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CAPITOL OFFENSE: IS DONALD TRUMP GUILTY OF INCITING A RIOT AT THE CAPITOL?

MICHAEL CONKLIN*

“It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot.”¹

I. ABSTRACT

On January 6, 2021, President Trump’s incendiary speech at the “Save America Rally” was immediately followed by a riot on the Capitol Building. In the aftermath, Trump was banned from Twitter and impeached a second time. Some are even calling for criminal prosecution for Trump’s role in inciting the Capitol riot. This article examines the likely outcome of such criminal proceedings using the applicable *Brandenburg* three-prong test.² The article further addresses a number of unique factors that would affect the application of the *Brandenburg* test: (1) the results of a 2018 civil case against Trump for incitement, (2) the objectively false nature of Trump’s speech, (3) Trump’s response to the Capitol riot, (4) Trump’s position of authority and the loyalty of his ardent followers, and (5) the Supreme Court’s hesitancy to punish a president for political speech.

II. INTRODUCTION

On January 6, 2021, President Trump spoke at the Save America Rally where he encouraged participants to “fight like Hell,” “stop the steal,” “never concede,” and “walk down to the Capitol.”³ Rudy Giuliani and Donald Trump Jr. also spoke at the rally, the former demanding “trial by combat” and the latter stating, “we’re coming for

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¹ *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 244 (6th Cir. 2015).

² *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

³ *Donald Trump Speech “Save America” Rally Transcript January 6*, REV (Jan. 6, 2021), <https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6>.

you.”⁴ Shortly after the rally, participants stormed the Capitol Building in an effort to block the ratification of Joe Biden’s victory.⁵ After assaulting Capitol police officers, breaking windows, and pushing through police barricades, some Trump supporters made it inside the Capitol.⁶ There, they broke into Nancy Pelosi’s office,⁷ defaced statues,⁸ and smeared feces on the walls.⁹ After the violence at the Capitol started, Trump sent mixed messages. At one point, he told those involved, “go home . . . We love you. You are very special.”¹⁰ And at another point, he said, “I know your pain, I know you’re hurt. We had an election that was stolen from us. It was a landslide election and everyone knows it. Especially the other side. But you have to go home now. We have to have peace.”¹¹

In the aftermath of the riot, over fifty people were arrested¹² and five people had died.¹³ Trump was permanently suspended from Twitter and blocked indefinitely from Facebook.¹⁴ One week later he

⁴ Katie Benner, *Justice Department Open to Pursuing Charges Against Trump in Inciting Riot*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/politics/justice-department-trump-capitol.html>.

⁵ Ted Barrett, Manu Raju & Peter Nickeas, *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden’s Win*, CNN (Jan. 7, 2021 3:33 AM), <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html>.

⁶ *Id.*

⁷ Pete Williams & Erik Ortiz, *Man Pictured with Foot on Desk in Pelosi’s Office is Arrested*, NBC NEWS (Jan. 8, 2021, 1:35 PM), <https://www.nbcnews.com/news/us-news/man-foot-desk-pelosi-s-office-capitol-arrested-n1253490>.

⁸ Sarah Bahr, *Curators Scour Capitol for Damage to the Building or Its Art*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/arts/design/us-capitol-art-damage.html>.

⁹ Dan Satherley, *Trump Rioters Smeared Poop, Urinated Through Capitol Building*, MSN NEWS (Jan. 8, 2021), <https://www.msn.com/en-nz/news/national/trump-rioters-smeared-poop-urinated-through-capitol-building/ar-BB1cAQXK>.

¹⁰ Barrett, *supra* note 5.

