



MEMORANDUM:
PRACTICAL RESPONSES TO THE DOJ'S NEW ELECTION POLICY

From: Voter Protection Program
To: Interested Parties
Re: **Practical Responses to Recent Federal Election Activity and Statements**
Date: 10/14/20

This memorandum provides timely guidance regarding the possible involvement of the U.S. Department of Justice (DOJ) in the upcoming presidential election.

THE CONCERN

- DOJ is departing from its longstanding policy of non-interference with elections. For nearly forty years, DOJ policy has been not to conduct “overt investigations . . . until after the outcome of the election allegedly affected by the fraud is certified.” [U.S. Dep’t of Just., *Federal Prosecution of Elections Offenses*, Eighth Edition, Dec. 2017, Richard C. Pilger ed., at 9](#) (hereinafter, “*Handbook*”). This policy was reiterated under AG Sessions in 2017.
- Recent press releases issued out of the [Middle District of Pennsylvania](#) and the [District of New Jersey](#) appear to violate this policy. One announced an investigation – which in and of itself violates DOJ policy. President Trump instantly weaponized these announcements in his campaign.
- The DOJ [reportedly](#) distributed a memo on October 2, 2020 creating an exception to the non-interference policy. The exception allows for overt investigations “when the integrity of any component of the federal government is implicated by election offenses” including into certain offenses if federal employees (e.g. Postal, DOD) are involved.
- The dangers of DOJ election activity overreach include, but are not limited to: (1) interference with and influence on the ongoing election; (2) delegitimization of the

The Voter Protection Program (VPP) is a national nonpartisan initiative promoting election integrity and ensuring safe, fair, and secure elections. Learn more at voterprotectionprogram.org

election after the votes are counted and the outcome certified; (3) damage to the integrity of our democracy; and (4) further politicization of the DOJ.

WHAT SHOULD AGS CONSIDER DOING TO PREVENT DOJ OVERREACH?

1. Engage the United States Attorneys in Your State

- Remind them that states have the primary responsibility for administering elections. That responsibility is rooted in federal law, principals of federalism, and DOJ's own policies.¹ Assure them that you and your fellow state officials are executing that responsibility. Invite them to coordinate with you in carrying out the DOJ's limited role in election protection.²
- Clarify that you want to avoid the election interference that the Handbook warns against.³ The PA and NJ investigations, intended or not, have become [campaign issues](#). They should not be.
- Remind them that DOJ cannot send armed officers or agents to polling locations. Make the point that this prohibition includes sending local officers who are part of a federal task force. 18 U.S.C. § 592.
- Offer to help them address any evidence preservation concerns, and remind them that DOJ cannot seize or take custody of ballots. 52 U.S.C. §§ 20701, 20703.⁴

¹“The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof . . .” U.S. Const. art. I, § 1.

² DOJ's involvement in elections can take the form of getting more ballots *included* in the count or bringing wrongdoers to justice *after* an election has been completed. Its authority is limited to: (1) enforcing the inclusive protections of the Voting Rights Act, and (2) prosecuting individuals who have committed federal crimes related to an election. *Handbook* at 8-9. According to DOJ guidance, federal prosecution of federal election-related crimes does not serve a “preventative” function; any deterrent effect is achieved through “awareness of the Department’s prosecutive interest in, and prosecution of, election fraud – not through interference with the process itself.” *Handbook* at 9. DOJ has no role in the conduct of an election.

³ “[O]vert investigative steps may chill legitimate voting activities. They are also likely to be perceived by voters and candidates as an intrusion into the election. Indeed, the fact of a federal criminal investigation may itself become an issue in the election.” *Handbook* at 11-12.

⁴ The Civil Rights Act of 1960 requires that election administrators retain original election-related documents for 22 months after the election. 52 U.S.C. § 20701. It provides for DOJ, “upon demand in writing” including “a statement of the basis and the purpose” of the demand, to have access to election-related records through “inspection, reproduction, and copying at the principal office” of the record holder. 52 U.S.C. § 20703. This list should be read as exhaustive. It does not include any provision allowing DOJ to seize original records. Further, it is DOJ policy that “election officials should not be deprived of documents

- Consider these specific requests to U.S. Attorneys and/or other federal law enforcement:
 - Ask if there have been meetings or task forces in their district regarding election protection issues. Ask to attend every meeting and to be on any such task force. Get the names of the USAO's designated "District Election Officer(s)" and provide specific points of contact in your office as liaisons.
 - Ask them not to put out press releases or create media coverage on any election related cases. Even where overt investigative steps must occur, the DOJ should not make election-related cases into media events. Publicizing such investigative steps can damage public confidence in our elections and does not serve legitimate law enforcement interests.
 - If they are considering indicting or investigating postal workers for offenses related to mail matter which occur year-round (i.e. postal workers stealing mail or discarding mail), urge them not to portray the offense as election-specific based only on the mail content. Note that, when postal workers improperly discard holiday mail in December, the intent is not portrayed as disruption of Christmas.
 - Ask for proactive collaboration and involvement in any decisions that could impact the administration or public perception of the election or its results.

2. Educate the Voting Public

- Consider making appropriate public statements in the near term educating the public on the impropriety of partisan law enforcement actions and your commitment to protecting free and fair elections in your state. Reemphasize steps you are taking to protect the process.

3. Prepare to Respond if Interference Occurs

- Contact and educate state and local officials, including Secretaries of State and local election officials.

necessary to tally and recount the ballots and to certify the election results." *Handbook* at 83. *See infra* for recommendations as to improper subpoenas.

- Create one-page sheets for local election officials on their rights and responsibilities if federal agents attempt to get involved in election administration.
- Include contact information for your office and instruct local election officials to contact your office immediately if they need assistance or have any concerns.
- Though federal agents will likely understand that it is illegal to seize or take custody of ballots, include specific legal guidance for local officials in case of such an occurrence.
- Ensure that local law enforcement, including District Attorneys' offices, are aware that although federal agencies have a limited role in election protection, election administration is primarily the responsibility of the states. In case of irregularities or concerns, advise them to contact a designated person in your office immediately.
- Prepare for any anticipated litigation.
 - Draft motions to quash any improper subpoenas for election materials, including ballots. A grand jury subpoena can only require production at the time and place a grand jury is meeting. It is not a substitute for a search warrant approved by a federal judicial officer.
 - Prepare now to get any needed authority or approvals to litigate or file motions to quash.
 - Contact the chief or administrative judge in each key district. Provide a point of contact and request to be included in any *ex parte* proceeding in which legal issues impacting election administration in your state are implicated. Designate a person to be available for each district from now until the result of the election is certified.
 - Contact local prosecutors and county attorneys in key areas. Set up communication lines and early warning systems to employ if there are signs of federal overreach in election activity.