

# NEW REPUBLIC

## Will Merrick Garland Defend Democracy?

Mark Hosenball

June 13<sup>th</sup>, 2022

Eric Holder, the former frontline prosecutor and local judge who served as Barack Obama's first attorney general, was never a fan of Donald Trump, but he responded cautiously in 2019 when asked whether Trump should face prosecution even after he left office. "I think there is a potential cost to the nation by putting on trial a former president, and that ought to at least be a part of the calculus that goes into the determination that has to be made by the next attorney general," Holder told David Axelrod in a [CNN interview](#). But in the wake of the January 6 riot and related investigations, Holder's view appears to have significantly hardened. Appearing in early May on CBS News' *Face the Nation*, Holder offered a tougher assessment: "At some point, people at the Justice Department, perhaps that prosecutor in Atlanta, are going to have to make a determination about whether or not they want to indict Donald Trump." Asked by interviewer Margaret Brennan if he would issue such a criminal indictment, Holder said he thought available evidence would justify that. "My initial thought was not to indict the former president out of concern of what—how divisive it would be. But given what we have learned, I think that he probably has to be held accountable."

Many Trump opponents, including key Democratic politicians, have for months been calling for the Justice Department, under the leadership of Attorney General and former federal appeals court judge Merrick Garland, not only to file harsher charges against a wider range of alleged January 6 riot participants but to prosecute reputed riot organizers. Possible targets range, Trump critics and some legal experts say, from internet activist Ali Alexander and veteran Republican operative Roger Stone to right-wing law professor John Eastman, author of the infamous memo laying out how Republicans could overturn the presidential election results, to Trump White House aides to, most notably, Trump himself. Former White House chief of staff Mark Meadows is of particular interest. Some witnesses are known to have testified to the House committee investigating the January 6 riot that he was directly warned about possible violence. Cassidy Hutchinson, a Trump White House assistant, said that in early January 2021 "there were concerns brought forward to Mr. Meadows" indicating "that there could be violence," but added that it was unclear to her if Meadows "perceived them as genuine concerns." *Rolling Stone* reported that two anonymous sources told its reporter about how they had participated in "dozens" of briefings in the days before pro-Trump rioters attacked the Capitol. One source told the magazine that Meadows was totally clued in on such discussions. "Meadows was 100 percent made aware of what was going on," the source said.

How much Trump himself knew remains unclear. At the “Stop the Steal” rally near the White House not long before the start of the riot, Trump told the crowd: “We’re going to walk down to the Capitol, and we’re going to cheer on our brave senators and congressmen and women, and we’re probably not going to be cheering so much for some of them, because you’ll never take back our country with weakness. You have to show strength, and you have to be strong.” Some information about what he was up to privately, on January 6 and before, has been leaked, including the rather stunning revelation by *The New York Times* in late May that he reacted approvingly as he watched the rioters chant “Hang Mike Pence!” but not enough to draw firm conclusions on whether he committed crimes.

Jonathan Winer, a former congressional investigator and State Department official, said in an interview that evidence is building that the Trump White House discussed calling out the National Guard to back Trump and his supporters as they sought to prevent the certification of the election for Joe Biden. In January, Winer wrote a widely circulated article laying out the case for prosecuting Trump, citing specific sections of the U.S. Code under which a prosecution could potentially be made (18 U.S. Code § 242, “deprivation of rights under color of law”). In Winer’s view, the riot and efforts by Trump and his entourage to manipulate politics and the law to keep Trump in office “were inextricably linked.” There was a “plot by Trump and Meadows to overturn the election,” he said. At present, however, Winer and other current and former officials following investigations acknowledge, Justice Department interest in these issues is unclear at best.