¹¹ *Id.*

¹² *Id.*

¹³ Jack Healy, *These Are the Five People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

¹⁴ Joshua Roberts, *The Day the Internet Turned on Trump*, NBC NEWS (Jan. 10, 2021, 11:28 AM), <https://www.nbcnews.com/tech/tech-news/day-internet-turned-trump-n1253651>; On May 5, 2021, Facebook’s independent oversight board upheld

was also suspended from YouTube.¹⁵ On January 13, 2021, Trump was impeached by the House of Representatives for a second time.¹⁶ The articles of impeachment charged him with “incitement of insurrection” regarding the Capitol riot. Some are even calling for Trump to be criminally prosecuted for incitement.¹⁷ The U.S. Attorney for the District of Columbia stated he had not ruled out pressing charges against Trump for his role.¹⁸

III. LEGAL STANDARD

The Constitution’s free speech protections are not absolute. One limit is that “speech that falls within the category of incitement is not entitled to First Amendment protection.”¹⁹ Like most First Amendment exceptions, the incitement doctrine is a subjective determination that has evolved over time. In older cases, such as the 1919 case of *Schenk v. United States*, courts easily found incitement.²⁰ In *Schenk*, the Supreme Court ruled that someone merely distributing leaflets encouraging opposition to the draft was incitement and therefore not protected speech.²¹

the ban on Trump. Elizabeth Culliford, *Trump Facebook Ban Remains but Oversight Board Rips Company Policies*, REUTERS (May 5, 2021 1:02 PM), <https://www.reuters.com/world/us/facebook-oversight-board-rule-trumps-return-facebook-2021-05-05/>.

¹⁵ Brian Fung, *YouTube Is Suspending President Donald Trump’s Channel*, CNN BUS. (Jan. 13, 2021, 12:15 PM), <https://www.cnn.com/2021/01/12/tech/youtu-be-trump-suspension/index.html>.

¹⁶ Lisa Mascaró, Mary Clare Jalonick, Jonathan Lemire & Alan Fram, *Trump Impeached After Capitol Riot in Historic Second Charge*, ASSOCIATED PRESS (Jan. 13, 2021), <https://apnews.com/article/trump-impeachment-vote-capitol-siege-0a6f2a348a6e43f27d5e1dc486027860>.

¹⁷ Albert Fox Cahn, *Trump Didn’t Just Cross a Line in Inciting Today’s Riot in the Capitol—He Committed a Crime*, YAHOO! NEWS (Jan. 6, 2021 6:43 PM), <https://news.yahoo.com/trump-didn-t-just-cross-004321592.html>.

¹⁸ Katie Benner, *Justice Department Open to Pursuing Charges Against Trump in Inciting Riot*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/politics/justice-department-trump-capitol.html>.

¹⁹ *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002).

²⁰ *Schenk v. United States*, 249 U.S. 47 (1919).

²¹ *Id.*

The modern, more demanding, incitement doctrine was established in the 1969 case of *Brandenburg v. Ohio*.²² There, a Ku Klux Klan leader was prosecuted for saying, “we’re not a revengent [sic] 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 [sic] taken.”²³ The Supreme Court held in a unanimous opinion that this was protected speech and that the speaker was not liable for incitement.²⁴ This is the result of the Court’s reasoning that the threats were general in nature as opposed to specific,²⁵ they were not directed at the present audience (a group of KKK members),²⁶ and they were not likely to imminently produce lawless action.²⁷

Four years after *Brandenburg*, the Supreme Court clarified the modern incitement doctrine in *Hess v. Indiana*.²⁸ There, the Court overturned the conviction of a man who shouted, “we’ll take the fucking street later” during an antiwar rally.²⁹ The Court focused on how the threat “was not directed to any person or group in particular.”³⁰ Also, the Court held that the statement did not call for imminent action.³¹ Although the Court has not heard a major incitement case in over forty-five years, there is no indication that today’s Supreme Court would significantly deviate from the standard

²² Richard Ashby Wilson & Jordan Kiper, *Incitement in An Era of Populism: Updating Brandenburg After Charlottesville*, 5 U. PENN. J.L. & PUB. AFFAIRS 57, 68 (2020) (“The Brandenburg test has been settled law for five decades.”).

²³ *Brandenburg v. Ohio*, 395 U.S. 444, 445–46 (1969).

²⁴ *Id.* at 449.

²⁵ *Id.* at 448.

²⁶ *Id.* at 445–46.

²⁷ *Id.* at 447 (referring to “the principle that 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”).

