WILL *BRANDENBURG* PROVIDE PROTECTION FOR DONALD TRUMP IN THE SECOND IMPEACHMENT TRIAL?

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Those preparing bar examination questions, and law school professors writing questions for their students in Constitutional Law or First Amendment Law, often create a fictional scene in which a speaker exhorts (or perhaps berates) a described group of listeners who are gathered in a certain place under stated circumstances. While sometimes contrived, these scenarios are fun to write, and they have the additional potential merit of giving students the opportunity to apply the well-known, multi-part *Brandenburg*[1] test in a fact-specific context that may ease the grader's pain when confronting dozens of answers to the same question. Somewhat unexpectedly, the Members of the United States Senate have recently been given this question, which, most regrettably, is not at all hypothetical or fictional:

> The sitting President of the United States lost his reelection effort on November 3, but refused to accept that outcome. Attorneys acting on the President's behalf filed dozens of challenges to the election results in six separate states, but these were all rejected, often with very firm statements by the judges that no substantial argument or evidence had been presented. There was even a last-ditch effort led by the Attorney General of Texas to invoke the original jurisdiction of the Supreme Court to review the election results, but the Court overwhelmingly denied leave to file the complaint, and even the two Justices who would have allowed its filing did not support the granting of any relief to the challengers. On the day in December prescribed by statute, the presidential Electors met in each state and cast their votes, confirming the President's loss. In the weeks that followed, leading up to the anticipated January 6 session in which the states' reports of their electoral votes would be opened by the Vice President during a joint session of Congress, the President and his supporters continued to denounce the announced election of the President's rival as a "fraud" and they continued in a blizzard of public statements, tweets, and other messages to announce that they would "Stop the Steal".
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> The only step remaining before the official declaration that the President's rival was President-elect and would be sworn in on January 20 was the ceremony before Congress in which the states' votes would be read and tallied, and the result announced. The President begged the Vice President to use the occasion to refuse to accept the results in the contested states, but the Vice President responded with a letter stating that he had no such power. Then, on the morning of January 6, shortly before the joint session of Congress would begin, the President spoke to thousands of his supporters in an open area near the White House and about a mile from the Capitol. He spoke for more than an hour, and said, among other things:
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> "They rigged it like they have never rigged an election before."

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[1] Brandenburg v. Ohio, 395 U.S. 444 (1969).

"All of us here today do not want to see our election victory stolen by bold and radical left Democrats."

"We will never give up. We will never concede. It doesn't happen. You don't concede when there's theft involved."

"Now it is up to Congress to confront this egregious assault on our democracy. And after this, we are going to walk down and I'll be there with you. We're going to walk down."

"And now we're out here fighting."

"And I can say this. Since our election, I believe -- which was such a catastrophe when I watched, and even these guys knew what happened."

"You will have a president who lost all of these states, or you will have a president, to put it another way, who was voted on by a bunch of stupid people who lost all of these states. You will have an illegitimate president. That is what you will have, and we can't let that happen."

"This is a time for strength."

"This is a criminal enterprise."

"The Republicans have to get tougher. You're not going to have a Republican Party if you don't get tougher."

"This is the most corrupt election in the history, maybe in the world."

"So we are going to walk down Pennsylvania Avenue. . . .and we are going to the Capitol. And . . . we are going to try to give our Republicans -- the weak ones because the strong ones don't need any of our help -- going to try and give them the kind of pride and boldness they need to take back our country. So let's walk down Pennsylvania Avenue."[2]

Can the President, consistent with *Brandenburg*, be found guilty of inciting violence?[3]

I. The President's Statements to His Supporters on January 6 Are Outside the Expansive Protection Given Speech by the *Brandenburg* Test.

[2] The full video of the President's speech is readily available on the Internet. A link to the video, along with an annotated transcript, are available at Aaron Blake, *What Trump said before his supporters stormed the Capitol, annotated*, WASH. POST, Jan. 11, 2021, https://www.washingtonpost.com/politics/interactive/2021/annotated-trump-speech-jan-6-capitol/ .

[3] A week followed the incidents of January 6, the House of Representatives voted 232-197 to approve H. Res. 24, impeaching President Donald J. Trump based on the allegation that he "engaged in high Crimes and Misdemeanors by willfully inciting violence against the Government of the United States."

