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

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

Statutes

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

Other Authorities

Secretary Matthew Dunlap submits this memorandum of law in further support of his motion for a preliminary injunction seeking access to the documents he needs to serve as a member of the Presidential Advisory Commission on Election Integrity (the "Commission"). Defendants' opposition papers make clear that the Commission is not willing to comply with the Federal Advisory Committee Act ("FACA") as it has been interpreted by the D.C. Circuit and the district courts within this Circuit. The intervention of this Court is essential if Secretary Dunlap is to carry out his assigned role as a member of the Commission.

Defendants do not dispute that Secretary Dunlap has a right of access to information necessary for his meaningful participation in the Commission. Any argument to the contrary would be foreclosed by *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999). Nor do Defendants dispute that hundreds of communications involving commissioners, staff, and third parties exist and have been withheld from him.

Nor can there be any misunderstanding about which documents Secretary Dunlap seeks to obtain. In keeping with the Court's suggestion, Secretary Dunlap's counsel identified each category of document and specific document that he is entitled to see (based on the *Vaughn*-type index generated in connection with other litigation before this Court) and transmitted that list to Defendants.[1] In response, Defendants reiterated their refusal to provide *any* of the documents sought and did not explain *why* Secretary Dunlap was not entitled to the documents and categories of documents he seeks. *See* Transcript at 16-17 (Nov. 17, 2017) (THE COURT: "If there's something there that stands out that you think that Commissioner Dunlap thinks he's entitled to . . . the Government [should be able to] tell me why not.").[2]

In an effort to avoid *Cummock*, Defendants throw up a series of roadblocks, but each is

[1] This Nov. 21, 2017 letter, with appendices, was filed as Exhibit F to Defs' Br. (Dkt. 30-6).

[2] Defendants' responsive letter was filed as Exhibit G to Defs' Br. (Dkt. 30-7).

overcome. Under their approach, *Cummock*—and, indeed, FACA itself—would be rendered a dead letter, bestowing on Secretary Dunlap rights without any remedy. In truth, Secretary Dunlap has shown that there is a likelihood of success on the merits and that a writ of mandamus is an appropriate form of relief if Defendants are correct that a claim does not lie under the Administrative Procedure Act. *Cummock* provides a clear entitlement to relief under FACA. Defendants' interpretation of FACA is at odds with both text and precedent. Without authority, they try to limit a commissioner's right under Section 10(b) to documents discussed at public meetings. But the law requires Defendants to provide all documents that facilitate a commissioner's "meaningful participation"—which is not restricted to work performed at public meetings. Similarly, Defendants' atextual interpretation that a commissioner can be deprived of Commission documents so long as another commissioner is forced to endure the same deprivation makes a mockery of FACA and is not supported by law. Defendants also contend that Section 5 is not justiciable, but the D.C. Circuit has held exactly the opposite.

The other requirements for a preliminary injunction also are satisfied. Secretary Dunlap is suffering ongoing and concrete irreparable harm. Defendants reference the few documents they provided to Secretary Dunlap, as if that satisfies Defendants' obligation to provide all documents he is due. Having been denied hundreds of documents in just the first few months of the Commission's work, there is no telling how many documents continue to be created and withheld from Secretary Dunlap as the Commission proceeds. It would not be sufficient for Defendants to dump additional documents on him as the Commission disbands (although Defendants have given no indication they will ever provide them). Secretary Dunlap has a right to meaningfully participate in all facets of the Commission's work, including its fact gathering, investigation, and deliberations. Nor are Defendants persuasive on the balance of harms and the public interest. In their topsy-turvy view, the Commission will be better able to carry out its task

of studying voting and elections if some commissioners are denied access to information. Their secretive attitude is at odds with the purpose of FACA: to ensure quality advice from a cross-section of informed individuals who actively participate in the Commission's work. Defendants' approach would permit the capture of the Commission by special interests or the appointing authority, exactly the outcomes FACA is meant to prevent. And the *Vaughn*-type index and this Court's rulings on remand in *Cummock* make it readily apparent how to implement Secretary Dunlap's rights under FACA. The motion for a preliminary injunction should be granted

I. SECRETARY DUNLAP IS LIKELY TO SUCCEED ON THE MERITS

A. A Writ of Mandamus Should Issue Because Secretary Dunlap Is Clearly and Indisputably Entitled To the Relief He Seeks.

Secretary Dunlap is likely to succeed in obtaining a writ of mandamus because he has a clear right to relief; Defendants have a clear duty to act; there likely is no other adequate remedy available; and there are compelling equitable grounds for mandamus relief. *See In re Medicare Reimbursement Litig*, 414 F.3d 7, 10 (D.C. Cir. 2005).

1. FACA Section 10(b) and *Cummock* Entitle Secretary Dunlap to Substantive Commission Documents.

a. Defendants Have Violated FACA Section 10(b).

Secretary Dunlap has a clear entitlement to substantive Commission documents because they are necessary for his "meaningful participat[ion]" in the Commission's fact-gathering, meetings, questioning of witnesses, deliberations, development of recommendations, and drafting of a report. *See Cummock*, 180 F.3d at 291. To state Secretary Dunlap's request in as clear and categorical a manner as possible, he is entitled under FACA to the following documents: communications between commissioners; communications between commissioners and Commission staff; communications between Commission staff; communications between commissioners and third parties regarding issues and subjects relevant to the Commission; and

drafts and work product of commissioners or Commission staff that may result in formal documents for the review of one or more commissioners. *See* Opening Br. (Dkt. 7-13) at 9-12.