²⁸ *Hess v. Indiana*, 414 U.S. 105 (1973).

²⁹ *Id.* at 107 (noting that Hess either said, “We’ll take the fucking street later,” or “We’ll take the fucking street again.”).

³⁰ *Id.*

³¹ *Id.* at 109 (“[A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”).

set in *Brandenburg*.³² In 2002, the Court denied certiorari in *Stewart v. McCoy*, in which a conviction for advising gang members on how to organize was overturned primarily because the lawless advocacy was neither imminent nor specific.³³

IV. APPLICATION TO TRUMP’S ACTIONS

The modern standard established in *Brandenburg* applies a three-prong test to the speaker. It requires that the speaker (1) advocate and intend for a criminal act that is (2) imminent and (3) likely to occur.³⁴ This is an intentionally high burden to overcome. The following analyzes how each of the three prongs applies to Trump’s speech at the Save America Rally.

A. Intent

The first prong of the *Brandenburg* test is that of intent to cause a criminal act.³⁵ This element would prove difficult to apply to someone like Trump because he often makes contradictory statements that leave his audience wondering what was meant.³⁶ For example, at his rallies, Trump would often encourage violence against counter-protestors while at the same time explicitly calling for no violence.³⁷

For purposes of determining intent, it is important to take Trump’s statements from the rally that preceded the Capitol riot in context. Trump did say “fight like Hell,” “stop the steal,” “never

³² The Supreme Court heard *NAACP v. Claiborne Hardware Co.* in 1982 but did little to clarify *Brandenburg* since the acts of violence occurred before the speech in question. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902–03 (1982).

³³ *McCoy v. Stewart*, 282 F.3d 626, 631–32 (9th Cir. 2002). However, Justice John Paul Stevens wrote a statement regarding the denial of cert. where he referred to the lower court’s holding as “surely debatable.” *Stewart v. McCoy*, 123 S. Ct. 468, 469 (2002) (Stevens, J., dissenting). Justice Stevens seemed to disagree with applying the imminent standard from *Brandenburg* to cases involving speech that has a “teaching function.” *Id.* at 470.

³⁴ Wilson & Kiper, *supra* note 22, at 60.

³⁵ *Id.*

³⁶ Darlene Superville, *He Said-He Said: 10 Times That Trump Has Contradicted Trump*, ASSOCIATED PRESS (Jan. 19, 2018), <https://apnews.com/article/north-america-donald-trump-elections-trump-at-year-one-george-papadopoulos-495269c1760c4268b6fa3162dffd1eb3>.

³⁷ JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U.L. REV. 585, 626–29 (2019).

concede,” “these people are not going to take it any longer,” and “we got to get rid of the weak congresspeople,” and he encouraged the audience to “walk down to the Capitol” to accomplish these ends.³⁸ However, these statements were made over the course of a meandering speech that lasted longer than an hour. Trump also talked about revoking Section 230,³⁹ the quality of teaching in public schools, bringing home the troops, building the border wall, the “corrupt” media, and the quality of care in VA hospitals.⁴⁰ There is no bar against liability simply because the inciting statements were made interspersed over a long speech. However, this does shed light on whether Trump intended to incite criminal activity. It suggests that he was just engaged in off-the-cuff rambling rather than implementing an intentional plan to cause criminal behavior.

Furthermore, the incendiary quotes from the speech must be taken in context with what else was said at the rally. Trump talked favorably about stopping the destruction of government monuments.⁴¹ He also explicitly stated that the march to the Capitol was to be done “peacefully and patriotically.”⁴² These two statements imply an intent to not incite criminal behavior.

Even if the more incendiary quotes are considered alone outside of the larger context, they are still unlikely to rise to the level required for criminal intent. While they could be interpreted as calls for criminal behavior, they could also be interpreted as calls for political action and protest. However, there are reports that Trump expressed pleasure when hearing about the Capitol riot.⁴³ If admissible in court, this would support the notion that he intended to incite

³⁸ *Donald Trump Speech*, *supra* note 3.

