

MERRICK GARLAND POINTS OUT THAT MISDEMEANORS ARE EASY

Merrick Garland's address was, best as I can tell, a useful attempt to stave off the whingers. Some subset of those people have stated that Garland (who provided few details!) had reassured them.

A key point of his speech amounted to addressing the complaint that DOJ is only charging misdemeanants. 145 people, Garland noted, pled early, which is what the news is covering in their reports on the investigation.

In charging the perpetrators, we have followed well-worn prosecutorial practices.

Those who assaulted officers or damaged the Capitol face greater charges.

Those who conspired with others to obstruct the vote count also face greater charges.

Those who did not undertake such conduct have been charged with lesser offenses – particularly if they accepted their responsibility early and cooperated with the investigation.

In the first months of the investigation, approximately 145 defendants pled guilty to misdemeanors, mostly defendants who did not cause injury or damage. Such pleas reflect the facts of those cases and the defendants' acceptance of responsibility. And they help conserve both judicial and prosecutorial resources, so that attention can properly focus on the more serious perpetrators.

In complex cases, initial charges are often less severe than later charged offenses. This is purposeful, as investigators methodically collect and sift through more evidence.

By now, though, we have charged over 325 defendants with felonies, many for assaulting officers and many for corruptly obstructing or attempting to obstruct an official proceeding. Twenty defendants charged with felonies have already pled guilty.

Approximately 40 defendants have been charged with conspiracy to obstruct a congressional proceeding and/or to obstruct law enforcement. In the months ahead, 17 defendants are already scheduled to go to trial for their role in felony conspiracies.

A necessary consequence of the prosecutorial approach of charging less serious offenses first is that courts impose shorter sentences before they impose longer ones.

In recent weeks, however, as judges have sentenced the first defendants convicted of assaults and related violent conduct against officers, we have seen significant sentences that reflect the seriousness of those offenses – both in terms of the injuries they caused and the serious risk they posed to our democratic institutions.

The actions we have taken thus far will not be our last.

The Justice Department remains committed to holding all January 6th perpetrators, at any level, accountable under law – whether they were present that day or were otherwise criminally responsible for the assault on our democracy. We will follow the facts wherever they lead.

Because January 6th was an unprecedented attack on the seat of our democracy, we understand that there is broad public interest in our investigation. We understand that there are questions about how long the investigation will take, and about what exactly we are doing.

Garland also gave the (appropriate) excuse DOJ has been giving for months: that they can't provide details of an ongoing investigation.

Our answer is, and will continue to be, the same answer we would give with respect to any ongoing investigation: as long as it takes and whatever it takes for justice to be done – consistent with the facts and the law.

I understand that this may not be the answer some are looking for. But we will and we must speak through our work. Anything else jeopardizes the viability of our investigations and the civil liberties of our citizens.

But the important message was, effectively, to tell people to stop complaining about misdemeanor arrests because those lay a "foundation" for later arrests.

We build investigations by laying a foundation. We resolve more straightforward cases first because they provide the evidentiary foundation for more complex cases.

Investigating the more overt crimes generates linkages to less overt ones. Overt actors and the evidence they provide can lead us to others who may also have been involved. And that evidence can serve as the foundation for further investigative leads and techniques.

In circumstances like those of January 6th, a full accounting does not suddenly materialize. To ensure that all those criminally responsible are held accountable, we must collect the evidence.

We follow the physical evidence. We follow the digital evidence. We follow the money.

But most important, we follow the facts – not an agenda or an assumption. The facts tell us where to go next.

It was about this time when other journalists covering Jan 6 started teasing me about scripting Garland.

As I have noted, repeatedly, the misdemeanor charges are not the end, but instead are an investigative step in the large investigation. Everyone who entered the Capitol that day committed a crime, which makes it easy to use them as steps in a larger investigation. Here's an explanation of the way misdemeanants are providing evidence in the larger investigation.

MISDEMEANANTS

The most common complaint about the January 6 investigation – from both those following from afar and the judges facing an unprecedented flood of trespassing defendants in their already crowded court rooms – the sheer number of trespassing defendants.

It is true that, in the days after the riot, DOJ arrested the people who most obviously mugged for the cameras.