The political calendar is inexorably moving forward. If Republicans, still under strong Trump influence, recapture control of the House in this year’s congressional elections, they will likely shut down the January 6 investigation committee. Instead, a Republican House majority would almost certainly redirect investigative resources and attention to scandals they believe could damage Democrats in general and the presidential family in particular, such as the dubious business dealings of Hunter Biden. The possibility, if not likelihood, of a Republican takeover in the House—and maybe the Senate, too—has already fueled speculation inside law enforcement and political circles that any potential move by Garland’s Justice Department to file January 6–related criminal charges against Trump himself and/or his family and top aides would have to be undertaken before the end of 2022. Some recent public statements and news revelations suggest that the department has definitely begun to look into issues such as the inspiration and origins of the January 6 riots and into alleged efforts in multiple states by Trump supporters to replace legitimate Biden electors with fraudulent pro-Trump electoral slates. But such investigations appear to be in relatively early stages, and it is unclear how advanced they will be by the November elections.

In this evolving drama, the individual who will be principal screenwriter and director is Merrick Garland. Officials and legal experts observing how the investigation is unfolding are wondering how dramatic the final act will be. Maybe Garland and his team are moving forward toward Trump and other prominent possible targets with “exceptional secrecy,” said Andrew Kent, a national security expert at Fordham University School of Law. But at present, Kent said, “I’m reading the absence of tea leaves” regarding how high up the investigation will go. A former senior Justice Department official said that until recent news reports suggested a significant widening of the department’s investigation, “I thought they had decided not to go

after Trump.” The former official said that if prosecutors were really seriously going after Trump, there ought to be more public indication they were calling relevant witnesses before grand juries.

A former U.S. official in close contact with key Trump critics in Congress said that the possibility of criminal charges against Trump cannot be ruled out. “But on the other hand, we don’t know,” the former official said. “It’s a black box.” This source also told TNR that top legal aides in the House had spoken of “a priestlike vow of silence” Garland had imposed on the department, telling employees not to reveal any details of its actions to House staff. That is, the department—both “Main Justice,” as the department is referred to by insiders, and all U.S. attorney’s offices—receives evidence from House investigators, but it tells them nothing about its activities. The source added, by the way, that this is probably a good thing, because it protects the department from charges of politicization.

It is this last point, the depoliticization of the department, that has been a key Garland priority. After what Bill Barr and Donald Trump did to Justice, it’s hard to blame him, and it’s an admirable position. But given that a prosecution of Trump will be instantly politicized by the right, does that mean that Garland could back away from such a move, even if justified by the facts, because it would seem “political”? Garland could find himself restoring independence and integrity to the Justice Department—while simultaneously allowing the subversion of democracy by a former president.

### **Laying the Groundwork**

The case for the possible prosecution of Trump and top aides can be traced back to the days shortly after the riot. Congressional committees began serious investigations of the January 6 events and the background to them at that time. In a report issued in June 2021, two (Democrat-led) Senate panels, the Rules and Administration and Homeland Security and Governmental Affairs committees, said they found “critical breakdowns” in intelligence operations, including information collection and sharing, by the Department of Homeland Security and FBI. The committees found that spy agencies underestimated the seriousness and nature of the threat to the Capitol on January 6, and that the FBI did not share relevant information it had with police guarding the Capitol.

A report by the Senate Judiciary Committee published last October widened the focus to Trump and his political allies—and directly raised the issue of whether Trump himself violated laws. The committee found that the country was “only a half-step away from a full-blown constitutional crisis” when Trump and his entourage “threatened a wholesale takeover of the Department of Justice.” The Judiciary report included an account of how Jeffrey Clark, acting head of the Justice Department’s Civil Division, whom Trump at one critical point tried to install as acting attorney general, tried to pressure other DOJ officials to overturn the election results. A principal Judiciary Committee finding was that Trump repeatedly pressured DOJ leadership “to endorse his false claims that the election was stolen and to assist his efforts to overturn the election results.”

Beginning on December 14, the day former Attorney General William Barr announced his resignation, and continuing almost until the January 6 insurrection, Trump directly and repeatedly asked DOJ's acting leadership to initiate investigations, file lawsuits on his behalf, and publicly declare the 2020 election "corrupt," the committee said. Documents and testimony confirmed that Jeffrey Rosen, Barr's successor as acting attorney general, and in some cases other senior DOJ leaders participated in several calls and meetings where Trump directly raised discredited claims of election fraud and asked why DOJ was not doing more to address them. The committee said these contacts included multiple calls between Trump and Rosen and Trump and Richard Donoghue, an associate deputy attorney general, and Oval Office meetings that included Rosen and Donoghue on December 31 and January 3. The committee declared, "In attempting to enlist DOJ for personal, political purposes in an effort to maintain his hold on the White House, Trump grossly abused the power of the presidency."

