

# **MAYBE MERRICK GARLAND ALREADY MADE SOME OF THE DECISIONS EVERYONE THINKS ARE PENDING?**

Jack Goldsmith has weighed in on the debate over whether and if so how Trump should be charged in the NYT. He tries to capture three things that Merrick Garland might consider before charging Trump, which include:

- Whether charging Trump would require a Special Counsel to avoid any conflict of interest stemming from Garland's appointment by Joe Biden
- Whether there's enough evidence to convict the former President
- Whether the national interest is served by such a prosecution

It's a worthwhile piece that has, at least, generated some substantive discussion.

## **Garland might face a prosecutorial decision on something other than obstruction**

But I wanted to throw out some things that might change the calculus on these three questions. First, Goldsmith's column is premised on prosecuting Trump for crimes relating to January

6, focusing on 18 USC 1512(c)(2) and 18 USC 371.

The two most frequently mentioned crimes Mr. Trump may have committed are the corrupt obstruction of an official proceeding (the Jan. 6 vote count) and conspiracy to defraud the United States (in working to overturn election results). Many have noted that Mr. Trump can plausibly defend these charges by arguing that he lacked criminal intent because he truly believed that massive voter fraud had taken place.

Mr. Trump would also claim that key elements of his supposedly criminal actions – his interpretations of the law, his pressure on Mr. Pence, his delay in responding to the Capitol breach and more – were exercises of his constitutional prerogatives as chief executive. Mr. Garland would need to assess how these legally powerful claims inform the applicability of criminal laws to Mr. Trump's actions in what would be the first criminal trial of a president. He would also consider the adverse implications of a Trump prosecution for more virtuous future presidents.

I think it's not necessarily the case that the first prosecutorial decision Garland would face for Trump would be for one of these January 6 crimes, nor is it certain that these would be the January 6 charges he would be considering.

For example, Trump has potential criminal exposure that dates to before and after his time in the Presidency, which for various reasons might be easier to charge sooner. Trump has criminal exposure in Georgia for trying to cheat; if he were charged there, it might make it easier to charge him federally with an associated crime (including 18 USC 371). Similarly, other charges in relation to January 6 might be easier to charge, including aiding

and abetting the violence, conspiring in violation of 18 USC 372 to intimidate Pence out of certifying the vote, or wire fraud in conjunction with the way he monetized the Big Lie.

It'd be one thing, after all, to charge Trump for pressuring Pence and another thing to charge him for trying to get Pence killed. The *mens rea* requirements for other charges would not give Trump the same invitation to pretend he really believed he had won. And with regards to Trump's grift, even Laura Ingraham reacted negatively to the evidence of his Big Grift (though that may only be because Republicans are seeking a way to clear the decks for Ron DeSantis).

So the prosecutorial decision that Garland might face would differ considerably based on what crime line prosecutors and US Attorneys were asking for approval to charge.

## **DOJ has already put in place measures to guard the independence of the investigation**

Second, my impression is that Garland would view appointing a Special Counsel not only as unnecessary, but also counterproductive.

I wrote about why it would be counterproductive here. The short version of that is that if Trump committed a crime in conjunction with January 6, he did so in part by conspiring some subset of the 1,000 people who have already been charged or are being investigated now, in an investigation that upwards of 140 prosecutors have worked.

In Merrick Garland's recent speech, he revealed there are 140 prosecutors working on this investigation, half normally assigned to the DC US Attorney's office (that is, people who

now report to Graves), and the other half coming from other units. Some of those units are functional, with the most notable being National Security's Terrorism prosecutors, but also Public Corruption. Far more of them are detailees assigned from different US Attorneys offices. Some of these detailees, working on the simpler cases, are doing 6 month stints, then handing off their cases. Others, including key prosecutors involved in the Proud Boys investigation, appear to be seeing the investigation through. Just as one example, there are three prosecutors on the case against the five Florida men who traveled with Joe Biggs the day of the attack; they are located in Chicago, Brooklyn, and Seattle. Just accounting for the number of prosecutors involved, this investigation is larger than most US Attorneys Offices in this country, and far too large for a Special Counsel to handle.

Then there's this magical notion about convening a grand jury. The existing January 6 investigation is already using somewhere between four and six. Public Corruption prosecutions, like that of Steve Bannon, are using the same grand juries that the militias are being prosecuted through.

If Trump were to be charged with conspiring with any number of those 1,000 people, then you'd want to use one of the grand juries that has already reviewed big chunks of this investigation. In my opinion, you'd want to make sure that Trump's prosecution was charged via the same process that the thousand other alleged criminals involved that day were, in part to make it clear that his was the crime of a violent mob, not a backoffice presidential decision.

And even as it would be counterproductive to

appoint a Special Counsel in this investigation, I think Garland has already taken steps to ensure the independence of the investigation. For starters, while Deputy Attorney General Lisa Monaco's office has kept a very close watch on the investigation (many would say too close a watch), the prosecutorial decisions are being made out of DC US Attorney's Office. And while Garland was confirmed with broad approval, Matthew Graves had no recorded opposition at his confirmation (though Ron Johnson held up the confirmation). No Special Counsel will have any more recorded buy-in from Republicans than the existing team does.

Meanwhile, among the things Garland's DOJ did, at a moment when prosecutors may have realized a Trump prosecution was *possible*, was to set up a framework under which prosecutors could obtain sensitive information on Trump's role in January 6 without any involvement from Joe Biden. The most important of those is the privilege review for January 6-related materials the January 6 Committee deems material to their investigation. It has gone like this:

- Jan 6 Committee makes requests
- The Archives identifies materials responsive to those requests
- Biden reviews those materials and either waives privilege or withholds the information
- Trump sues to withhold the materials but the Supreme Court denies his lawsuit
- The Committee receives the materials

Once materials have been through that process, DOJ could simply serve a warrant on the Archives to obtain the same materials. Neither Trump nor

Biden nor any of the rest of us would know (and this is consistent with things past investigations into Presidents have done, including the Mueller investigation). This process would bypass one of the problems Mueller had investigating Trump, in which Trump waived privilege for the investigation but not for any further use of it.

But DOJ would have various other means to obtain pertinent potentially privileged information, including:

- Using a January 6-specific warrant to obtain materials seized from Rudy Giuliani in response to a warrant approved on Lisa Monaco's first day in office; as I laid out here, the privilege review of those materials included all materials through the date of seizure
- Obtain a warrant to Chapman University for all John Eastman emails that Judge David Carter approved to be turned over to the January 6 Committee
- Review for an obstruction determination all the emails and texts sent over personal accounts that Mark Meadows had originally withheld from the Archives in violation of the Presidential Records Act
- Review the already identified materials tied to the referral for stealing classified information from

## NARA

- Obtain a January 6-specific warrant for materials already obtained from Sidney Powell in the fraud-related investigation into her gift

I wrote more about some of these methods here.

Obtaining sensitive information like this doesn't eliminate the political sensitivities of an Attorney General appointed by Joe Biden making a prosecutorial decision regarding Trump. But it ensures that DOJ can entirely shield the investigation from any Biden involvement.

None of these things make the question easier. But they do suggest that Garland may have already put into place ways of addressing them.