Brandenburg fascinates us because its result is so startlingly counterintuitive. It provides the controlling modern test for prosecutions of speakers who are alleged to have "incited" violence or other lawless conduct by others, and comes after decades in which case after case found that punishing a speaker for incitement did not violate the First Amendment. And it's not that the "speakers" in *Brandenburg* conform in any way to the stereotype of the brave individualist objecting to government malice or folly. A Ku Klux Klan group consisting of a dozen hooded men, some of whom were armed, held a rally on a farm near Cincinnati, burned a cross, and offered these words of social commentary: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[4] Despite the long and violent history of the KKK, the criminal conviction based on these words was overturned and a firmly speech-protective formula was announced: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[5] The crucial distinction being made by the Court is between "mere advocacy" and "incitement to imminent lawless action,"[6] and therefore the broad Ohio Criminal Syndicalism law under which the KKK leader had been prosecuted fell short. Nor could the facts have supported a conviction, since the small, made-for-TV[7] rally was held on a farm in mid-June, while the closest possible confrontation mentioned by the speaker was a march on Congress in distant Washington, D.C., several weeks later on the Fourth of July.[8]

Contrast the tree-falling-in-the-forest aura of *Brandenburg*, and the muddled and unfocused language used by the KKK speaker, with the explosive circumstances of the January 6 rally at which the President spoke. After months of unceasing denunciations by the President and his supporters of the election results, all obstacles to the recognition of Joe Biden as President-elect had been cleared away. Within a matter of hours, the joint session of Congress presided over by the Vice President would announce the final results of the election. There would perhaps be several two-hour interruptions for debate by the Senate and the House for each state as to which both a Representative and a Senator raised an objection, but it was inevitable what outcome would be reached later that day, or perhaps in the wee hours of January 7. And this is when the President, having summoned his most loyal supporters to Washington, delivered the remarks excerpted above, and he told them that he would lead them down Pennsylvania Avenue to the Capitol to save the country from a stolen presidential election. The only way for the President to fend off the outcome that he so fervently opposed was to interfere with the proceedings taking place in the Capitol, and that is exactly what his followers accomplished with their violent rampage.

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[4] 395 U.S. at 446.

[5] 395 U.S. at 447 (footnote omitted). In a bit of indirection, the Court's per curiam opinion in *Brandenburg* states that earlier decisions had "fashioned" the test being announced and applied, but there is a consensus that it is *Brandenburg* itself that takes elements from prior cases and combines them to provide greater constitutional protection against incitement prosecutions than had existed before.

[6] 395 U.S. at 444 n.4.

[7] Brandenburg called a television station to invite coverage of the event, and it was filmed with the cooperation of the KKK. 395 U.S. at 444.

[8] 395 U.S. at 446.

While *Brandenburg* is certainly protective of even outrageous advocacy, with the result that successful prosecutions for incitement have been virtually unknown in the decades since the test was announced, the First Amendment still allows prosecutions within the narrow category identified by *Brandenburg*. As the Fourth Circuit recently summarized in a thorough opinion considering and affirming incitement convictions arising out of the Unite the Right gathering in Charlottesville and similar events: "These days . . . advocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness."[9] No criminal conviction for incitement in an ordinary case would stand unless the jury determined that the statement made by the defendant, in context, was "directed to inciting or producing imminent lawless action" and was "likely to incite or produce such action." I believe that the advocacy engaged in by the President on January 6 meets that test, especially when considered in the context of the unceasing stream of commentary delivered by the President to his supporters between November 3 and January 6. All efforts to use litigation and political pressure on state officials to change the outcomes being reported by the states had failed. The march down Pennsylvania Avenue to the Capitol could not succeed, either, unless it interrupted the proceedings being conducted there, and that objective could not be achieved by any means other than physical interference. If one imagines that the President's exhortation to the crowd contemplated and called for a peaceful parade to Capitol Hill rather than an attack on the building in which "the most corrupt election in the history, maybe in the world" was going to be ratified, then it is significant that the President announced that "I'll be there with you." Having, with the strong words directed to his most ardent supporters, deliberately unleashed the whirlwind, the President retreated to the White House to watch the consequences play out on television.