Defendants continue to withhold hundreds, if not thousands, of substantive documents bearing on the Commission's work. Defendants have conceded that these documents exist—indeed, they were documented on a *Vaughn*-type index submitted to this Court in a related case—yet they refuse to provide *any of them* to Secretary Dunlap. For example, Defendants continue to withhold, *inter alia*, the following categories of highly relevant documents (with Defendants' own descriptions):

- Internal emails and documents . . . including discussions about the direction and management of the Commission, deliberations over decisions affecting the Commission, litigation-related discussions, media and public relations discussions.
- Emails and associated materials sent to or from one or more Commission members and/or to or from Commission staff, about suggestions for research and/or future activities of the Commission.
- Emails, including attachments, circulated among Commission staff and between one and three present or future Commission members commenting on draft documents that will eventually be provided to the full Commission.

Sandick Letter (Dkt. 30-6).[3] FACA clearly entitles Secretary Dunlap to these documents.[4]

Section 10(b) is a broad provision, entitling Secretary Dunlap to "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." 5 U.S.C. app. 2

[3] After the November 17, 2017 teleconference with the Court, Secretary Dunlap followed the Court's suggestion and identified categories of documents (and particular documents) on the *Vaughn*-type index that Defendants maintained were not subject to section 10(b) and which were withheld from Secretary Dunlap. The categories of documents and particular documents are listed in full in Appendix A and Appendix B to that letter. Dkt. 30-6.

[4] Defendants do not dispute that the Commission is subject to FACA, and thus have waived argument to the contrary. *See United States v. Caicedo-Llanos*, 960 F.2d 158, 164 (D.C. Cir. 1992). Defendants would at any rate be judicially estopped from making such an argument because they have argued to this court that the Commission's status as an advisory committee means it cannot be an agency. Defs' Br. at 14-15.

§ 10(b). *Cummock v. Gore* defined section 10(b) in light of a commissioner's right "to fully participate in [the committee's] deliberations," which is broader than the public's right of access *Id.* at 292. Commissioner Cummock was entitled to documents necessary for her to "fully and adequately participate in [the deliberative] process." *Id.* The court "flatly reject[ed]" the view that commissioners could "be denied access to information underscoring the committee's recommendations." *Id.* at 291. *Cummock* requires that substantive Commission materials must be provided to Secretary Dunlap.

Any doubt about the reach of a commissioner's entitlement to documents under FACA, or how to implement Secretary Dunlap's rights in this case, is resolved by this Court's application of *Cummock* on remand. After the D.C. Circuit remanded *Cummock* to this Court to "engage in the necessary discovery and fact finding to determine" the extent of Commissioner Cummock's entitlement to materials, *id.* at 293, this Court ordered the Government to produce precisely the types of substantive Commission documents sought here, including "all documents that were retained by Commission staff," "all electronic (computer) records or files that were created or maintained in conjunction with the Commission's activities," and "all documents that were retained by the Commissioners." Order, *Cummock v. Gore*, No. 97-cv-981 (D.D.C. Nov. 16, 1999) (attached as Ex. 1). Secretary Dunlap's motion for injunctive relief is supported by the Court's handling of Commissioner Cummock's case on remand.

This Court also had occasion to define which materials were *not* required to be produced to commissioners under section 10(b): those that "bore no relationship whatsoever to the work of the Commission." Memorandum Order, *Cummock v. Gore*, No. 97-cv-981 (D.D.C. June 23, 2000) (attached as Ex. 2). Secretary Dunlap does not press any claim for these non-substantive or personal documents that are beyond the reach of section 10(b). *Cummock*, both at the D.C. Circuit and on remand, establishes Secretary Dunlap's indisputable entitlement to substantive

Commission documents while allowing Defendants to withhold those documents bearing no relationship to the Commission's work.[5]

Notably, despite conceding that *Cummock* applies and provides Secretary Dunlap a greater right to documents than the public, (Transcript at 26 (Nov. 17, 2017) (THE COURT: "Mr. Borson, despite what he put in the letter, has agreed that under *Cummock*, Commissioner Dunlap has greater rights than the public.")), Defendants fail to present a coherent framework identifying which materials must be provided to Secretary Dunlap beyond those provided to the public. According to Defendants, a commissioner's right to documents is coextensive with the public's right with the lone addition of documents the public would be entitled to see but for a FOIA exemption. Defs' Br. at 24. But this narrow conception is not a fair reading of *Cummock*: a commissioner is entitled to all documents he needs to have a "*real* right to participate in committee proceedings." *Cummock*, 180 F.3d at 291 (emphasis added). Secretary Dunlap is entitled to "the same information provided [to] other members." *Id.* at 294 (Rogers, J., concurring).

Defendants misunderstand this language when they contend that a commissioner's entitlement to documents extends only to documents that have been provided to every single other commissioner. Defs' Br. at 23 (arguing that Secretary Dunlap is only entitled to documents accessible "to the committee as a whole"). This cramped interpretation of FACA and section 10(b) is incorrect and not supported by any relevant authority. Defendants cite only a

[5] Other interpretations of section 10(b)—although not in the context of a commissioner's section 10(b) rights, which are greater than the public's—are in accord. *See, e.g., Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 228 (D.D.C. 2017) (materials created by commissioners, including preliminary work, are subject to disclosure under section 10(b)); *Heartwood, Inc. v. United States Forest Serv.*, 431 F. Supp. 2d 28 (D.D.C. 2006) (ordering production, pursuant to section 10(b) of draft reports).

pre-*Cummock* district court case and a pre-*Cummock* Office of Legal Counsel memo.[6] Both were written without the benefit of *Cummock* and neither addresses which documents must be provided to advisory committee *members*. Defs' Br. at 23-24. In advocating this narrow construction, Defendants insert words—"committee as a whole"—that do not appear in FACA or in *Cummock*, which nowhere limits a commissioner's right to documents under FACA to those that were provided to every single other commissioner. In fact, Defendants' interpretation is in direct conflict with *Cummock* itself. In *Cummock*, Commissioner Cummock sought a briefing book that had been provided to two other commissioners. *Cummock*, 180 F.3d at 287; *see also* *Cummock* complaint ¶ 30 (attached as Ex. 3). Were Defendants' narrow reading of FACA correct, the D.C. Circuit would have carved out this document from its ruling because it was not provided to the "commission as a whole"; it did not.

