

Congress of the United States
Washington, DC 20515

September 28, 2016

The Honorable Thomas Hicks
Chairman
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

Brian Newby
Executive Director
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

Cliff Tatum
General Counsel
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

Dear Commissioner Hicks, Mr. Newby, and Mr. Tatum:

We are writing to follow up on our June 1, 2016, letter regarding Mr. Newby's unilateral decision as Executive Director of the U.S. Election Assistance Commission (EAC) to amend the federal voter registration form to require proof of citizenship in Alabama, Georgia, and Kansas.¹

We remain extremely concerned that Mr. Newby's actions violated internal EAC policies and precedent and may already have impaired the legitimate right to vote of many Americans. These concerns have been validated recently by the U.S. Court of Appeals for the D.C. Circuit, which has now issued an order temporarily halting and reversing Mr. Newby's action because of "irreparable harm" and the "public interest."²

We appreciate that Mr. Newby and Mr. Tatum provided a briefing to our staff on August 1, 2016. However, our staff was troubled to learn the following information at the briefing:

¹ Letter from Ranking Member Elijah E. Cummings, Ranking Member Robert A. Brady, and Assistant Democratic Leader James E. Clyburn to Election Assistance Commission Chairman Thomas Hicks (June 1, 2016).

² *League of Women Voters of the United States, et al v. Brian D. Newby, In His Capacity as the Executive Director of the United States Election Assistance Commission, et al*, No. 16-5196, (DC Cir. Sept. 9, 2016) (judgment).

- Mr. Newby conducted no written analysis regarding the impact of his unilateral decision to require proof of citizenship on the ability of eligible voters to register to vote. He conducted no cost-benefit analysis of the impact of his decision to compare the potential for voter fraud to the potential for eligible voter disenfranchisement. This is concerning given reports that in Kansas alone, state records show that, as early as April, at least 30,000 applicants had been denied registration due to lack of documents, and some believe the actual number could have been as high as 45,000.³
- Mr. Newby conceded that neither Alabama nor Georgia submitted any evidence that proof of citizenship requirements are necessary for those states to effectively administer their elections as required in the U.S. Supreme Court's ruling in *Arizona v InterTribal Council of Arizona* and the Tenth Circuit Court of Appeals' decision in *Kobach v. EAC*. Kansas reportedly submitted a report of only one ineligible voter in a single county.
- Mr. Newby, the Executive Director of the nation's top election administration agency, claimed that he had been unaware until recently that proof of citizenship laws could have a disproportionate impact on people of color. This is especially disturbing since it has been widely reported that these proof of citizenship laws unduly burden not only people of color, but young voters, women, the elderly, people with disabilities, low-income voters, and the homeless.⁴
- Mr. Newby was aware that in the past, EAC had denied similar requests by states to require proof of citizenship through the state instructions to the federal form. Mr. Newby was also aware that his unilateral decision would depart from that past precedent, but he claimed that he "needed to have a point of view" and did not want to "rubber stamp" past precedent.
- Mr. Newby knew prior to his action that Commissioner Hicks, the Vice Chairman of the EAC at the time, believed that the requests regarding proof-of-citizenship constituted a question of policy and therefore could not be handled by the Executive Director unilaterally.
- Disregarding past precedent, EAC policies, and his conversation with the then-Vice Chairman, Mr. Newby decided to act alone rather than requesting a vote of the EAC or seeking public comment.

³ *The Voter Support Agency Accused of Suppressing Votes*, New York Times (Apr. 8, 2016).

⁴ See, e.g., *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice, New York University School of Law (Nov. 28, 2006); Wendy R. Weiser, Keesha Gaskins, and Sundeep Iyer, "*Citizens Without Proof*" *Stands Strong*, Brennan Center for Justice, New York University School of Law (Sept. 8, 2011); and Stuart Naifeh, *How Do Proof-of-Citizenship Laws Block Legitimate Voters?* Demos (Aug. 25, 2014).

- Mr. Newby admitted that, at the time of the decision, he did not believe the action would violate the National Voter Registration Act (NVRA), but now he believes that it is unclear.

In seeking a better understanding of Mr. Newby's unilateral action, we requested specific documents and information. Unfortunately, EAC has withheld large categories of documents from Congress, claiming they are privileged or unable to be produced as a result of the court's protective order.

At the August 1 briefing, Mr. Tatum, EAC's General Counsel, committed to responding by the end of that week about whether EAC would produce redacted copies of documents over which EAC has claimed a privilege and would ask the Department of Justice to request that the court allow EAC to produce documents covered by the protective order.

Despite a follow-up email on August 12, 2016, Mr. Tatum has not provided a response to date.

Raising additional concerns, we also learned that on November 8, 2012, Mr. Newby wrote on his own blog, "No election administrator has been more in favor of closing the EAC than me."⁵ On January 28, 2014, Mr. Newby wrote on the same blog, "the EAC is now a 'was'."⁶

Given these troubling findings, we request that you produce all documents withheld for attorney-client or deliberative process privileges, with the privileged portions redacted. We also request that you arrange for staff to hold meetings with each EAC Commissioner to learn more about their conversations with Mr. Newby and about his unilateral decision.

Finally, given the new information Mr. Newby has obtained about the disproportionate impact of his decision on people of color, his lack of analysis regarding the impact on eligible voters' ability to vote, and his lack of clarity as to whether his decision undermines the NVRA, we request that Mr. Newby rescind his unilateral decision and reconsider it in a manner consistent with the U.S. Constitution, the NVRA, past EAC precedent, and current EAC policies and procedures.

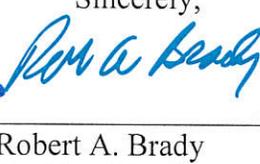
We request a response by October 6, 2016. Please contact Karen Kudelko of Ranking Member Cummings' staff at (202) 225-5051, Khalil Abboud with Ranking Member Brady's staff at (202) 225-2061, or Amy Miller Pfeiffer with Assistant Democratic Leader Clyburn's staff at (202) 226-3210 with any questions.

Thank you for your consideration of this request.

⁵ Brian Newby, Election Diary, *We've Got to Fix This* (Nov. 8, 2012) (online at electiondiary-briandnewby.blogspot.com/2012/11/weve-got-to-fix-this.html).

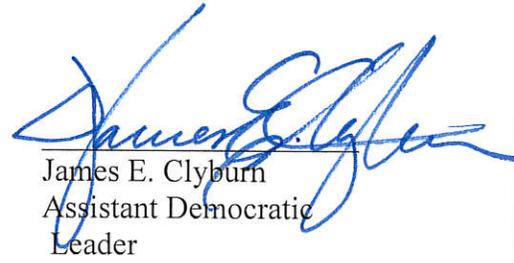
⁶ Brian Newby, Election Diary, *Chronicles of Yarnia, Part One* (Jan. 28, 2014) (online at http://electiondiary-briandnewby.blogspot.com/2014_01_01_archive.html).

Sincerely,

Elijah E. Cummings
Ranking Member
Committee on Oversight
and Government Reform

Robert A. Brady
Ranking Member
Committee on House
Administration



James E. Clyburn
Assistant Democratic
Leader