

July 20, 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 Portland, Oregon

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) and the American Civil Liberties Union of Oregon strongly urge the appointment of a special counsel to investigate, and if warranted, prosecute any federal criminal violations of protesters', journalists', and others' constitutional rights in the federal response to ongoing protests in Portland, Oregon, and throughout the country. For over 50 days, the people of Portland have taken to the streets to protest against police brutality and for racial justice. The government response has been nothing less than criminal attempts on the part of federal, state, and local forces to silence their voices and interfere with their exercise of constitutionally protected rights.

Last week, we urged you to appoint a Special Counsel to investigate the violent ejection of protesters from Lafayette Square on June 1, 2020.¹ Rather than immediately appointing a special counsel to investigate, and if warranted prosecute any federal crimes against protesters, journalists, and others, this Administration has doubled down on its unconstitutional and likely criminal tactics. In fact, Deputy Director of Homeland Security, Ken Cuccinelli has said the tactics in use in Portland will be used in other places throughout the country.² Press reports indicate that the next city to face these violent tactics will be Chicago.³ If the Administration follows through on its threat to expand these tactics to Chicago or anywhere else, the results will be devastating to the rule of law in this country. This Administration must immediately cease these violent uses of force and the Department of Justice must begin the necessary, independent, and thorough process of appointing a special prosecutor to investigate and, if warranted, prosecute, those responsible for ordering and carrying out attacks on protesters.

This administration has claimed that it is serious about holding individuals and institutions accountable for their illegal acts against protesters.⁴ If that was a truthful statement, then a full, independent and complete criminal investigation into law enforcements' violence against and abductions of protesters in Portland, 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 any of the decisions to deploy indiscriminate weapons against protesters or to abduct them from the street without a warrant or probable cause for arrest must recuse yourself from the process of selection and any oversight of a special prosecutor. 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. Militarized special ops officers are occupying the streets of downtown Portland, bent on inflicting pain and terror on people protesting against police brutality and expressing their belief that Black Lives Matter.⁵ Federal agents, including those from the Departments of Homeland Security and Justice, working with local law enforcement, are terrorizing the community, threatening lives, and relentlessly attacking protesters demonstrating against police brutality.

Militarized federal agents have used sharpshooters to maim people, and deployed military tools and tactics — including sonic weapons and tear gas.⁶ Portland Police Bureau and the Trump administration have responded to nightly protests in Portland over the police killing of George Floyd by indiscriminately using tear gas, rubber bullets, and acoustic weapons

¹ Letter from the American Civil Liberties Union to Attorney General William Barr (Jul. 14, 2020), <https://www.aclu.org/letter/aclu-letter-ag-barr-violent-clearing-white-house-protesters>.

² Sarah McCammon, *DHS Official On Reports of Federal Officers Detaining Protesters in Portland, Ore.*, ALL THINGS CONSIDERED (Jul. 17, 2020), <https://www.npr.org/2020/07/17/892393079/dhs-official-on-reports-of-federal-officers-detaining-protesters-in-portland-ore>.

³ Gregory Pratt and Jeremy Gerner, *Homeland Security Making Plans to Deploy Some 150 Agents in Chicago this week, With Scope of Duty Unknown*, Chi. Trib. (Jul. 20, 2020), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-dhs-deployment-20200720-dftu5ychwbxctg4ltarh5qnwma-story.html>.

⁴ 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/>.

⁵ Doug Brown, *A Constitutional Crisis in Portland*, ACLU News & Commentary (Jul. 18, 2020), <https://www.aclu.org/news/criminal-law-reform/a-constitutional-crisis-in-portland/>.

⁶ Emily Gillespie, Devlin Barrett, Katie Shepherd, & Mark Berman, *Portland Officials Decry Aggressive Tactics of Federal Agents in Their City*, WASH. POST (Jul. 18, 2020), https://www.washingtonpost.com/national-security/portland-officials-decry-aggressive-tactics-of-federal-agents-in-their-city/2020/07/17/ae5dbf18-c871-11ea-8ffe-372be8d82298_story.html.

against protesters,⁷ journalists, and legal observers,⁸ even after the federal court enjoined such violent attacks in a lawsuit filed by the ACLU of Oregon. Federal officers also shot a protester in the head with a rubber bullet fracturing the person's face and skull.⁹

Even more disturbingly, federal forces, wearing no insignia, names, badge numbers, or any other identification, and driving unmarked vehicles have swept away protesters to undisclosed locations.¹⁰ In a clear violation of the Fourth Amendment, no reasons are given for their arrests, no warrants provided, and there appears to be no probable cause – or any other exception to the Fourth Amendment's warrant requirement – for these arrests. The people have a right to be free from unreasonable searches and seizures. Kidnapping people from the street with no warrant and without reason clearly violates that right.