While analysis of a situation under *Brandenburg* often requires detailed examination of the facts bearing upon the likelihood and imminence of whatever violence or other lawbreaking has been called for by the speaker, the January 6 attack on the Capitol does not call for any extended consideration of those elements of *Brandenburg*. Washington was a tinder box at the time of the President's speech, and his remarks again and again reminded the crowd that it was "now or never" to save the country from what was alleged to be a fraudulent election, one of most serious misdeeds that could be imagined. It is also significant that the speaker was the President himself, whose sway over his followers is well known and proudly proclaimed. The President's inflammatory remarks to the crowd would have been less likely to bring about the attack on Congress if they had been delivered by someone less revered by the listeners. In the warmup to the President's speech, Rudy Giuliani called for "trial by combat" against the ongoing election proceedings, but prosecuting him for incitement would, in my opinion, be more difficult than the case against the President, because it would be dramatically less likely that those in the crowd would act as he directed them to do. "Likelihood" of "imminent" lawless action along the lines called for by the President was further enhanced by the near-simultaneity of the end of the Trump rally and the proceedings in Congress, and the short distance between the speech site near the White House and Capitol Hill.

[9] United States v. Miselis, 972 F.3d 518, 533 (2020). The court held that certain aspects of the federal Anti-Riot Act under which the defendants were prosecuted were invalid under the overbreadth doctrine, but that the defendants' convictions did not depend on any of the stricken portions of the statute. A petition for rehearing and rehearing en banc was denied on October 5, 2020.

Prosecutions for incitement have been infrequent since *Brandenburg*, and the First Amendment principles announced in that case have often raised daunting constitutional impediments. However, the words spoken by the President on January 6 to his most enthusiastic supporters, given what he said was at stake and in light of the proximity of the Capitol and the imminent results that would be coming out of the joint session, would comfortably be susceptible to successful prosecution under the constitutional standard announced in *Brandenburg*.

II. How Will *Brandenburg* Be Interpreted and Applied in President Trump's Trial in the Senate on the Charge of "Inciting Violence Against the Government of the United States"?

So far, the discussion has analyzed *Brandenburg* as if President Trump were going to be tried for the crime of incitement. Since there have been so few impeachment trials of Presidents in the Senate, there is sparse authority on how the Senators might go about analyzing and applying *Brandenburg*, if they find it appropriate to undertake that task. It is reasonable to expect that the attorneys for former President Trump will raise the *Brandenburg* principle as a defense, in effect arguing that it would violate the First Amendment for the Senate to convict him based on his speech to the crowd on January 6. As discussed above, I do not believe that such a defense should be accepted, even if it is assumed that the constitutional issue should be framed and decided as it would be in a court. But there are also some complications that should be mentioned.

The *Brandenburg* test is one that is intensely context-specific. Will certain words, spoken at a given time and place to a particular audience, be considered advocacy of violence or other lawless conduct that is *likely* to take place *imminently*? As discussed above, it is critical to examine all the circumstances that make it more or less likely that an audience will actually do what a speaker is advocating. Therefore, while *Brandenburg* as formulated does not state different rules for different speakers, the identity of the speaker and the relationship between the speaker and the audience will be important considerations in applying the test to any set of facts.

Professor Einer Elhauge has taken that thinking one step further, arguing that "the *Brandenburg* standard should be lowered for incitements by presidents given their greater danger."[10] This is not the place for me to analyze that issue, although I believe it likely that the Senate will find it worth looking into. Starting with *Schenck v. United States*[11] and following up through *Brandenburg* and later cases, the First Amendment concern has always been that the power of the government will be used to suppress dissenting voices. The scenario involved in the current impeachment trial of former President Trump – possible use of the power of the Presidency to disrupt election processes that are yielding a result that is objected to by the

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[10] Einer Elhauge, *The First Amendment doesn't protect Trump's incitement*, WASH. POST, Jan. 14, 2021, https://www.washingtonpost.com/outlook/2021/01/14/trump-brandenburg-impeachment-first-amendment/ . Elhauge concludes that, if *Brandenburg* applies fully to Trump, "his incitement of imminent lawless action more than suffices to satisfy it." For an ardent, if unpersuasive, expression of the opposing point of view, see Alan Dershowitz, *Impeachment Over Protected Speech Would Harm the Constitution*, NEWSWEEK, Jan. 12, 2012, https://www.newsweek.com/impeachment-over-protected-speech-would-harm-constitution-opinion-1560512 (it "is beyond dispute . . . that his speech – disturbing as it may have been – is within the core protection of political speech").

