

November 28, 2017

Jennifer D. Ricketts  
Director, Federal Programs Branch  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Re: Request for Investigation of Kris W. Kobach

Dear Ms. Ricketts:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Department of Justice (“DOJ”) investigate whether Kansas Secretary of State Kris W. Kobach, Vice Chair of the Presidential Advisory Commission on Election Integrity (“Commission”), improperly participated in a matter in which he is believed to have a financial interest in violation of the federal conflict of interest statute, 18 U.S.C. § 208, and consider whether civil action is appropriate in response to such a violation.

Secretary Kobach agreed to be paid for writing and delivering columns to *Breitbart News*. One of those columns seemingly was written by Secretary Kobach in his official capacity as Vice Chair of the Commission, an advisory committee established by Executive Order that is charged with studying voting processes in federal elections, including voting fraud. The column, published five days before a Commission meeting in New Hampshire, alleged there was serious voter fraud in that state’s 2016 election. Secretary Kobach then incorporated the column into the meeting, listing it as part of the Commission’s meeting materials, posting it on the Commission’s website, and dedicating substantial time to discussing it during the meeting. Because Secretary Kobach agreed with *Breitbart News* to write a column for official Commission use, knowing he would be paid for the column, he appears to have participated in a particular matter in which he had a financial interest, conduct that may have violated 18 U.S.C. § 208.

The official actions of government employees should be free from any actual or apparent influence from outside financial interests. Secretary Kobach’s conduct, however, appears to undermine that principle, and should be investigated to determine if it violates the federal conflict of interest statute.

### **Background**

#### **The Presidential Advisory Commission on Election Integrity**

President Donald J. Trump established the Commission by Executive Order on May 11, 2017 to “study the registration and voting processes used in Federal elections,” including “vulnerabilities in voting systems used for federal elections that could lead to improper voter

registrations, improper voting, fraudulent voter registrations, and fraudulent voting,”<sup>1</sup> as well as “concerns about voter suppression, as well as other voting irregularities.”<sup>2</sup>

The Commission is “solely advisory” and is tasked with producing a report that identifies the “laws, rules, policies, activities, strategies, and practices that enhance” confidence in the integrity of the voting processes used in federal elections, those that “undermine” such confidence, and “vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.”<sup>3</sup> The Commission is required to “hold public meetings and engage with Federal, State, and local officials, and election law experts, as necessary, to carry out its mission.”<sup>4</sup> In carrying out its work, the Commission is to “utilize all available data, including state and federal databases.”<sup>5</sup>

On the day he established the Commission, President Trump appointed Vice President Mike Pence as Chairman and Secretary Kobach as Vice-Chair.<sup>6</sup> Secretary Kobach has served as Kansas Secretary of State since January 10, 2011, and currently is a candidate for governor.<sup>7</sup>

The Commission’s Executive Order is silent on whether its members serve as special government employees (“SGEs”) or as representatives of their respective organizations. Secretary Kobach’s spokeswoman, however, asserted that “Commission members are considered ‘Special Government Employees’ under federal law” and confirmed that Secretary Kobach “is serving on the Commission in his personal capacity, not as a representative of the State of Kansas.”<sup>8</sup> As an SGE, Secretary Kobach is subject to certain federal conflict of interest statutes applicable to executive branch employees that are discussed in detail below.

### Secretary Kobach’s Breitbart News Column on Election Integrity

In addition to his government positions, Secretary Kobach also is a paid columnist for *Breitbart News*.<sup>9</sup> While Secretary Kobach confirmed to the *Kansas City Star* that “I get paid for

<sup>1</sup> Executive Order No. 13799, Presidential Order on the Establishment of Presidential Advisory Commission on Election Integrity, May 11, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/05/11/presidential-executive-order-establishment-presidential-advisory>.

<sup>2</sup> White House Press Statement, President Announces Formation of Bipartisan Presidential Commission on Election Integrity, May 11, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission>.

