of former commissioners with that request is voluntary and not legally enforceable.

Moreover, Defendant Kobach's record with respect to compliance—even with court orders—is spotty, to say the least, further giving the Court a basis for issuing this subpoena. In another action in the District of Kansas, Defendant Kobach was sanctioned $1000 for misleading the court and was required to sit for a deposition as a result. In that action, the district court explained its basis for the sanctions:

> Defendant argues that he should not be sanctioned for "an honest mistake," that he claims was not intentionally misleading. But Judge O'Hara carefully explained the basis for his finding that Defendant's statements were not merely honest mistakes, but effectively misled the Court about the contents of the documents at issue on the motion to compel—documents that had not yet been submitted to him for *in camera* review at the time Defendant submitted his brief. Judge O'Hara's finding that Defendant's misstatements are not adequately explained by his assertion that he was merely attempting to correct Plaintiffs'

> mischaracterizations and did so unclearly, is not clearly erroneous. Judge O'Hara carefully compared the statements, in context, with the documents at issue, and concluded that they were misleading.

Order, *Fish v. Kobach*, No. 16-cv-2105-JAR-JPO, Dkt. No. 374 at 4, 7-8 (D. Kan. July 25, 2017) (attached as Exhibit 4).

Not only is there good cause for such a subpoena, but in these unique circumstances, a document preservation subpoena is necessary to preserve the status quo and make sure any eventual remedy or judgment can be satisfied. *See Trump*, No. 17-cv-1596, Dkt. No. 64 (granting motion for leave to serve document preservation subpoena). In the absence of a TRO, a preservation subpoena is the most readily available mechanism to create a legally enforceable obligation for Defendant Kobach to preserve (and, ultimately, to be in a position to return) any Commission records in his sole possession. Further, the document preservation subpoena is appropriately tailored and would not burden Defendant Kobach or the other Defendants: Secretary Dunlap seeks only to preserve relevant evidence pending the Court's resolution of his entitlement to access to these records; as a primary request, he does not seek early discovery or production of the records at this time.

B. DOJ's Position To The Contrary Is Untenable

When DOJ advised Plaintiff that it intended to oppose this application, DOJ stated that the motion should be analyzed as a request for "preliminary injunctive relief". *See* Exhibit 5 (January 30 email). But the authorities cited by DOJ for this proposition also make clear that such relief was denied in part on the ground that, in fact, Rule 45 provides an adequate remedy. *See Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 44 (E.D. La. 1966) ("[T]he additional discovery procedures available under Rule 34 of the Federal Rules of Civil Procedure, with the enforcement provisions available under Rule 37 and the additional availability of Rule 45, present an adequate remedy to the plaintiff under the facts here presented."); *see also United*

States v. Sum of $70,990,605, 991 F. Supp. 2d 154, 164, 170 (D.D.C. 2013) (noting that claimants' requests can be "appropriately resolved in the context of civil discovery"). Here, Plaintiff is availing itself of Rule 45.[4]

The cases are also inapposite given that they deal only with the situation in which litigants are seeking preservation of documents in the possession of other litigants. DOJ's current position, while disputed, is that Kobach is no longer a Defendant in this case and, accordingly, that DOJ no longer represents him. DOJ's cases, on the other hand, examine whether a preservation order is necessary "given that *all litigants* are obligated to take appropriate measures to preserve documents and information which are reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery" and, additionally, that "[l]awyers have an affirmative duty to advise their clients of pending litigation and the requirement to preserve potentially relevant evidence." *Madden v. Wyeth*, 2003 U.S. Dist. LEXIS 6427, at *3 (N.D. Tex. Apr. 16, 2003). Relief is being sought here precisely because DOJ has disavowed any legally-enforceable authority itself to obligate Defendant Kobach to preserve or return the records, notwithstanding his obligations as a Defendant subject to the Court's December 22 Decision.[5]

Finally, it is difficult to understand why DOJ is opposing the issuance of a subpoena that seeks only to protect the Government's interest in the preservation of Commission records that are outside the custody of the federal government, nor is it clear why DOJ is advancing

[4] In any event, Secretary Dunlap's request meets the requirements for preliminary injunctive relief, as he is likely to prevail on the merits for the reasons explained in the Court's December 22 Decision (Dkt. No. 33); he would be irreparably harmed if records to which he is entitled are destroyed or not returned to the Government; and the relief he seeks serves the public interest by preserving Commission records, which the federal government is obligated to retain custody of by law.

[5] It seems DOJ is taking the contradictory positions that, as a former commissioner, Defendant Kobach is now a third party to this litigation, but that it is inappropriate for Plaintiff to use discovery tools appropriate for third parties because he was previously a party to the case.

arguments that seek only to protect Defendant Kobach—an individual whom DOJ claims is no longer a client—from judicial process. One might have expected that DOJ would have the same interest in making sure that individuals who possess relevant documents preserve those documents, but DOJ's position suggests that it may not share Plaintiff's interest in this objective. But for the reasons discussed above, DOJ's objections should be overruled.

IV. CONCLUSION

For these reasons, Plaintiff requests that the Court grant his motion for leave to serve a subpoena upon Defendant Kris W. Kobach seeking the preservation of documents or, in the alternative, the production of documents at a future date. A copy of the proposed subpoena requests and instructions that would be sent to Kobach is attached hereto as Exhibit 6. A proposed order, that can be modified based on the Court's ruling, is also attached for the Court's convenience.

Dated: January 31, 2018

Respectfully submitted,

By:
/s/ Harry Sandick

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Defendants.

Civil Action No. 17-cv-2361-CKK

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO SERVE A SUBPOENA

Upon consideration of Plaintiff Matthew Dunlap's ("Secretary Dunlap") Motion for Leave to Serve a Subpoena, all supporting documents, and any opposition thereto, Plaintiff's Motion for Leave to Serve a Subpoena is hereby GRANTED. It is hereby:

ORDERED that Secretary Dunlap shall be permitted to serve a subpoena on Kris. W. Kobach for the sole purpose of preservation of documents.