³⁹ See 47 U.S.C. § 230 (2018) (providing immunity from liability to providers and users of interactive computer services who publish third-party content).

⁴⁰ *Donald Trump Speech*, *supra* note 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Lexi Lonas, *Sasse Says Trump Was ‘Delighted’ and ‘Excited’ by Reports of Capitol Riot*, HILL (Jan. 8, 2021, 4:00 PM), <https://thehill.com/homenews/senate/533403-sasse-says-trump-was-delighted-and-excited-by-reports-of-capitol-riot>.

violence.⁴⁴ However, even this would not be dispositive as to the issue of intent, as expressing pleasure with criminal behavior after the fact does not directly prove the existence of intent to cause such an occurrence at the time of an earlier speech.

B. Imminent

The second prong of the *Brandenburg* test is that the criminal act called for must be imminent.⁴⁵ Unfortunately, *Brandenburg* and *Hess* provide little guidance as to exactly how much time can pass between the speech and the illegal action while still qualifying as imminent. Some scholars have attempted to extrapolate a requirement of “within a few hours,” but this is mere speculation.⁴⁶ With little guidance available for how to apply the imminence standard, courts have returned mixed results. One court held that “weeks or months” later was not imminent,⁴⁷ while another held that five weeks later was imminent.⁴⁸

Furthermore, case law supports the notion of a variable standard based on the nature of the event. A California appellate court explained:

[T]he imminence of an event is related to its nature. A total eclipse of the sun next year is said to be imminent. An April shower thirty minutes away is not . . . [T]he seriousness of the threatened crime, i.e., the nature of the lawless action solicited, bears some relationship to its imminence. Generally speaking, the more serious the crime the greater its time span.⁴⁹

This logic, if adopted by the Supreme Court, would work against Trump. The significance of storming the Capitol is likely to afford it a

⁴⁴ At present, the report of Trump’s pleasure at the Capitol riot is hearsay from anonymous “White House officials.” *Id.*

⁴⁵ Wilson & Kiper, *supra* note 22, at 75.

⁴⁶ *Id.* at 76.

⁴⁷ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

⁴⁸ People v. Rubin, 158 Cal. Rptr. 488, 493 (Cal. Ct. App. 1979).

⁴⁹ *Id.* at 492–93 (holding that “solicitation of murder in connection with a public event of this notoriety, even though five weeks away, can qualify as incitement to imminent lawless action”).

longer timeframe while still qualifying as imminent. Regardless, criminal activity at the Capitol began roughly ten minutes after Trump concluded his rally speech.⁵⁰ This is certainly a short enough time period to qualify as imminent. Trump's call for action—whether interpreted as lawful or lawless—was for imminent action and not action “at some indefinite future time.”⁵¹

C. Likelihood of Causing a Criminal Act

The third prong of the *Brandenburg* test is the likelihood of causing a criminal act.⁵² Much like with the imminence requirement, there is no objective standard for exactly how likely the future criminal act must be. Some scholars have suggested that this probabilistic standard should be defined as a “reasonable chance” of the criminal act.⁵³ The fact that this suggested improvement is equally as ambiguous as the original standard is telling as to how subjective this standard is. Furthermore, the nature of probabilistic determinations of future criminal acts is itself so subjective that even if a quantifiable standard were given, it would provide minimal guidance. For example, if the standard was “the speech must make the future criminal act at least 80% likely,” the process of determining whether the speech was more or less than 80% likely to cause a criminal act would remain highly subjective.

The California appellate court case *People v. Rubin*, mentioned above, also referenced how statements that were “the outcome of an improvised piece of braggadocio” were less likely to be taken seriously.⁵⁴ This is relevant to the present case, as “improvised braggadocio” is a fitting description of Trump's rally speeches. This would therefore strengthen Trump's defense that his speech was not

⁵⁰ George Petras, Janet Loehrke, Ramon Padilla, Javier Zarracina & Jennifer Borresen, *Timeline: How a Trump Mob Stormed the US Capitol, Forcing Washington into Lockdown*, USA TODAY (Jan. 6, 2021 10:19 PM), <https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests-capitol-riot-trump-supporters-electoral-college-stolen-election/6568305002/>.