<sup>3</sup> Executive Order, section 3.

<sup>4</sup> *Id.*

<sup>5</sup> White House Press Statement, May 11, 2017.

<sup>6</sup> *Id.*

<sup>7</sup> Biography of Kris W. Kobach, 31st Kansas Secretary of State, *available at* [http://www.kssos.org/about/about\\_news\\_biography.html](http://www.kssos.org/about/about_news_biography.html); Kobach for Governor website, *available at* <https://www.kobach2018.com>.

<sup>8</sup> Bryan Lowry and Hunter Woodall, Is Kobach a private citizen on Trump commission? Question will test transparency law, *Kansas City Star*, Sept. 18, 2017, *available at* <http://www.kansascity.com/news/politics-government/article173996136.html>.

<sup>9</sup> Bryan Lowry, Kris Kobach’s new job: Columnist for Breitbart, *Kansas City Star*, Aug. 31, 2017, *available at* <http://www.kansascity.com/news/politics-government/article170581152.html>; *see also* Ezra Dulis, Leftists

my columns,”<sup>10</sup> no other facts appear to be publicly available about the nature of his financial relationship with *Breitbart News*.

On September 7, 2017, Secretary Kobach published a column about election integrity in *Breitbart News* (“the *Breitbart* column”).<sup>11</sup> Based on his statement to the *Kansas City Star*, he presumably was paid for writing it.

In the column, Secretary Kobach claimed that “facts have come to light that indicate that a pivotal, close election was likely changed through voter fraud on November 8, 2016: New Hampshire’s U.S. Senate Seat, and perhaps also New Hampshire’s four electoral college votes in the presidential election.”<sup>12</sup> Relying on statistics released by the Speaker of New Hampshire’s House of Representatives, Secretary Kobach asserted that “5,313 fraudulent votes” were cast in New Hampshire’s 2016 election, “more than enough to swing” the state’s U.S. Senate election from now-Senator Maggie Hassan to former Senator Kelly Ayotte, and possibly enough to swing the state’s presidential contest from Hillary Clinton to President Trump.<sup>13</sup> According to Secretary Kobach, the allegedly fraudulent votes were cast by nonresident voters who registered to vote on election day using out-of-state licenses but subsequently failed to satisfy the requirement that they obtain a New Hampshire driver’s license or vehicle registration within 60 days of becoming a resident.<sup>14</sup>

A biographical description for Secretary Kobach at the bottom of the column recognized his position on the Commission, stating:

Kris W. Kobach is the elected Secretary of State of Kansas. An expert in immigration law and policy, he coauthored the Arizona SB-1070 immigration law and represented in federal court the 10 ICE agents who sued to stop Obama’s 2012 executive amnesty. In 2017 President Trump named him Vice Chairman of the Presidential Commission on Election Integrity. He is currently a candidate for governor of Kansas. His website is [kriskobach.com](http://kriskobach.com).<sup>15</sup>

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Apoplectic, Smear Kris Kobach as ‘Nazi’ for Paid Breitbart Column, *Breitbart News*, Sept. 1, 2017, available at <http://www.breitbart.com/big-journalism/2017/09/01/leftists-apoplectic-smear-kris-kobach-as-nazi-for-paid-breitbart-column/>. Secretary Kobach’s columns are available at <http://www.breitbart.com/author/kriskobach/>.

<sup>10</sup> Lowry, *Kansas City Star*, Aug. 31, 2017.