[*ORDERED that Secretary Dunlap shall be permitted to serve a subpoena on Kris W.*

Kobach for the production of documents.]

SO ORDERED.

_____
Hon. Colleen Kollar-Kotelly
United States District Judge

_____
Dated:

Exhibit 1

AMERICAN OVERSIGHT

January 18, 2018

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Dear Archivist Ferriero:

I write to inform you of an urgent issue relating to the potential alienation and risk of destruction of presidential records that has become apparent during the course of our representation of Secretary Matthew Dunlap, the Secretary of State for the State of Maine and a commissioner on the Presidential Advisory Commission on Election Integrity (PACEI or the Commission).[1]

As you likely know, the President terminated the Commission by Executive Order on January 3, 2018.[2] You may also be aware that, rather than providing members of the Commission with federal laptop computers and governmental electronic mail accounts with which to conduct Commission business, the Commission asked individual members of the Commission to use their own personal or work computers and email addresses to perform their responsibilities as commissioners. Of course, the use of non-governmental systems to conduct government business presents a serious risk that appointees will not comply with applicable statutory requirements for the preservation of presidential records.

From our case on behalf of Secretary Dunlap, we have become aware of a significant risk that at the time of the dissolution of the Commission there were a substantial number of records relating to Commission activities that remain solely in the possession of individual members of the Commission. Despite the diffusion of Commission records across the country, before taking the precipitous action of terminating the Commission the federal government appears to have taken no steps whatsoever to collect and archive records outside of its custody. According to court filings, Commission staff last undertook an effort to gather copies of records relating to the work of the Commission from individual commissioners at some point in September 2017. Consequently, the federal government does not have custody or control of records reflecting any work of individual members of the Commission performed after that date unless those records were copied to federal employees on the Commission's staff. This includes communications between individual commissioners regarding the Commission's work, any preparatory work or administrative work performed by individual commissioners, or communications with third parties such as potential witnesses or experts regarding the Commission's work.

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[1] *See Dunlap v. Presidential Advisory Commission on Election Integrity et al.*, Civil Action No. 17-cv-2361-CKK (filed November 9, 2017).
[2] Executive Order No. 13820: Termination of Presidential Advisory Commission on Election Integrity (January 3, 2018).

As the federal government has recently acknowledged in our case, all of these records are Commission records that must be preserved under the Presidential Records Act. The Presidential Records Act requires the President to "take all such steps as may be necessary to assure that [presidential records] are preserved and maintained . . . .,"[3] and "presidential records" are defined by the Act to include "documentary materials . . . created or received by . . . a unit . . . of the Executive Office of the President whose function is to advise or assist the President"[4] such as the Commission.

Thus we were troubled when the federal government took the position in our case that, in light of the dissolution of the Commission, the individuals who were formerly commissioners no longer had any enforceable obligation to preserve their records relating to the work of the Commission or to return any such records to the federal government, and that their compliance with litigation holds to preserve the records or with a request by the federal government to return copies of the records would be entirely voluntary. Indeed, the government's filing in our case indicates that, at least as of Tuesday, January 16th, nearly two weeks after the dissolution of the Commission, the federal government had taken no steps to secure the return of presidential records relating to the work of the Commission that might be in the sole possession of individual commissioners. The notion that the termination of the Commission freed individual commissioners to potentially refuse to return or even possibly to destroy copies of Commission records in their sole possession is deeply disturbing, as is the fact that no meaningful effort was made to secure these presidential records prior to the termination of the Commission.

We urge you to take all immediate steps necessary to ensure the preservation and return of these records as soon as possible, including by requesting that the Attorney General institute immediate legal action to require individual commissioners to return copies of any records in their possession relating to the work of the Commission. In light of the Department of Justice's claim on behalf of the White House that it lacks authority to compel the former commissioners to preserve or return the records (dubious as that may be), the Archives stands in a unique position. Lawyers for the Department of Justice suggest an action in replevin may be brought by the Archives to recover the records.[5]

Absent immediate action to impose a clear legal obligation on individual commissioners to retain and return copies of all records related to the Commission's work, there is a significant risk that presidential records will be permanently lost. Everyone is harmed when presidential records are improperly alienated from federal custody and possibly destroyed. The public loses its right to a complete record of American history; Congress, the media, law enforcement, and inspectors

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[3] 44 U.S.C. § 2203(a).

[4] 44 U.S.C. § 2201(2).

[5] ***Dunlap v. Presidential Advisory Commission on Election Integrity et al.***, Civil Action No. 17-cv-2361-CKK, Defs.' Response to Pl.'s Supp. Br. in Supp. of Mot. for TRO 18 (Jan. 16, 2018) (citing ***Jackson v. United States***, 248 F. Supp. 3d 167, 170 n.2 (D.D.C. 2017); ***United States v. McElvenny***, No. 02 Civ. 3027 (JSM), 2003 WL 1741422 (S.D.N.Y. Apr. 1, 2003)).

general lose the raw material to conduct proper oversight; and the presidency loses access to records of its own actions. Officials' candid communications and positions on issues of national importance—such as election integrity and potential evidence of voter fraud—are hidden from view, forever.

American Oversight is a non-profit organization dedicated to transparency, accountability, and ethics in government. Our mission is irreparably harmed by the Executive Office of the President's failure to comply with applicable record-keeping requirements. Unless immediate steps are taken to secure these presidential records, American Oversight—and the public more broadly—can have no faith that the searchable public record is complete, or ever will be.

We share a common mission to promote transparency in government, which necessarily depends upon a foundation of compliance with fundamental federal recordkeeping requirements. In light of these facts, it is incumbent on your office to take steps to ensure that government officials are not undermining that principle, whether negligently or willfully, and that presidential records are preserved and in the possession of the United States.

