

DOJ SAYS INCITING A RIOT IS NOT PART OF THE PRESIDENT'S JOB DESCRIPTION

When Trump appealed Amit Mehta's ruling that he could be sued for his role in setting off an attack on January 6, Trump said he had absolute immunity from being held accountable for his role in the attack.

The DC Circuit asked DOJ what they thought about that claim.

DOJ has now responded in an amicus filing. They argued that Mehta's opinion – which held that it is plausible that Trump incited violence at the Capitol – would not cover stuff that is part of the President's job description.

Here, the district court concluded that plaintiffs' complaints plausibly allege that President Trump's speech at the rally on January 6, 2021, precipitated the ensuing attack on the Capitol—and, in particular, that the complaints plausibly allege that the former President's speech encouraged imminent private violent action and was likely to produce such action. The United States expresses no view on that conclusion, or on the truth of the allegations in plaintiffs' complaints. But in the United States' view, **such incitement of imminent private violence would not be within the outer perimeter of the Office of the President of the United States.**

In this Court, President Trump has not challenged the district court's conclusion—reiterated by plaintiffs on appeal—that the complaints plausibly allege that his speech instigated the attack on the Capitol. Instead, his briefs advance only a single,

categorical argument: A President is always immune from any civil suits based on his “speech on matters of public concern,” Trump Br. 7—even if that speech also constitutes incitement to imminent private violence. The United States respectfully submits that the Court should reject that categorical argument.

The government specifically and repeatedly stated that they are not endorsing Mehta’s opinion. They also make it clear that they’re not stating a view about the criminal liability of anyone for January 6.

[T]he United States does not express any view regarding the potential criminal liability of any person for the events of January 6, 2021, or acts connected with those events.

But they are saying that if Mehta’s opinion holds, then what his opinion covers (and he excluded Trump’s inaction as areas in which he might be immune) would not be covered by the President’s job description.

The United States here expresses no view on the district court’s conclusion that plaintiffs have plausibly alleged that President Trump’s January 6 speech incited the subsequent attack on the Capitol. But because actual incitement would be unprotected by absolute immunity even if it came in the context of a speech on matters of public concern, this Court should reject the categorical argument President Trump pressed below and renews on appeal. Resolving the appeal on that narrow basis would allow the Court to avoid comprehensively defining the scope of the President’s immunity for speech to the public—including when and how to draw a line between a President’s speech

in his presidential capacity and speech
in his capacity as a candidate for
office.

Of note for Scott Perry: In the midst of a passage that explains that a President's natural incumbency position must render some reelection speech Presidential, it also notes that that's not true for Members of Congress, because House ethics rules exclude campaign activity from a Member of Congress' job description.

For those reasons, and because of differences in the applicable legal standards, the outer perimeter of the President's Office differs from the scope of a Member of Congress's employment for purposes of the Westfall Act, 28 U.S.C. § 2679. Cf. U.S. Resp. to Mo Brooks's Westfall Act Pet. at 8-19, *Swalwell v. Trump*, No. 21-cv-586 (July 27, 2021), Dkt. No. 33 (explaining that Representative Brooks's speech at the January 6 rally was outside the scope of his employment because House ethics rules and agency-law principles establish that campaign activity is not within a Representative's employment).

So Members of Congress can't campaign as part of their jobs. Presidents can. But they cannot – whether to stay in office or for some other reason – incite private actors to engage in violence.

Update: As I laid out here, DOJ may be laying the groundwork for proving aid and abet liability for both Trump and Rudy Giuliani in the near-murder of Michael Fanone. Those exhibits are being presented in the bench trial, before Amy Berman Jackson, of Ed Badalian.