Defendants' interpretation also would violate the policy underlying FACA: balance and transparency are "strong safeguard[s] of the public interest." H.R. REP. NO. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500. Defendants could, consistent with their interpretation, provide documents to every commissioner except two. For example, they could refuse to provide documents to all Democratic commissioners because that would not be depriving any one commissioner to documents provided to the "committee as a whole." Indeed, in the Defendants' view, they could go far beyond that: they could provide documents only to the Vice-Chair and a small number of other like-minded commissioners without triggering other commissioners' right of access.

The *Vaughn*-type index shows that an "unbalanced" sharing of documents in this matter

[6] The OLC memo is further inapposite because it discusses only the applicability of section 10(b) to work prepared by a staff member or a subcommittee. 12 U.S. Op. Off. Legal Counsel 73, 75 (1988). Contrary to Defendants' paraphrase of the memo, it does not purport to exempt from 10(b) materials prepared by "individual members" of an advisory committee. Defs' Br. at 23.

is more than a hypothetical concern. Defendant Kobach has communicated with certain commissioners (including commissioners Adams and von Spakovsky) but not with Secretary Dunlap. (*E.g.*, email chain between Kossack, Kobach, Mr. von Spakovsky, Mr. Adams, and others re "introductory phone call" (Index #360)). Similarly, communications between commissioners and Commission staff about the direction and substantive work of the Commission have been withheld from Secretary Dunlap. (*E.g.*, "discussions about subjects for potential Commission report" (Index # 780); "internal emails re: discussing next steps for Commission" (Index # 781); "internal discussions about draft Commission documents" (Index # 787)). Secretary Dunlap seeks not "special treatment," but to be treated the same as these other commissioners.[7]

It is precisely this sort of "wall[ing] off" of a commissioner "from the committee's operations" that the *Cummock* court rejected as "astonishing" because it would "render[] membership essentially meaningless." *Cummock*, 180 F.3d at 291. *Cummock* does not authorize the walling off of Secretary Dunlap so long as at least one other commissioner is also walled off. *See id.* ("It would be quite absurd for us to hold that a FACA advisory committee—a public deliberative body that is subject to precise statutory mandates designed to ensure openness and fair deliberations—may simply exclude unpopular viewpoints from participation."). *Cummock* held that an advisory committee may not "exclude a disfavored member." *Id.* at 291. Nor may the Commission immunize its actions by excluding *more than one* disfavored member. Allowing the Vice-Chair to confer repeatedly on the substance of the Commission's work with a

[7] Defendants contend, without any support, that they can treat commissioners differently if there is a "reason" for disparate treatment. Defs' Br. at 24-25 & n. 4. But neither the by-laws nor anything else vests Vice-Chair Kobach or any other commissioner (including commissioners von Spakovsky or Adams) with preferred access to Commission documents pursuant to section 10(b). Secretary Dunlap does not seek preferential access; he believes that any documents that he is permitted to review as a result of this motion should be shared with all of the Commissioners, of whatever background or political affiliation.

small number of like-minded commissioners while excluding all others risks exactly the outcome Congress sought to prevent in enacting FACA: an advisory committee unduly influenced by special interests or the appointing authority, a risk that is particularly acute on a commission that atypically has a Chair and Vice-Chair with similar views. Defendants concede that they cannot "treat [an advisory committee member] on less-than-equal footing with other committee members." Defs' Br. at 24 (citing *Cummock*, 180 F.3d at 293 (Rogers, J., concurring). But that is exactly what they have done.

Finally, while Secretary Dunlap appreciates Defendants' response to his attempt to narrow and define this dispute, Defendants' offer to let Secretary Dunlap view (but not obtain copies of or even to take notes on) a limited set of documents that Defendants deem "related to the September 12 meeting" does not constitute or excuse compliance with section 10(b). *See* Borson Letter (Dkt. 30-7). First, Defendants continue to maintain that Secretary Dunlap is not entitled to *any* of the documents on the *Vaughn*-style index. Second, while Defendants have not identified which of the documents may be viewed under this offer, it appears to be a small portion of the documents to which Secretary Dunlap is entitled and has requested. Third, granting Secretary Dunlap a one-time peek at documents does not satisfy Defendants' section 10(b) obligations or facilitate in any way Secretary Dunlap's meaningful participation in the Commission. A commissioner has a right to copies of Commission documents so he can use them to question witnesses, develop topics for investigation, and draft a report, concurrence, or dissent. Likewise, this review of documents relevant to a past meeting would not assist Secretary Dunlap's participation in the decision-making in connection with upcoming meetings, including offering his input on potential witnesses and agenda items and reacting to suggestions from others for witnesses or agenda items.

Secretary Dunlap plans to continue to discuss the proposal in Defendants' letter.

However, in light of the fact that Defendants' unwavering position is that Secretary Dunlap is entitled to none of the documents on the index, Secretary Dunlap remains in the same excluded position he was prior to filing the motion for preliminary injunction. Thus, the scenario is reminiscent of *Cummock*. On remand, when the parties litigated whether certain documents were required to be provided to Commission Cummock, the Government "afforded Ms. Cummock and her counsel the opportunity to review" the disputed documents. *See* Ex. 2 at 3. But because the Government "decided not to release" the disputed documents to Commissioner Cummock, this Court was required to determine whether they fell within section 10(b). *Id.* Allowing a "peek" at documents does not satisfy Defendants' duties under FACA.

b. The Government's Focus on the Handful of Materials That Secretary Dunlap Received Before Public Meetings Ignores the Hundreds of Relevant Documents He Was Not Provided.