Thank you for your prompt attention to these important issues.

Sincerely,

Austin R. Evers
Executive Director
American Oversight

Cc: Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Elizabeth Shapiro
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Gary Stern
General Counsel
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Exhibit 2

NATIONAL ARCHIVES

January 25, 2018

Austin R. Evers
Executive Director
American Oversight
1030 15th Street, NW
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Washington, DC 20005
austin.evers@americanoversight.org

Dear Mr. Evers:

Archivist of the United States David Ferriero asked me to respond to your letter of January 18, 2018, in which you raised concerns about "the potential alienation and risk of destruction of presidential records" relating to the Presidential Advisory Commission on Election Integrity. We appreciate your interest in supporting the proper management and preservation of government records.

In your letter, you ask the National Archives to take steps to ensure the return of any records of the Commission that may remain in the sole possession of individual commissioners, including by requesting that the Attorney General institute immediate legal action to require such return.

As you are aware, the Director of the White House Office of Records Management, Philip Droege, has already asked the former commissioners to return any such records. In a declaration that was attached to the January 16, 2018, Department of Justice filing that is cited in footnote 5 of your letter, Mr. Droege stated that he is "sending a letter to all former Commissioners instructing them to forward to my office any documents that they created or received regarding Commission work that they have not already sent to the White House, to include text messages noted above."

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION
8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

GARY M. STERN
GENERAL COUNSEL
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gary.m.stern@nara.gov

We have confirmed that Mr. Droege has contacted the former commissioners to this end, and we have also been informed by the White House and the Department of Justice that they are taking all appropriate steps to ensure that the records of the Commission are being properly captured and preserved in accordance with the Presidential Records Act.

Sincerely,

Gary M. Stern
General Counsel

Cc: David Ferriero, Archivist of the United States
Elizabeth Shapiro, Department of Justice, Civil Division, Federal Programs Branch

Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

THE DISTRICT OF COLUMBIA AND THE STATE OF MARYLAND,

Plaintiffs,

vs.

DONALD J. TRUMP, in his official capacity as President of the United States of America,

Defendants.

Case No. 8:17-cv-01596

ORDER ON MOTION FOR LEAVE TO SERVE DOCUMENT PRESERVATION SUBPOENAS

This matter has come before the Court on Plaintiffs' Motion for Leave to Serve Document Preservation Subpoenas. Based on the motion, any response thereto, and the entire record herein, good cause is found and the motion is GRANTED. It is hereby

ORDERED that the parties shall be permitted to serve subpoenas on third-parties for the sole purpose of preservation of documents. No document production will be required prior to the earlier of, (a) entry of a scheduling order opening discovery, or (b) further order of this Court.

SO ORDERED this 28 day of Nov, 2017.

Hon. Peter J. Messitte

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, et al., **Plaintiffs,** **v.** **KRIS KOBACH, Kansas Secretary of State,** **Defendant.**	**Case No. 16-2105-JAR-JPO**

MEMORANDUM AND ORDER

This case is before the Court on Defendant Kris Kobach's Rule 72(a) Motion of Judge O'Hara's June 23, 2017, Order (Doc. 362),[1] filed on July 5, 2017. The briefing deadlines for this motion were expedited to facilitate a prompt ruling before the scheduled deposition of Secretary Kobach on August 3, 2017. The matter is now fully briefed and the Court is prepared to rule. As described more fully below, Defendant's motion for review is denied.

I. Background

The individual Plaintiffs in this case are United States citizens who attempted to register to vote at the time they applied for a Kansas driver's license. Under a 2011 Kansas Documentary Proof of Citizenship ("DPOC") law, Plaintiffs' voter registration applications were deemed "incomplete," and under a 2015 regulation passed by Kansas Secretary of State Kris Kobach, some of these applications were cancelled in the Kansas voter registration database. On May 17, 2016, the Court issued an extensive Memorandum and Order granting in part Plaintiffs' motion for a preliminary injunction barring enforcement of the Kansas DPOC law until this case

[1]Although the title of Defendant's motion only references the June 23 Order, the body of the motion, and the title of the memorandum in support make clear that Defendant also objects to Judge O'Hara's July 5, 2017 Order denying his motion for reconsideration (Doc. 361).

could be decided on the merits.[2] The order was effective on June 14, 2016.[3] The Tenth Circuit affirmed that ruling on October 19, 2016, in an extensive opinion.[4]

Discovery had completed in June 2016, but because the Tenth Circuit's comprehensive opinion clarified the standards that apply to Plaintiffs' claim under § 5 of the National Voter Registration Act ("NVRA"), this Court granted Defendant's motion to reopen discovery. Based on the Tenth Circuit's opinion, the undersigned and presiding United States Magistrate Judge James P. O'Hara permitted additional discovery on two issues:

> (1) whether a substantial number of noncitizens have successfully registered to vote in Kansas under the NVRA's attestation-of-citizenship requirement (showing that attestation falls below the minimum necessary for Kansas to carry out its eligibility-assessment and registration duties); and
>
> (2) whether DPOC is the minimum amount of information necessary for Kansas to carry out its eligibility-assessment and registration duties.[5]

On November 22, 2016, Plaintiffs served their Sixth Request for Production of Documents.[6] This request, as modified during counsel's meet-and-confer discussion, seeks: "all documents and communications regarding potential amendments or changes to the National Voter Registration Act affecting how officials may assess the eligibility of a voter registration applicant" ("Sixth Request").[7] Plaintiffs moved to compel production of two documents that they argued were responsive to this request: (1) a draft of a possible future amendment to the NVRA that was created by Defendant and shared only with counsel in Defendant's office and

[2]189 F. Supp. 3d 1107 (D. Kan. 2016).

[3]Doc. 145.

[4]840 F.3d 710 (10th Cir. 2016).

[5]Docs. 258 at 2–3, 254 at 2–4; *Fish*, 840 F.3d at 737–40 & n.14.

