PUBLIC INTEREST
LEGAL FOUNDATION

January 5, 2017

The Honorable Charles E. Grassley
Chairman
The Honorable Diane Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of the Honorable Jeff Sessions to the Office of Attorney General of the United States; Deval Patrick Letter of January 3, 2017.

Dear Chairman Grassley and Ranking Member Feinstein:

There were a number of significant legal and factual errors in a January 3, 2017 letter from Mr. Deval L. Patrick to your Committee. The letter related to the nomination of Senator Jeff Sessions to the office of Attorney General of the United States. It would be unfortunate if Committee members were to rely on the representations in the letter when deciding on this nomination. Because the letter touched on matters about which I have some close familiarity, and matters that relate to the Public Interest Legal Foundation's mission of protecting election integrity, it is important to understand the errors in Mr. Patrick's letter.

Most notably, Mr. Patrick's recitation of the legal and factual circumstances of the prosecutions for improperly assisting the casting of ballots widely misses the mark. Mr. Patrick characterizes the prosecution in the 1980's of individuals in Perry County, Alabama, who were harvesting and often casting absentee ballots on behalf of African-American voters, as if it were a noble civil rights endeavor. This characterization could not be farther from the truth.

While I was an attorney at the Voting Section at the United States Department of Justice Civil Rights Division, I brought what are likely the only two voter intimidation cases filed by the United States under Section 11 of the Voting Rights Act in at least three decades. One went to trial and involved corrupt behavior strikingly similar to that which Mr. Sessions prosecuted at the time. The opinion by the United States District Court in that case both defines what is actual voter "intimidation" prohibited by federal law and catalogs the corrupt and criminal methods used by vote harvesters in the South to exploit African-American voters. Far from being some noble endeavor couched in civil rights, these absentee ballot activities steal votes by stripping the will of the voter away and giving it to a corrupt political enterprise. Far from being an exercise in voter intimidation, prosecution of these crimes by federal officials is essential to preserving

209 West Main Street, Plainfield, Indiana 46168
Telephone: 317.203.5599 Fax: 888.815.5641 www.PublicInterestLegal.org

the right to vote and the integrity of our elections. Mr. Patrick is squarely wrong when he says otherwise.

The right to vote means the right to vote of *the voter*, not the right of a political machine *to force assistance* on voters or *mark the ballot for them without the voter's input*. And it certainly does not mean the right to alter the ballot of a voter against the will of the voter, which was the central charge brought by Mr. Sessions in the Perry County case. Mr. Sessions should be praised for pressing these prosecutions--not criticized. Indeed, you will see below that after Mr. Sessions' prosecutorial efforts in the 1980's, criminality surrounding elections in this part of Alabama only grew worse – and with it the wholesale disenfranchisement of African-American voters by a corrupt political machine.

Legal Errors in Mr. Patrick's Letter

Mr. Patrick makes the implausible clam that the **"theory of Mr. Sessions' case was that it was a federal crime for someone to help someone else vote or to advise them how to vote."** Mr. Patrick may not have read the actual indictment very carefully in the case against his client, Spencer Hogue, Jr., and Albert and Evelyn Turner. The indictment alleged two different statutory charges – a violation of 18 U.S.C. § 1341 – essentially a mail fraud statute – and a violation of 42 U.S.C. § 1973i(e) (since recodified at 52 U.S.C. § 10307(e)) which bans voting more than once in a federal election. Mr. Patrick erroneously alludes to the right of voters to receive assistance (found in Section 208 of the Voting Rights Act of 1965).

But the United States has never considered the right of voters to receive assistance to extend to the right of a political machine to corruptly harvest and cast absentee ballots without the input of the voters. Perhaps Mr. Patrick holds the view that since the voters and the harvesters were merely of the same race, no crime occurred because the harvesters knew who the voters should (or would) support. While this excuse might seem outlandish to sensible people, it was an excuse which I encountered frequently while I investigated these types of cases at the Department of Justice Voting Section. It is not an excuse with a basis in law.

