

September 15, 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 Kenosha,
Wisconsin

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 Wisconsin 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 law enforcement response to ongoing protests in Kenosha, Wisconsin, and throughout the country.

This is now our third letter¹ urging the appointment of a special prosecutor to investigate these potential criminal civil rights violations by law enforcement against protesters that have taken to the street to demand an end to police violence again Black people and communities of color. An independent investigation into the potential criminal civil rights violations against Black Lives Matter protesters is necessary to restore faith of the people in their government and their trust in the protections afforded to them by law and by the Constitution

Since the murder of George Floyd by Minneapolis Police on May 25, 2020, protesters have gathered daily in Wisconsin and across the country to express their outrage at the murders of George Floyd, Breonna Taylor, and other Black people killed by law enforcement. On August 23, 2020, in just the most recent example, a Kenosha police officer shot Jacob Blake at least seven times. This, of course, sparked increased protests in Kenosha. We now understand that a federal civil rights investigation has now been opened into this shooting.²

Despite this development with respect to the potential violation of Jacob Blake's civil rights, the Kenosha Police Department and the Kenosha Sheriff's Department have reacted in a militarized way to protesters. Most notably, when right-wing extremists arrived at the protests armed with semi-automatic weapons, Kenosha law enforcement greeted them warmly, provided them water, and failed to enforce the curfew against them — even while aggressively enforcing the curfew against protesters. A white person, Kyle Rittenhouse, then

allegedly shot three protesters, killing two of them — and even though he was underage and walked down the street with his weapon, law enforcement let him go home that night. Meanwhile, Jacob Blake, an unarmed Black man shot by Kenosha police, is paralyzed, and also was unconscionably handcuffed to his hospital bed.

Unfortunately, in addition to the dangers the community faces from the Kenosha police and sheriff's departments, federal forces have come to Wisconsin. We are concerned about numerous reports of protesters who have been abducted from the streets by officers in unmarked vehicles and taken to unknown locations, which raise chilling echoes of similar events in Portland. The Kenosha Police Department has acknowledged that it is working with the U.S. Marshals to conduct these arrests.³

The U.S. Marshals is one of the same agencies that engaged in the lawless response to protests in Portland, Oregon. We are concerned because in Oregon, those militarized federal agents have flouted valid court orders, used sharpshooters to maim people, and deployed military tools and tactics — including sonic weapons, tear gas, and arrests conducted by unmarked officers in unmarked vehicles against Black Lives Matter protesters.

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. The people have a right to be free from unreasonable searches and seizures. Being attacked with tear gas or kinetic impact munitions by law enforcement simply for engaging in a protest against systemically racist policing of course violates the First Amendment of the US Constitution. A number of federal courts have found these tactics to be unconstitutional.

These law enforcement actions may also constitute violations of federal criminal prohibitions against interfering with civil rights and civil liberties. 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.” Section 242 of Title 18

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>; Letter from the American Civil Liberties Union to Attorney General William Barr (Jul. 20, 2020), <https://www.aclu.org/letter/aclu-and-aclu-oregon-letter-attorney-general-barr-calling-special-counsel-investigation>.

² Julie Bosman & Sarah Mervosh, *Justice Department to Open Investigation into Kenosha Shooting*, NY TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/kenosha-shooting-protests-jacob-blake.html>.

³ Tom Schuba, *U.S. Marshals in Unmarked Vehicles Assist Kenosha Police with Arrests*, CHICAGO SUN TIMES (Aug. 27, 2020), <https://chicago.suntimes.com/news/2020/8/27/21405126/federal-law-enforcement-assisting-kenosha-police-arrests-protests>.

further prohibits persons acting under color of law from willfully depriving any person of any right or privilege secured to them by the Constitution. Both of these statutes are clearly implicated by the law enforcement responses to protests in Kenosha.

Given the seriousness of these events in Kenosha, as well as in Portland and across the country, 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 or law enforcement officials at any level of government 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.”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

It is clear that, as in our previous requests for an independent special counsel to investigate and, if warranted, prosecute federal criminal violations of protesters civil rights, the test outlined above has been met. Law enforcement has apparently intentionally interfered with protesters’ exercise of their constitutionally protected rights. Investigation by the DOJ or any officer within the DOJ presents a clear conflict of interest because elements of the DOJ, including the U.S. Marshals are present in Kenosha and coordinating with local law enforcement on the ground. It is also in the public interest for a special counsel to assume responsibility for the matter as the protection of civil rights and civil liberties is paramount in this country and a full, complete, and independent investigation would garner the confidence and trust of the public. Furthermore, it may also be appropriate for the same special prosecutor to investigate the various civil rights violations against protesters perpetrated by law enforcement in Kenosha, Portland, and Lafayette Square.

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 Kenosha and elsewhere must cease immediately and these

⁴ 28 C.F.R. § 600.1

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* §§ 600.3-600.6.

tactics should not be deployed elsewhere in the country as the Administration has threatened to do. Finally, 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
National Political Advocacy Department



Chris Ott
Executive Director
ACLU of Wisconsin



Kate Ruane
Senior Legislative Counsel
National Political Advocacy Department



Molly Collins
Advocacy Director
ACLU of Wisconsin

cc: Members of the U.S. Senate
Members of the U.S. House of Representatives