⁵¹ *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

⁵² Wilson & Kiper, *supra* note 22, at 60.

⁵³ *Id.* at 79.

⁵⁴ *Rubin*, 158 Cal. Rptr. at 493.

likely to cause criminal behavior. However, the fact that Trump utilized a serious and intense tone during his speech would work against him. There is precedent establishing that statements made in jest are less likely to be the basis for criminal acts.⁵⁵ This does not mean that statements made in a serious manner automatically satisfy this third prong of the *Brandenburg* test; it is just part of the context to be considered.

Trump's position of authority and the loyalty he receives from his most devout followers—those in attendance at the January 6th rally—is relevant to determining the likelihood his speech was to cause a criminal act. There is reason to believe that the perceived authority that Trump commands when talking to a group of his most ardent supporters is evidence that they would interpret his statements as calls for criminal behavior.⁵⁶ Indeed, Trump supporters have demonstrated a willingness to sincerely believe what Trump says, regardless of factual accuracy.⁵⁷ This is further supported by how Trump has consistently praised violent acts:

- In response to protests over the death of George Floyd, Trump tweeted, “when the looting starts, the shooting starts.”⁵⁸
- After armed protestors broke into the capitol building in Michigan, Trump said, “[The governor should] give a little, and put out the fire. These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal.”⁵⁹

⁵⁵ *Id.*

⁵⁶ For an assessment of how the authority of the speaker is relevant to determining the likelihood of his speech being acted upon, see Wilson & Kiper, *supra* note 22, at 99.

⁵⁷ Aaron C. Kay & Mark J. Landau, *Op-Ed: Why So Many People Want to Believe the Election Was Stolen*, L.A. TIMES (Dec. 6, 2020, 4:00 AM), <https://www.latimes.com/opinion/story/2020-12-06/donald-trump-election-fraud-lies-psychology>.

⁵⁸ Libby Cathey & Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Inciting Violence*, ABC NEWS (May 30, 2020 4:00 AM), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766>.

⁵⁹ *Id.*

- There are reports that Trump inquired into shooting undocumented immigrants below the waist in order to slow them down.⁶⁰
- Trump responded to the white nationalist rally in Charlottesville, Virginia, where a woman was killed by a car, by saying there were “some very fine people on both sides.”⁶¹
- Trump encouraged police officers to rough up suspects who are arrested.⁶²
- Trump shared a video on Twitter in which he was portrayed viciously attacking someone with the CNN logo digitally imposed on the victim’s head.⁶³
- Trump praised Rep. Greg Gianforte for throwing a reporter to the ground, stating, “any guy that can do a body slam, he is my type!”⁶⁴
- At political rallies, Trump encouraged attendees to “knock the crap out of” people who were attempting to throw tomatoes at him and promised to pay the legal fees for anyone who did.⁶⁵
- Trump bragged about being able to shoot someone in the middle of Fifth Avenue and not lose any voters.⁶⁶
- Before being indefinitely banned, Twitter placed warning labels on some of Trump’s tweets for violating its policy on “glorifying violence.”⁶⁷

This well-documented relationship with calling for violence could be presented as either evidence for or evidence against guilt in a potential incitement case. Trump could claim that it demonstrates there was no special intent to call for violence on the day of the Capitol riot,

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Libby Cathey & Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Inciting Violence*, ABC NEWS (May 30, 2020 4:00 AM), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

he just happens to have a very intense manner of speech, as evidenced by the bulleted examples above. Conversely, these examples could be used to produce a cumulative case, pointing out that the violence following his speech at the Save America Rally was foreseeable. And again, Trump sends mixed messages. In addition to all the previously documented statements regarding violence, Trump also said, “in these times we have to unify. We have to come together and send one very clear, strong, unmistakable message that acts or threats of political violence of any kind have no place in the United States of America.”⁶⁸

A difficulty in trying to predict the likelihood of criminal conduct due to Trump’s speech is that the trier of fact is viewing the speech with the hindsight of knowing that the criminal act did occur. Hindsight bias is a cognitive fallacy whereby people weigh the odds of something happening higher if they know it did happen.⁶⁹ Another cognitive fallacy that may distort a jury’s ability to accurately predict the likelihood of Trump’s speech causing the Capitol riot is the *post hoc ergo propter hoc* fallacy, in which causation is inferred when one event chronologically follows another.⁷⁰ The well-documented effects of these two fallacies provide support for a potential case ending in a conviction, regardless of the accuracy of such a finding.