Defendants incorrectly frame Secretary Dunlap's entitlement to documents by citing the small number of documents that were actually discussed at public Commission meetings, ignoring the hundreds of documents that were distributed among Commission staff and/or one or more commissioners, but not to Secretary Dunlap. Defs' Br. at 19-21. According to Defendants, Secretary Dunlap cannot have been denied material used in formulating the Commission's recommendations because no recommendations have yet been formulated. Defs' Br. at 24. But a commissioner is entitled to documents he needs to have a "real right to participate in committee *proceedings*," not just formal deliberations or public meetings. Cummock, 180 F.3d at 291 (emphasis added).

Defendants' misconception seems to stem from an artificial understanding of how commissions work. There is no discrete "fact gathering" phase, which is concluded and followed by a discrete "deliberations" phase, which, after it ends, is followed by a "report" stage.

Rather, the Commission's ultimate recommendations are a product of the entire fact gathering and investigative process that has already begun. This much is clear from the *Vaughn*-type index, which confirms that work is occurring outside of the Commission's public meetings that will be relevant to the Commission's recommendations and report. (*See, e.g.*, "Internal discussions about subjects for potential Commission *report*" (Index # 780)) (emphasis added); ("Internal discussions about draft Commission *documents*" (Index # 787)) (emphasis added)).

Each Commission action, including communications between commissioners, directions to staff, and the setting of meeting agendas is a building block leading to the Commission's final recommendations and report and must be provided to Secretary Dunlap under FACA. The fallacy of Defendants' position is apparent from the fact that other advisory committees created by this President have disclosed "draft" and "interim" reports.[8] A final report does not suddenly appear; it is the product of iterations of drafting and editing over the course of a commission's life. Secretary Dunlap has a right to be a full participant in that process.

c. FACA Requires Secretary Dunlap's Meaningful Participation in the Commission's Activities.

Meaningful participation in the Commission means more than simply the right to attend public meetings and ask questions. It also includes the right to participate in the determination of topics for investigation, the selection of witnesses at public meetings, and the direction and use of staff resources—none of which has been afforded to Secretary Dunlap.

Defendants' brief and the Declaration of Defendant Kossack (Dkt. 30-3) demonstrate that any purported opportunities for Secretary Dunlap to provide input into the direction of the Commission were illusory. For example, Secretary Dunlap had no notice regarding the substance of the requests that would be the primary focus of the June 28, 2017 call that preceded

[8] *See* "President's Commission on Combating Drug Addiction and the Opioid Crisis," *available at* https://www.whitehouse.gov/ondcp/presidents-commission.

the dissemination of Defendant Kobach's letters to states seeking voter data. The call agenda included an item titled "Information Requests" with no additional information about the nature of the requests. *See* Agenda (attached as Ex. 4). On the call, Defendant Kobach described the information requests, which he had already drafted with the help of Commission staff (unbeknownst to Secretary Dunlap), but he did not distribute the letters before the call to allow Secretary Dunlap a meaningful opportunity to comment. *See* Kossack Decl. (Dkt. 30-3) ¶ 3. The letters were then sent just mere hours after the call. Neither was Secretary Dunlap asked to contribute to or comment on the July 19, 2017 meeting agenda nor was he invited to suggest witnesses for the September 12, 2017 meeting or to comment on the agenda or other proposed witnesses for that meeting. Indeed, the timing of the sending of the agenda—only a week before the September meeting—made it impossible for Secretary Dunlap to invite witnesses.

Owing to a recognition that the facts show that Secretary Dunlap had no meaningful opportunity to shape the direction of the Commission, Defendants rely heavily on the Commission by-laws, which vest the Chair or Vice-Chair with the power to "establish the agenda for all Commission meetings." By-Laws ¶ IV(C), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-bylaws_final.PDF.[9] But in practice, the Vice-Chair does not act alone in setting a meeting agenda. Defendant Kobach and Commissioner Gardner "collaborated on a bipartisan agenda for the meeting," demonstrating that Secretary Dunlap was not treated on an equal basis as Commissioner Gardner in this regard. Kossack Decl. (Dkt. 30-3) ¶ 9. Moreover, there was no way for Secretary Dunlap to know when these by-laws were enacted that the Commission's leadership and executive staff would methodically deprive him of access to the Commission's workpapers. The failure to provide

[9] Both the June 28 call and the July 19 meeting occurred before the by-laws (on which Defendants rely to justify their failure to include Secretary Dunlap) were ratified.

access to these basic materials has hampered Secretary Dunlap's ability to suggest topics, find relevant materials to distribute to the other commissioners, or make substantive suggestions to meeting agendas, much less comment on proposed agenda items or witnesses proposed by other commissioners or Commission staff.[10] Defendants cite no authority that permits an advisory committee's by-laws (which are facially limited to meeting agendas) to override statutory obligations. To the extent that a conflict exists between the by-laws and FACA, the latter must control since it is an act of Congress, not waivable by a vote of the commissioners.[11]

2. FACA Section 5 Entitles Secretary Dunlap to Documents and Full Participation.

By being denied access to the Commission's documents and frozen out from setting the direction of the Commission, Secretary Dunlap has been excluded from meaningful participation in the Commission's activities in violation of Section 5 of FACA. 5 U.S.C. app. 2 § 5(b)(2) (requiring "the membership of the advisory committee to be fairly balanced in terms of the points of view represented . . . ."); *id.* § 5(b)(3) (requiring that "the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest").

a. Secretary Dunlap's Section 5 Claim Is Justiciable.