According to the committee the House set up to investigate the insurrection and its origins, Trump engaged in detailed discussions with Pence and others about what powers the vice president might have to alter the election results. The committee notes that at 1:00 a.m. on January 6, Trump tweeted: "If Vice President @Mike\_Pence comes through for us, we will win the Presidency.... Mike can send it back." Seven hours later, Trump tweeted: "States want to correct their votes ... All Mike Pence has to do is send them back to the States, and we win. Do it Mike, this is a time for extreme courage!" The committee said Trump called Pence personally to pressure him to act.

"It's clear there was a coordinated attempt to weaponize the Justice Department to subvert the election. Investigators need to examine every aspect of that effort, from pressuring Georgia legislators and election officials to scheming to install Jeffrey Clark as Attorney General. This has to be a top priority," Senator Sheldon Whitehouse, the Rhode Island Democrat who is a senior Judiciary Committee member, said in an email.

The Judiciary Committee's report didn't aim only at Trump. It found that "Meadows asked acting Attorney General Rosen to initiate election fraud investigations on multiple occasions, violating long standing restrictions on White House-DOJ communications about specific" cases under investigation. The committee said "Meadows asked Rosen to have DOJ investigate at least four categories of false election fraud claims that Trump and his allies were pushing." Meadows asked Rosen to have the DOJ look into "various discredited claims of election fraud in Georgia that the Trump campaign was simultaneously advancing in a lawsuit that the Georgia Supreme Court had refused to hear on an expedited basis." Meadows also asked the DOJ to "investigate a series of claims of election fraud in New Mexico that had been widely refuted," including a claim that machines built by Dominion Voting Systems produced late-night "vote dumps" for Democratic candidates.

Meanwhile, in contrast to the Judiciary report, for months after the riot, FBI and prosecutors' analyses of what happened on January 6 focused almost exclusively on the riot and its direct participants. In a story that attracted angry responses from some Trump critics, a colleague and I reported for Reuters on August 20 of last year that five current and former law enforcement officials—very well placed—told us that FBI investigators at that point had found "scant evidence that the Jan. 6 attack on the U.S. Capitol was the result of an organized plot to

overturn the presidential election result.” The FBI still believed the violence was not centrally coordinated by far-right groups like the Oath Keepers, Proud Boys, and Three Percenters, or by prominent Trump aides or supporters.

However aggressively congressional investigations proceed, most notably by the House select committee, it remains unclear how closely Garland’s Justice Department will follow. Recent developments indicate that the department has significantly widened the scope of January 6–related investigations and is examining issues beyond the riot itself. One key move earlier this year signaling that Justice was toughening its approach was a federal grand jury indictment issued on January 12 featuring “sedition conspiracy” charges against Stewart Rhodes, the leader of the Oath Keepers, and 10 other members of the group. The first seditious conspiracy charges were filed a few months after Matthew Olsen, a former director of the National Counterterrorism Center, was confirmed as assistant attorney general in charge of the Justice Department’s National Security Division. (It is not clear what role Olsen might have played in determining how the Oath Keepers case should move forward; Olsen did not respond to requests for comment.)

Another signal of the department’s seriousness came in late January, shortly after the seditious conspiracy indictment was issued, when Lisa Monaco, Garland’s deputy attorney general, confirmed in a CNN interview that the Justice Department was investigating slates of electors assembled by Trump supporters that declared Trump the winner in seven key states whose governments had already certified Biden as winner of their electoral votes. Recent federal court rulings also appeared to openly encourage a possible prosecution of Trump. In late February, Amit Mehta, one of the D.C. federal judges hearing January 6 cases, ruled that Trump could be held civilly liable for egging on participants in the Capitol riot. Then, in an explosive late March opinion ordering Eastman to turn over key emails to House investigators, David Carter, a federal judge in California, found that Trump “more likely than not ... corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021.” He wrote: “The illegality of the plan was obvious.”