V. LIKELY OUTCOME

The *Brandenburg* standard is strongly biased in favor of protecting free speech.⁷¹ A judge faithfully applying the three-prong test to Trump’s speech and subsequent Capitol riot would likely hold

⁶⁸ *Id.*

⁶⁹ ‘I Knew It All Along . . . Didn’t I?’ – Understanding Hindsight Bias, ASS’N FOR PSYCH. SCI. (Sept. 6, 2012), <https://www.psychologicalscience.org/news/releases/i-knew-it-all-along-didnt-i-understanding-hindsight-bias.html> (explaining that hindsight bias “has been documented in various domains, including medical diagnoses, accounting and auditing decisions, athletic competition, and political strategy.”).

⁷⁰ Overview: Post Hoc Ergo Propter Hoc, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100339479> (last visited Jan. 15, 2021).

⁷¹ Bible Believers v. Wayne Cnty., 805 F.3d 228, 244 (6th Cir. 2015) (“It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot.”).

that Trump's speech is protected and therefore not incitement. The timing of the criminal behavior certainly qualifies as imminent, but the other two prongs of the test are likely not met. Considered in context, it would be difficult to prove that Trump intended to cause criminal behavior. And it would be difficult to prove that Trump's abstract statements were likely to cause criminal behavior.

Looking at incitement case law also supports this conclusion. The *Brandenburg* case, for example, also included a call to march on Washington, D.C.⁷² Unlike Trump's call to march to the Capitol, however, Brandenburg's call was made while standing next to a burning cross and Klansmen wielding guns.⁷³ And even this was not enough to constitute incitement.

The results of a previous civil lawsuit against Trump for incitement provides insight into the likely outcome if charges are brought against him. Trump was sued by counter protestors who were injured by Trump supporters at a 2016 Louisville Trump campaign rally.⁷⁴ The plaintiffs, upon engaging in a counterprotest, were assaulted by Trump supporters in the crowd after Trump said, "get 'em out of here."⁷⁵ Similar to the present case, Trump sent mixed messages by also stating, "don't hurt 'em."⁷⁶ The Sixth Circuit unanimously granted a motion to dismiss, explaining, "Trump's words may arguably have had a tendency to encourage unlawful use of force, but they did not specifically advocate for listeners to take unlawful action and are therefore protected."⁷⁷ This exact phrasing could also apply to the Capitol riots. Namely, while Trump's speech on January 6th could have had a tendency to encourage unlawful use of force, he did not specifically advocate for those in attendance to unlawfully storm the Capitol.

The political nature of Trump's speech would also work in his favor. Political speech is recognized as the most highly protected form

⁷² *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1 (1969).

⁷³ *Id.*

⁷⁴ *Nwanguma v. Trump*, 903 F.3d 604, 606 (6th Cir. 2018).

⁷⁵ *Id.*

⁷⁶ *Id.* at 608.

⁷⁷ *Id.* at 610.

of speech.⁷⁸ As one expert explains, the current standard from *Brandenburg* is “a test designed to protect political speech and the abstract advocacy of violence or revolution.”⁷⁹ This summation of the current standard, written twenty years ago, accurately describes Trump’s speech at the Save America Rally.

Trump’s false claim—made knowingly or otherwise—that widespread voter fraud cost him the election may have motivated his supporters to riot at the Capitol. But that is not enough to overcome First Amendment protections, which consistently protect false statements of fact.⁸⁰

While incitement does not require the speaker to call out specific victims by name,⁸¹ general advocacy of violence is not enough.⁸² Statements such as “fight like Hell” and “stop the steal” lack specificity. Trump’s urging that the crowd at the rally walk to the Capitol was specific, but that is not a criminal act. Trump never called for any specific criminal act.