Under controlling D.C. Circuit precedent, Secretary Dunlap's Section 5 claim is justiciable. *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on*

[10] This concern is particularly acute here because the Commission's Chair and Vice-Chair, unusually among advisory committees, are both elected officials from the same party and share similar views of the substantive issues before the Commission. They therefore are unlikely to provide a check that ensures a diversity of views will be represented in the agenda or witness lists for Commission meetings. *Cf.* The Presidential Commission on Election Administration (co-chaired by Robert F. Bauer (D) and Benjamin L. Ginsberg (R) (final 2014 report available at https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf)).

[11] Under Defendants' logic, for example, an advisory committee could vote to amend the by-laws to exclude members of one political party from deliberations notwithstanding the balance requirements found in FACA's Section 5. *See, infra*, pages 13-17.

Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) ("When [Section 5's] requirement is ignored, therefore, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue."); *see also Cummock*, 180 F.3d at 291 ("[A]n interpretation of FACA that permitted a given advisory committee to exclude a disfavored member would fly in the face of the principle established by [Section 5]."); *Cargill, Inc. v. United States*, 173 F.3d 323, 335 (5th Cir. 1999) ("[T]he functional balance and adequate staffing requirements . . . are justiciable."); *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (declaring recommendations issued by "unbalanced" advisory committee to be *ultra vires*).

Defendants cite only a single concurring opinion by a judge of the D.C. Circuit (and cases from outside this Circuit) in support of their argument against Section 5's justiciability. Defs' Br. at 29-35 (citing *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989) (Silberman, J., concurring)). But Defendants ignore that the other two judges in *Microbiological* found that Section 5 claims *are* justiciable. *See Microbiological*, 886 F.2d at 434 (Edwards, J., concurring in part and dissenting in part) (section 5 claims justiciable even though the "'fairly balanced' requirement falls short of mathematical precision in application [and] may involve some balancing of interests"); *id.* at 423-25 (Friedman, J., concurring) (reaching the merits of Section 5 claim). "The question of justiciability of claims under section 5 of FACA is thus not an open issue in this circuit." *Id.* at 433 (Edwards, J., concurring in part and dissenting in part).

More to the point, Defendants' concerns regarding adjudication of Secretary Dunlap's Section 5 claim are inapplicable here. Judicial review in this case does not require the Court to "oversee the President's appointment process, question the views of individual Commission members, manage the Commission's operations, [or] develop and mandate a standard for

committee balance and independence." Defs' Br. at 29. Secretary Dunlap merely seeks an order that each commissioner duly appointed by the President be allowed to participate fully in the Commission's activities. Such an order would *give effect to* the President's appointment decisions and would not require the Court to second-guess the President's determinations on the proper balance of the Commission. For purposes of this motion, the Court can defer completely to the President's selection of commissioners, which eliminates the need for the Court to make any thorny findings regarding balance. Secretary Dunlap was appointed to the Commission because he has considerable expertise in voting and election issues, has a unique perspective as the longtime Secretary of State of Maine, and was "determined by the President to be of value to the Commission." Charter, Presidential Advisory Commission on Election Integrity ¶ 4, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf. Injunctive relief would in no way interfere with the President's prerogatives.

Defendants' cases are inapposite because they concerned challenges to the composition of an advisory committee; none held that Section 5 claims were non-justiciable in circumstances such as these. *See, e.g.*, *Microbiological*, 886 F.2d at 422-23 (Friedman, J., concurring); *Ctr. for Policy Analysis on Trade & Health v. Office of the United States Trade Representative*, 540 F.3d 940, 947 (9th Cir. 2008) ("[W]e do not suggest that FACA's "fairly balanced" requirement is non-reviewable in every circumstance."). In the only case in which the relief sought was identical to the relief sought here (an order for the Government to refrain from "wall[ing] off" a commissioner duly appointed by the President), the D.C. Circuit found the challenge justiciable and granted the requested relief. *Cummock*, 180 F.3d at 291.[12] The rule that applies here—a

[12] Defendants state that "section 5(b)(3) 'on its face, is directed to the establishment of *procedures* to prevent inappropriate external influences on an already constituted advisory committee.'" Defs' Br. at 34. The Commission's "procedures"—not the appointment of commissioners—are precisely what Secretary Dunlap is challenging as inadequate.

court should grant injunctive relief when an advisory committee deprives one or more of its duly appointed commissioners access necessary for meaningful participation—is well-accepted and does not require the application of any judicially unmanageable standards.

b. Defendants' Failure To Provide Documents and To Allow Full Participation Has Clearly Violated Section 5.

Defendants have clearly violated Section 5 by walling off Secretary Dunlap and involving only a select few commissioners and staff in substantive Commission activities. Defendants are flatly wrong that the "treatment" of commissioners is not covered by Section 5 or by case law. Defs' Br. at 35. *Cummock*, in no uncertain terms, rejected the argument that, once appointed, commissioners have no participation rights:

> [A]n interpretation of FACA that permitted a given advisory committee to exclude a disfavored member would fly in the face of the principle established by [Section 5]: *a committee might be nominally balanced, because an individual was appointed to represent certain views, but effectively unbalanced, because that individual was precluded from meaningful participation.*

Cummock, 180 F.3d at 291 (emphasis added); *see id.* at 292 (commissioner entitled to "fully and adequately participate" in the deliberations process). In promulgating Section 5, Congress recognized the dangers associated with the "lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their recommendations." H.R. REP. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3496.

There is no doubt that Secretary Dunlap has been excluded from meaningful participation and treated differently than certain favored commissioners. Defendant Kobach and commissioners von Spakovsky and Adams have been involved in many communications regarding the substance of the Commission. *Supra*, pages 7-8. Freezing out commissioners with different viewpoints violates Section 5. Defendants' argument that at least one other commissioner (Secretary Lawson) has also been frozen out is telling and does nothing to show

that Defendants have satisfied Section 5. Defs.' Br. at 36[13]; *see Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913-14 (D.C. Cir. 1993) ("Advisory committees . . . possess a kind of political legitimacy. . . only insofar as their members act as a group.").