But in the last six months or so, it seems that DOJ has been more selective about which of the 2,000 – 2,500 people who entered the Capitol they choose to arrest, based off investigative

necessities. After all, in addition to being defendants, these “MAGA Tourists” are also witnesses to more serious crimes. Now that DOJ has set up a steady flow of plea deals for misdemeanors, people are pleading guilty more quickly. With just a few exceptions, the vast majority of those charged or who have pled down to trespassing charges have agreed to a cooperation component (entailing an FBI interview and sharing social media content) as part of their plea deal. And DOJ seems to be arresting the trespassers who, for whatever reason, may be useful “cooperating” witnesses for the larger investigation. I started collecting some of what misdemeanor’ cooperation will yield, but it includes:

Video or photographic evidence

Hard as it may be to understand, there were parts of the riot that were not, for a variety of reasons, well captured by government surveillance footage. And a significant number of misdemeanor defendants seem to be arrested because they can be seen filming with their phones on what surveillance footage does exist, and are known to have traveled to places where such surveillance footage appears to be unavailable or less useful. The government has or seems to be using evidence from other defendants to understand what happened:

- *Under the scaffolding set up for the inauguration*
- *At the scene of Ashli Babbitt’s killing (though this appears to be as much*

to get audio capturing certain defendants as video)

- *In the offices of the Parliamentarian, Jeff Merkley, and Nancy Pelosi*
- *As Kelly Meggs and other Oath Keepers walked down a hallway hunting for Nancy Pelosi*
- *Some of what happened in the Senate, perhaps after Leo Bozell and others rendered the CSPAN cameras ineffective*

In other words, these misdemeanor arrests are necessary building blocks for more serious cases, because they are in possession of evidence against others.

Witness testimony

TV lawyers seem certain that Trump could be charged with incitement, without considering that to charge that, DOJ would first have to collect evidence that people responded to his words by invading the Capitol or even engaging in violence.

That's some of what misdemeanor defendants would be available to testify to given their social media claims and statements of offense. For example, trespasser defendants have described:

- *What went on at events*

on January 5

- *The multiple signs that they were not permitted to enter whatever entrance they did enter, including police lines, broken windows and doors, loud alarms, and tear gas*
- *Directions that people in tactical gear were giving*
- *Their response to Rudy Giuliani and Mo Brooks' calls for violence*
- *Their response to Trump's complaint that Mike Pence had let him down*
- *The actions they took (including breaching the Capitol) after Alex Jones promised they'd get to hear Trump again if they moved to the East front of the Capitol*

Securing the testimony of those purportedly incited by Trump or Rudy or Mo Brooks or Alex Jones is a necessary step in holding them accountable for incitement.

Network information

Some misdemeanor defendants are being arrested because their buddies already were arrested (and sometimes these pleas are "wired," requiring everyone to plead

guilty together). Other misdemeanor defendants are part of an interesting network (including the militias). By arresting them (and often obtaining and exploiting their devices), the government is able to learn more about those with more criminal exposure on January 6.

Misdemeanor plea deals

In its sentencing memo for Jacob Hiles, the guy who otherwise would probably be fighting an obstruction charged if he hadn't helped prosecute Capitol Police Officer Michael Riley, the government **stated** that, "no previously sentenced defendant has provided assistance of the degree provided by the defendant in this case." The comment strongly suggests there are other misdemeanor defendants who have provided such assistance, but they haven't been sentenced yet.

This category is harder to track, because, unless and until such cooperation-driven misdemeanor pleas are publicly discussed in future sentencing memos, we may never learn of them. But there are people – Baked Alaska is one, but by no means the only one, of them – who suggested he might be able to avoid obstruction charges by cooperating with prosecutors (there's no sign, yet, that he has cooperated). We should assume that some of the defendants who've been deferring charges for months on end, only to end up with a misdemeanor plea, cooperated along the way to get that charge. That is, some of the misdemeanor pleas that everyone is complaining about likely reflect significant, completed cooperation with prosecutors, the kind of cooperation without which this prosecution will never move beyond the crime scene.

A key thrust of Garland's speech served, however obliquely, to confirm this.

Every single person who entered the Capitol that day committed a crime. Every single one of them was subject – if there was enough investigative interest – to arrest them.

Those misdemeanor arrests are one step in a process. It's a process that won't move quickly enough for anyone's taste. But it hypothetically could lead to more powerful people being held responsible.

The key takeaway from Garland's speech is, in my opinion, is that misdemeanor arrests are serving the larger investigation.