

THE OPPORTUNITY COSTS OF CONSPIRACY THEORIES ABOUT MERRICK GARLAND

You have a choice.

You can spend the next few weeks laying the groundwork for making a big stink about the fact that the aspiring FBI Director tried to help Trump steal classified documents.

Or you can spend it clinging to false claims about Merrick Garland so you can blame *him* for the fact that Trump won reelection rather than blaming the guy directly responsible for preventing a trial (and the guy who'll remain responsible for Trump's license going forward), John Roberts, to say nothing of the failed Democratic consultants and voters themselves.

Sadly, Democrats and lefties – from random people on Bluesky to TV lawyers to the President himself – are choosing the latter path, the path that will guarantee they remain maximally ineffective.

They're rolling out all the tired false claims: Merrick Garland waited before investigating people close to Trump, they claim. According to NYT, Garland approved an effort to follow the money in his first meeting with prosecutors – an effort that turned out to be a dry hole, but nevertheless was precisely the approach that people like Sheldon Whitehouse and Andrew Weissmann demanded.

After being sworn in as attorney general in March 2021, Merrick B. Garland gathered his closest aides to discuss a topic too sensitive to broach in bigger groups: the possibility that evidence from the far-ranging Jan. 6 investigation could quickly lead to former President Donald J. Trump and his

inner circle.

At the time, some in the Justice Department were pushing for the chance to look at ties between pro-Trump rioters who assaulted the Capitol on Jan. 6, 2021, his allies who had camped out at the Willard Hotel, and possibly Mr. Trump himself.

Mr. Garland said he would place no restrictions on their work, even if the “evidence leads to Trump,” according to people with knowledge of several conversations held over his first months in office.

“Follow the connective tissue upward,” said Mr. Garland, adding a directive that would eventually lead to a dead end: “Follow the money.”

In June 2021, they focused on the Willard, precisely the people everyone wanted investigated.

In late June, Mr. Garland, Ms. Monaco and several aides decided they needed to take a dramatic step: creating an independent team, separate from Mr. Cooney’s original group, tasked with investigating the Willard plotters, with no restriction on moving up the ladder to Mr. Trump if the evidence justified it.

They did not want too many people knowing about it. So they gave it a vanilla name: the “Investigations Unit.”

NYT misses – as everyone else has, too – one of the most opportunistic things DOJ did to accelerate the investigation. It used the existing warrant for Rudy’s devices obtained on Lisa Monaco’s first day on the job, April 21, 2021, to do a privilege review of the January 6 content at the same time. The Special Master

prioritized the phone Rudy used on January 6 – 1b05A, which appears throughout Rudy’s privilege log for January 6 related material – and started turning over that material to DOJ starting on November 11, 2021. That effort yielded at least one key document that shows up in Trump’s January 6 indictment but not the January 6 Report, as well as encrypted content not available anywhere else.

DOJ *started* with Rudy, Co-Conspirator 1, the guy through whom the entire fake elector plot got pitched to Trump, and people are whining that DOJ didn’t start at the top of the conspiracy. They did. You just didn’t notice.

Those are not the only things DOJ was doing in 2021. The plodding DOJ IG started investigating Jeffrey Clark on January 25, 2021. DOJ appears to have figured out a way to solve a difficult problem – how to get waivers of Executive Privilege without violating White House contact policies – in July 2021. DOJ sent overt subpoenas pertaining to Co-Conspirator 3, Sidney Powell, in September 2021. DOJ was also working to fill out the encrypted communications the militias exchanged with people like Roger Stone (who first showed up in a court filing in March 2021) and Alex Jones, but it took even longer, over a year, to exploit Enrique Tarrio’s phone, than it did Rudy’s, nine months, and that process necessarily requires working phone by phone.

You can complain that investigations take too much time. You can gripe that investigators did precisely what everyone wanted them to do – follow the money and investigate the Willard. But they were pursuing precisely the angles people were demanding, and long before virtually everyone understands.

That 2021 focus is inconsistent with other conspiracy theories people are floating, too: None of this started until Jack Smith was appointed (or that Jack Smith gave it new life), they say. Nothing happened for two years, they say.

As far as I know, *every phone* that went into the indictment and immunity brief (which added information from Boris Ephsteyn and Mike Roman's phone) was seized before Smith's appointment. The onerous 10-month process of obtaining Executive Privilege waivers for testimony from Trump's top aides, without which you couldn't prove that Trump held the murder weapon – the phone used to send a tweet targeting Mike Pence during the riot – started on June 15, 2022, five months before Smith's appointment. Jack Smith looks prolific to those who don't know those details, because 10 months of hard work finally came to fruition in the months after he was appointed.

