

WHAT LISA MONACO SAID ABOUT CHARGING A HYPOTHETICAL FORMER PRESIDENT

When I was doing my, "What DOJ Was Doing While You Were Wasting Time Whinging on Twitter" post, I was laughing to myself at the number of times that Merrick Garland or Lisa Monaco have said things about the January 6 investigation, including charging high ranking people, only to have pundits claim that DOJ never makes a statement about such things.

On that note, someone linked this appearance Monaco did at University of Chicago in May, where professor Genevieve Lakier asked her a hypothetical about charging the President and Monaco answered at some length.

Lakier: I have one final question. I think it's my responsibility to ask. And again, I know you're not supposed to talk about pending cases, or uncharged cases, you don't want to prosecute anyone in this theater. So I'm just going to ask you a hypothetical. Not about any real person. Just a hypo, like I do every day in the classroom.

Monaco: Okay.

Lakier: Which is, you're the Deputy Attorney General and you have some power to decide what the Department of Justice and there's former high ranking members of the Administration who are no longer in the Administration and there's plenty of suggestive evidence and maybe some Federal judges have found there to be quite a lot of evidence that they have committed crimes. So how do you go about the process of thinking about whether to charge them? How do you talk to the American public about that process? How

do you do it?

Monaco: See, e.g., the last hour.

Lakier: Yeah. It's no different?

Monaco: No!

Lakier: When thinking about charging the highest federal official and a regular person.

Monaco: One set of rules, not matter who's on the side of "the v[ersus]," right? That has to be the right answer. Right, professor, doesn't that have to be the right answer?

Lakier: And so if you have enough evidence to charge – Well, in my class we talk a lot about a thing called prosecutorial discretion.

Monaco: Right.

Lakier: And how much power this gives prosecutors to make difficult choices about where to mobilize resources.

Monaco: Right. That's exactly right. That's exactly right. And so we look to the policy and the process that guides that decision-making, and then, when it's appropriate, if we've decided to bring charges, we'll talk about those charges. Right? We won't talk about the uncharged conduct. And it is important to talk about the work that we're doing. So for instance, I've spent a bunch of time in the last month talking about what we're doing to go after Russian cyberattackers. What we're doing to go back and seize back assets from Russian oligarchs. As our part of the whole of government effort to respond to the horror that's happening in Ukraine. It's important for us to talk about that as a priority, so people understand the steps we are taking in their name to address the aggression that's happening in

Ukraine. That's an example where we're taking steps, we're talking about the work that we're doing, but we're doing it in the context of specific enforcement action that we're taking and where we can point to conduct that we will either prove in court or put before a judge in a forfeiture action.

Lakier: I guess I'll [take a?] follow-up, because maybe I don't see any students at the microphones, but if students have questions please go up to the microphones. Just as a quick follow-up. I mean, thinking sympathetically one might imagine that if you're a prosecutor and you've got lots of cases to charge and there's lots of bad behavior to go after, you might think that the profound political fall-out that might follow going after a particular individual would distract generally from the work of the Department of Justice and in the long run, undermine the people's justice. So I guess I'm wondering, are those kinds of concerns – not with the, oh we don't want to charge this person because of their rank. But we don't want to charge this person because it's going to make our lives of doing the people's justice so much harder. Do those kinds of considerations come in?

Monaco: Look, I'll quote the Attorney General here. "We don't avoid specific cases because they're controversial or they're sensitive. We do avoid making decisions based on purely political or partisan considerations."

Later, after Monaco dodged a question about fraudulent claims of stolen elections based on her past confirmation that DOJ was investigating the fake electors plot, Lakier tried again.

Lakier: Okay, I guess I'll ask a variety

of that question. I did not put [the questioner] up to it but I'm curious about this.

Monaco: Yeah. Yeah.

Lakier: Which is, again, going back to January 6, you say you just follow the law. But there's so many laws. And they're generally quite broadly worded, for example, seditious conspiracy. So again, I just want to know about the trade-off. So so far in the prosecutions though I understand that everything's not over yet, by any means, most of the people who've been charged are those who were directly involved in the events at the Capitol. But we know that there was plenty of organizing, inciting, encouraging. And we might think that many of those who were involved in the organizing, the inciting, the encouraging, perhaps bear more responsibility than those who participated, or equal responsibility. and yet it does raise difficult First Amendment concerns. So when thinking about how high to go, how broadly to go in these prosecutions, when we move beyond the people who entered the Capitol to the people who were involved in the planning, the orchestrating, how do you think about the free speech concerns? And also how do you think about – this excellent question about the prior precedents? How conservative do you play it? Do you worry that if you are going to be conservative, the result is going to be an overly anemic form of justice.

Monaco: So a few points. One, on the question of how broad to go, how high to go, we've been exceptionally clear about this and let me restate it and be clear here. We will follow the facts and the law wherever they go, to hold

perpetrators of January 6 accountable at *any level*. At any level. And we will do so whether or not individuals were present on that day or not. So we've been exceptionally clear and I want to make that clear here for this audience.

When it comes to making judgements about how to make these charging decisions, seditious conspiracy, I mentioned three pleas already, to seditious conspiracy. It won't take a huge law school paper writing exercise to look at the history of the seditious conspiracy statute as the professor here can tell you, it does not – you won't find a lot of cases. So something we take very seriously. And we appropriately, I think, brought these charges, which I'm not going to expound upon beyond what is in the charging papers, except to say that we think it appropriately gets at the gravity of the conduct, and again, we've gotten three guilty pleas to that particularly statute already.

Last point, on how we make these decisions, starting first with the crimes that are in front of us, and then working out from there, and the reasons for that. I think what you see in the charging decisions that we've made, the most serious charges and thus far the most serious sentences have been meted out against those individuals who engaged in assault. The 200+ individuals who I said we've arrested and charged with assaulting officers or members of the news media. Those who engaged in conspiracy acts to obstruct the peaceful transfer of power. Those are the most serious charges and thus far are garnering the most serious charges and ultimately sentences, most likely. Then, where that conduct is not present, either assault or a conspiracy to obstruct the peaceful transfer of power,

you see us using lesser charges for those who entered the Capitol without authorization. Trespassing and the like. It is important to mete out those charges as well, however you're seeing individuals both coming forward and taking responsibility, getting lesser sentences both because they are lesser charges and if they've come forward, accepted responsibility, and in some instances, cooperated with the government, you will see lesser sentences and lesser charges there.