<sup>11</sup> Kris W. Kobach, Exclusive - Kobach: It Appears That Out-of-State Voters Changed the Outcome of the New Hampshire U.S. Senate Race, *Breitbart News*, Sept. 7, 2017, available at <http://www.breitbart.com/big-government/2017/09/07/exclusive-kobach-out-of-state-voters-changed-outcome-new-hampshire-senate-race/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (emphasis added). The hyperlink to “kriskobach.com” sends readers to Secretary Kobach’s campaign website. By doing so, Secretary Kobach may raise Hatch Act concerns that fall within the purview of the Office of Special Counsel. See Press Release, Lawyers’ Committee for Civil Rights Under Law Files Hatch Act Complaint Against Kris Kobach, July 3, 2017, available at <https://lawyerscommittee.org/press-release/lawyers-committee-civil-rights-law-files-hatch-act-complaint-kris-kobach/> (complaint alleging Secretary Kobach may have violated Hatch Act on multiple occasions while serving on the Commission).

Secretary Kobach Incorporated the Breitbart Column into Commission Proceedings

The Commission held its first meeting in Washington D.C. on July 19, 2017.<sup>16</sup> On September 12, 2017, five days after the *Breitbart* column was published, Secretary Kobach chaired the Commission's second meeting at St. Anselm College in Manchester, New Hampshire.<sup>17</sup>

The agenda and meeting materials for the second meeting are posted as Commission documents on the Commission's page on the White House website.<sup>18</sup> Secretary Kobach's *Breitbart* column is listed as part of the meeting materials, and is posted on the website in its entirety under the *Breitbart News* banner.<sup>19</sup>

Although the *Breitbart* column was not listed as a discussion item on the Commission's formal meeting agenda, Secretary Kobach set aside approximately 20 minutes of the meeting to discuss it.<sup>20</sup> During the discussion period, two other members of the Commission challenged Secretary Kobach's allegations of fraudulent voting detailed in the *Breitbart* column. New Hampshire Secretary of State Bill Gardner took issue with the allegations by explaining that the "driver's license issue is not an issue. . . . The problem that has occurred *because of what you wrote* is . . . whether our election as we have recorded it is real and valid. And it is real and valid."<sup>21</sup> Maine Secretary of State Matthew Dunlap similarly criticized Secretary Kobach's claims, calling them "reckless" noting that "there is no connection between motor vehicle law and election law" and explaining that Secretary Kobach's claims "would be almost as absurd as saying if you have cash in your pocket that you robbed a bank."<sup>22</sup> Secretary Kobach expressly

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<sup>16</sup> White House Press Release, Remarks by President Trump and Vice President Pence at the Presidential Advisory Commission on Election Integrity Meeting, July 19, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/07/19/remarks-president-trump-and-vice-president-pence-presidential-advisory>; White House Press Release, Remarks by Vice President Pence and Elected Officials at the First Meeting of the Presidential Advisory Commission on Election Integrity, July 19, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/07/19/remarks-vice-president-pence-and-elected-officials-first-meeting>.

<sup>17</sup> Meeting notice with request for comments, 82 Fed. Reg. 40581, Aug. 25, 2017.

<sup>18</sup> Agenda for the Second Meeting of the Presidential Advisory Commission on Election Integrity, Sept. 12, 2017, available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-updated-meeting-agenda-09122017.pdf>; September 12, 2017 Meeting Materials, available at <https://www.whitehouse.gov/presidential-advisory-commission-election-integrity-resources>.

<sup>19</sup> See <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/Kobach-It-Appears-Out-of-State-Voters-Changed-Outcome.pdf> (reprinting Kris W. Kobach, *Exclusive - Kobach: It Appears That Out-of-State Voters Changed the Outcome of the New Hampshire U.S. Senate Race*, *Breitbart News*, Sept. 7, 2017).

<sup>20</sup> See WMUR-TV Video, *Part 2: Election integrity commission meets at NHIOP*, Sept. 13, 2017, available at [https://www.youtube.com/watch?v=XkPJbbKPJ\\_w](https://www.youtube.com/watch?v=XkPJbbKPJ_w).

<sup>21</sup> Josh Gerstein and Lauren Dezenski, *N.H. official rebukes Kobach over out-of-state voting claims*, *Politico*, Sept. 12, 2017, available at <http://www.politico.com/story/2017/09/12/bill-gardner-trump-voter-fraud-panel-242593> (emphasis added); Ben Kamisar, *Kobach defends controversial Breitbart column on NH voter fraud*, *The Hill*, Sept. 12, 2017, available at <http://thehill.com/homenews/administration/350270-kobach-defends-controversial-breitbart-column-on-nh-voter-fraud>.