[6]Doc. 273-2.

[7]*Id.*; Doc. 273-6 at 2.

Bryan Caskey, who is the head of the Elections Division of the Secretary of State's office ("the draft amendment") ; and (2) a document created by Defendant to share with then President-elect Donald Trump referencing a possible amendment to the NVRA, which was photographed by the Associated Press in late November 2016 as Defendant was walking into a meeting with President-elect Trump ("the photographed document"). Defendant refused to produce these documents, asserting that they are beyond the scope of discovery, do not seek relevant information, and are protected by the attorney-client, deliberative-process, and executive privileges.

On April 5, 2017, Judge O'Hara issued an Order ruling that the Sixth Request was within the scope of discovery, as limited by this Court's order reopening discovery.[8] He ordered the documents be produced for *in camera* review before ruling on the relevance and privilege arguments. After reviewing the two documents *in camera*, Judge O'Hara issued a second Order on April 17, 2017.[9] The April 17 Order explained that the documents (in redacted form) are relevant to the issues for which discovery was reopened. He further ruled on Defendant's assertions of privilege, finding none of the asserted privileges apply to these documents. In a footnote, Judge O'Hara pointed to two statements in Defendant's response brief on the motion to compel that "most charitably, can be construed as word-play meant to present a materially inaccurate picture of the documents."[10] Judge O'Hara reminded Secretary Kobach that in his capacity as counsel of record in this case, he is "an officer of the Court with a duty of candor and a duty not to assert frivolous arguments."[11] Judge O'Hara ordered Defendant to produce the two

[8]Doc. 318.

[9]Doc. 320.

[10]*Id.* at 7 n.22.

[11]*Id.*

documents at issue and left it to Plaintiffs "to decide whether to seek sanctions against defendant."

On May 22, 2017, Plaintiffs filed a motion for sanctions based on the misstatements discussed by Judge O'Hara in his April 17 Order. In that motion, Plaintiffs also sought to remove the "confidential" designation from the two documents at issue, and asked the court to order a deposition of Secretary Kobach to answer questions limited to the creation and purpose of the two documents because Plaintiffs did not possess those documents during his earlier depositions. Judge O'Hara granted in part and denied in part Plaintiffs' motion on June 23, 2017.[12] Although Judge O'Hara found that Defendant's misstatements in the earlier brief did not justify sanctions under Fed. R. Civ. P. 37(a)(5), he did exercise his discretion to impose "inherent power" sanctions, and fined Secretary Kobach $1000, to be made payable to the court. Further, Judge O'Hara found that the documents at issue were properly deemed "confidential" under the protective order. Finally, Judge O'Hara granted Plaintiffs' request to reopen discovery for a limited deposition of Secretary Kobach. The deposition is limited to

> non-privileged information and evidence pertaining to the draft amendment and the photographed document. The deposition will be held . . . in Room 211 of the United States Court House, 500 State Avenue, Kansas City, Kansas. The undersigned will preside over the deposition and contemporaneously resolve any disputes that arise. The deposition is limited to sixty minutes of testimony on direct examination. As agreed to by plaintiffs, all testimony at the deposition will be subject to the confidentiality provisions of the protective order (i.e., the deposition will not be open to the public).[13]

Defendant filed a motion to reconsider the imposition of sanctions, arguing that his "lack of clarity" was an unintentional mistake, and the result of a rushed editing process between co-

[12]Doc. 355.

[13]*Id.* at 23–24 (footnotes omitted).

counsel. He also argued that deposing him could pose an ethical problem under Kansas Rule of Professional Conduct 3.7 by potentially disqualifying him from testifying at trial. Judge O'Hara denied the motion, finding that both arguments were inappropriate attempts to raise new arguments on a motion to reconsider that could have been but were not presented in the first instance.[14]

II. Discussion

Secretary Kobach now objects to Judge O'Hara's June 23 and July 5, 2017 Orders under Fed. R. Civ. P. 72(a), on two grounds: (1) ordering sanctions based on unintentional misstatements caused by last-minute editing mistakes was erroneous; and (2) permitting his deposition is contrary to law under Tenth Circuit precedent.

Fed. R. Civ. P. 72 allows a party to provide specific, written objections to a magistrate judge's order. With respect to a magistrate judge's order relating to nondispositive pretrial matters, the district court does not conduct a *de novo* review; rather, the court applies a more deferential standard by which the moving party must show that the magistrate judge's order is "clearly erroneous or contrary to the law."[15] "The clearly erroneous standard 'requires that the reviewing court affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"[16] To the extent Defendant raises new arguments in his motion for review that were not articulated in his response to the motion for sanctions, they are waived.[17]

---

[14]Doc. 361.

[15]28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

[16]*U.S. Fire Ins. Co. v. Bunge N.A., Inc.*, 244 F.R.D. 638, 641 (D. Kan. 2007) (quoting *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)).

[17]*ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1184–85 (10th Cir. 2011); *Marshall v. Chater*, 75 F.3d 1421, 1426–27 (10th Cir. 1996); *see also Burton v. R.J. Reynolds Tobacco Co.*, 177 F.R.D. 491, 494 n.3 (D. Kan. 1997).

A. Sanctions

In Judge O'Hara's Order granting the original motion to compel, he cited two examples of misstatements by Secretary Kobach in his response to the motion to compel.[18] The first was Defendant's statement that the draft amendment "does not propose to 'amend or alter' an [sic] 'eligibility-assessment procedures mandated by the NVRA.'"[19] The second was his statement that "no such document exists," demonstrating that Defendant sought an "alternative means of assessing voter qualifications by amending the NVRA."[20]

Defendant's response to the motion for sanctions states that "the problem was the result of counsel's apparently inarticulate phrasing, not the result of an intent to mislead or obfuscate. In both sentences, counsel for Defendant was attempting to *correct* misstatements by Plaintiffs' [sic] in their motion to compel."[21] Defendant went on to explain how in each instance he was attempting to correct misstatements of fact or law by Plaintiffs, and admitted he "was not as clear as he could have been." Defendant denied any lack of candor with the Court, and insisted that he was attempting to correct mischaracterizations by Plaintiffs.[22] He stated: "Defendant's counsel can possibly be faulted for a lack of clarity, but not for a lack of candor."[23]

Judge O'Hara was not persuaded by Defendant's explanation. As to the first problematic statement, Judge O'Hara observed that the text of the proposed draft amendment in fact would amend the type of information required by the states to assess voter registration applicants' eligibility. As to the second example, Judge O'Hara found that it "gives the strong impression

[18]Doc. 320 at 8 n.22.

