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

March 7, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Lynch:

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). As you know, the Plaintiffs in that case have sued the Executive Director of the Election Assistance Commission (EAC), Mr. Brian Newby, in his official capacity, as well as the EAC itself. The EAC is an independent, bipartisan commission created by the Help America Vote Act of 2002. Its mission is to assist State and local election officials with the administration of Federal elections. Upon its creation, the EAC assumed the functions originally assigned by the National Voter Registration Act (NVRA) to the Federal Election Commission. Among those functions is the management of a mail voter registration application form (Federal form), to be developed in consultation with the States, which each State is required to accept in the voter registration process. The Federal form consists of three components: the application, general instructions, and State-specific instructions.

As the Supreme Court has recognized, Article I Section 2 of the United States Constitution reserves to the States the exclusive power to establish the qualifications of voters. Kansas, Alabama, and Georgia each enacted laws directing election officials to reject voter registration applicants who fail to prove they are United States citizens, with a variety of identification documents, such as a birth certificate, passport, or naturalization papers, serving as such proof. Each of these States asked the EAC to update its respective State-specific instructions in the Federal form to reflect these laws. After some consideration of the issues, the

EAC's Executive Director accepted the States' requested updates to the State-specific instructions on January 29, 2016, and updated the EAC's website accordingly.

In response, the Plaintiffs filed suit on February 12, 2016. Plaintiffs allege that it was unlawful, for a variety of reasons, for the EAC's Executive Director to update the State-specific directions in the Federal form to accurately reflect current state law. One of Plaintiffs' arguments was that under the NVRA the Federal form may only require such information as is necessary to enable the States to assess an applicant's eligibility to vote, but Mr. Newby had expressly stated that he did not evaluate such necessity in deciding to approve the requested changes. Plaintiffs moved for a temporary restraining order and a preliminary injunction.

Although it is an independent agency, the EAC is represented by the Department of Justice in the case because it 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.

In response to Plaintiffs' motion, 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 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.

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 modifications of the state instructions were unlawful, the EAC could simply undo the change 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. The EAC's Commissioner, Christy McCormick, and its Executive Director, Brian Newby, took the drastic step of writing to the Court to inform it that "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, Ms. McCormick 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" and noted that she had made a similar written request for outside counsel to you.

The Department of Justice responded to Commissioner McCormick's letters, stating that, by law, 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 whether the EAC needs independent litigation authority in order to truly be free from political influence from the administration. 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. The Justice Department's attempted concession was based solely on the argument that Mr. Newby failed to consider whether the requested changes were necessary for State officials to assess an applicant's eligibility to vote, a consideration mandated by the NVRA, and that such failure constitutes a violation of the Administrative Procedure Act thus warranting the preliminary injunction. If Mr. Newby were to withdraw his prior acceptance of the modifications to the State-specific instructions, re-evaluate the States' requests in the context of their necessity, and subsequently make a written decision including that analysis, would the Justice Department then defend the legality of that decision?

2. Has any part of the Justice Department conducted an analysis of this area of the law prior to the current case? If so, please provide copies of the documents containing such analyses.

3. In addition to Justice Department's Federal Programs Branch, are attorneys from the Civil Rights Division involved in this case?

4. The EAC reportedly believes that attorneys within the Civil Rights Division have previously acted in such a manner as to create a conflict in representing the EAC in this case. Have you considered using your authority to assign only Department attorneys from offices that the EAC believes have no such conflict, if any?

5. If, while this case is ongoing, a law were enacted granting the EAC independent litigating authority, is it the Department of Justice's view under its own regulations that the EAC would then be free to dismiss the Department in this case and take up its defense under the newly-granted litigating authority?

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