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October 20, 2008

The Honorable Michael B. Mukasey  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-001

Dear Attorney General Mukasey:

I wrote to you on October 17 to ask that you immediately refer to Special Prosecutor Dannehy full responsibility to investigate and prosecute all violations of law that may have been committed by Justice Department personnel in connection with the ongoing Presidential election. A copy of my letter is attached.

In the light of an emerging pattern of apparent unlawful coordination between the McCain campaign and the Department of Justice and state law enforcement agencies controlled by Republican officials, the most recent and outrageous example of which is noted below, other steps beyond those urged in the October 17 letter are urgently needed. While an investigation by Special Prosecutor Dannehy is necessary, it is not sufficient. Her jurisdiction extends only to violations of the federal criminal law. She has no power either to investigate and remedy past violations of Department policies, or to protect against misuse of the Department for partisan political "attack" purposes between now and Election Day.

Accordingly, I am writing now to ask (a) that the Inspector General and the Office of Professional Responsibility investigate what appear to be substantial violations of Department of Justice policy in connection with the so-called "election fraud" investigations and (b) that you personally take steps to ensure that all relevant Department of Justice policies are followed and that the Department is not misused for partisan purposes.

These actions, and nothing less, are required to restore public confidence that the Department of Justice will honor its traditions and avoid further embroilment in this unethical and illegal misuse of law enforcement authority to serve partisan political ends.

## **I. The Pattern: Using Law Enforcement as a Tool of Partisan Attack Politics**

It is well known that senior federal law enforcement officials have unlawfully leaked word of an "investigation," only 24 hours after the Republican Presidential nominee announced that rampant fraud was putting at risk the very "fabric of democracy." "Officials: FBI Investigates ACORN for Voter Fraud," *AP News*, Oct. 16, 2008. The statements made by Senator McCain, and echoed by his running mate Governor Palin, were reinforced by an orchestrated campaign of calls for investigation, directed to the Department and US Attorneys, by Republican elected officials. A number of these officials are active speaking surrogates for the McCain campaign, and serve as members of that Campaign's Steering and Grassroots Leadership Committees.

The subsequent leak was knowingly and willfully made in violation of Departmental policy: in fact the "senior officials" advised the press that they had to remain anonymous to skirt the very prohibitions they were violating. *Id.* ("Both officials spoke on condition of anonymity because Justice Department regulations forbid discussing ongoing investigations particularly so close to an election."). And despite their knowledge of these prohibitions, these officials, and perhaps others, continued to speak with the press, for on the next day they put out further word that they would pursue the investigation but retreat from making it too visible, apparently in view of the peril of too openly and flagrantly flouting Department policy. *See* United States Attorneys' Manual, § 1-7.530. The one commitment not heard, but that Departmental policy requires, was not to support with leaks or other violations of Department policy one party's attack politics built on highly partisan and trumped up allegations of "voter fraud."

It is also clear that what we have seen in Washington – the misuse of law enforcement policy to achieve the aims of a attack politics focused on allegations of "fraud" – is being repeated in the states by formal representatives of the McCain campaign. In Ohio, the Hamilton County prosecutor – who also serves as the formal McCain campaign chair for Southwest Ohio – subpoenaed registration records for voters who registered and cast absentee ballots during the "window" period provided for this purpose under Ohio law. "Deters Subpoenas Voter Records," *AP News*, Oct. 18, 2008, available at <http://news.cincinnati.com/article/20081018/NEWS01/310180031/1055/NEWS>. This outrageous action is not the first time in this election cycle that an agent of the McCain campaign has abused law enforcement powers for partisan purposes. In Wisconsin, the Attorney General of the state, also the Co-Chair of the McCain campaign there, has filed a suit against the state's own Government Accountability Board, seeking to force challenges without any basis in law against thousands of Wisconsin voters. Press Release, Atty Gen. J.B. Van Hollen, Attorney General J.B. Van Hollen Files Suit Against Wisconsin Government Accountability Board to Bring Wisconsin into Compliance with Voting Laws (Sept. 10, 2008), available at [http://www.doj.state.wi.us/news/2008/nr091008\\_AG.asp](http://www.doj.state.wi.us/news/2008/nr091008_AG.asp).

Evidence of abuse and improper actions, on a fully coordinated and national basis, is plainly in view and compels a response by you to stop any further participation in these activities by the

Department and to restore public confidence in its historic mission of enforcing the law impartially, in the public interest.

## **II. OIG and OPR Must Investigate Apparent Violations of Department Policy**

The events of the last few weeks indicate several violations of Department of Justice policies.

First, the Inspector General and the Office of Professional Responsibility have already concluded, specifically with reference to allegations of voter fraud, that the Department must make investigative and prosecutive decisions based solely on the law, the facts and Department policy, and that they are "obligated to put political considerations aside" even when pressured by political figures. *See generally* An Investigation into the Removal of Nine U.S. Attorneys in 2006. Yet the recent sequence of events – the increasingly strident but utterly unfounded claims by the Republican Party of widespread election fraud; the concerted calls for action from Republican candidates and officeholders; the almost immediate leak by several senior law enforcement officials of Department investigations; and emerging conduct of the same nature in the states – raises a strong inference that, once again, the resources of the Department are being misused to launch partisan political attacks in support of a national program adopted for this propose by the McCain campaign.