[19]Doc. 288 at 18.

[20]*Id.* at 17.

[21]Doc. 346 at 25 (emphasis in original).

[22]Defendant repeated this argument in his reply brief to the motion for review under Rule 72(a) of Judge O'Hara's Order compelling production of documents. Doc. 335 at 14–15.

[23]Doc. 346 at 28.

that neither of the two at-issue documents relate to proposals by defendant to amend the NVRA's eligibility-assessment provisions. Upon *in camera* review of the documents, the undersigned learned this is clearly not the case."[24] Judge O'Hara would not go so far as to say Defendant "flat-out lied in representing the content of the disputed documents," but did find that his justifications for these statements were based on "thinly parsing the wording plaintiffs allegedly used." He found that "it would have been obvious to any reasonable attorney" that the document request would encompass the documents at issue.

In his motion for reconsideration, and now in his motion for review, Defendant asserts that his "lack of clarity" in the response to the motion to compel does not rise to the level of sanctionable conduct, and provides a new explanation for this lack of clarity: last-minute editing mistakes. Defendant did not mention editing, page-limitations, or issues with deadlines in his thirty-three page response brief to the motion for sanctions, so his assertion that this is an "expanded explanation" is not well taken. This basis for Defendant's objection is thus waived.

Even if not waived, the Court does not find that Judge O'Hara committed clear error in imposing a $1000 fine on Defendant for misleading the court. An inherent-power sanction may be appropriate where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[25] In imposing such sanctions, the court must exercise caution, and comply with due process requirements.[26] Defendant argues that he should not be sanctioned for "an honest mistake," that he claims was not intentionally misleading. But Judge O'Hara carefully explained the basis for his finding that Defendant's statements were not merely honest mistakes, but effectively misled the Court about the contents of the documents at issue on the motion to

[24]Doc. 355 at 8.

[25]*Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *see also Mellett v. MSN Commc'ns, Inc.*, 492 F. App'x 887, 889–90 (10th Cir. 2012) (approving making inherent-power sanction payable to the court).

[26]*Chambers*, 501 U.S. at 50.

compel—documents that had not yet been submitted to him for *in camera* review at the time Defendant submitted his brief.[27] Judge O'Hara's finding that Defendant's misstatements are not adequately explained by his assertion that he was merely attempting to correct Plaintiffs' mischaracterizations and did so unclearly, is not clearly erroneous. Judge O'Hara carefully compared the statements, in context, with the documents at issue, and concluded that they were misleading.

Furthermore, Judge O'Hara's decision on reconsideration was not clearly erroneous. Defendant's insistence that he merely provided an "expanded explanation" for his misleading statements does not persuade the Court that Judge O'Hara erred in declining to consider them. Defendant's original explanation for his misstatements did not mention the editing process. In his thirty-three-page response to the motion for sanctions, he took the position that he was merely responding to Plaintiffs' mischaracterizations. To be sure, he claimed that his statements were not intentional misrepresentations, but honest mistakes. But he did not place Judge O'Hara on notice of the basis for this claim, newly set forth in the motion for reconsideration:

> Defendant hopes that with <u>additional</u> context, this Court would see that the issue involved last-minute editing to meet page limitations; which led to the deletion of language that more fully explained the point Defendant was making.

[27]The undersigned echoes Judge O'Hara's warning in the Order compelling production that "when any lawyer takes an unsupportable position in a simple matter such as this, it hurts his or her credibility when the court considers arguments on much more complex and nuanced matters." Doc. 320 at 8 n.22. These are not the only two statements made or positions taken by Secretary Kobach that have called his credibility into question. *See* Doc. 338 at 18–19 & n.59 (discussing contradictions between position taken in response to class certification, and later on mootness issues); Doc. 145 at 2–4 (discussing Defendant's misleading recitation of the record before this Court at the time it ruled on the preliminary injunction motion in his motion for stay pending appeal); *see also Bednasek v. Kobach*, Case No. 15-9300, Doc. 165 at 12 n.23 (documenting Defendant's mischaracterization of summary judgment exhibit). Indeed, his assertion in this motion for review that his editing explanation was fairly raised before Judge O'Hara in the first instance is precipitously close to unsupportable. While these examples do not form the basis for any sanctions award imposed by Judge O'Hara, they do demonstrate a pattern, which gives further credence to Judge O'Hara's conclusion that a sanctions award is necessary to deter defense counsel in this case from misleading the Court about the facts and record in the future.