[11] 249 U.S. 47 (1919).

incumbent President because it will force him to leave office – has not been imagined, as far as I am aware. Given the immense and largely unreviewable power of the President, it would seem plausible to argue that his or her advocacy, at least in an election context, might properly be considered incitement even if not as explicit in advocating violence or other lawless behavior, or not as likely to bring about such imminent misconduct, as might be required for another defendant.

While we are still relatively early in the second Trump impeachment, it is important to remind ourselves where the ultimate decisional authority will reside in deciding the First Amendment questions, or other legal issues, arising during the trial. There is already a debate underway, for example, about whether now-Former President Trump can properly be tried in the Senate, since his term has ended. J. Michael Luttig has argued that he cannot, but concedes that "only the Supreme Court can answer the question of whether Congress can impeach a president who has left office prior to its attempted impeachment of him."[12] Professor Stephen Vladeck disagrees,[13] but he also notes that in any event it's "ultimately Congress's call — for former officers as much as current ones."[14] Since the Senate is proceeding with its trial during the second week of February, I don't feel any need to analyze here the jurisdictional question, but I do want to emphasize the unusually categorical manner in which the Supreme Court has stated its unwillingness to get involved in impeachment matters, even if their substantive content would ordinarily be appropriate for the Court's consideration.

The controlling case is *Nixon v. United States*,[15] not a matter involving the impeachment of Richard M. Nixon, but rather the impeachment and removal of a federal district judge who had been convicted of making false statements before a federal grand jury. As we are aware, conducting an impeachment trial of a President before the Senate can seriously disrupt the completion of the Chamber's other business. But the distraction is unavoidable in that instance. However, the Senate decided that it wanted to limit the time devoted to impeachments of lesser officers. Therefore, under the Senate's rules, the evidence in the trial of Judge Nixon was heard by a committee of twelve Senators rather than by the entire Senate. The committee then made a full report of the testimony to the Senate. The proceedings before the full Senate were then limited mostly to oral argument, although Nixon was allowed to make a personal appearance. The judge was convicted by the required two-thirds majority, and then went to court, asserting that he had not been tried by the Senate as required by Art. I, §3, cl. 6 of the Constitution.

It would have been simple enough for the Supreme Court to rule that Nixon had been given the trial to which he was entitled, even though not all Senators heard the presentation of evidence. But the Court instead took a different path, emphatically declaring that the matter was a political question because the Senate has "the sole Power to try all Impeachments." The Court agreed with Nixon "that courts possess power to review either legislative or executive action

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[12] J. Michael Luttig, *Once Trump leaves office, the Senate can't hold an impeachment trial*, WASH. POST, Jan. 12, 2021, https://www.washingtonpost.com/opinions/2021/01/12/once-trump-leaves-office-senate-cant-hold-an-impeachment-trial/ .

[13] Stephen I. Vladeck, *Why Trump Can Be Convicted Even as an Ex-President*, N.Y. TIMES, Jan. 14, 2021, https://www.nytimes.com/2021/01/14/opinion/trump-impeachment-senate.html .

[14] Id.

[15] 506 U.S. 224 (1993).

than transgresses identifiable textual limits," but concluded "that the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate."[16]

For present purposes, the most salient point to be drawn from *Nixon* is that the federal courts, and ultimately the Supreme Court, are very unlikely to participate in any way in the Senate's upcoming trial and disposition regarding former President Trump. Just as the Court held that the Senate's power to try impeachments precluded judicial involvement in determining the procedures that would be followed at the trial, so will the courts almost certainly refuse to intervene if asked to "correct" alleged Senate errors on the proper application of *Brandenburg* to the former President's January 6 speech or on whether a President may be given narrower First Amendment protection than other speakers in certain circumstances.[17] Thus, *Brandenburg* is not likely to materially strengthen former President Trump's defense at his upcoming impeachment trial in the Senate.

[16] 506 U.S. at 238.

[17] As Professor Vladeck notes, the Senate's decision that it has the authority to conduct an impeachment trial for a President who has left office is also very likely to be labeled a political question which the federal courts have no power to consider. Chief Justice Rehnquist's opinion for the Court in *Nixon* does not suggest any circumstances under which the Senate's conduct of an impeachment trial would be subject to judicial review. The political question analysis advanced by the Chief Justice was so unlimited that it prompted Justice Souter to offer his own possible boundary, in which no other Justice joined: "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "'a bad guy' [citing Justice White, concurring in the judgment], interference might well be appropriate." 506 U.S. at 253-254 (Souter, J., concurring in the judgment).