Also in late March, reports began to surface that the Justice Department focus had expanded to include persons around Trump, and possibly even Trump himself. *The Washington Post* reported that the criminal investigation had expanded to examine “preparations” for January 6, including the issuing of subpoenas to unidentified “officials in former President Donald Trump’s orbit” who assisted in planning, funding, and executing the rally that preceded the Capitol riot. *The New York Times* also reported that the expanded Justice Department investigation included the involvement of government officials in efforts by Trump to “obstruct the certification of President Biden’s Electoral College victory” as well as alleged efforts by Trump supporters to put forward bogus slates of electors. The *Times* also said it had seen a subpoena indicating prosecutors were seeking information on people “classified as VIP attendees” who were present at Trump’s pre-riot rally. Then, in early May, the *Times* reported that the Justice Department had opened a grand jury investigation into possible mishandling of classified documents by Trump as he brought boxes of official materials with him when he left the White House for Mar-a-Lago.

## **But Was It Illegal?**

But egregious as Trump's behavior was, the question remains whether it was illegal—especially given that Trump was president at the time, and U.S. jurisprudence is ambiguous at best on how strictly laws apply to sitting presidents. A story involving the Oath Keepers' Rhodes, the hard-right anti-government figure who wrote after Biden's victory that the United States now faced “a moment of peril as great, or greater, as what General Washington and his men faced in 1776,” provides a tentative window on White House contacts with rioters.

Rhodes, who was indicted in January on seditious conspiracy charges, was in a suite at Washington's Phoenix Park Hotel on January 6 when, prosecutors allege, he “called an individual over speaker phone.” The feds said that another Oath Keepers official heard Rhodes “repeatedly implore” the unidentified person he was talking to “to tell President Trump to call upon groups like the Oath Keepers to forcibly oppose the transfer of power.” Prosecutors said the person Rhodes was talking to “denied Rhodes's request to speak directly with President Trump,” and that, after the call ended, Rhodes told his cohorts, “I just want to fight.”

So far, Rhodes's post-riot discussion with someone who he evidently believed was close to Trump is the only direct evidence January 6 investigators have released that begins to suggest some kind of dealings between riot leaders and the Trump White House, and evidence of the extent of such contacts at present remains murky at best.

Aside from the question of what laws Trump may have broken, there's also a potential snag for Justice around the very idea of seditious conspiracy charges. Although it has not so far become a major subject of courtroom argument in the Oath Keepers cases, the limited legal history of the modern use of seditious conspiracy charges by federal prosecutors has raised questions about the difficulty of using this law. In 1954, prosecutors successfully filed such charges against four militants demanding independence from the United States for Puerto Rico who shot up the House of Representatives, wounding several members of Congress. The shooters and more than a dozen co-conspirators were subsequently convicted of seditious conspiracy, and the leader of the group that staged the attack spent 35 years in prison. Prosecutors also obtained seditious conspiracy convictions against Omar Abdel-Rahman, the radical Egyptian imam known as the Blind Sheikh, and nine others in 1995 for allegedly plotting to blow up bridges, tunnels, and other targets in New York City.

The most recent attempt before January 6 by prosecutors to bring seditious conspiracy charges targeted nine members of a militia group called the Hutaree. Based in Michigan's Lenawee County, the Hutaree claimed to be Christian warriors whose website vowed that the group “will one day see its enemy and meet him on the battlefield if so God wills it.” But a judge ultimately threw out the sedition charges when the case came to trial in 2012, ruling that prosecutors had produced little if any evidence that the defendants had put together detailed plans for an anti-government rebellion. The judge also found that the prosecution case relied too heavily on anti-authority diatribes that the judge found were protected free speech under the First Amendment. Ultimately, three Hutaree members pleaded guilty to weapons charges.

Finally, there is the case of the four Michigan militia members accused of conspiring to kidnap Governor Gretchen Whitmer. Though they did not face charges explicitly including seditious conspiracy, in late April a federal court jury in Michigan acquitted two of the men. The judge

declared a mistrial for the two additional defendants in the case. The four suspects were alleged by prosecutors to have become enraged by Covid-19 restrictions Whitmer instituted and to have possible connections to a loosely organized far-right group known as the Boogaloo movement.