Second, the Department's official manual on Federal Prosecution of Election Offenses (7th ed. 2007) cautions that "any criminal investigation by the Department must be conducted in a way that minimizes the likelihood that the investigation itself may become a factor in the election," and that accordingly "it is the general policy of the Department not to conduct overt investigations, including interviews with individual voters, until after the outcome of the election allegedly affected by the fraud is certified." *Id.* at 10. Here, not only has the Department, according to press reports, commenced investigations into spurious allegations of fraud in the immediate run-up to the election and in apparent coordination with the wishes of the Republican Party, but "senior law enforcement officials" have made sure that this information is made public, thus ensuring, contrary to Department policy, that "the investigation itself [becomes] a factor in the election." Indeed, it is undoubtedly the purpose of the Republican initiative to encourage such investigations in the precise hope of affecting the election.

Finally, of course, Department policy forbids public acknowledgement of or comment on a criminal investigation, save only for very limited circumstances not present here. *See* United States Attorneys' Manual, § 1-7.530. In violation of this policy, two "senior law enforcement officials" – apparently speaking anonymously because they were conscious that they were acting in violation of Department regulations – confirmed the existence of a criminal investigation, an improper leak that appears calculated to have served the interests of the Republican Party and its candidate for President, who had less than 24 hours earlier alleged that pervasive fraud threatened the election. Indeed, it is difficult to imagine any other purpose for these anonymous and improper disclosures.

There is thus more than a reasonable basis to believe that individuals may have violated fundamental Department policies designed to ensure the integrity of the investigative process and to insulate the Department from political influence. The Inspector General and the Office of Professional Responsibility have already shown that they have the ability to conduct thorough and fair investigations of such charges, and they must be asked to do so in this instance as well.

### **III. The Department Should Ensure That Its Policies Are Followed**

The Department's official policies recognize the extreme sensitivity of investigations into election-related allegations. "Starting a public criminal investigation of alleged election fraud before the election to which the allegations pertain has been concluded runs the obvious risk of chilling legitimate voting and campaign activities. It also runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest." Federal Prosecution of Election Offenses 91-92. For this reason, the Department requires consultation with the Public Integrity Section before any such investigation moves beyond the preliminary stage, and encourages consultation even at earlier stages. United States Attorneys' Manual § 9-85.210; Federal Prosecution of Election Offenses 88.

The Department's reported investigative activity precisely "runs the obvious risk of chilling legitimate voting and campaign activities" and of "interjecting the investigation itself as an issue . . . in the campaign." Indeed, that is self-evidently the reason for the repeated Republican calls for such investigations.

Under these circumstances, you must take the strongest possible steps to ensure that Department policies with respect to consultation, timing and publicity are being followed. The last eight years have demonstrated that Department personnel have too often succumbed to political pressure in instituting and conducting election investigations, and the Department's reputation for impartiality and integrity has suffered egregiously as a result. The actions of at least some law enforcement officials in conducting investigations and leaking their existence in the weeks immediately prior to an election, as demanded by one party, cannot be justified by any legitimate law enforcement interest but only by partisan considerations.

I call upon you to personally review the basis for the present investigations before any additional steps are taken, and to explain publicly how you will ensure that the Department's policies will be fully followed. In the light of obviously inappropriate and partisan actions by two senior law enforcement officials in recent days, and the pattern emerging across the country, I call upon you further to instruct your subordinates in certain terms that no such breaches of policy will be tolerated and that violators will be identified and disciplined, and that any investigations must be conducted entirely free of partisan taint and without influencing the upcoming election. The report of the Inspector General and the Office of Professional Responsibility makes clear that it is the responsibility of the senior leaders of the Department to ensure the Department's integrity.

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It would be a grievous and long-lasting blow to the Department – and to public confidence in the administration of justice – if, as a result of your failure to act, the Department once again had to suffer loss of credibility, internal inquiries and criminal investigation into the conduct of senior officials because its leaders permitted the tremendous power of law enforcement to be used to aid one political party.

#### **IV. Conclusion: Fulfilling Requests Made in the Wake of the US Attorneys Dismissal Scandal**

The request here is fully consistent with the commitments you made when the President nominated you to succeed former Attorney General Alberto Gonzalez. At the time you affirmed that "announcing an investigation or a prosecution can influence the outcome of an election and that that is not what investigations are supposed to be for or prosecutions are supposed to be for." Mukasey Confirmation Hearing, Oct. 17, 2007.

This is true, of course, when the "announcement" is made formally, through official channels. Still more destructive are the use of improper leaks we are now seeing, intended to accomplish the same result.

On the same day that you rightly confirmed Departmental responsibility under the law, you assumed, as indeed you should as Attorney General, the lead on these crucial issues so central to the impartial administration of justice. You committed to the following:

[I]f I'm confirmed, I'm going to articulate again in as clear English as I can. And that is that politics – partisan politics plays no part in either the bringing of charges or the timing of charges, and that people in the department should not be authorized – people below a very small group at the top should not be authorized to take calls or make calls with political figures to talk about cases.

By this letter, you are requested to make this clear again, in plain English, publicly and urgently.

I look forward to meeting with you to discuss our concerns.

Very truly yours,



Robert F. Bauer  
General Counsel  
Obama for America