

July 14, 2020

Attorney General William Barr
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Criminal Violations of Protesters' Civil Rights in Lafayette Square
Park

Dear Attorney General Barr:



National Political
Advocacy Department
915 15th St. NW, 6th FL
Washington, D.C. 20005
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

The American Civil Liberties Union (ACLU) strongly urges the appointment of a special counsel to investigate, and if warranted, prosecute any federal criminal violations of protesters' constitutional rights in Lafayette Square Park on June 1, 2020. On that day, at approximately 6:25 pm, federal and other government forces attacked peaceful protesters and journalists covering the event without warning and unprovoked, used tear gas, flash bang grenades, and rubber bullets to drive the crowd out of the public park they lawfully occupied. These actions were an unconstitutional violation of protesters' right to speak, assemble, and petition the government under the First Amendment and to remain free of unreasonable seizure under the Fourth Amendment. They were also potentially violations of federal statutes prohibiting interference and conspiracies to interfere with any federally or constitutionally protected right. Given your own acknowledged role in ordering the clearing of Lafayette Square, you must take all necessary steps to ensure that you and others involved in the ordering and carrying out of the use of force have no role in the appointment or supervision of the special counsel.

This administration has claimed that it is serious about holding individuals and institutions accountable for their illegal acts against protesters.¹ If that was a truthful statement, then a full, independent and complete criminal investigation into the actions in Lafayette Square, and the extent to which they violated existing laws, is warranted. Given the inherent conflict of interest present, appointment of an outside prosecutor is needed to ensure impartiality of any investigation and, if warranted, of any prosecution of any criminal acts committed by members of the Executive Branch. You and any other officials within the Department who were involved in the events surrounding the Lafayette Square attacks or subsequent response must recuse yourself from the selection and oversight of the special counsel, given the inherent conflict of interest. In addition, a report on the results of any investigation, including any reports and

supporting materials, must be promptly publicly released in their entirety upon completion of the special counsel's investigation.

The Illegal Attack on Protesters and Journalists. Following the murder of George Floyd by the Minneapolis Police Department on May 25, 2020, protesters began to gather daily in Lafayette Square—the public park closest to the White House—to peacefully express their outrage at the murders of George Floyd, Breonna Taylor, and other Black people killed by law enforcement.² They were protesting the gross, systemic injustice perpetrated by law enforcement against Black and Brown people and other marginalized communities and calling for change. The scene on June 1 was the same as it had been on previous days. Protesters gathered in the Square, chanted “I can’t breathe” in remembrance of George Floyd’s last words, knelt, prayed, raised their hands, and engaged in other legal expressive activities. Journalists were also present, reporting on the protest.

Law enforcement and military forces present near the protesters included agents from the U.S. Secret Service, the U.S. Park Police, the D.C. National Guard, and the D.C. Metropolitan Police Department. At approximately 6:03 pm on June 1, these agents donned gas masks in preparation for their deployment of tear gas, flash bangs, pepper balls and other chemical agents against the gathered crowd. At 6:08 pm, you entered Lafayette Square, and shortly thereafter stood behind law enforcement officials and pointed toward St. John’s church on the far side of the Square from the White House. At around the same time, White House Deputy Chief of Operations Tony Ornato alerted the Secret Service that President Trump planned to make an appearance at St. John’s church.

At around 6:25 pm, well before the city's curfew in effect at the time, government officers rushed the crowd and attacked the protesters and journalists in Lafayette Square. As numerous reports and witnesses have confirmed, they provided no warning, never asked the crowd to disperse, and were in no way provoked by the peaceful demonstrators. During their attack on the crowd, officers used tear gas, rubber bullets, pepper spray, smoke canisters and flash bangs to drive the demonstrators out of Lafayette Square. As video recordings show, the officers assaulted the protesters by hitting and punching them with their fists, feet, batons, and shields. They also used mounted police to intimidate protesters and force them to flee to avoid being trampled. Even after the demonstrators and press had been violently ejected from Lafayette Square, armed agents continued to pursue them for several blocks.

Shortly after the protesters and journalists were violently forced from the Square, President Trump left the White House and walked through Lafayette Square Park to St.

¹ Press Release, Michael R. Pompeo, Secretary of State, On the Hypocrisy of the UN Human Rights Council (Jun. 20, 2020), <https://geneva.usmission.gov/2020/06/20/secretary-pompeo-on-the-hypocrisy-of-un-human-rights-council/>.

