

March 7, 2019

Inspector General Michael E. Horowitz
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Prosecution of Inauguration Day Protestors

Dear Inspector General Horowitz,

I write on behalf of the American Civil Liberties Union of the District of Columbia to ask that your office investigate the policy decision of the U.S. Attorney's Office for the District of Columbia (USAO-DC) to prosecute more than two hundred demonstrators — most of whom were peaceful — who protested the Inauguration of President Donald Trump.

On January 20, 2017, a small handful of individuals out of the thousands who demonstrated in downtown D.C. that day engaged in property destruction in the vicinity of Franklin Square. Although only a few people engaged in acts of vandalism, more than two hundred protesters, journalists, medics, and legal observers who were near Franklin Square were swept up in a mass arrest by the D.C. Metropolitan Police Department (MPD). MPD's on-scene commander, Keith Deville, has acknowledged in sworn trial testimony that he "wasn't differentiating who was demonstrating and who was rioting." Tr. of Trial Proceedings 71, *United States v. Macchio*, Nos. 2017 CF2 1183 et al. (D.C. Super. Ct. Dec. 4, 2017).

In deciding which of the individuals arrested by MPD to charge with crimes, the USAO-DC followed Cmdr. Deville's unfortunate lead in failing to differentiate, or even attempting to differentiate, between the individuals who had engaged in or aided property destruction and the vast majority of arrestees — individuals who had merely been in the vicinity of such actions while exercising their First Amendment rights to speech and assembly. The USAO-DC charged more than 200 Inauguration Day demonstrators with numerous felonies, including felony rioting and conspiracy to riot. Indicted demonstrators faced more than 60 years in prison, even though the prosecution admitted in court that most of them had not personally engaged in property destruction, and even though there was no evidence that most of them were part of any criminal conspiracy.



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The decision of the USAO-DC to charge peaceful Inauguration Day demonstrators with crimes is of grave concern to the ACLU of the District of Columbia, as it seems to us that these charging decisions reflected a theory of guilt by association — “a very dangerous principle” in any criminal case, *Irick v. United States*, 565 A.2d 26, 30 (D.C. 1989), and particularly dangerous in cases in which the underlying facts implicate protected First Amendment expression and association. As the Supreme Court has explained, “guilt by association alone, without any need to establish that an individual’s association poses the threat feared by the Government in proscribing it,” has an “inhibiting effect on the exercise of First Amendment rights.” *United States v. Robel*, 389 U.S. 258, 265 (1967).

Although a small fraction of the defendants pleaded guilty, a D.C. jury acquitted of all charges the first group of protesters to face trial in December 2017. In January 2018, the U.S. Attorney’s office dismissed 129 of the remaining cases. In May 2018, the Chief Judge of the D.C. Superior Court sanctioned the prosecution for “serious” *Brady* violations, Tr. of Trial Proceedings 36, *United States v. Vasquez*, Nos. 2017 CF2 1369 et al. (D.C. Super. Ct. May 31, 2018), including (as described subsequently by the Court) withholding exculpatory video evidence, Order 4-5, *United States v. Meltzer*, Nos. 2017 CF2 1176 et al. (D.C. Super. Ct. Nov. 9, 2018), and leaving the court and the defense “with a misimpression of what materials were in the possession of the government” in spite of “ample opportunity” to correct the “erroneous understanding of the pertinent facts,” *id.* at 6 (citation and internal quotation marks omitted). In June 2018, the second jury trial resulted in one acquittal and three mistrials. In July 2018, the USAO-DC dropped all remaining charges.

During the many months that these charges were pending, each of the defendant’s lives was seriously disrupted. Defendants had to obtain counsel, in some instances at great expense. They had to spend the time necessary to assist their lawyers in their defense. For many of the protestors, who had traveled from out of town to express their views concerning the inauguration, they had to make (and pay for) multiple trips back to Washington in order to appear for court proceedings. And throughout the proceedings, which for most defendants lasted ten months or more, defendants had to endure the anxiety of facing decades’ worth of prison time.