The claim nothing happened for two years? The only major investigative step that happened *after* the two-year anniversary of Merrick Garland's confirmation was Mike Pence's testimony.

The claims people are using to blame Merrick Garland that Trump was reelected – all of them!!! – are easily falsifiable. (I'm happy to entertain arguments that Garland's grant of Special Counsel status to David Weiss affected the election, but the decision to keep Weiss was one Biden made.) The single possible action from DOJ (likely either Brad Weinsheimer or Public Integrity) that could have created a delay would be pre-election limits on what prosecutors could including the August 2024 superseding indictment. But it's just as likely that prosecutors believed a narrow superseding indictment was tactically smart.

This is the point, though. *This is not about Merrick Garland*. I'm happy to criticize him for things he did. I've written more critical of his picks and handling of Special Counsels than anyone.

I could give a flying fuck about Merrick Garland.

What I care about is that at a time when we need to start establishing means of accountability

for a second Trump term, much of the Democratic world has chosen instead to wallow in false claims about the Trump investigation in order to make *Garland* a scapegoat, rather than the guy directly responsible, John Roberts. It's classical conspiracy thinking. Something really bad happened (Trump got elected), it's not entirely clear why (because almost no one bothers to learn the details I've laid out here, to say nothing of considering the political work that didn't happen to make Trump own this), and so people simply invent explanations. Every time those explanations get debunked, people double down on the theory – it's *Garland's* fault – rather than reconsidering their chosen explanation.

And those explanations have the effect of distracting attention from Roberts. Rather than talking about how six partisan Justices rewrote the Constitution to give the leader of the GOP a pass on egregious crimes, Democrats are choosing to blame a guy who encouraged prosecutors to follow the money in March 2021.

It's a choice. And it's a choice that guarantees maximal impotence. It's a choice that eschews actual facts (and therefore the means to actually learn what happened). It's a choice that embraces irrational conspiracy thinking (which makes people weak and ripe for manipulation by authoritarians). It's a choice that distracts from Roberts' role.

And there is a better, more urgent, option.

We have every reason to believe we'll get a report from Jack Smith (though I would be unsurprised if Trump tried to enjoin its release). Given David Weiss' great rush to sentence Alexander Smirnov on January 8, I suspect we'll get a report from Weiss too. My guess (given Weiss' January 8 sentencing day) is we may get both reports at the same time – maybe January 10 or so. *That's a wildarse guess.*

And so rather than in wallowing in conspiracy theories, Democrats would do well to prepare a

messaging plan for those reports.

I expect David Weiss' report to smear up not just Hunter but also Joe Biden, for pardoning Hunter. I expect he'll suggest that Kevin Morris' support of Hunter (a loan Hunter would have had to pay back after the election, but which he had no means to pay) has amounted to a massive campaign contribution to Joe. I wouldn't even rule out Weiss pushing for Republicans to impeach Biden over that.

I spoke with Harry Litman back in November about what a Jack Smith report might have. Remember, his mandate is to describe both charging decisions (the two indictments he filed) but also declination decisions (the people and crimes he didn't charge).

That means the report – if Trump doesn't thwart its release – should answer a lot of questions that have people spun into conspiracy theories. Why didn't Smith charge all of Trump's co-conspirators (probably because the Mueller investigation showed how futile it would be to charge anyone before Trump, which the Florida prosecution seems to confirm)? Why didn't Smith charge any members of Congress (undoubtedly because their actions would be covered by Speech and Debate, as confirmed by a DC Circuit opinion written about the exploitation of Scott Perry's phone)? It likely will even provide more fulsome descriptions of the documents Trump refused to give back.

But there are three possible or likely aspects to the report that may become important for the confirmation of Trump's appointees (which is one reason he might try to enjoin the release) and the pardons he plans shortly thereafter.

First, prosecutors had investigated how Trump used money raised on a promise to spend on election integrity to instead pay everyone off. That's how he paid Deputy Attorney General nominee Todd Blanche, Solicitor General nominee John Sauer, and PADAG Emil Bove (Bove does not need Senate confirmation). Trump's incoming

Chief of Staff (who also does not need Senate confirmation), Susie Wiles, managed much of that process. DOJ did not charge this scheme, but we may get an explanation for what it entailed and why Smith didn't charge it. While Blanche, et al, have no legal exposure themselves in the way Trump paid them, if we learned more about it, it would further highlight the wildly inappropriate conflicts all these men would have in running DOJ. That is, there's the distinct possibility that a report would provide tangible explanation for why Blanche and Sauer have grave conflicts.