Criminal Violations of Federal Civil Rights Laws. The use of militarized tools and tactics against protesters exercising their constitutionally protected rights is an assault on civil rights and civil liberties that violates the First and Fourth Amendments of the Constitution.¹¹ Similar to the attacks on protesters in Lafayette Square on June 1, it also may violate 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.” In Portland, according to the facts outlined, the Department of Justice, along with the Department of Homeland Security and, potentially, other components of the Executive Branch 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 gathering nightly. Forces under your collective command and control have used indiscriminate weapons, like tear gas and rubber bullets, against protesters. These weapons are never justified at mass gatherings, yet they are being continuously deployed

⁷ *Id.*; Maxine Bernstein, *Lawyers for Don't Shoot Portland Urge Judge to Sanction City for Violating Court Orders Restricting Force Used Against Crowds*, THE OREGONIAN (Jun. 30, 2020), <https://www.oregonlive.com/crime/2020/07/lawyers-for-dont-shoot-portland-urge-judge-to-sanction-city-for-violating-court-orders-restricting-force-used-against-crowds.html>.

⁸ Order Granting Prelim. Injunction, *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI (Jul. 16, 2020), https://aclu-or.org/sites/default/files/field_documents/2020-07-16_preliminary_injunction.pdf.

⁹ Ryan Nguyen, *Police Shoot Portland Protester in the Head with Impact Weapon, Causing Severe Injuries*, THE OREGONIAN (Jul. 12, 2020), <https://www.oregonlive.com/news/2020/07/police-shoot-portland-protester-in-head-with-impact-weapon-causing-severe-injuries.html>.

¹⁰ Johnathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OPB (Jul. 17, 2020), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/>.

¹¹ *Id.*

by federal, state, and local law enforcement, despite valid courts order enjoining their use. Moreover, forces under your command are conducting warrantless arrests, sweeping protesters into unmarked vehicles and refusing to identify themselves. These authoritarian tactics are unconstitutional and appear intended to interfere with and suppress the exercise of constitutionally protected rights in 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. A full, complete, and impartial investigation of these events and, if warranted, prosecution of any criminal acts committed by Executive Branch officials must commence immediately.

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 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.”¹² 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.”¹³ Third, “under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”¹⁴ 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.¹⁵

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 against protesters in Portland, and the decision to use unmarked officers and vehicles to arrest people without sufficient cause. The Department of Justice has been intimately involved in the response to the protests in Portland and throughout the country. One of the protesters who was abducted by federal forces as he was walking home found, upon his eventual release from custody, that he had been taken to a federal courthouse for questioning.¹⁶ It has also been reported that you are conferring with Acting Homeland Security Secretary, Chad Wolf, to develop an executive order that would expand the use of these unconstitutional tactics to other cities and other protesters. It is, therefore, clear that the Department of Justice’s role in responding to the protests requires you to recuse yourself from the appointment and supervision of a special prosecutor. Under the regulations, an

¹² 28 C.F.R. § 600.1

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* §§ 600.3-600.6.

¹⁶ Johnathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OPB (Jul. 17, 2020), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/>.

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 use indiscriminate force against protesters in Portland or to use unmarked agents and vehicles to seize people from the streets.

Similarly, the conflict of interest posed by any existing litigating arm of the Department of Justice—or the U.S. Attorney for Oregon—investigating and prosecuting these violations is self-explanatory. The Department of Justice has deployed forces to Portland to assist in the federal government’s unconstitutional response to the protests. Furthermore, the FBI has arrested and the DOJ is prosecuting numerous protesters and demonstrators throughout the country claiming that their participation in protests were violations of the unconstitutional Anti-Riot Act,¹⁷ as well as other federal offenses. 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. Federal law enforcement’s interest in painting the protesters as violent instigators to obtain convictions will raise doubts regarding the results of any investigation into the 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 and to be free from unlawful searches and seizures 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 are on display in Portland must be investigated fully and completely. Responsibility may extend to the very highest levels of the federal government, including to the Attorney General of the United States and the Acting Secretary for the Department of Homeland Security. The country deserves to have these outstanding questions addressed and those responsible for the ongoing attacks on our civil rights and liberties 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. The unconstitutional and likely criminal use of force against protesters in Portland and elsewhere must cease immediately and these tactics should not be deployed elsewhere in the country as the Administration has

¹⁷ 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.

threatened to do. Furthermore, 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,



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Jann Carson
Interim Executive Director
ACLU of Oregon



Kate Ruane
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