The United States District Court in the Southern District of Mississippi confronted nearly identical behavior from a region not far from Perry County in the case of *United States v. Ike Brown.* (Attached and found at 494 F.Supp.2d 440 (S.D.Miss. 2007)). I served on the trial team in that case and spent a number of years investigating behavior nearly identical to what was alleged in Mr. Sessions' prosecution. Some portions of the District Court's opinion in that case are worth highlighting:

> The Government also presented direct evidence of fraud in the collection of absentee ballots by one notary in particular, Carrie Kate Windham . . . . Another black voter, Nikki Nicole Halbert, testified at trial that Windham came to her home and recruited her and her mother to vote absentee, telling them all they had to do in order to vote absentee was to let Windham know. Although Halbert never requested an absent ballot application, a ballot came in the mail. Not long after, Windham came by Halbert's house to pick up the ballots. Halbert had already voted her ballot. Halbert handed Windham the envelope and ballot and Windham

> left without signing or sealing it. When shown the application form and envelope at trial, Halbert maintained that the signatures on the application and ballot envelope were not hers, and that whoever had filled out the application had checked the box indicating Halbert was voting absentee because she had a temporary or permanent disability, which was untrue.

U.S. v. Brown, 459-60. The quoted example is but one of many instances of similar absentee ballot fraud described in the opinion of the District Court. Contrary to Mr. Patrick's letter, prosecuting this sort of absentee ballot behavior is not based on an outlandish theory that anyone, including Mr. Sessions, believes it violates federal law to assist someone to vote. *Federal law is violated when absentee ballot harvesters cast multiple ballots without the input or against the will of the voters.* Section 208's promise of the right of assistance is not a federal right to have your vote stolen.

Mr. Sessions should be praised, not criticized, for bringing cases that protect the sanctity of the vote and the individual dignity of the voters in Perry County who had their vote stolen. Mr. Patrick should reacquaint himself with the indictment because the victims of the criminal enterprise in Perry County were named individually. These victims, all of whom were black, had their votes stolen when someone else voted for them.

I would urge members of the Committee to read the full opinion in *U.S. v. Brown* to enjoy a complete understanding of the pervasive, insidious and immoral violation of voting rights which occurred in that case through the imposition of a scheme strikingly similar to the one which Mr. Sessions prosecuted. Members will see that Section 208's right to receive assistance has nothing to do with criminals forcing assistance on them in an absentee ballot fraud scheme.

Lastly, Mr. Patrick's **most incendiary and unfair allegation is that it constitutes voter intimidation to prosecute voter fraud.** Voter intimidation is prohibited by Section 11 of the Voting Rights Act. The United States brought, and lost, a voter intimidation claim in *U.S. v. Brown*.

Members of the Committee are free to read the facts the United States alleged in that case, and that the District Court found insufficient to establish intimidation, and thereafter judge whether Mr. Patrick's claims are credible. In sum, they are not. The process of producing witnesses for trial in an absentee ballot fraud case is not easy – especially when the fraud is as pervasive as it was in Perry and Noxubee Counties. Mr. Patrick surely understands the enormously complex task to subpoena and produce dozens of witnesses, all governed by rules of procedure and ethical cannons, and should not so lightly mischaracterize those efforts as "a concerted campaign to intimidate susceptible witnesses." His letter said "many observers" held this view. He never says *he* holds this view and one can only hope and presume a former Department of Justice official familiar with the complexities of producing large numbers of witnesses in a criminal case would not share such an incendiary and unfair opinion.

Factual Errors in Mr. Patrick's letter

Mr. Patrick's letter has a number of important factual errors.

Contrary to the assumptions in his letter, the prosecution brought by Mr. Sessions was not initiated only on his own motion but was approved by the Public Integrity Section at the Justice Department. Any election crimes prosecution at the Justice Department undergoes multiple layers of review and oversight. For example, the Public Integrity Section, Election Crimes Branch, would conduct an independent review of the merits of the case. This unit would be required to approve any proposed prosecution as being in the interests of justice and provable beyond a reasonable doubt. The Public Integrity Section is independent and would have vetoed and stopped any case as preposterous as the one characterized by Mr. Patrick. You will note Mr. Patrick entirely omits any mention of the Public Integrity Section's review in his letter – an omission which is most unfortunate because he certainly knew it occurred from his own time spent at the Justice Department supervising such matters.