3. The Other Requirements For Mandamus Relief Are Satisfied.

There are compelling equitable grounds for this Court to order mandamus relief.[14] As Defendants admit, Defs' Br. at 37, courts have held that the lack of a private right of action within the FACA statute does not mean that FACA violations cannot be enforced. *See, e.g.*, *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011) ("The mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action."); *Judicial Watch, Inc. v. United States DOC*, 736 F. Supp. 2d 24, 31 (D.D.C. 2010) ("[P]laintiff may bring his claim for alleged FACA violations under the Mandamus Act.").

The vague separation-of-powers concerns proffered by Defendants do not counsel against mandamus relief. Defs' Br. at 38-39. It is difficult to apprehend how permitting Secretary Dunlap's meaningful participation in an advisory committee to which he was appointed by the President will chill the President's ability to obtain considered advice. But even were Defendants' concerns valid, the solution is not to permit Defendants to violate FACA without judicial review.[15] If Defendants did not wish to comply with FACA, the President could have

[13] Defendants also violated Section 9 by "tak[ing] action" before the Commission's charter was filed on June 23, 2017. *See, e.g.*, June 5, 2017 email from Adams to OVP Counsel re "addressing potential research opportunities for Commission" (Index # 165); June 16, 2017 email from Defendant Kossack to Defendant Kobach re "potential commission members" (Index # 362). On this point, the Secretary relies on the points and authorities in his opening brief at page 12.

[14] Defendants do not offer that any other remedy is available for FACA violations.

[15] The President is not a party to Secretary Dunlap's suit and the Vice President is one of ten defendants. This Court can easily grant mandamus relief here without compelling the Vice

"easily create[d] an advisory body" that was "composed only of federal employees and thus exempt from FACA." *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc). He did not, presumably because he wished to obtain the views of individuals like Secretary Dunlap, who bring a wealth of knowledge and experience to the Commission and who were "determined by the President to be of value to the Commission." Charter § 11(b). In any event, here, the President expressly created the Commission in accordance with FACA. *See, e.g.*, Charter at § 2 ("The Commission is established in accordance with Executive Order 13799 . . .*and the provisions of the Federal Advisory Committee Act* ("FACA").") (emphasis added). The Commission has therefore waived any constitutional challenge to the application of FACA to the Commission and must comply with FACA's requirements.[16] The President cannot voluntarily form a committee under the auspices (and patina of balance and respectability) of FACA and then refuse to comply with FACA's requirements.

B. Secretary Dunlap Is Entitled To Relief Under the APA.

Issuance of a writ of mandamus would not be necessary if the Court concludes that Secretary Dunlap has a likelihood of success in bringing his FACA-related claims pursuant to the Administrative Procedure Act ("APA"). For the reasons discussed below, Secretary Dunlap is also entitled to injunctive relief based on his rights under the APA.

1. The Commission Is An Agency Under the APA.

The Administrative Procedure Act provides for judicial review of "final agency action" by "an agency or an officer or employee thereof" that is "arbitrary, capricious, an abuse of

---

President's action. *See Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004) ("Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus" would not raise constitutional concerns).

[16] Separation-of-powers concerns are further minimized here because Secretary Dunlap is not challenging the President's actions in selecting and appointing commissioners.

discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 702, 704, 706. FACA incorporates the APA's definition of "agency." *See* 5 U.S.C. app. 2 § 3(3) ("The term 'agency' has the same meaning as in section 551(1) of title 5, United States Code."). The APA defines an "agency" as "each authority of the Government of the United States . . . whether or not it is within or subject to review by another agency[.]" 5 U.S.C. § 551(1). "[T]he APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. . . . [A]dminstrative entities that perform neither [rulemaking nor adjuciation] are nevertheless agencies[.]" *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). This definition is purposefully broad to avoid "exclud[ing] any authority within the executive branch that should appropriately be subject to the requirements of the APA." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Defendants argue that the Commission serves only to provide advice to the President, but it also has acted like an agency with independent authority, such as when it called for detailed records on every voter in this country.[17] The Commission therefore qualifies as an "agency" under a plain reading of the APA's text.

The defendants chiefly rely on *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) to argue that the Commission is not an agency. Defs.' Br. at 8-15. *Soucie* is inapposite because its "substantial independent authority" and "sole function" tests were developed in the context of a request for records under the Freedom of Information Act ("FOIA"). The Court narrowly construed the relevant statutes in order to avoid the "[s]erious constitutional questions [that] would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act[.]" *Soucie*, 448 F.2d at 1071. Though Congress amended the definition of "agency" in FOIA to incorporate the *Soucie* holding, *see Kissinger v. Reporters Comm. For*

[17] *See* Letter from Vice Chair Kobach Requesting Voter Roll Data (June 28, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/information-requests-to-states-06282017.pdf.

Freedom of the Press, 445 U.S. 136, 156 (1980), it did not change the broader definition of "agency" in section 551(1) of the APA. FACA is explicit when incorporating provisions from the APA and FOIA, and it borrows the APA's definition of agency, not FOIA's.[18]

2. Other Defendants Are Agencies Under the APA.

Secretary Dunlap also has sued the GSA and Andrew Kossack in his official capacity as the Commission's Designated Federal Officer ("DFO"). Compl. ¶¶ 14, 15. The GSA is an agency whose actions are subject to judicial review under the APA. *See AT&T Information-Systems, Inc. v. General Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987); *Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 75 (D.D.C. 1991). The executive order establishing the Commission and the Commission's charter require the GSA to "provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission[.]" Exec. Order 13799 § 7(a); Charter § 6.