<sup>22</sup> Dartunorro Clark, *Trump's Voter Fraud Commission Clashes Over New Hampshire Count*, *NBC News*, Sept. 12, 2017, available at <https://www.nbcnews.com/politics/politics-news/kobach-faces-critics-election-integrity-panel-after-claiming-fraud-new-n800751>.

defended his *Breitbart* column during the Commission's discussion, noting that "[t]his [issue] obviously is a subject of concern because there have often been anecdotal reports of people driving into New Hampshire because it's a same-day registration state and it's a battleground state."<sup>23</sup>

### **Potential Violation - 18 U.S.C. § 208**

18 U.S.C. § 208 is a criminal conflict of interest statute that prohibits an executive branch employee, including a special government employee, from participating personally and substantially in any particular government matter that will have a direct and predictable effect on his financial interest or any financial interest imputed to him. The purpose of the statute is to prevent an employee from allowing personal interests to affect his or her official actions, and to protect governmental processes from actual or apparent conflicts of interests.<sup>24</sup> DOJ may pursue a civil action against any person who violates 18 U.S.C. § 208, and those violations may result in a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received for the prohibited conduct, whichever is greater.<sup>25</sup>

A "particular matter" covered by 18 U.S.C. § 208 encompasses only matters that involve deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons.<sup>26</sup> Particular matters involve a wide range of government actions – they are not limited to adversarial proceedings or formal legal relationships, and can include policy matters and government contacts.<sup>27</sup> A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.<sup>28</sup> The magnitude of the gain or loss need not be known and the dollar amount of the gain or loss is immaterial.<sup>29</sup>

The timing, context, content, and use of the *Breitbart* column strongly suggest Secretary Kobach wrote it in his official capacity as a member of the Commission, for the purpose of carrying out his Commission duties to "study the registration and voting processes used in Federal elections." As a result, if, as it appears, he received compensation for it as a paid columnist with *Breitbart News*, the agreement to write and deliver the *Breitbart* column in his official capacity was a particular matter. *Breitbart* published Secretary Kobach's column less than a week before the September 12 Commission meeting. Moreover, the column's substance, which challenges the validity of the November 2016 New Hampshire U.S. Senate and presidential elections because of an alleged "5,313 fraudulent votes" being cast, falls within the

<sup>23</sup> Kamisar, *The Hill*, Sept. 12, 2017.

<sup>24</sup> 5 C.F.R. § 2640.101.

<sup>25</sup> 18 U.S.C. § 216(b).

<sup>26</sup> 5 C.F.R. § 2635.402(b)(3) and § 2640.103(a)(1).

<sup>27</sup> *Id.*; OGE Legal Advisory 06 x 9, Memorandum from Robert I. Cusick, OGE Director, to Designated Agency Ethics Officials Regarding "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter", October 4, 2006, available at [https://oge.gov/web/oge.nsf/0/624E14B0D710694B85257E96005FBE7E/\\$FILE/06x9.pdf](https://oge.gov/web/oge.nsf/0/624E14B0D710694B85257E96005FBE7E/$FILE/06x9.pdf).

<sup>28</sup> 5 C.F.R. § 2635.402(b)(1) and § 2640.103(a)(3).

<sup>29</sup> *Id.*

scope of the Commission's mission. As noted above, the Commission is required to produce a report on the "laws, rules, policies, activities, strategies and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections" and "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, *including improper fraudulent voter registrations and fraudulent voting*."<sup>30</sup> Furthermore, the source of the allegation that "5,313 fraudulent votes" were improperly cast was data provided by New Hampshire's House Speaker, the type of data that the Commission is to draw upon and utilize.