> The additional context is as follows. The primary author of the brief was Mr. Garrett Roe. Mr. Roe was working on this brief into the evening on its due date, Tuesday, February 7, 2017. Mr. Roe had spent Sunday, Monday, and Tuesday essentially re-writing an earlier draft, while also being consumed with other discovery issues. Mr. Roe sent the brief to Secretary Kobach to review at approximately 6:30 p.m. on February 7. The draft was approximately 34 pages long at that time, four pages overlength. Secretary Kobach reviewed the draft in order to assist Mr. Roe by suggesting cuts that would reduce the brief in size to the permissible page limits. Mr. Roe was simultaneously preparing exhibits, further reviewing case law on certain arguments, and finishing citations. The brief was e-mailed back to Mr. Roe at just before 10:30 p.m., when Mr. Roe was still working on exhibits and citations. At that point, Mr. Roe lacked the time to thoroughly review the edits and did not realize that the shortened brief did not explain the arguments at issue here as fully as in the original draft.[28]

None of this information was included in the response to the motion for sanctions. The language Defendant employed to explain this new editing defense concedes as much. The response to the motion for sanctions, while admitting a lack of clarity, almost solely places responsibility for the misstatements on Plaintiffs. A motion for reconsideration is not an opportunity for a party to raise arguments that could have been raised in the first instances, when those facts were previously available.[29] The new facts presented on reconsideration were clearly available to Defendant at the time he responded to the motion for sanctions, therefore Judge O'Hara did not err in concluding that there was no basis for reconsideration. The Court further finds that Judge O'Hara's observation that this new explanation lacks credibility given its late assertion and lack of documentation is not clearly erroneous.

[28]Doc. 359 at 4–5 (emphasis added) (footnote deleted indicating that "Mr. Roe wishes he would have sought a two-day extension.").

[29]*See, e.g.*, *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (explaining that a motion to reconsider is an "inappropriate vehicle[]to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion.").

The Court is not left with the definite and firm conviction that a mistake has been committed as to Judge O'Hara's sanctions ruling, or his ruling denying reconsideration. Defendant's objection to his sanctions rulings are therefore overruled and denied.

B. Deposition

Defendant argues that Judge O'Hara's ruling requiring him to appear for deposition was erroneous because (1) Tenth Circuit precedent forecloses the deposition of opposing counsel; (2) Judge O'Hara failed to consider his argument that the deposition was sought merely to embarrass, annoy, or harass him.

Defendant relies on Tenth Circuit precedent adopting the Eighth Circuit's decision in *Shelton v. American Motors Corp.*,[30] which held that

> depositions of opposing counsel should be limited to where the party seeking to take the deposition has shown that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.[31]

Judge O'Hara determined that this rule does not apply where opposing counsel is also a party to the case, only he can answer questions about the creation of the documents and his subsequent related actions, and the deposition is being sought to obtain information from the Defendant as a fact witness on these issues, and not in his capacity as opposing counsel. This ruling is not contrary to law. It is supported by ample case law in this district declining to apply the rule in *Shelton* on similar distinguishing facts.[32]

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[30]*Boughton v. Cotter Corp.*, 65 F.3d 823, 829–30 (10th Cir. 1995) (applying criteria set forth in *Shelton*, 805 F.2d 1323, 1327 (8th Cir. 1986)); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1112 n.15 (10th Cir. 2001).

[31]*Boughton*, 65 F.3d at 829.

[32]*See, e.g.*, *Perez v. Alegria*, No. 15-mc-401-SAC, 2015 WL 4744487, at *4 (D. Kan. June 24, 2015) ("This district has allowed the depositions of counsel of record in pending cases when the deposition relates to the attorney's role as a fact witness rather than the attorney's role in representing a client." (footnote omitted)); *Fugett v. Sec. Transport Servs., Inc.*, No. 14-2291-JAR-KGS, 2015 WL 419716, at *4 (D. Kan. Feb. 2, 2015) (declining to

Defendant points out that these cases have not been taken up on appeal, and until they do, this Court is bound to apply the *Shelton* rule. Defendant's position relies entirely on one sentence in a footnote by the Tenth Circuit in *Thiessen v. General Electric Capital Corp.*: "*Shelton* was adopted by this court in *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995)."[33] The Court disagrees that this statement foreclosed Judge O'Hara from distinguishing *Shelton* in this case. In *Thiessen*, the plaintiff sought to depose the defendants' corporate counsel about an internal investigation regarding a company policy, and the corporations' alleged purging of related documents.[34] The parties agreed in that case that *Shelton* controlled the analysis, and the court's single sentence footnote indicated that it had "adopted" *Shelton* in its earlier *Boughton* decision.[35] Importantly, Defendant has not pointed to any case where the Court has prohibited opposing counsel's deposition when opposing counsel is also the named party and the deposition seeks information about his actions as a party, rather than counsel. Here, Defendant, in his capacity as Secretary of State, created the documents at issue. Under these circumstances, it was not contrary to law for Judge O'Hara to decline "to protect defendant from the limited deposition requested based on his status as attorney of record."[36]

Defendant suggests that Judge O'Hara's decision not to apply *Shelton* turned on the fact that the deposition questions would not address his "role" has counsel, as opposed to his role as a fact witness, and that such an exception would swallow the *Shelton* rule. The Court disagrees with this characterization of Judge O'Hara's ruling. Judge O'Hara considered Mr. Kobach's role

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apply *Shelton* rule where the client identified its attorney as a potential witness and the plaintiff sought information relating to events giving rise to the cause of action, and not about legal advice); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 249–50 (D. Kan. 1995) (declining to apply *Shelton* to limit scope of deposition where the parties had agreed to take the deposition in the first instance).

[33]*Thiessen.*, 267 F.3d at 1112 n.15.

[34]*Id.* at 1112.

[35]*Id.*.

[36]Doc. 355 at 22.

in creating these documents, but he also weighed heavily the fact that Mr. Kobach is the named defendant in this matter. Defendant argues that his status as a named defendant is a mere formality necessitated by the NVRA. But as Defendant states in the reply, he has chosen to represent himself in this and other cases challenging the DPOC law, presumably due to his intimate familiarity with the law and issues involved in these cases.[37] Nonetheless, that is his choice, and Judge O'Hara's conclusion that this choice does not immunize him from deposition on issues that affect his role as a party and not as an attorney is not contrary to *Thiessen.* Moreover, the narrow deposition topic at issue on this motion involves documents that were created and disseminated by Mr. Kobach. No other witness could answer questions about these topics. Judge O'Hara concluded that under Rule 1, the most efficient method of obtaining these answers is through a controlled and limited deposition, over which he would preside. The Court has reviewed the cases cited by both parties and concludes that Judge O'Hara's decision distinguishing this case from those applying *Shelton* is not contrary to law.