A former senior law enforcement official said that the Michigan acquittals could signal problems that prosecutors of January 6 cases might encounter when seeking convictions in cases that go to trial. Prosecuting any seditious conspiracy case can be difficult, the former official said, because they are hard to sell to juries. For that reason, federal prosecutors are “reluctant to go forward on a case that’s going to be picked apart.”

### **What Will Garland Do?**

What, then, will Garland decide to do? Trump critics and many legal experts say that sufficient evidence exists that prosecutors could use to build a criminal case not only against his acolytes but against Trump himself. “There is no accountability” if the department shrinks from prosecuting Trump, said University of Baltimore law professor Kimberly Wehle. “I think Merrick Garland has to understand the massive implications of not prosecuting Donald Trump....” No prosecution of Trump, Wehle said, would be an “invitation to future presidents to do whatever you want. The Constitution is about pushing back against people’s worst intent to amass and abuse power.”

Michael German, a former FBI agent now affiliated with the Brennan Center for Justice, expressed concern that “so many of the initial charges” that prosecutors have filed against January 6 defendants so far have been “for relatively minor misconduct.” German noted, however, that “a lot” of the Justice Department’s strategy regarding what kinds of charges should be brought may well have been made before Garland took charge of the department in the wake of Biden’s inauguration. In indicting the Proud Boys’ Enrique Tarrío in March, German said, prosecutors “didn’t really understand how coordinated the attack was.” (In June, the Justice Department added a charge of seditious conspiracy to the indictment against Tarrío and four other Proud Boys members.) The Justice Department was “looking at January 6 as a stand-alone event,” German said, rather than looking more broadly at a “network that was sending violent people across the country to engage in violence.” Federal investigators “have a lot of capacity to go after” anti-government plotters “who operate across state lines,” German said. Historically, however, federal agencies “to this day” don’t collect enough information on the activity of white supremacist leaders and groups. Prosecutors have been “late to recognize how much coordination” January 6 participants engaged in during the days and weeks before the event, German said.

Other legal experts and former officials nonetheless question whether the FBI and Justice Department will ever pull together enough evidence to satisfy prosecutors—and Garland in particular—that a prosecution of Trump is viable. A former senior law enforcement official,

who asked not to be named when discussing the January 6 investigation, said that, given the historical problems federal prosecutors had with seditious conspiracy law in the Hutaree case, some investigators are concerned that trying to use this law not only against rioters but to somehow expand its use to persons allegedly involved in inciting the riot or trying to interfere in certification of the election results would be unlikely to prove effective.

The reason? The First Amendment. Protection for free speech is a key roadblock for successful prosecution of such charges, a former senior law enforcement official said. Josh Blackman, a professor at the South Texas College of Law Houston, and adjunct scholar at the libertarian Cato Institute, said he had “yet to see any” indication that prosecutors are “going to try to indict Trump.” Many of those who walked into the Capitol “were committing a trespass—clearly a crime,” Blackman said. But basing a criminal prosecution against alleged organizers or persons who inspired such activity would rely on “an untested legal theory” that would be “very, very risky,” Blackman said.

Michael German, a former FBI agent now affiliated with the Brennan Center for Justice, expressed concern that “so many of the initial charges” that prosecutors have filed against January 6 defendants so far have been “for relatively minor misconduct.” German noted, however, that “a lot” of the Justice Department’s strategy regarding what kinds of charges should be brought may well have been made before Garland took charge of the department in the wake of Biden’s inauguration. In indicting the Proud Boys’ Enrique Tarrío in March, German said, prosecutors “didn’t really understand how coordinated the attack was.” (In June, the Justice Department added a charge of seditious conspiracy to the indictment against Tarrío and four other Proud Boys members.) The Justice Department was “looking at January 6 as a stand-alone event,” German said, rather than looking more broadly at a “network that was sending violent people across the country to engage in violence.” Federal investigators “have a lot of capacity to go after” anti-government plotters “who operate across state lines,” German said. Historically, however, federal agencies “to this day” don’t collect enough information on the activity of white supremacist leaders and groups. Prosecutors have been “late to recognize how much coordination” January 6 participants engaged in during the days and weeks before the event, German said.

