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January 3, 2017

Hon. Charles Grassley, Chairman
Hon. Dianne Feinstein, Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Re: Nomination of Hon. Jefferson B. Sessions III to the position of Attorney General

Dear Chairman Grassley and Ranking Member Feinstein:

At the request of Committee Counsel Tiffith, I am submitting these written comments in connection with the nomination of Senator Jeff Sessions to the position of Attorney General of the United States. I apologize to the Committee and to the nominee that I cannot be there to offer my comments in person, but long-planned travel overseas will keep me from attending the upcoming hearings.

In years past, I have worked closely and, I believe, respectfully with both of you and many of the members of your Committee. For those Members with whom I am not familiar, my background is as an attorney, business executive and public official. In addition to being a partner in two business law firms, I was a staff lawyer at the NAACP Legal Defense Fund in New York in the early 1980s. I served in the first term of the Clinton administration as Assistant Attorney General for Civil Rights. I have also served as an executive and general counsel for two Fortune 50 companies and as the two-term Governor of Massachusetts. I currently lead an impact investing fund in Boston, where I live with my wife of more than 30 years.

I write to shed light on an important aspect of Mr. Sessions' record, to which I can attest from personal experience. In 1985 I was part of the defense team in the federal criminal voting fraud prosecution of three African-American community activists (the so-called "Perry County Three") in Alabama. With colleagues from the Legal Defense Fund, I represented defendant Spencer Hogue. That prosecution was led by the then-United States Attorney for the Southern District of Alabama Jeff Sessions. I have not had direct contact with Mr. Sessions since that time.

That case was thoroughly litigated twice: once in the Federal District Court in 1985 and again before this Committee in 1986 when Mr. Sessions was nominated for a federal judgeship. There is no need to litigate it again. My objection is not that Mr. Sessions lost that case. It was that he undertook to bring it at all.

The theory of Mr. Sessions's case was that it is a federal crime for someone to help someone else to vote or to advise them how they should vote -- even if and when they ask for such help. At the outset of the trial, the presiding judge -- Judge Emmett Cox, a Reagan appointee to the district court, subsequently elevated to the Eleventh Circuit -- rejected that theory as contrary to settled law and the Constitution. Mr. Sessions proceeded to trial on that theory anyway. The jury unanimously acquitted each of the defendants on all counts.

Pursuing that case was an act of extraordinary quasi-judicial activism. Voting is a civic and even sacred right in our country. Extending it to black voters in the Alabama Black Belt was a significant national challenge. Making access real -- through the Voting Rights Act, and countless acts of civil disobedience -- represents an equally significant national triumph. Courts have recognized that, while the ballot is officially secret, citizens have the right to seek assistance -- as informal as asking one's spouse how to vote or as formal as conforming to the designated slate of a political party or advocacy group. To use prosecutorial discretion to attempt to criminalize voter assistance is wrong and should be disqualifying for any aspirant to the Nation's highest law enforcement post.

There were other troubling aspects about the manner in which Mr. Sessions pursued this case. First, while absentee ballots were used widely and to great effect by white voters and their advocates within his jurisdiction, Mr. Sessions investigated only the use by black voters and only where white incumbents were losing political ground. Second, the prosecution focused on the Perry County Civic League, a service and community organization whose main activities were helping poor, rural and often elderly residents with food, education, medical and other needs on whose meetings Mr. Sessions authorized the FBI to eavesdrop. Third, though most of the 20 government witnesses were old and frail, and had only achieved access to the ballot in their elder years, the prosecution loaded them onto a bus under armed federal, state and local police guard and drove them 160 miles to Mobile for grand jury testimony, causing many observers to conclude there was a concerted campaign to intimidate susceptible witnesses into believing that voter assistance was illegal. And finally, though Mr. Sessions had a reputation for plea bargaining criminal cases, many involving violence, he was adamant in refusing to consider a deal in this one.

For 30 years I have viewed the prosecution of the Perry County Three as a cautionary tale. I believe it demonstrates what can happen when prosecutorial discretion is unchecked, when regard for facts is secondary to political objectives. What can happen is that the rule of law is imperiled. In a republic based on law, this is not the kind of risk any of us should accept in our attorney general.

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Donald Trump was not my candidate, but he is my President-elect. While I do not expect to agree with him on every appointment or policy choice, I believe it would be irresponsible and unpatriotic to oppose everything he does even before he does it. For the peace and prosperity of the country, I pray for the President-elect, just as I have for President Obama and his predecessors.

I also believe that, within bounds of basic preparedness and qualifications, presidents should have the team of their choosing. That should be as true for the President-elect as it has been for most presidents and as it should have been for President Obama.

With that context, I wish nevertheless to express one additional concern about this appointment.

Our Nation needs a healing.

The tenor and divisiveness of the recent presidential campaigns -- whether one cheered or grieved the outcome -- discouraged many Americans. The dysfunction and hyper-partisanship of the federal government in the years before the campaigns has contributed to the public's frustration. Meanwhile, all over the country hate crimes assaults against black and brown citizens, against women, against immigrants are on the rise. Like it or not, intentional or not, the recent election cycle seems to have given some in our country the view that they have permission to treat other Americans as lesser because of the color of their skin or the free exercise of their religion. If America is to be what the Founders committed her to be, if we are to be the land of liberty and justice for all, this kind of behavior cannot be sanctioned or encouraged -- directly or indirectly.

This Committee shares responsibility for setting the right tone. Thirty years ago, because it was widely understood and appreciated that his appointment to the bench would raise a question about this Committee's commitment to a just, fair and open justice system, Mr. Sessions's nomination was withdrawn on a bi-partisan basis. I respectfully suggest to you that this moment requires similar consideration and a similar outcome. At a time when our Nation is so divided, when so many feel so deeply that their lived experience is unjust, Mr. Sessions is the wrong person to place in charge of our justice system.

Thank you for your consideration.

Respectfully,