Finally, Defendant argues that Judge O'Hara failed to consider his argument that Plaintiffs seek this deposition merely to annoy and harass him, citing tweets by counsel for Plaintiffs. First, the Court finds that Defendant waived this argument by not raising it in response to Plaintiffs' original motion. To be sure, Defendant made this argument in response to Plaintiffs request to remove the "Confidential" designations from the documents at issue, but that is a wholly separate issue that is not within the scope of Defendant's motion for review. The only arguments Defendant made in opposition to Plaintiffs' request to depose him about the documents at issue were that he could not be deposed based on his status as attorney of record,

[37]In other cases naming the Secretary of State in his official capacity in the District of Kansas, the Kansas Attorney General's Office, and sometimes outside counsel have represented the Secretary. *See, e.g.*, *Briscoe v. Biggs*, No. 10-2488-EFM, 2011 WL 1594948 (D. Kan. Apr. 27, 2011); *Canfield v. Office of the Sec'y of State for the State of Kan.*, 209 F. Supp. 3d 1219 (D. Kan. 2016).

and as a public official. Moreover, the limitations imposed on this deposition by the court belie any contention that it is being sought to annoy, embarrass or harass. Judge O'Hara ordered that the deposition will be limited in scope to questions concerning the draft amendment and the photographed document. He limited the deposition to one hour, and he ruled that the deposition would be subject to the confidentiality provisions of the protective order—it will not be open to the public. Under the deferential standard that applies under Rule 72(a), the Court overrules and denies Defendant's objection.

The Court declines to take up Plaintiffs' request in the response brief that Defendant be required to review its process for reviewing responsive documents. It is not appropriately before the Court on this motion under Rule 72(a).

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Rule 72(a) Motion of Judge O'Hara's June 23, 2017, Order (Doc. 362) is **denied**.

IT IS SO ORDERED.

Dated: July 25, 2017

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

Exhibit 5

[redacted]

From: "Borson, Joseph (CIV)" <Joseph.Borson@usdoj.gov>
Subject: RE: Dunlap v. PACEI
Date: January 30, 2018 at 10:55:34 AM EST
To: "Friedman, Daniel (x2378)" <dfriedman@pbwt.com>, "Shapiro, Elizabeth (CIV)" <Elizabeth.Shapiro@usdoj.gov>, "Wolfe, Kristina (CIV)" <Kristina.Wolfe@usdoj.gov>, "Federighi, Carol (CIV)" <Carol.Federighi@usdoj.gov>
Cc: Melanie Sloan <msloan@americanoversight.org>, Austin Evers <austin.evers@americanoversight.org>, John Bies <john.bies@americanoversight.org>, Cerissa Cafasso <cerissa.cafasso@americanoversight.org>, "Sandick, Harry (x2723)" <hsandick@pbwt.com>

Dear Dan,

We do not understand the legal basis for your proposed "document preservation subpoena," which, in any event, goes far beyond the claims relevant to this FACA document disclosure lawsuit. Are you seeking to file a motion for a preservation order in this case, presumably against Mr. Kobach? If so, as you are no doubt aware, your client would be required to satisfy the requirements for preliminary injunctive relief. *See Madden v. Wyeth*, 2003 WL 21443404, at *1 (N.D. Tex. Apr. 16, 2003) ("A motion to preserve evidence is an injunctive remedy and should issue only upon an adequate showing that equitable relief is warranted.") (citing *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966)); *see also United States v. Sum of $70,990,605*, 991 F. Supp. 2d 154, 163 (D.D.C. 2013) (analyzing a request for an injunction prohibiting destruction of evidence under the traditional preliminary injunction framework).

You have not provided any grounds for why such a motion is necessary. Furthermore, as you are aware, on January 17, 2018, the White House Office of Records Management instructing that all former Commission members – including your client and Mr. Kobach - send any records that they created or received regarding Commission work to the Executive Office of the President for preservation. Given the assurances that you have been provided, and the declarations that have been filed, there are no grounds to believe that preservation is in any jeopardy, and you have provided none.

Moreover, to the extent you mean that you intend seek leave under Rule 26(d) for expedited discovery, so that you may file a Rule 45(d) subpoena against a non-party, you have also not provided a good cause basis for why such a subpoena would be necessary or appropriate, particularly one as broad as this one, or under the circumstances as discussed above. And, of course, D.D.C. would not appear to be the proper jurisdiction to enforce such a subpoena.

Accordingly, while we do not represent Mr. Kobach in his personal capacity, we do not see the legal basis for your proposed "document preservation subpoena" and so cannot support it. If you nonetheless file a motion with the court, we ask that you reproduce this response.

All my best,

Joey

_____
Joey Borson
Trial Attorney
U.S. Department of Justice, Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
ph: (202) 514-1944
joseph.borson@usdoj.gov

From: Friedman, Daniel (x2378) [mailto:dfriedman@pbwt.com]
Sent: Monday, January 29, 2018 3:03 PM
To: Borson, Joseph (CIV) <jborson@CIV.USDOJ.GOV>; Shapiro, Elizabeth (CIV) <EShapiro@CIV.USDOJ.GOV>; Wolfe, Kristina (CIV) <krwolfe@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>
Cc: Melanie Sloan <msloan@americanoversight.org>; Austin Evers <austin.evers@americanoversight.org>; John Bies <john.bies@americanoversight.org>; Cerissa Cafasso <cerissa.cafasso@americanoversight.org>; Sandick, Harry (x2723) <hsandick@pbwt.com>
Subject: Dunlap v. PACEI

Joey,

We plan to move the Court for leave to serve a document preservation subpoena on Kris Kobach. The documents to be preserved are specified in the attached schedule. Given your statements that DOJ no longer represents Mr. Kobach, your position that the Court does not have the power to order Mr. Kobach to preserve Commission documents on the current record, and your acknowledgement that it is important to preserve the status quo, we imagine you do not object. But please let us know your position by 11:00 a.m. tomorrow. In addition, please let us know if Mr. Kobach is represented by counsel in this matter and the name / contact information for that counsel (to the extent you are aware).