Secretary Kobach also listed his official position as Vice Chair of the Commission in his biographical description. While his inclusion of other biographical details might suggest the column was written in a personal capacity, the column's timing, relevance, and role in the meeting dictate otherwise.

As the Vice Chair, Secretary Kobach has the authority to determine the agenda and meeting materials. If Secretary Kobach drafted the column for the purpose of including it in the Commission's meeting materials, then it should be viewed as a particular matter under 18 U.S.C. § 208. The circumstances surrounding the publication of the article and its role in the meeting suggest that this was the intended purpose.

The subject of the column focused on the legitimacy of the 2016 New Hampshire elections, where the September 12 meeting was being held. Within days of its publication, Secretary Kobach incorporated the *Breitbart* column into the Commission's proceedings. The column was listed as part of the meeting materials and posted in its entirety on the Commission's White House web page. Secretary Kobach, who chaired the September 12 meeting, set aside 20 minutes to discuss it. During that meeting, at least two members of the Commission challenged its substance and conclusions, and Secretary Kobach himself defended the column as addressing issues of concern because of anecdotal reports of people driving into New Hampshire for same-day registration state in a battleground state.

Based on the foregoing, the *Breitbart* column should be viewed as having been written by Secretary Kobach in his official capacity as a member of the Commission. While the details of Secretary Kobach's financial arrangement with *Breitbart News* are not publicly known, he has admitted he was paid to write and deliver columns, demonstrating an agreement or arrangement between the two parties. As a result, the agreement to write and deliver the *Breitbart* column and then introduce it into the Commission proceeding should be viewed as a particular matter in which Secretary Kobach participated personally and substantially, which would have a direct and predictable effect on his financial interests or those imputed to him. In other words, when Secretary Kobach wrote and delivered the *Breitbart* column in his official capacity as a Commission member, with the apparent intent of introducing it into the September 12 Commission agenda and proceeding, the arrangement constituted a particular matter for purposes

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<sup>30</sup> Executive Order, section 3 (emphasis added).



of 18 U.S.C. § 208, and Secretary Kobach should be viewed as having a financial interest in the matter since he knew he would be paid for the column.

The fact that Secretary Kobach is an SGE and not a full time government employee does not exclude him from 18 U.S.C. § 208's prohibition. While the statute applies to SGEs, there is a limited regulatory exemption for employment interests of SGEs serving on advisory committees.<sup>31</sup> Under that exemption, an SGE serving on an advisory committee under the Federal Advisory Committee Act ("FACA") may participate in a particular matter of general applicability where the disqualifying financial interest arises from his or her non-federal employment or non-federal prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.<sup>32</sup> Here, while the Commission is a FACA committee,<sup>33</sup> Secretary Kobach does not appear to be an employee of *Breitbart News*, and even if he were, the exemption still should not apply because the *Breitbart* column involves a specific party matter rather than a particular matter of general applicability.

### Conclusion

CREW respectfully requests that DOJ investigate whether Secretary Kobach improperly participated as Vice Chair in a particular matter in which he is believed to have a financial interest arising out of his paid columnist position with *Breitbart News*. Specifically, DOJ should investigate the circumstances involving the drafting and delivery of the September 7, 2017 *Breitbart* column by Secretary Kobach to determine if he did so with the intent to introduce it into the September 12, 2017 Commission agenda and proceedings. If so, Secretary Kobach's conduct may have violated 18 U.S.C. § 208.

Sincerely,



Noah Bookbinder  
Executive Director

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<sup>31</sup> A "special government employee" for purposes of the conflict of interest statute is any officer or employee of the executive or legislative branch who is "retained, designated, appointed, or employed to perform, with or without compensation," for not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a).

<sup>32</sup> 5 C.F.R. § 2640.203(g).

<sup>33</sup> The Commission considers itself an advisory committee established under FACA. See Meeting Notice, 82 Fed. Reg. 31063 (July 5, 2017).