

# CONGRESS VERSUS THE CONSTITUTION: MERRICK GARLAND'S SECOND RECONSTRUCTION

Early morning Eastern Time on January 6, I wrote a post arguing that Merrick Garland was a better Attorney General pick than a lot of people assumed. By the end of the day, the January 6 insurrection made him look like an even better pick, based on his successful prosecution of right wing terrorist Timothy McVeigh. When he testified on Monday, Garland surpassed even those expectations, in large part because he described as his mission the same one DOJ had when originally founded 151 years ago: protecting the rights of people of color in the face of right wing terrorism.

Celebrating DOJ's 150th year reminds us of the origins of the Department, which was founded during Reconstruction, in the aftermath of the Civil War, to secure the civil rights promised by the 13th, 14th and 15th Amendments. The first Attorney General appointed by President Grant to head the new Department led it in a concerted battle to protect black voting rights from the violence of white supremacists, successfully prosecuting hundreds of cases against members of the Ku Klux Klan.

Almost a century later, the Civil Rights Act of 1957 created the Department's Civil Rights Division, with the mission "to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society."

That mission remains urgent because we do not yet have equal justice. Communities of color and other minorities still face discrimination in housing, education, employment, and the criminal justice system; and bear the brunt of the harm caused by pandemic, pollution, and climate change.

150 years after the Department's founding, battling extremist attacks on our democratic institutions also remains central to its mission. From 1995 to 1997, I supervised the prosecution of the perpetrators of the bombing of the Oklahoma City federal building, who sought to spark a revolution that would topple the federal government. If confirmed, I will supervise the prosecution of white supremacists and others who stormed the Capitol on January 6 – a heinous attack that sought to disrupt a cornerstone of our democracy: the peaceful transfer of power to a newly elected government.

This mission is all the more important – and optimistic – given the strains on Congress in the wake of January 6.

Given the delay caused by the former President's attempted coup, impeachment, the delayed Senate organizing resolution, and a recess, this week, kicked off by Garland's hearing, has been the first week where the 117th Congress has moved to account for the events of January 6. How Congress responds – and its effect on mid-term elections in 2022 – will have a key role in deciding whether the Republic survives Trump's efforts to steal an election, or whether those events just harbor a decline into white supremacist authoritarianism.

How Congress responds to the events of January 6 is especially critical given disputes about the form of a 9/11 style commission to assess the event. Nancy Pelosi and Mitch McConnell disagree

on key details: whether Democrats should have more representatives on the commission, and how broad the scope will be.

Senate Minority Leader Mitch McConnell slammed House Speaker Nancy Pelosi's draft proposal for a commission to investigate the Jan. 6 attack on the U.S. Capitol, calling it "partisan by design."

The Kentucky Republican said he agrees the siege on the Capitol warrants a "serious and thorough review," but said he thinks Pelosi's proposal falls short of the standard set by the commission established after the Sept. 11, 2001, terrorist attacks, upon which Pelosi said she would model this new panel.

"The 9/11 Commission was intentionally built to be bipartisan, 50-50 bipartisan split of the commissioners was a key feature," McConnell said Wednesday on the Senate floor. "It both helped the effectiveness of the investigation itself, and help give the whole country confidence in its work, and its recommendations."

It's unclear whether the two sides *can* come up with a plan for a 9/11 type commission, both because there's virtually no comity between the two parties and because Republicans have prioritized protecting Trump, their party, and the members of Congress who played a role (with another member implicated yesterday by her spouse's Three Percenter truck decal). I suspect such a commission may have to wait until other events change the GOP's current commitment to Donald Trump.

One thing that might change the GOP's current capture by Trump is the DOJ investigation.

While there are some DOJ decisions that raise questions for me and while it is not yet clear how the courts will finally decide to treat

January 6, Merrick Garland's confirmation will presumably only raise confidence in DOJ's actions. Virtually all members of the Senate Judiciary Committee, for example, praised his role in the prosecution of Timothy McVeigh during his confirmation hearing (see my live tweet here). Unless DOJ really bolloxes key cases – or unless they shy away from witnesses like James Sullivan, Ali Alexander, and Enrique Tarrío, who can tie the insurrection directly to Trump's close associates – I expect the investigation and eventually prosecution of those responsible will make the GOP's continued support of Trump far more toxic (as a few of the GOPers who've been censured for their vote to convict Trump have suggested will happen).

The prosecution of January 6 will be the easy part.

The real question, I think, is how Garland weathers GOP attempts to demand prosecutions that Billy Barr primed them to expect.

For example, numerous members (especially Lindsey Graham and Chuck Grassley, whose staffer Barbara Ledeen and her spouse were implicated in the Russian investigation) demanded that Garland promise to keep John Durham on, citing Barr's promise to keep Mueller on during his confirmation hearing, at a point when Barr had already made public statements about the investigation while admitted he knew fuckall about the actual facts.

Garland repeated, over and over, that he can't make such a commitment until he speaks with Durham. No one knows what Durham continues to pursue that has made his investigation last as long as the Mueller investigation. What is known is that Durham hasn't interviewed key witnesses and his public filings exhibit fundamental misconceptions about the Russian investigation and precisely the kind of bias he purports to be investigating. Garland repeatedly answered that he didn't know of any reason to remove Durham early. But he also noted that precisely what Graham and others are demanding about Page –

some kind of investigation – happened with the Horowitz report. Notably, Garland knew a detail Republicans refuse to acknowledge: that Horowitz’s ongoing investigation into FISA reveals that the problems in the Carter Page Woods file were no different than other FISA applications, and the more general problems may be a pattern as well.

Given Garland’s emphasis on civil rights, I was at least as interested in Republican attempts to undermine such an effort. Most pathetically, John Kennedy engaged in a colloquy about whether systematic racism exists, whether he, himself, can be racist if he doesn’t think he is, “who wins,” as if equality is a zero sum game. Tom Cotton tried to play games about the difference between racial equality and racial equity.

Finally, there will be GOP pressure to either both-sides political violence, equating actions they claim without evidence were perpetuated by Antifa with January 6, or to limit the extent of the prosecution. With regards to the latter, Garland argued that this investigation will proceed like all investigations, working their way up if the evidence dictates it. That is a position utterly consistent with support for prosecuting Trump’s associates, or maybe even Trump.

With regards to efforts to both-sides political violence – which was Trump’s defense to impeachment and has already played a key role in Republican efforts to dodge accountability for their role in January 6 – Garland gave the kind of judicious answer to Josh Hawley that every Democrat should be prepared to offer. The violence in Portland was criminal (and to the extent it was, it was prosecuted). But it was not an attempt to interrupt the processes of government, such as by interrupting trials.

The Republicans have for years successfully pressured DOJ to try to criminalize their political opponents. As DOJ continues its massive investigation into the insurrection, these efforts will grow more urgent.

Merrick Garland will be confirmed without cowing to Republican efforts to equate their own assault on the Constitution with Democratic politics. But such efforts will intensify after he assumes office, particularly if Durham fails to find the crimes that really don't exist and as DOJ gets closer to Trump or members of Congress. DOJ has about 18 months to right itself after Bill Barr's damage, and we shall see how long Garland continues to retain the goodwill of Republicans.