United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 7, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Christy McCormick
Commissioner
U.S. Election Assistance Commission
1335 East West Highway, Suite 400
Silver Spring, MD 20910

The Honorable Brian Newby
Executive Director
U.S. Election Assistance Commission
1335 East West Highway, Suite 400
Silver Spring, MD 20910

Dear Commissioner McCormick and Executive Director Newby:

I am writing regarding troubling developments in *League of Women Voters of the U.S., et al. v. Brian Newby, et al*., 1:16-cv-00236 (RJL). Based on filings in that case, as well information relayed in a recent hearing, it appears that the Department of Justice has taken positions in court that, while purportedly made on the Election Assistance Commission's (EAC) behalf, are in fact taken over your objections and against your will.

Specifically, in response to Plaintiffs' motion for a temporary restraining order and a preliminary injunction, the Department of Justice did not advocate for the legality of the EAC's actions but rather sided with the Plaintiffs by asking the judge to grant the Plaintiffs' requested preliminary injunction against the EAC. The Department did not even raise a defense for the EAC's decision to update the State-specific instructions to the Federal voter registration form against any of the other theories contained in the Plaintiffs' motion, but conceded to the issuance of a preliminary injunction against its client on the ground that Mr. Newby's failure to address the necessity of the changes violated the Administrative Procedure Act.

As you are likely aware, at the hearing on the Plaintiffs' motion, Judge Leon stated that by attempting to side with the Plaintiffs against the EAC, the Department of Justice had taken the

"unprecedented action…of conceding not only a [temporary restraining order], but a [preliminary injunction]." He further stated, "I've never heard of it in all my years as a lawyer. And certainly, the 14 years I've been on this Court, I've never heard of the Department of Justice conceding to a preliminary injunction, which is an extraordinary relief in its own right." Indeed, he noted that "there is no situation that I can conceive of, including this one, where I would grant a [preliminary injunction] on a concession. It's inconceivable. It's too important and sensitive an exercise of power by a court without having full briefing and full argument on it."

Judge Leon declined the Justice Department's invitation to enter a preliminary injunction, denied in part the Plaintiffs' motion for a temporary restraining order, and in light of the Justice Department's refusal to offer a defense for its client, ordered the Intervenor-Defendants, the Secretary of State of Kansas and the Public Interest Legal Foundation, to submit oppositions to Plaintiffs' motion, stating he "looks forward to the benefit of full, adversarial briefing on the complex and important issues this case presents."

Conceding a preliminary injunction is so inconceivable, in part, because if the EAC believed, as the Department of Justice apparently does, that the Executive Director's actions at issue in the case were unlawful, the EAC could simply undo those actions and inform the Court that the Plaintiffs' motion was moot. The only reason for the Department of Justice to concede the preliminary injunction motion would be to try to force the judge to order the EAC to take action against the EAC's will.

According to a letter you sent to Judge Leon, which he read into the record at the hearing, "the Department of Justice has filed a response that reflects the interests and positions of the Department of Justice and not of the defendants." In another letter to the Court, referenced by the Justice Department, you asked: "[I]f it is within the Court's jurisdiction and the Court is willing, I request that the court permit Mr. Newby and the Election Assistance Commission to seek outside counsel to represent EAC in this matter." The Justice Department also noted that you had made a similar written request for outside counsel to the Attorney General.

Although the EAC is an independent agency, you are represented by the Department of Justice in the case because the EAC was not granted independent litigation authority when it was created. Absent such a grant of independent litigation authority, the Department of Justice has exclusive litigation authority on behalf of federal government agencies. In other words, the Justice Department is the EAC's lawyer, and the EAC is unable to fire its lawyer and seek other representation, for any reason.

The Department of Justice filed a response to your letters, stating that it has exclusive and non-delegable litigation authority over the EAC. The response further stated that this exclusive authority includes "the absolute discretion to settle, compromise, or even concede claims, even over the objection of its client agency." The response also stated that the "Department has informed the Court that because the Executive Director expressly declined to apply the proper statutory standard, his decisions cannot be upheld under the Administrative Procedure Act" but claimed "the Department is not interfering with the Commission's authority to reach its own

conclusions about whether to accept or reject the states' requests – so long as it applies the correct statutory standard."

By law, the EAC is an independent and bipartisan agency. It is intended to be free of an administration's interference in its functions. If the Department of Justice believes it can use its litigation authority, in concert with lawsuits from certain groups, to require the EAC to take actions against its will and contrary to the EAC's own legal judgment, then the Committee must evaluate the situation and determine whether the EAC needs independent litigation authority in order to truly be free from political influence from the administration. This case involves the integrity of elections and is taking place in the context of an ongoing Presidential election process. The potential appearance that the administration is substituting its judgment for the EAC's is a matter of significant concern.

In order for the Committee to fully evaluate this situation, please answer the following by March 21, 2016:

1. As noted above, you reportedly sent two letters to the Court, as well as one to Attorney General Lynch, voicing your concerns about the Justice Department's representation of the EAC in this case. One of those letters was read into the record by Judge Leon at a recent hearing, and another selectively quoted in a Justice Department filing. Please provide copies of the full letters, as well as copies of any responses received.

2. As noted in a filing by the Justice Department, you have suggested that the Justice Department's representation of EAC in this case poses a conflict of interest because the Department was "intimately involved with actions dealing with the same matters that the Commission took [in 2013 and 2014] during the time the Commission was vacant and prior to the appointment of the current Commissioners." Please explain the underlying factual situation, and why it leads you to believe the Department of Justice has a conflict of interest in this case. Please provide all relevant documents relating to this issue.

3. Are there any portions of the Department of Justice, or particular Justice Department attorneys, that you believe could represent the EAC without this conflict of interest?

4. Do you believe that the EAC requires independent litigation authority in order to be free from political interference from the administration exerted via the Justice Department's current litigation authority over the EAC?

5. Is there any other information about these matters that you would like to share with the Committee?

As a reminder, "the right of [federal] employees…to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." *See* 5 U.S.C. § 7211. Moreover, Federal employees who deny or interfere with any other Federal

employee's right to furnish information to Congress are not entitled to have their salaries paid by taxpayers' dollars.[1]

Thank you for your attention to this important matter. If you have any questions, please contact Jay Lim of my Committee Staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Senate Committee on the Judiciary

cc: The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

[1] Sec. 712 of the Consolidated and Further Continuing Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, (2015), provides, in relevant part, as follows:

> No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who…prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.