The GSA's role is not merely administrative; the DFO was appointed by the GSA Administrator (*see* Charter § 8) to oversee the Commission's compliance with FACA. *See ACLU v. Trump*, 2017 U.S. Dist. LEXIS 111293, at *18 (D.D.C. July 18, 2017); First Kossack Decl. (Dkt. 30-1) at Exhibit A ("As the Commission's Designated Federal Officer ("DFO"), I will support the Commission's work and its members with administrative needs and ensure the Commission complies with the Federal Advisory Committee Act ("FACA")."); Kossack Decl.

[18] Defendants' citations to *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28 (D.D.C. 2006) and *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.D.C. 1975), *see* Defs.' Br. at 14-16, are inapposite because in those cases, FACA committees sought to avoid their 10(b) obligations by invoking a FOIA exemption for "inter-agency or intra-agency memorandums or letters," and the courts held that the FACA committees could not shirk their disclosure duties by attempting to disguise themselves as agencies covered by FOIA. *See Wolfe*, 403 F. Supp. at 242-43 ("[T]o allow the [advisory committee] to avail itself of the (b)(5) exemption . . . would be tantamount to burying the type of deliberations which the [FACA] sought to bring to the light of day"); *Heartwood*, 431 F. Supp. 2d at 36 (citing *Wolfe*, 403 F. Supp. at 242-43). Here, the President made the choice to receive advice from an advisory committee, which is subject to FACA, requiring transparency.

(Dkt. 30-3) ¶ 10 (Kossack responsible for gathering and distributing substantive materials); Second Kossack Decl. (Dkt. 30-5) ¶ 2 ("I . . . committed to posting all documents that were prepared for [the July 19, 2017] meeting."). Kossack's actions, as an appointee of the GSA, are final agency actions subject to judicial review. *See Judicial Watch, Inc. v. United States DOC*, 736 F. Supp. 2d 24, 30 (D.D.C. 2010) ("[A]gency's decisions not to comply with the various procedural requirements of FACA had the effect of a final action because they were not tentative or interlocutory and had the legal consequence of denying the public's right of access to that information.") (internal quotation marks and alterations omitted); *see generally Friedler v. GSA*, 2017 U.S. Dist. LEXIS 153573, at *29 (D.D.C. Sept. 21, 2017) (reviewing the action of a GSA official as an "agency action" under the APA). Regardless of whether the Commission itself is an "agency" for purposes of FACA, Defendants' conduct is reviewable under the APA.

II. SECRETARY DUNLAP WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Secretary Dunlap is suffering ongoing irreparable harm from being excluded from the bulk of the Commission's work. The *Vaughn*-type index makes it apparent that the Commission and its staff are engaged in substantive work separate and apart from the few public meetings the Commission has held and that such work has been ongoing for several months. Exclusion of a commissioner from this work is a serious matter requiring judicial intervention. *See Cummock*, 180 F.3d at 291 (FACA "must be read to confer on a committee member the right to fully participate in the work of the committee to which he or she is appointed").

Defendants' opposition papers offer a myopic focus on the Commission's willingness to share a small number of documents with Secretary Dunlap shortly before the most recent meeting. They tout the fact that Secretary Dunlap received the agenda for the September 12 meeting a week in advance, and some other presentation materials four days in advance. Defs'

Br. at 40-41. But a dump of the agenda and documents less than one week before a meeting is not sufficient time for Secretary Dunlap to prepare presentations of his own or to identify and secure the attendance of witnesses not invited by the Vice-Chair, much less provide his own feedback on the proposed agenda and witness list before it is finalized. Moreover, from a review of the *Vaughn*-type index, these pre-meeting documents are only a small fraction of the Commission documents to which he was entitled. *See*, *supra*, pages 4 -10; *Vaughn*-type Index (Dkt. 30-4). Defendants' failure to acknowledge the inadequacy of existing procedures to enable Secretary Dunlap's input before meetings or the wrongfulness of their continued embargo on hundreds of Commission documents shows that they plan to repeat their conduct in the future.

Defendants' irreparable harm arguments all therefore hinge on a predicate that Secretary Dunlap has shown to be false: that Secretary Dunlap is not entitled to *any* of the hundreds of substantive Commission documents that are listed on the *Vaughn*-type index (and similar documents that have been created since the index was filed). If Defendants are not obligated to provide those documents, Secretary Dunlap has not been irreparably harmed. But here, the converse is true: if Secretary Dunlap is entitled to substantive Commission documents, the ongoing failure to provide them constitutes irreparable harm.

It is not premature for Secretary Dunlap to seek these materials now—while the Commission is still doing its work—as opposed to waiting until the Commission's work is finished. Defendants insist that the Court must wait until the Commission's final report is complete to decide whether Secretary Dunlap needs the vast amounts of withheld information. Defs' Br. at 42. This is incorrect. As courts have recognized, irreparable harm is sustained when active participation in an advisory committee is thwarted. *See Pub. Citizen v. Nat'l Econ. Comm'n.*, 703 F. Supp. 113, 129 (D.D.C. 1989) (enforcing FACA while advisory committee still active); *Gates v. Schlesinger*, 366 F. Supp. 797, 801 (D.D.C. 1973) (same). FACA requires that

recommendations are the product of the deliberations of the Commission as a whole. Until the foundational documents are provided, Secretary Dunlap cannot meaningfully participate in meetings, take part in deliberations, develop recommendations to the President that are the product of a thorough and unbiased investigation, decide whether to join the Commission's report, or contribute to the drafting of a report, concurrence, or dissent. All of these steps necessarily influence the Commission's final recommendations and report.