Yours,
Dan

Daniel A. Friedman
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Exhibit 6

LIST OF DOCUMENTS TO BE PRESERVED AND/OR PRODUCED PURSUANT TO SUBPOENA

DEFINITIONS

1. "All" shall be construed as all, each, any, and every.

2. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

3. "Relating to" means mentioning, discussing, constituting, concerning, referring to (directly or indirectly), or in any other way pertaining to the subject matter of the request.

4. "Concerning" means relating to, referring to, describing, evidencing, or constituting, in whole or in part, directly or indirectly, the stated subject matter.

5. "Including" means "including but not limited to" or "including without limitation."

6. "Document(s)" is used in the broadest possible sense as interpreted under the Federal Rules of Civil Procedure and shall include, without limitation, any written, printed, typed, recorded, filmed, punched, transcribed, taped, or other graphic matter of any kind or nature, however produced or reproduced, whether in hard copy, handwritten, printed, electronic, or other form, either in Your possession or custody or under Your control, and shall include, without limitation, originals, file copies, and other copies, no matter how or by whom prepared, and all drafts prepared in connection with any such writings or recordings, whether used or not, regardless of whether the Document still exists, and regardless of who has maintained custody of such Documents.

7. "Communication(s)" means any transmission of information from one person to another, including, without limitation, by personal meeting, telephone, facsimile, electronic transmission, including electronic mail, text message, and teleconference.

8. The terms "person" and "entity" mean any natural person and any other cognizable entity, including, without limitation, corporations, proprietorships, partnerships, joint ventures, businesses, associations, foundations, governmental agencies or instrumentalities, societies, and orders.

9. "You" or "Your" means Kris W. Kobach and all persons or entities acting or purporting to act on behalf or under the control of Kris W. Kobach.

10. "Commission" refers to the Presidential Advisory Commission on Election Integrity.

11. "Commissioners" refers to members of the Presidential Advisory Commission on Election Integrity.

12. "Commission's Bylaws" refers to the bylaws of the Presidential Advisory Commission on Election Integrity.

13. "Voter Data" refers to information provided by any of the 50 states or the District of Columbia in response to the Commission's request(s) for the personal information of registered voters.

14. The use of a verb in any tense shall be construed as the use of that verb in all other tenses whenever necessary to bring within the scope of the discovery request Documents or information that might otherwise be construed to be outside its scope.

15. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. These Requests shall be deemed continuing in nature so as to require preservation and/or production of documents becoming available subsequent to the service of the subpoena.

2. Documents shall be preserved and/or produced in the manner in which they appear in Your files, including with all associated metadata. Documents that were stapled, clipped, or otherwise fastened together in their original condition shall be preserved and/or produced in such form.

3. Each non-identical copy of each document or thing requested herein which is in Your possession, custody or control, or that of any of Your agents, attorneys, accountants, employees, or representatives, shall be preserved and/or produced.

4. If any portion of any document is responsive to any request, the entire document shall be preserved and/or produced without abbreviation or redaction. In the event that a copy of a document, the preservation and/or production of which is requested, is not identical to any other copy thereof, by reason of alterations, marginal notes, comments, or materials contained therein or attached thereto, or otherwise, all such non-identical copies shall be preserved and/or produced separately.

5. Unless otherwise stated, the relevant time period for All requests are for Documents created or originating on or after May 11, 2017.

DOCUMENT CATEGORIES

1. All Documents concerning the motivations and reasons for creating the Commission.

2. All Documents concerning the Commission's establishment, including the appointment of the individual Commissioners.

3. All Documents concerning creation of the Commission's Bylaws.

4. All Documents concerning the Commission's operations, including staffing and potential Commission members.

5. All Documents concerning the direction and management of the Commission.

6. All Documents concerning the Commission's work, including suggestions for research to be conducted by the Commission and proposed future activities of the Commission.

7. All Documents concerning any decision to engage or not engage third parties for data analysis or other work on behalf of the Commission.

8. All Documents concerning decisions affecting the Commission, including litigation-related decisions and media- and public relations-related decisions.

9. All Documents concerning the scheduling of any meeting of the Commission, whether or not such meeting actually transpired.

10. All Documents concerning any meeting of the Commission—whether or not all Commissioners were invited to attend the meeting and whether or not the meeting eventually transpired—including meeting invitations, logistics, proposals, presentations, information on potential panelists, outreach to potential panelists, agendas, and working documents.

11. All Documents concerning the Commission's collection, dissemination, use, and storage of Voter Data, including the Voter Data requests disseminated to the individual states.

12. All Documents constituting preparatory work for the Commission, as defined by the Commission's Bylaws.

13. All Documents constituting administrative work for the Commission, as defined by the Commission's Bylaws.

14. All Documents concerning the Commission's development of public documents.

15. All Documents concerning the Commission's development of policies and policy proposals.

16. All Documents concerning any findings made by the Commission or the individual Commissioners, including but not limited to any Communications to the President, the Chair of the Commission, the Department of Homeland Security, any other federal agency, or any third party regarding any findings, factual determinations, or conclusions related to the Commission's work, whether formal or informal, final or preliminary, official or unofficial, or collective or individual.

17. All Documents concerning whether the Commission should be closed or terminated, including how Documents should be treated upon the Commission's closure or termination.

18. All Communications regarding the work or subject matter of the Commission, election integrity or voter fraud, or any other Commission-related subject, between any Commissioner and a Commission staff member; between a Commissioner and any other Commissioner or Commissioners; or between a Commissioner and a third-party.

19. All documents made for or prepared by the Commission, any Commission member, or any Commission staff.