Contrary to the assumptions in his letter, the prosecution brought by Mr. Sessions was overseen by officials in the Criminal Division of the Department of Justice. Mr. Patrick surely understands that the Criminal Division *supervised* the prosecution. The prosecution was not "led" by Mr. Sessions as Mr. Patrick claims in his letter. Prosecutions of election-related crimes are "supervised" by Criminal Division officials in Washington D.C. at Main Justice. "The Section has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also *supervises the nationwide investigation and prosecution of election crimes.*" (emphasis added)(found at https://www.justice.gov/criminal/pin). "The Department of Justice has a longstanding consultation policy for election crimes investigations involving violations of the statutes discussed in this chapter [including casting of multiple ballots]. The policy is set forth in Section 9-85.210 of the U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (USAM)." FEDERAL PROSECUTION OF ELECTION OFFENSES, Seventh Edition, 2007. As Mr. John Keeney, a Deputy Assistant Attorney General in the Criminal Division of the Justice Department, testified to the Senate Judiciary Committee in Mr. Sessions' 1986 confirmation hearing, the Public Integrity Section was closely involved in the prosecution "at every stage of the process."

Contrary to the statements in his letter, the federal court overseeing the prosecution found the theories plausible. Mr. Patrick did not inform this Committee in his letter that United States District Judge Emmett Cox (later elevated to the Court of Appeals for the Eleventh Circuit) found the evidence submitted to the jury to be sufficient to support convictions on legal theories brought in the prosecution, which he found to be perfectly plausible. On July 3, 1985, he very specifically *denied* motions for judgments of acquittal on many of the criminal counts brought in the case. This finding by the District Court that the prosecution presented plausible claims included the charges that the defendants actively altered the votes cast by certain voters without their consent and that the defendants were voting multiple absentee ballots. (Specifically Counts 28 and 29 of the indictment.)

Mr. Patrick's letter omits the fact that the defendants offered to plead guilty to misdemeanor election crimes. Certainly if the prosecution's case were as outlandish as Mr. Patrick portrays it to be, no attorney would have properly and ethically advised his client to plead guilty. As Mr. Patrick represented one of the defendants, perhaps he can explain this conundrum to the Committee.

Since Mr. Sessions brought the case in question, the disturbing pattern of absentee ballot fraud has continued to plague this part of Alabama. As I note in my book *Injustice*:

> By 2004 and 2005, elections in Hale and Perry Counties featured open lawlessness both in the polls and in the collection of absentee ballots. Cochran and others discovered false voting registration addresses, including abandoned houses with trees growing through them and vacant lots sporting only a fire hydrant. Meanwhile, teams of notaries swarmed the counties collecting absentee ballots from black voters. After questionable absentee ballots were seized and placed in a bank vault to await further scrutiny, *the bank was burned to the ground overnight, destroying the evidence.*

The criminal absentee ballot harvesters apparently learned that a jury trial is not the only way to escape justice. In August 2009, multiple individuals entered guilty pleas for possessing forged absentee ballots in this same part of Alabama, including Gay Nell Tinker, Rosie Lyles and Valada Paige Banks. Despite her absentee ballot fraud convictions, Tinker (now named Singleton) *presently serves on the bench* as the appointed municipal magistrate in Greensboro, Alabama.

Mr. Sessions should be applauded for his efforts to combat voter fraud in Alabama. Mr. Patrick's letter misses the mark and should not be given credible consideration. Lawlessness in elections is a pervasive and ongoing problem in Perry County, Alabama. When political machines steal the votes of the most vulnerable, everyone should be outraged. All sides of the election law debate recognize that absentee ballot fraud is a serious problem. On *National Public Radio*, one law professor even noted "The most common kind of voter fraud we see, usually in a local election where maybe dozens or 100 ballots could make a difference, involving absentee ballots. Usually, it's absentee ballots that are bought or sold." (Found at http://www.npr.org/2016/10/25/499274789/rigging-an-election-its-not-so-easy-voting-law-expert-says).

The Public Interest Legal Foundation (PILF) is a 501(c)(3) public interest law firm dedicated to election integrity. PILF exists to assist states and other in aiding the cause of election integrity and fighting against lawlessness in American elections. Drawing on numerous experts in the field, PILF protects the right to vote and preserves the Constitutional framework of American elections.

Thank you for your attention,

Respectfully,

Christian Adams, President
Public Interest Legal Foundation

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