

January 11, 2021

Acting Attorney General Jeffrey Rosen
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Request for Special Counsel to Investigate Any Criminal
Interference with the Certification of the Presidential Election

Dear Acting Attorney General Rosen:



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 you to appoint a special counsel to investigate, and if warranted, prosecute President Donald Trump, his associates, and any other federal official who may have been involved in recent attempts to subvert the outcome of the 2020 Presidential election, if those attempts amount to criminal violations of federal civil rights laws, including, but not limited to, Section 241 of Title 18 of the United States Code. By a unanimous vote on January 10, 2021, the ACLU National Board voted to support the impeachment of President Donald Trump because of his pattern of bad-faith conduct designed to subvert the results of a fair and free election. Regardless of what happens in the House or Senate with regard to impeachment and removal, the U.S. Department of Justice should initiate its own investigation to ascertain whether criminal violations of federal civil rights laws occurred.

The outcome of the 2020 presidential election is the most litigated ever in our country's history. More than 60 legal challenges have been filed to throw out lawfully cast ballots. These lawsuits have had a single purpose: to disenfranchise qualified American voters, particularly voters of color, who voted against President Trump. The courts—both federal and state, and including judicial appointees of both political parties—have unanimously rejected these challenges as without basis in fact or law.

Yet the President has not been deterred in his efforts to overturn the results of an election that he lost. Since President-Elect Biden was declared the winner, President Trump and his associates have embarked on a relentless and multi-pronged campaign attempting to overturn the clear results, including, in one instance, by exhorting the Georgia Secretary of State to “find” enough votes that would allow him to win that state—a clear and unambiguous attempt to undermine the will of the voters of Georgia and steal their electoral votes.

In addition to pressuring and threatening state and local officials to reverse election results in his favor, the President has repeatedly

made scores of knowingly false statements attempting to undermine the integrity and legitimacy of the 2020 election, to impugn the votes of Americans in racial minority groups in particular, and to deny his loss at the ballot box. These statements have fueled the prevailing sentiment of his supporters that the election of President-Elect Biden is not legitimate. Following over eight weeks of persistent false statements about the legitimacy of the election results from the President and his surrogates, President Trump led his supporters in a rally on the National Mall at the very moment Congress was meeting to certify the election. After the President said, “we’re going to walk down to the Capitol,” a group of Trump supporters did just that and, once there, many of them broke into the Capitol building and disrupted the joint session of Congress convened to certify the election of Joe Biden to be the 46th President of the United States. Images of these rioters swarming the halls of our Capitol — carrying weapons, tactical gear, restraining zip ties, and, in a symbol of the white supremacy underpinning their violent acts, Confederate flags — while Members of Congress, staff, reporters, and the building’s caretakers fled for their lives will not soon be forgotten.

The President and his enablers must be held accountable for their efforts to subvert the November 2020 election, including for any federal crimes they may have committed in the course of their attempts to overturn the election results.

The President and his advisors have engaged in multiple concerted efforts to pressure or coerce state and local officials to reject, revise, or refuse to certify the vote totals, thereby overturning the results of the election in those states. Although vigorous lobbying of government officials is permissible, the scope and baseless character of the President’s personal intrusion into the machinery of the electoral process at the local and state levels is unprecedented, and the context in which it has taken place cannot be ignored: Election officials in Georgia, Pennsylvania, Arizona, and other states have faced intense pressure and acrimony from the President’s supporters, including death threats.¹

In an especially notorious case, the President called the Georgia Secretary of State on January 2, and, during the call, stated that “I just want to find 11,780 votes”—i.e., enough to overcome the certified margin in the state—and raised the specter of possible criminal liability against him if he did not comply with the President’s demands.

These efforts ultimately failed, and the states performed their duty to certify the proper slates of electors, chosen by their voters. With options to overturn the election narrowing, the President and his enablers trained their sights on the Vice President and Congress as they prepared to certify the result of the electoral college votes. The President pressured the Vice President to refuse to accept the electoral votes of three states—Arizona, Georgia, and Pennsylvania—despite the fact that the Vice President has no legal authority to do so—in order to prevent certification of the presidential election. When that failed, the President exhorted his supporters to go to the Capitol, which they then stormed, disrupting the tally of electoral votes. At least five people died in the resulting chaos.

¹ In at least one case, the President’s pressure was effective: in Wayne County, Michigan, which includes Detroit, two local elections officials attempted to rescind their votes to certify election results roughly 24 hours after being contacted by the President.

Taken together, these acts and others provide evidence of a sustained and concerted attempt on the part of President Trump and his supporters to overturn the results of what his own Department of Homeland Security has called the most secure election in history. The fact that the President was unsuccessful does not and cannot absolve him from facing appropriate consequences for his actions, including criminal penalties if warranted.

Criminal Violations of Federal Civil Rights Laws. As the Department of Justice well knows,² numerous federal laws protect voter participation and the integrity of our elections. Among them is Section 241 of Title 18 of the United States Code, a key civil rights statute, which 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.” If the President engaged in acts to prevent the vote of citizens of the United States from being counted and taking effect, those actions amount to unlawful election interference. For example, the President of the United States, during his call with officials from Georgia, urged the officials to “find” precisely enough votes to swing the election in his favor and raised the specter of criminal prosecutions for the officials if they did not succumb to his will. That conversation and any other communications with Georgia officials deserve a thorough examination to determine whether they demonstrate an intent to deprive the people of Georgia of their right to vote, secured to them by the Constitution. There must be a full investigation into President Trump’s various acts that appear to have been intended to overturn or subvert the results of an election he lost. This should also include his actions on January 6, 2021, in relation to the mob attack on the U.S. Capitol.³

Requirement to Appoint a Special Counsel. 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.”⁴ 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.”⁵ Third, “under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”⁶ 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.⁷

² See, e.g., Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition (December 2017).

³ Of course, if the special counsel determines that any potential defendants should be prosecuted based on their speech alone—as distinguished from the acts carried out as part of a conspiracy that they joined—we trust that the counsel would apply the standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), and other relevant First Amendment principles to determine whether the speech is protected.

⁴ 28 C.F.R. § 600.1

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* §§ 600.3-600.6.

There is little doubt that an investigation is warranted in this matter. The President of the United States sought to coerce state officials to manufacture additional votes for him that would swing an election he lost in his favor. He has daily repeated falsely that the election was stolen from him and engaged in numerous other acts attempting to change, reject, subvert, or otherwise undermine the results. The franchise is at the very core of our democracy, and it is a crime to intentionally interfere with its exercise. For those reasons, a criminal investigation is warranted.

There would be a conflict of interest for the Department of Justice to pursue this investigation under its own authority. The Department of Justice is ultimately supervised by the President, a classic conflict of interest. Given the accusations made by President Trump and his efforts to misuse the Department of Justice's powers for personal gain, to avoid any appearance of bias, an independent special counsel is necessary to promote public trust in the process and to ensure the results of the investigation are respected by everyone, including those that support President Trump.

It would be in the public interest for an outside counsel to pursue this investigation. The integrity of our election is a gravely serious matter, and investigations into its systematic subversion should be conducted with the utmost integrity and clarity.

The faith of the people in their government and their trust in the government's ability to protect their right to vote and to ensure their vote will be counted have been imperiled by the actions of the President. A full investigation, and, if warranted, prosecution, by an independent special counsel are necessary to reveal any criminal activity that may have been perpetrated within the highest halls of power and to hold those responsible to account for their actions.

Thank you for your attention to this urgent request.

Sincerely,



Anthony Romero
Executive Director
American Civil Liberties Union



Monica Hopkins
Executive Director
ACLU of the District of Columbia