Far more important is the point I made here. FBI Director nominee Kash Patel may figure in both sides of Jack Smith's report, the January 6 and the documents side. With Christopher Miller, Kash engaged in what Barry Loudermilk treated as insubordination by refusing Trump's order to get him 10,000 troops for January 6; this post talked about how that might be a more productive way to make Loudermilk's Liz Cheney referral a problem for Kash. That's a way to raise distrust of Kash among Republicans.

But Kash's involvement in the other side of the investigation (which appears at 19:00 in the video above) is more important. A key prong of the investigation into Trump's treatment of the documents found at Mar-a-Lago involve disproving Kash's public claim – made just before DOJ subpoenaed the documents – that Trump had declassified everything.

Patel did not want to get into what the specific documents were, predicting claims from the left that he was disclosing "classified" material, but said, "It's information that Trump felt spoke to matters regarding everything from Russiagate to the Ukraine impeachment fiasco to major national security matters of great public importance – anything the president felt the American people had a right to know is in there and more."

Someone whose potty mouth resembles Eric Herschmann (Person 16) debunked this claim just before Patel (Person 24) testified.

According to Per. 16, there was no standing declassification order. The first time Per. 16 heard that FPOTUS had "declassified everything" was when it appeared in the media in 2022. Per. 16 had never heard that while in the White House. Per. 16 believed no one in the White House, to include Per. 44 and , or any of , would testify that there was such an order, with the exception of possibly Per. 24.

Per. 16 believed Per. 24 was pushing the "declassified everything" line of thinking. Per. 16 saw Per. 24 at the White House regularly. Per. 24 bragged a lot about Per. 24 access while working for U.S. Congressman , who was how Per. 24 first got into the White House. Per. 24 knew a lot of people. Per. 24 was friendly with , and , at the White House. Per. 16 thought Per. 24 was motivated "to move up in the world" and would brag about the "unbelievable things" Per. 24 had seen.

Per. 16 interacted with Per. 24 since January 2021 "maybe once." They did not leave on the best of terms. Per. 16 explained at one point Per. 24 wanted the position of . Per. 16 told Per. 24 he was not qualified for that job and relayed the same to Per. 24 did not obtain the position. Per. 16 explained Per. 24 was "unhinged" and "crazy" but at one point was under real consideration for the job.

What Kash said in his immunized November 2022 testimony didn't show up in either of the Florida indictments (and we only got reports of what he thought he'd say beforehand). We don't know whether he backed off his unsworn comments. We don't know whether he gave testimony debunked by five other people. We don't know how much Kash had to say about efforts to take the Crossfire Hurricane binder home.

But all that is highly likely to show up in a report.

If we get the report, it is highly likely that we'll get evidence that the aspiring FBI Director lied to help Trump take classified documents home from the White House.

If we get the report, it is highly likely that, shortly before his confirmation process, we'll get evidence that the aspiring FBI Director helped Trump commit a crime.

Now, the Republicans don't care. That's not going to affect their willingness to rubber stamp Kash's nomination. But if Democrats do their job well, then they can use this information to dramatically raise the costs of the Kash confirmation.

Or Democrats can continue to wallow in conspiracy theories about Merrick Garland.

Finally, I think it highly likely a report – if we get one – will talk about how Trump's call to the rally motivated certain key rioters to conspire to obstruct the election. We'll learn about how his exhortation to Stand Back and Stand By had an immediate effect on Proud Boy membership. We're likely to learn about how Danny Rodriguez immediately responded to Trump's targeting of Mike Pence in his January 6 speech to make slitting motion at his throat, naming Joe Biden, and then proceeded to almost murder Michael Fanone, pretty close to meeting the Brandenburg definition of incitement. We're likely to learn how the guys who helped breach the East door, then broke into the Senate gallery, then rappelled down to the Senate floor and let others in believed that Trump ordered them to come to DC on December 19, 2020. Trump has been desperate to prevent just this evidence from being submitted at trial.

But it will also raise the stakes of his pardons. If this information comes out, then it will make it clear that Trump isn't just pardoning his fans, he's pardoning people who believed they were responding to his orders to attack Congress.

Democrats can spend the time between now and confirmation hearings making ever-evolving conspiracy theories about Merrick Garland, something that makes them as weak as possible, something that makes them more susceptible to authoritarian manipulation.

Or they can spend the time making it clear just how corrupt Trump's appointments and pardons are.

Democrats seem to be struggling even to chew gum without faceplanting. They can't do both.

It's just my opinion. But I think Democrats would be far better served focusing on the facts that we do know from the twin investigations of Trump rather than inventing false claims about why they didn't go to trial. This is the work Democrats didn't do in 2023, when Trump was

making unchallenged false claims that these investigations were witch hunts. The failure to do that work is a more direct explanation why the indictments didn't disqualify him with voters than anything Merrick Garland did or didn't do. And until Democrats do this work, they'll be politically sunk.