

THREE WAYS MERRICK GARLAND AND DOJ SPOKE OF TRUMP AS IF HE MIGHT BE INDICTED

I want to look at three ways that Attorney General Merrick Garland and DOJ spoke of Trump yesterday using language that acknowledges the possibility he will be indicted.

They were subtle, but consistent references based in DOJ's policy, one Garland's DOJ has adhered to inflexibly, about avoiding discussion of any suspect unless they have been charged.

First there was Garland's statement. It was short, clocking in at fewer than 500 words.

Remarkably, it adhered to DOJ guidelines prohibiting the naming of uncharged individuals (though the motion to unseal did name Trump). Rather than referring to Donald J. Trump by name, the Attorney General referred to him, exclusively, as "the former President," just as Tom Barrack's charging documents do.

Garland reminded that everyone is entitled to the presumption of innocence.

All Americans are entitled to the evenhanded application of the law, to due process of the law, and to the presumption of innocence.

But the Attorney General also said that his DOJ *is*, using the present tense to describe an investigation of the man who used to be President, "applying the law evenly, without fear or favor."

Faithful adherence to the rule of law is the bedrock principle of the Justice Department and of our democracy.

Upholding the rule of law means applying

the law evenly, without fear or favor. Under my watch, that is precisely what the Justice Department is doing.

Applying the law evenly means that if someone steals classified documents and stores it in their basement, they get charged for it. And the invocation of “fear and favor” even as an attack against the Cincinnati FBI office was still being resolved suggests that the actuality of violence will not deter charges, if they are warranted.

After saying that (and rigorously adhering to rules about releasing the name of uncharged persons), Garland suggested that there “will” come a time when he will be able to, under the same rules, provide a more fulsome explanation.

Federal law, longstanding Department rules, and our ethical obligations prevent me from providing further details as to the basis of the search at this time.

[snip]

This is all I can say right now. More information will be made available in the appropriate way and at the appropriate time.

That description – the appropriate way, the appropriate time – is the way DOJ always refers to speaking through indictments.

There’s a third, less surprising instance of this in the motion to unseal. In a footnote to an argument in the body of the motion in favor of a First Amendment right of access to court filings, it notes there’s no 11th Circuit ruling on whether that right extends to sealed search-warrant affidavits “at the preindictment stage.” (Bart Gellman made this observation yesterday.)

2 In addition, the First Amendment provides a basis for the press and the public’s “right of access to criminal

trial proceedings.” Chicago Tribune Co., 263 F.3d at 1310. However, this Circuit has not addressed whether the First Amendment right of access applies to sealed search warrant materials. See, e.g., Bennett v. United States, No. 12-61499-CIV, 2013 WL 3821625, at *3 (S.D. Fla. July 23, 2013) (“this Court has found no Eleventh Circuit decisions addressing whether a First Amendment right of access extends to sealed search-warrant affidavits, particularly at the preindictment stage”).

This is normal language in all fights over unsealing search warrants, one we’re seeing in the fight to unseal the Project Veritas warrants in SDNY, among others. DOJ will rely on it heavily come Monday, when it makes a bid for more time before unsealing the affidavit itself.

But like Garland’s own language, it describes this search as one not to collect information Trump forgot to return, but one conducted at a preindictment phase. That envisions at least the possibility of a time when the calculus about providing more information might be different because the former President would have been indicted.

I’m pointing to this language *not* as a guarantee that Trump will be indicted. And I don’t think Garland is saying that either. For example, he might also approve the release of information at such time that this investigation is closed.

But particularly the language that Garland used is language that lays the groundwork for the possibility that the former President of the United States might, because DOJ was “applying the law evenly,” be indicted.