Another issue that could complicate potential incitement litigation is that Trump was not the sole agitator. Rudy Giuliani and Donald Trump Jr. also made incendiary comments at the Save America Rally.⁸³ Additionally, the people who rioted at the Capitol were doing so based on false information that was not exclusively spread by Donald Trump. For example, the defamation lawsuit by Dominion

⁷⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339–40 (2010).

⁷⁹ S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1168 (2000).

⁸⁰ *United States v. Alvarez*, 567 U.S. 709 (2012) (applying strict scrutiny to a false claim of military service).

⁸¹ *People v. Rubin*, 158 Cal. Rptr. 488, 493 (Cal. Ct. App. 1979). The court addressed a solicitation for murder case in which someone offered a \$500 reward for killing “a member of the American Nazi Party . . .” *Id.* at 490. The court noted that “undoubtedly, the prosecution’s case would be stronger if a specific Nazi Party member had been named as the target for assassination . . . Yet murder remains a crime, whether or not a specified victim is identified as the target.” *Id.* at 493.

⁸² *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

⁸³ Benner, *supra* note 4 (Giuliani demanded, “trial by combat,” and Trump Jr. warned, “we’re coming for you.”).

Voting Systems against Sidney Powell alleges that the riot at the Capitol was “incited by Powell’s disinformation campaign . . .”⁸⁴

Trump’s position as President interjects a wildcard element to predicting his potential liability. It could be argued that as President, his speech inherently carries with it a sense of authority. When the Commander-in-Chief of the Armed Forces tells a group to do something, they will naturally be more inclined to follow such an instruction than if given by a random citizen. Furthermore, Trump’s position as a highly divisive President⁸⁵—even within his own party⁸⁶—could result in a judge erring on the side of striking down the speech of such a person. The imposition of a different standard when evaluating Trump’s actions was advocated for by one scholar in 2019 who called for courts to be “flexible” when applying the requirements in *Brandenburg* to Trump.⁸⁷ Conversely, Trump’s position as President could lead to judges extending him deference in his statements. This would be consistent with the related notion that judges are hesitant to interfere with political questions.⁸⁸

VI. CONCLUSION

Given the inherently subjective nature of applying the *Brandenburg* test, it is not possible to predict with certainty how a court would rule in a potential case against Trump regarding his speech that preceded the Capitol riot. However, faithfully applying the *Brandenburg* three-prong test and examining analogous case law leads to the most likely conclusion that Trump would not be found guilty of incitement. Regardless, a potential prosecution would be highly

⁸⁴ Complaint at 66, *Dominion Voting Sys., Inc. v. Powell*, No. 1:21-cv-00040-CJN (D.D.C. Jan. 8, 2021).

⁸⁵ See Louise Boyle, *2020 US Election: Majority of Americans Think Trump Is ‘Divisive, Dangerous and Racist’*, INDEPENDENT (Oct. 29, 2020, 2:45 PM), <https://www.independent.co.uk/news/world/americas/us-election-2020/2020-us-election-trump-racist-dangerous-poll-b1378575.html>.

⁸⁶ See Shane Goldmacher, *Fractured by Trump, the G.O.P. Can’t Agree on a Way Back to Power*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/11/us/politics/republican-party-trump.html>.

⁸⁷ Sweeny, *supra* note 37, at 637.

⁸⁸ *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918) (holding that foreign relations conduct is the sole responsibility of the Executive Branch).

controversial and could lead to one of the most pressing constitutional questions of the last 100 years. Namely, could Trump issue himself a pardon as he has claimed he has the power to do.⁸⁹

⁸⁹ Michael J. Conklin, *Can a President Pardon Himself? Law School Faculty Consensus*, NE. U. L. REV.: EXTRA LEGAL (2019), <http://nulawreview.org/extralegalrecent/2019/12/19/can-a-president-pardon-himself-law-school-faculty-consensus>.