Other legal experts and former officials nonetheless question whether the FBI and Justice Department will ever pull together enough evidence to satisfy prosecutors—and Garland in particular—that a prosecution of Trump is viable. A former senior law enforcement official, who asked not to be named when discussing the January 6 investigation, said that, given the historical problems federal prosecutors had with seditious conspiracy law in the Hutaree case, some investigators are concerned that trying to use this law not only against rioters but to somehow expand its use to persons allegedly involved in inciting the riot or trying to interfere in certification of the election results would be unlikely to prove effective.

Other legal experts, however, said that Garland and his team must seriously consider criminal charges against Trump, his associates, and members of his legal team. Harvard Law professor Laurence Tribe, a sharp Trump critic, told me prosecutors in both Georgia, where a special grand jury investigating alleged 2020 election interference reportedly began work in early May, and in Washington, where a grand jury has been investigating the riot and the activities



of Trump and his associates for some time, “should methodically build a case that draws on the mountain of documentary and testimonial evidence already available (and fills in gaps with new subpoenaed documents and testimony, both voluntary and pursuant to subpoena) to paint a detailed, blow-by-blow account of how the former president began, even before the November 2020 election, to suggest that any result other than one in which he vanquished his Democratic opponent would necessarily result either from fraud or from breaking the rules set by the key state legislatures.”

Tribe said the evidence shows Trump then “proceeded, as the results pointing to a clear win for Biden came in and were certified, to conspire with his inner circle and a group of corrupt lawyers to pressure federal and state officials into fabricating fake election results and then fake electoral certificates in an audacious effort to strong-arm Vice President Mike Pence into stealing the election for Trump or at least taking illegal steps to toss the electoral count process into the House of Representatives, where a pro-Trump outcome was assured by the one-state-one-vote rule; and ... conspired with those and other individuals and funders to organize a march on the Capitol knowing that it would turn into a violent insurrection in hopes that the chaos and terror would ultimately lead to installing Trump as the incoming president in time for the inauguration despite knowing that he had lost a free and fair election.”

“The Justice Department needs to pursue every lead to uncover those responsible for launching the events of January 6,” Senator Whitehouse added. “As I told the Attorney General at the very beginning of his tenure, the investigation must move beyond the trespassers and rioters at the Capitol to the funders and organizers who still elude scrutiny. I hope the Attorney General is moving swiftly.”

### **Garland’s Caution—and His Democracy Dilemma**

Caution and careful consideration of evidence and precedent are trademarks of Garland’s approach to the law. His dedication to the law and public service is beyond question: In 1989, shortly after joining a private law firm, Garland decided to chuck it and took a serious pay cut to join the U.S. attorney’s office in the District of Columbia, where he prosecuted corruption, drug trafficking, and fraud cases. As a judge on the U.S. Court of Appeals for the D.C. Circuit, Garland often sided with liberal-leaning fellow judges in controversial cases. In a 2010 case, Garland voted with a unanimous court to invalidate limits on contributions to independent political groups. In 2003, he wrote the court’s ruling validating Labor Department complaints against a company that exposed miners to coal dust. In his unsuccessful effort to put Garland on the Supreme Court, Obama promoted him as a reasonable moderate, and liberals and conservatives both found cause to moan about his judicial record—right-wingers because he had voted to hear a gun rights case, and liberals because of his support for a majority appeals court ruling that declared federal courts lacked the jurisdiction to hear cases disputing the legality of detaining alleged terrorists at Guantánamo Bay.

One case that Garland pursued aggressively as a prosecutor before joining the appeals court was the prosecution of Theodore Kaczynski, the mentally disturbed former math professor known as the Unabomber, who committed 16 mail bombings that killed three and injured dozens more over a period of nearly two decades. While a prosecutor, Garland led a

Unabomber task force that at one point asked *The Washington Post* or *The New York Times* to publish Kaczynski's 35,000-word manifesto, which helped lead to Kaczynski's arrest, though critics allege the main reason Kaczynski was arrested was that his brother and sister-in-law recognized the writing in the manifesto and contacted the feds.