The factual record confirms that the Commission is moving forward and that Secretary Dunlap will be unable to meaningfully participate if relief is not granted. As early as next month, the Commission will hold another meeting.[19] Defendants intend to repeat their past practices of providing Secretary Dunlap with an agenda no earlier than one week prior to the next meeting and providing only a small number of relevant documents. Also, conspicuously absent from Defendant Kossack's declaration is any representation that the Commission's work is on hold other than with respect to the state data submitted to the Commission. Kossack Decl. (Dkt. 30-3) ¶ 15 ("[n]o action or analysis is currently being taken *with respect to the state data submitted to the Commission*") (emphasis added). Because recommendations and a report can issue at any time without Secretary Dunlap's meaningful participation, the Court should enjoin the publication of a report until the defendants have provided to Secretary Dunlap the materials to which he is entitled.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST SHARPLY FAVOR SECRETARY DUNLAP

It is hard to see how the public interest can be invoked here to support denial of the motion. Secretary Dunlap was appointed to serve on the Commission based on his deep

[19] Per the Commission's charter, meetings are to take place every 30 – 60 days, and it has now been nearly 90 days since the last meeting. Charter § 9; *see also* Kossack Decl. ¶ 14 (Dkt. 30-3) (stating that "there will be no meeting in December 2017" but making no representations regarding January).

experience in overseeing state elections, and in part to provide balance on a Commission whose leadership is exclusively Republican and that is composed of a majority of Republican members. FACA exists to ensure that advisory committees are balanced and interest groups cannot use their membership on the Commission to promote private concerns. H.R. REP. NO. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3496. Defendants would frustrate this statutory purpose by advocating a cramped interpretation of FACA. A preliminary injunction can vindicate the public's interest in a balanced commission composed of active participants.

Defendants, in response, offer a curious version of what is in the public interest. They contend that the public interest is best served by denying the motion because such an order "would limit the Commission's ability to manage its own operations" and providing meeting-related work to commissioners two weeks before a meeting would "limit Commission members, staff, and witnesses ability to prepare documents and materials[.]" Defs' Br. at 43-44. Nothing could be further from the truth. Meetings are valuable only if commissioners are prepared to engage with the documents and witnesses at the meeting. Besides objecting to the timing of providing meeting materials, Defendants do not explain how depriving Secretary Dunlap of hundreds of substantive Commission documents accords with the public interest, contending only that the public interest is "best served by allowing the Commission to conduct its own operations." Defs' Br. at 44. This cannot be reconciled with FACA sections 5 and 10(b), which do not grant complete deference to advisory committees when it comes to sharing materials with Commissioners and even members of the public. This Court should reject the argument that FACA permits advisory committees to operate under a veil of secrecy, even as to their own members.[20] *See Pub. Citizen v. Nat'l Econ. Comm'n.*, 703 F. Supp. at 127 ("Rather than harm,

[20] Defendants' contention that an injunction would violate Rule 65(d) is meritless. Defs' Br. at 43-44. Secretary Dunlap seeks specific relief and the injunction tracking the categories of

[complying with FACA] will highlight vividly the essence of our democratic society, providing the public its right to know its government is conducting the public's business"). [21]

IV. CONCLUSION

Secretary Dunlap has satisfied the requirements for a preliminary injunction. Accordingly, he respectfully requests that this Court grant his motion for a preliminary injunction and (1) order Defendants to produce records containing or reflecting communications between commissioners; records containing or reflecting communications between commissioners and Commission staff; records containing or reflecting communications between Commission staff members; records containing or reflecting communications between commissioners and third parties regarding issues and subjects relevant to the Commission; and drafts and work product of commissioners or Commission staff that may result in formal documents for the review of one or more commissioners; (2) order Defendants to produce to Secretary Dunlap all future documents made available to or prepared for or by the Commission promptly and no later than two weeks in advance of any future Commission meeting; (3) order Defendants to permit Secretary Dunlap to fully participate on an equal basis as all other commissioners; and (4) enjoin the Commission from releasing a final report until Secretary Dunlap has received all documents to which he is entitled and has had an opportunity to review them, has participated in the drafting of the report or, if necessary, has completed a concurrence or dissent to the report.

---

documents he identified in his attorney's November 21, 2017 letter to Mr. Borson would easily satisfy the rule. *See* Sandick Letter (Dkt. 30-6). In the appendices to that letter, Secretary Dunlap identified the specific documents and categories of documents he is entitled to review and is currently interested in reviewing.

[21] Defendants also contend that Secretary Dunlap has not pursued the "Commission's internal processes" to resolve his complaints, Defs' Br. at 43, but his repeated pre-suit inquiries for documents and information were rebuffed (Compl. ¶¶ 53, 59-63), making this lawsuit necessary.

Dated: December 6, 2017

Respectfully submitted,

By:
/s/ Harry Sandick

PATTERSON BELKNAP WEBB & TYLER LLP
Daniel S. Ruzumna (D.C. Bar No. 450040)
Harry Sandick (admitted *pro hac vice*)
Daniel A. Friedman (admitted *pro hac vice*)
1133 Avenue of the Americas
New York, N.Y. 10036
Tel: (212) 336-2000
Fax: (212) 336-2222
druzumna@pbwt.com
hsandick@pbwt.com
dfriedman@pbwt.com

AMERICAN OVERSIGHT
Austin R. Evers (D.C. Bar No. 1002367)
Melanie Sloan (D.C. Bar No. 434584)
John E. Bies (D.C. Bar No. 483730)
Cerissa Cafasso (D.C. Bar No. 1011003)
1030 15th Street NW, B255
Washington, DC 20005
Tel: (202) 869-5246
austin.evers@americanoversight.org
msloan@americanoversight.org
john.bies@americanoversight.org
cerissa.cafasso@americanoversight.org