Ultimately, the USAO-DC’s crusade against the Inauguration Day demonstrators, which lasted almost eighteen months, resulted in only 21 guilty pleas; the remaining defendants either were acquitted at trial or had their charges dismissed. Not a single defendant was convicted at trial. Although the ACLU of the District of Columbia has already sued the District and more than two dozen police officers for misconduct by law enforcement personnel on Inauguration Day, we are equally troubled by the actions of the USAO-DC, which prosecuted many law-abiding demonstrators merely for exercising their First Amendment rights while *other* people engaged in unlawful conduct.

Additionally, it appears that Jennifer Kerkhoff, the Assistant United States Attorney who was the lead prosecutor in these cases, was promoted twice since these prosecutions began. When these cases began, she was listed on the USAO-DC website as the Deputy Chief of the Superior Court Felony Major Crimes Trial Section. By the end of the first jury trial (at which all the defendants were acquitted), a new organization chart posted on the USAO-DC website showed that she had been promoted to Senior Deputy Chief. And a new organization chart posted on the USAO-DC website in August 2018 — at least two months after the prosecution was sanctioned by the Chief Judge for serious *Brady* violations — shows that she was promoted to Chief of the Felony Major Crimes Trial Section.*

The questions we raise here do not concern the narrow question of a single attorney’s conduct of litigation but broader and more fundamental principles about how the USAO-DC balances its charging decisions with their effect on constitutional rights and how the USAO-DC ensures that its practices stay within constitutional bounds. Accordingly, whereas questions relating to possible misconduct committed by AUSA Kerkhoff personally belong within the Office of Professional Responsibility, *see* 28 C.F.R. § 0.39a(a)(1), or bar authorities — and, indeed, we understand that a number of complaints have been filed within the past year either with OPR or with the District of Columbia Bar — the questions we raise here about the willingness of the USAO-DC to pursue meritless charges that chill the exercise of First Amendment rights and to promote an actor who has violated constitutional due process rights and subjected the government to sanctions, warrant the attention of your office. *See id.* § 0.29h(a) (responsibilities of the Office of the Inspector General include “[c]onduct[ing] investigations and issu[ing] reports relating to ... administrative misconduct of Department employees and administration of the programs and operations of the Department as are, in the judgment of the Inspector General, necessary or desirable”) *accord id.* § 0.29c(a) (requiring reporting to OIG of “[e]vidence and non-frivolous allegations of ... serious administrative misconduct”); *id.* § 0.29a(b)(4) (“[u]ndertak[ing] sensitive investigations of Department operations and/or personnel”).

Accordingly, the ACLU of the District of Columbia urges you to investigate and seek to answer these questions:

1. Why and how was the decision made to prosecute more than 200 protesters rather than only people individually suspected of property destruction and those as to whom there was actual evidence of participation in a conspiracy?

* Available at <https://www.justice.gov/usao-dc/page/file/992941/download> (final page, unnumbered, titled “Superior Court Division”); *see also* <https://www.justice.gov/usao-dc/file/900936/download> (page 3).

2. Was there any inappropriate political influence over the exercise of prosecutorial discretion regarding the charges arising out of the Inauguration Day protests?
3. What process, if any, does the USAO-DC undertake to decide whether an individual prosecution or series of prosecutions will have a detrimental effect on the public's exercise of constitutionally protected freedoms, and how does that possibility bear on USAO-DC charging decisions?
4. What steps is the USAO-DC taking to ensure that *Brady* violations like those that occurred in the prosecution of the Inauguration-Day cases do not recur? Does AUSA Kerkhoff's promotion to Section Chief send a message that such violations are condoned or even encouraged in the Department of Justice?

As an organization that works to protect civil rights and civil liberties for all individuals in the District of Columbia, the ACLU of the District of Columbia is deeply troubled by the USAO-DC's decision to indict and prosecute scores of people for whom there was no real evidence of criminal conduct, and to reward the individual attorney who was most responsible for these actions by promoting her twice, including (it appears) after the USAO-DC was sanctioned for her knowing failure to produce material exculpatory evidence. We are all the more troubled because of the potential chilling effect that these prosecutions of peaceful demonstrators have undoubtedly had on individuals wishing to exercise their First Amendment rights in our nation's capital in the future. We therefore believe that an investigation of the USAO-DC's handling of these matters is imperative.

Thank you for your attention to this matter. We look forward to your response.

Respectfully,



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