² The events of the day are fully recounted in the complaint on behalf of Black Lives Matter v. Trump. Black Lives Matter v. Trump, No. 1:20-cv-01469 (D.D.C. filed Jun. 4, 2020), <https://www.aclu.org/legal-document/black-lives-matter-dc-v-trump>.

John's Episcopal Church, where he posed for a photo opportunity. In the days and hours leading up to this violent attack on the civil rights and civil liberties of people protesting racial injustice, President Trump had issued numerous threats against protesters calling them thugs and anarchists. This hostility stands in stark contrast to the sympathetic comments he has made about demonstrators whose views align with his own, such as the heavily armed and predominantly white objectors who threatened lawmakers over pandemic stay-at-home rules and his own supporters whom he encouraged to counter-protest at the White House. On a call with governors earlier on June 1 to discuss response to the protests occurring nationwide in the wake of George Floyd's murder, President Trump urged governors to take harsh action against demonstrators, telling them to "dominate your city and your state." On that same call, Secretary of Defense Esper said that governors needed to "dominate the battle space." The battle spaces he referred to are American streets and parks where people had congregated to exercise their constitutionally protected right to protest.

The Department of Justice has officially acknowledged that you ordered Lafayette Square cleared. You have since claimed you were not the one to order the use of violent force on the protesters.³ However, the order you gave to clear the Square followed the series of statements from President Trump and other high-level officials threatening protesters and expressing animosity towards their activism. The order precipitated President Trump's dramatic walk through the Square to St. John's Church where he posed with a Bible. The images were juxtaposed with those of peaceful protesters fleeing federal and other law enforcement officials that were attacking them with chemical weapons so the President could have his picture taken.

The government forces' violent actions towards the civil rights protesters in Lafayette Square – apparently taken to enable a photo opportunity – were neither reasonable nor justified. Not only did your actions that day violate the First and Fourth Amendments, the attack on protesters in Lafayette Square also offends the basic constitutional demand that all government action be reasonable and non-arbitrary.

The American people deserve to know with certainty what happened that day, particularly who gave the order to use violent force to clear demonstrators and journalists who were exercising their constitutionally protected rights, under what authority, and why, and they deserve to have any responsible officials who violated the law held accountable. The appointment of an outside special counsel is a necessary step to ensure justice.

Criminal Violations of Federal Civil Rights Laws. Your order to violently attack protesters and journalists in Lafayette Square on June 1, 2020, and the assault on civil rights and

³ Matt Zapposky, *Barr Seeks to Dissociate Himself from Move on Demonstrators outside Lafayette Square*, WASH. POST (Jun. 5, 2020), https://www.washingtonpost.com/national-security/barr-seeks-to-dissociate-himself-from-move-on-demonstrators-outside-lafayette-park/2020/06/05/47cb96b6-a78e-11ea-bb20-ebf0921f3bbd_story.html.

civil liberties that ensued, violated the First and Fourth amendments of the Constitution.⁴ It also may have violated multiple federal criminal provisions that prohibit interference with the exercise of civil rights and civil liberties—a possibility that warrants the appointment of an outside prosecutor.

Section 241 of Title 18 of the United States Code prohibits conspiracies “to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” On June 1, according to the facts outlined, you appear to have conspired with other high-level government officials to interfere with the free exercise of the First Amendment rights of the protesters and journalists gathered in Lafayette Square. You gave no warning regarding your plans to clear protesters and press from the Square. You had no legitimate basis to clear protesters or press from the Square. The decision to clear the Square was itself an unconstitutional interference with the freedom of speech and press. Furthermore, government agents' use of violent force in order to expel protesters and journalists from the area in and around Lafayette Square, without a warrant or probable cause that criminal activity was afoot, violated the Fourth Amendment. In addition, the violent methods you deployed to disperse the crowd compound the damage to civil rights and civil liberties wrought by your decision and raise the question of whether the order to clear the Square was, in fact, a criminal act.

Furthermore, Section 245(b)(5) of Title 18 prohibits any person, by force or threat of force, from interfering with “any citizen because he is or has been ... participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to [participate in any federally protected right].” The facts outlined above indicate that federal agents, under your direction and control, did use force to interfere with citizens because they were participating in a lawful and peaceful assembly opposing the denial of George Floyd’s federally protected rights.

