

DC CIRCUIT RULES THAT A PRESIDENT'S SPEECH AS CANDIDATE IS NOT OFFICIAL

The DC Circuit just ruled that three lawsuits against Donald Trump (and others) for actions on January 6 can move forward.

Chief Judge Sri Srinivasan wrote the majority opinion, joined by Greg Katsas and Judith Rogers. He wrote:

When a sitting President acts in his capacity as a candidate for re-election, he acts as *office-seeker*, not *office-holder*.

But Katsas – a former Trump White House counsel and a Trump appointee – may have summarized the holding best.

Today, we do not definitively resolve that question. Instead, we hold only that we cannot resolve it on a motion to dismiss. Our conclusion rests on two propositions persuasively established by Chief Judge Srinivasan's lead opinion. First, in certain limited contexts, courts may reliably conclude that a sitting President is speaking only in a private capacity as a candidate for re-election or as the leader of a political party. These include instances where the President speaks at a party convention, in a presidential debate, in a political advertisement, at a campaign rally, or at a party fundraiser. Second, the operative complaints plausibly allege that the January 6 speech involved this kind of purely private campaign speech. In particular, the complaints allege that the January 6 rally was organized by campaign staff and funded by private

donors, and was neither facilitated by White House staff nor paid for with congressionally appropriated funds. Given those allegations, which remain to be tested on summary judgment or at trial, we cannot resolve the immunity question in President Trump's favor at this stage of the case.

Trump never argued that his actions were official. Instead, he said that when a President speaks on matters of public interest, even as a candidate, he is entitled to immunity.

But all three judges rejected that view.

Srinivasan engaged in an extended discussion of how unfair it would be for a former President running to be elected President again if he were running against the sitting President – that is, the presumed state of the 2024 race. Under Trump's scheme, Biden would be immune for anything he said as a candidate; Trump would not.

Under President Trump's proposed public concern test, if the candidate happens to be the sitting President (but not if she is a former President or any other candidate), her speech in the ad would be official—even though it is plainly campaign speech in a campaign ad given in her private capacity as candidate. A sitting President then would be absolutely immune from defamation liability for something she may have said about her opponent in the campaign ad, whereas a former President would face liability for saying the very same thing in the very same ad.

The pro-incumbent imbalance would be especially stark if the former and current Presidents were to run against each other. In that situation, one candidate, the former President, would face civil damages liability for

statements on matters of public concern in campaign ads or in an acceptance speech at a party convention. But the competing candidate, the sitting President, would be wholly insulated from damages liability for making the very same statements on the opposing side of the very same race. We see no basis for giving an incumbent President that kind of asymmetrical advantage when running against his predecessor.

This case – and Trump’s criminal case, presumably – will now focus on certain aspects of January 6 to test whether this was a campaign event or an official event. It will pivot on who paid for what and who organized the event.

There’s a big problem with this opinion. A sitting President cannot be prosecuted if he spends official resources for campaign events. Trump’s White House was repeatedly found to have broken the Hatch Act, and the President and Vice President are not covered by it. So a future Donald Trump (and indeed, all Presidents to some degree) will now have an incentive to bill taxpayers for all events so as to enjoy presidential immunity.

But for now, it’ll go back before Judge Mehta for a renewed discussion about whether this was an official presidential event or a campaign event.

Update: Fixed Judith Rogers/Janice Rogers Brown for probably the 100th time in my life.