Garland also played a key role in the investigation of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, traveling to the crime scene to supervise the case against alleged bombing mastermind Timothy McVeigh. Impressively, McVeigh was caught within hours of the attack that killed 168 people, and he was ultimately executed. However, some critics charge that there were limits on how far Garland was willing to dig into the backstory of the attack, and into contacts McVeigh had with organized far-right militant factions. Critics said Garland avoided digging into alleged contacts McVeigh had with foreign neo-Nazis and domestic militants based at an Oklahoma camp known as Elohim City. The critics charge that Garland sealed key documents and framed the OKC investigation as a "lone gunman" scenario.

In his first year-plus as Biden's attorney general, Garland has regularly pursued policies and made decisions consistent with his reputation for judicial caution. In one controversial decision nearly a year ago, Garland's department said it would continue defending Trump against legal efforts by the writer E. Jean Carroll to go after Trump over defamation. Carroll claimed that she was raped by Trump in a department store in the mid-1990s. Trump denied this, asserting that Carroll was "not [his] type." Carroll sued Trump for defamation. But Barr's Justice Department argued that Trump was entitled to protection under an obscure law granting immunity against civil litigation to federal employees under certain circumstances, and Garland's Justice Department said it would continue to defend Trump. Last year, the department also persuaded U.S. District Judge Amy Berman Jackson to allow it to maintain the secrecy of a section of a memo from advisers to Barr outlining legal arguments supporting a March 2019 decision by Barr not to charge Trump with obstruction of justice.

In other areas, Garland's department has been more assertive. Civil rights enforcement has been a sharp focus, with the attorney general pushing forward with federal investigations of killing of African Americans such as George Floyd and of alleged racism in multiple police departments, including Minneapolis, Louisville, and Phoenix. The department also filed lawsuits against the states of Texas and Georgia alleging that new voter registration laws were discriminatory. Following a plea deal the DOJ made with two of the three white men convicted of the murder of Black Georgia jogger Ahmaud Arbery, Garland publicly appeared to tear up when asked about the case.

Recent public declarations from Garland, whose spokespeople did not respond to multiple requests for interviews with him or his top aides, regarding where the investigation is headed have been portentous, but also ambiguous. In a publicly broadcast speech to Justice Department officials before the one-year anniversary of the riot, Garland explicitly promised: "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." After listing the types of

persons who have been threatened with violence by far-right activists, ranging from election officials to airline crews, journalists, teachers, elected officials, lawmakers, police, prosecutors, and judges, Garland noted that there is “no First Amendment right to unlawfully threaten to harm or kill someone.”

The core dilemma that confronts Garland is this: He came in wanting to depoliticize the department. A laudable goal, after the way Barr misled Americans about the Mueller report and all the moves Trump made trying to enlist Justice in stealing the election. Depoliticizing the department equals upholding the rule of law equals preserving democracy. Yet, on the other hand, does depoliticization mean don't do something that looks to some as and will certainly be accused of being “partisan”? Even if a former president broke the law? Hence, Garland's dilemma. How does he best defend democracy? By keeping the department out of partisan entanglements or by following the law wherever it goes?

Said Laurence Tribe: “If Garland's efforts to depoliticize the department ultimately lead him to put the former president and his inner circle above the law by never approving the indictment of Trump and his co-conspirators in the attempted coup and the insurrection that followed, then no doubt Garland would have undermined his own efforts by allowing the subversion of democracy. But I have not yet concluded that this is where Garland's methodical approach will lead him or the country and continue to believe that he is both smart enough and dedicated enough to democracy and the rule of law, as well as sensitive enough to the running of the clock, not to let events lead us to that tragic end.”

Whatever he decides, the decision will be Garland's alone. No attorney general in our recent history—arguably in our entire history, given that no other former president has fomented a coup against the United States of America—has faced such a momentous decision. The country, indeed the world, will be watching.