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DOJ's refusal to defend Mo Brooks was wrong; prosecuting Trump would be worse

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DOJ's refusal to defend Mo Brooks was wrong; prosecuting Trump would be worse | Bruce Ledewitz

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by Bruce Ledewitz, Pennsylvania Capital-Star August 20, 2021

The Department of Justice's [decision not to defend Republican U.S. Rep. Mo Brooks, of Alabama](#), in the lawsuit brought by Rep. Eric Swalwell, D-Calif., was an obvious misinterpretation of the department's obligation to defend government officials.



Bruce Ledewitz
(Capital-Star file)

The decision is an example of the politicization of the Justice Department that Democrats denounced under the administration of former President Donald Trump. The only reason that the decision is not being criticized is that some Democrats hope it portends a decision not to defend Trump in the same lawsuit and, perhaps, even hints at a criminal prosecution of Trump in the future.

That hope is a mistake.

Swalwell is suing Brooks, Trump and others [for inciting a mob of Trump supporters on Jan. 6](#) during the pro-Trump rally that preceded the attack on the U.S. Capitol.

Brooks asked for government representation pursuant to the Westfall Act, under which the Justice Department defends federal government employees entitled to immunity from suit for actions taken within the scope of their office or employment.

In rejecting Brooks' request, the DOJ concluded that the speech Brooks gave at the rally fell outside the scope of his office because it was campaign activity rather than congressional activity, noting in the court filing that inciting "a violent attack on the United States Congress is not within the scope of employment of a Representative – or any federal employee."

The speech Brooks gave on Jan. 6 was certainly fiery and irresponsible. He exhorted the crowd to "start taking down names and kicking ass," asked whether the crowd was "willing to do the same" as their ancestors who had sacrificed their lives, and told the crowd to "carry the message to Capitol Hill" where "the fight begins today."

But it is easy to see that the Justice Department's decision is wrong.

For one thing, [the rally was not campaign activity](#). The whole point of the rally was that Trump, who incorrectly believed himself to be the winner, should be installed as president. The election was over.

More generally, the subject of the rally was the acceptance by Congress of the vote by the electors in the presidential election. As a representative, Brooks' official responsibilities include objections to those electors. Whatever else it was, Brooks' speech was a complaint about the pending acceptance of some of the electors for President Joe Biden.

DOJ's sly references to the allegations in the plaintiff's complaint that Brooks incited a violent attack on the Capitol — after quoting the allegations, the filing stated it "would not address that issue"— are particularly reprehensible. Obviously, the Justice Department cannot base a decision to reject representation on the allegations in a complaint. The point of a lawsuit is to determine whether allegations in a complaint are accurate.

As it happens, it is very unlikely that Brooks or Trump can be held liable for incitement for their actions on Jan. 6. Unlike impeachment and removal, which are not a punishment, criminal or civil liability is protected by the First Amendment. This means that "incitement" in this context is not a commonsense term, but one defined by constitutional principles.

The test for incitement is taken from the [1969 Brandenburg case](#). The test requires that, before a speaker can be punished, that speaker's advocacy must be "directed to inciting or producing imminent lawless action and ... likely to incite or produce such action."

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As students of constitutional law know, the Brandenburg test is exceedingly difficult to satisfy. It requires not abstract exhortation or a tendency to produce violence [but an actual and specific call for illegality](#).

If Brooks' words had been sufficiently specific to satisfy Brandenburg, the Capitol Police would have been alerted to what was coming and [would](#)

[not have been caught unawares](#). But even after the rally, the police did not expect an actual attack on the Capitol by thousands of people.

There are Democrats who cannot give up the fantasy that [Trump will be convicted of a crime](#) and that is what they are hoping will happen in the wake of the Justice Department's decision.

But Trump's exhortation to the crowd on Jan. 6 to march to the Capitol and "fight like hell" is also protected speech. It should have been sufficient to warrant the Senate to remove him from office, since the First Amendment does not apply to that context, but it is not nearly enough to satisfy Brandenburg.

Democrats should have learned to give up the hope of a Trump prosecution when the investigation of the Trump organization's finances by the Manhattan district attorney's office yielded a paltry indictment of chief financial officer Allen Weisselberg and two Trump organizations for alleged actions that many large corporation could be charged with.

The norm against prosecuting losing candidates for office has been scrupulously observed in American history. Ironically, it was one norm that Trump respected when many of his supporters wanted Hillary Clinton and the Clinton Foundation criminally investigated after the 2016 election.

Non-prosecution is, as Paul Rosenzweig, termed it in The Atlantic, a "[sacred norm](#)." But, like others, Rosenzweig went on to argue it should be breached in the case of Trump's actions taken either before or after his term of office.

Trump is no unique threat to democracy. Writers who want to see the Republican Party returned to office have been publicly urging Trump not to run for president on the ground that he would be a weak candidate. The only way that Trump could actually win would be through voter sympathy after a failed effort to prosecute him.

More fundamentally, the courts are not where Americans should want their political disputes fought out. Democrats have now won at the ballot box. That is why Biden enjoys such legitimacy. What Democrats have to do now is govern in such a way that the party continues to win elections openly and fairly.

Anything else is a harmful distraction.

Opinion contributor Bruce Ledewitz teaches constitutional law at Duquesne University Law School in Pittsburgh. His work appears biweekly on the Capital-Star's Commentary Page. Listen to his podcast, "Bends Toward Justice" [here](#). His forthcoming book, "The Universe Is On Our Side: Restoring Faith in American Public Life," will be published in October. His opinions do not represent the position of Duquesne University Law School.