On June 1, 2020, you, as the highest ranking law enforcement official in the federal government, ordered the violation of protesters’ and journalists’ constitutional rights to speak, associate, and report on newsworthy events. The violent manner in which your order was carried out raises serious and significant questions surrounding whether that order was also a violation of federal criminal law. Given the seriousness of these events, a special counsel is necessary to meet the need for the American people to trust that their civil liberties will continue to be protected by the rule of law, through a full, complete, and impartial investigation of these events and, if warranted, prosecution of any criminal acts committed by Executive Branch officials.

Requirement to Appoint a Special Counsel. The rule on appointment of an independent prosecutor is clear. Justice Department regulations require the Attorney General, or, in

⁴ *Id.*

cases where the Attorney General is recused, the Acting Attorney General to appoint an outside counsel when a three-prong test is met. First, a “criminal investigation of a person or matter [must be] warranted.”⁵ Second, the “investigation or prosecution of that person or matter by a United States Attorneys’ Office or litigating division of the Department of Justice would present a conflict of interest for the Department.”⁶ Third, “under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”⁷ If the regulations’ three-prong test is met, then the Attorney General or Acting Attorney General must select a special counsel from outside the government who would have the authority to secure necessary resources for the investigation and prosecution and have full investigatory and prosecutorial powers.⁸

In this case, it is imperative that you recuse yourself, and anyone else within the government who had any role related to ordering or carrying out the use of force to clear protesters and journalists from Lafayette Square from the selection and oversight of any special counsel. Your department has acknowledged that you gave the order to clear Lafayette Square. Consequently, under the regulations, an Acting Attorney General should assume the authority to oversee the special counsel. The Acting Attorney General that assumes the authority to appoint and oversee the independent special counsel investigation should be within the order of succession for Acting Attorney General, but under no circumstances can that person be someone who was involved in the decision to attack protesters in Lafayette Square on June 1, or in any subsequent responses or investigations related to the attack.

Similarly, the conflict of interest posed by any existing litigating arm of the Department of Justice—or the U.S. Attorney for the District of Columbia—investigating and prosecuting these violations is self-explanatory. You, as the head of the Department of Justice, have publicly admitted to ordering the clearing of Lafayette Square that resulted in the violent attack on protesters and journalists that day. Furthermore, the FBI has arrested and is prosecuting numerous protesters and demonstrators throughout the country claiming that their participation in protests were violations of the unconstitutional Anti-Riot Act.⁹ These federal investigations and prosecutions of protesters heighten the conflicts of interest with any investigation into criminal violations of protesters’ civil and constitutional rights by government officers, especially when the order came directly from you as the Attorney General. Federal law enforcement’s interest in painting the protesters as violent instigators to obtain convictions will raised doubts regarding the results of any investigation into the

⁵ 28 C.F.R. § 600.1

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* §§ 600.3-600.6.

⁹ The Anti-Riot Act (the “Act”) criminalizes traveling across state lines or using any facility of interstate commerce—including, as in recent cases, Facebook posts—with the intent to “organize, promote, encourage, participate in, or carry on a riot” while or before “perform[ing] or attempt[ing] to perform any other over act for [that] purpose.” 18 U.S.C. § 2101(a) (emphasis added). The American Civil Liberties Union has long argued that the Act regulates speech at the core of constitutional protection, is not narrowly tailored, and therefore cannot withstand judicial review.

improper behavior of law enforcement officials in response to the protests. In order for a full and complete investigation to take place and to fulfill your duty as this country's chief law enforcement officer, the appropriate Acting Attorney General must appoint a special counsel to investigate, and prosecute any crimes, as warranted.

The public interest in the appointment of an independent, outside prosecutor is also self-evident. Our constitutional rights to speak and associate are among our most cherished. Any attempt by the federal government to undermine or violate those rights, especially through the uses of force or violence that were employed in Lafayette Square must be investigated fully and completely. Responsibility for the violent events of June 1 may extend to the very highest levels of the federal government, including to the Attorney General of the United States. The country deserves to have these outstanding questions addressed and those responsible for the attacks on our civil rights and liberties that occurred on June 1, 2020 must be held accountable.

The faith of the people in their government and their trust in the protections afforded to them by law and by the Constitution are in peril. A full investigation by an independent special counsel is necessary to restore confidence in federal law enforcement and to ensure our most-cherished rights and liberties are protected, especially as future civil rights protests unfold across the states and in the nation's capital.

Thank you for your attention to this urgent request. Please do not hesitate to contact Kate Ruane at kruane@aclu.org with any questions.

Sincerely,



Ronald Newman
National Political Director



Kate Ruane
Senior Legislative Counsel