

TO: Dr. Carroll
FROM: Charles Stephenson
RE: President Donald Trump- Incitement in January 6 speech
DATE: February 5, 2023
QUESTION PRESENTED

Under *Brandenburg v. Ohio* (1969), does former President Trump's speech fall under incitement for violent and imminent action, and should he be prosecuted for it?

SHORT ANSWER

No. Whereas President Trump never told rioters to storm and raid the Capitol building. He specifically said, "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard" (Trump, 2021). It should not violate *Brandenburg v. Ohio* since the speech was not meant to elicit violent or illegal action by the rioters. ✓

↑
necessarily

FACTS

President Trump held a speech on January 6, 2021, before the Congress ratified the results of the 2020 Presidential election. In this speech, President Trump urged his supporters to march through Pennsylvania Ave. to the Capitol building. He explicitly states, "But we're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country" (Trump, 2021).

Shortly, thereafter, the Capitol Building was stormed by protesters. Rioters broke into the Senate chamber and began to take photos and go through senator's belongings. Meanwhile, President Trump was tweeting for protestors to "stay peaceful" during this time. More than 2,000 rioters stormed the building. Five people died during the riot and over 140 officers were injured.

DISCUSSION

The question presented is under *Brandenburg v. Ohio* should President Trump be prosecuted for his speech on January 6, 2021. The issue in this case is whether not President Trump intended to incite violent or illegal action. Under this ruling, President Trump should not be prosecuted because this speech was not intended for rioters to storm and raid the Capitol building. It was intended for them to protest outside of the Capitol building as a way of protesting the 2020 Presidential election results.

Under other Supreme Court rulings in *Atlantic v. Twombly* and *Ashcroft v. Iqbal*, "charges should be dismissed if judges' 'common sense' and judicial experience indicated that (1) the preliminary facts (2) did not make a plausible showing (3) that the necessary elements of the crime were met". Under this doctrine, a court would not prosecute President Trump on incitement because the necessary elements of the crime were not met. Why would President Trump say "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard" if he wanted the people to storm the building? (Trump, 2021). If President Trump had explicitly stated to "storm and raid the Capitol" he could be prosecuted for incitement.

CONCLUSION

On these facts, the court would probably find that President Trump did not cause incitement based on the ruling of *Brandenburg v. Ohio*. Since, there is no evidence of President Trump openly endorsing the Capitol building riot, he would not be prosecuted on the grounds of incitement in Court.

Really well done, Charles. Persuasive.

10/10

does
intent
matter as
a question
of law?

TO: The US Department of Justice
FROM: Madi Rowe
DATE: February 5, 2023

Question Presented

Does the former president's speech on Jan. 6 rise to the legal threshold of "incitement" and, thus, warrant federal prosecution? Did the president's speech cause or incite "imminent illegal action" (Brandenburg v. Ohio. 1969)?

Short Answer

No, Donald Trump does not violate any law regarding incitement. Based on the "two-pronged test" used in Brandenburg v. Ohio. 1969, Donald Trump's words were not "directed at inciting or producing imminent lawless action" or "likely to incite or produce such action." ✓

Facts

25 days before the insurrection on January 6th, 2021, Donald Trump started to campaign for the "Save America" rally on Twitter. In these tweets, he praised those supporting him at Pro-Trump rallies, spread false information about the 2020 presidential election being rigged in favor of the Democrats, and retweeted many individuals' tweets about the preplanned January 6th protest.

Donald Trump gave a speech to goers of a rally for "Save America" the morning of January 6th. In this speech, he reiterated information he had previously stated and tweeted about how he supposedly won the 2020 presidential election. Trump's words did stir up the crowd many times, as they shouted phrases like "Fight for Trump," "We love Trump," and "Bull***." All of Trump's remarks on the 2020 election were false information.

Discussion

First, I'd like to establish that we are questioning Donald Trump's words for incitement for violence, not truth. It is evident that Donald Trump's words were false. However, fake news and false statements are covered under the First Amendment unless it defames someone. If we use the two-pronged test from Brandenburg V. Ohio (1969), Donald Trump's words never directly incited lawless action. He never directly asked his rally goers to storm the capitol or use violence to stop Congress. His words were not likely to produce lawless action because he stated twice that these protests were to be "peaceful and patriotic." He even tweeted before the January 6th riots that he expected them to be peaceful. The violence came from those who wanted to be violent and extreme. The rioters believed the lies of Donald Trump, which are covered under the First-Amendment, and decided to storm the capitol.

among other exceptions

Conclusion

The court should not federally prosecute Donald Trump for incitement, as his words did not directly offer, ask for, or hint at violence. Really, this leaves one question: Is it constitutional to federally prosecute a person who spreads false information and ignites extremism in other people?

Boom. 10/10