



FORUM

Making the Case for Trump’s January 6th Speech as Incitement

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On January 12th, Alan Dershowitz, Professor Emeritus at Harvard Law School and one of the nation’s most prominent attorneys, published an op-ed in the publication *Newsweek* in which he argued against the second impeachment of President Donald Trump on constitutional grounds. He reasoned that Trump’s false statements about the legitimacy of the 2020 election, though “deeply upsetting,” did not meet the standard the Supreme Court set for “incitement” in *Brandenburg v. Ohio* (1969). He wrote that instead of constituting incitement, Trump’s “volatile words fell plainly on the side of political ‘advocacy,’ which is protected speech.” Dershowitz then claimed that since Trump’s statements were constitutionally protected, they could not be sufficient grounds for impeachment, since First Amendment-protected speech does not constitute “Treason, Bribery, or other high Crimes and Misdemeanors”—the grounds for impeachment enumerated in Article II, Section IV of the Constitution. I will argue that, though Dershowitz is right about constitutionally permissible speech being insufficient grounds for impeachment, Trump’s statements on the morning of January 6th do meet the standard for incitement as laid out in *Brandenburg*.

In *Brandenburg*, the Supreme Court held that “freedoms of speech and press do not permit a State to forbid 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.” As the word “imminent” indicates, the only statements Trump made that could potentially constitute incitement of the

insurrection at the Capitol are those he made in a speech on January 6th, just before some of his followers stormed the building. The claims he repeated for months about widespread election fraud are irrelevant to the current discussion. Reformulating the Court's words in *Brandenburg* makes clear what criteria Trump's statements in this speech must meet in order to rise to incitement: they must have advocated for people to break the law, they must have been likely to cause illegal action, and Trump's goal in uttering them must have been to provoke this illegal action. Let us examine each of these criteria in turn.

Though it is true that Trump did not explicitly ask his followers to raid the Capitol in his January 6th speech, that does not preclude the possibility that he still advocated for the use of force; indeed, a close examination of his speech reveals several instances in which he employed coded, implicit appeals for those in the audience to take matters into their own hands to reverse the results of the election. He asserted, for example, that "We will never give up, we will never concede... You don't concede when there's theft involved," implying that taking "no" for an answer was out of the question. He also thanked the audience after they broke out into the chant, "Fight for Trump!" and then immediately brought up the military and the Secret Service—two organizations closely connected with the use of force. Taken in conjunction with one another, these statements, along with many other similar ones that pervade the rest of the speech, express the sentiment that the ends of delivering the election victory to its 'rightful' winner justify whatever means are necessary to secure that end.

Next we turn to whether or not Trump's rhetoric was "likely to incite or produce such [illegal] action." A consideration of the makeup of the crowd in attendance and the contents of Trump's speech points to a clear affirmative response to this question. Those in attendance in Washington D.C. on January 6th had traveled from all across the country in order to protest the certification of the Electoral College; just by virtue of having arrived in the capital, they had already demonstrated a profound willingness to—and even a commitment to—engage in extreme action in order to keep Trump in office for another four years. Their presence in Washington D.C. indicates that they felt deeply aggrieved by false claims of election fraud and that they strongly believed in the righteousness of their cause. They were, put simply, the individuals most likely to resort to violence to achieve their desired ends. So when Trump set out to "lay out just some of the evidence proving that we won this election," he lit a rhetorical match before the most flammable of audiences. And when he urged those in attendance to "fight like hell, [since if you don't] you're not going to have a country anymore," framing the consequences of inaction as destroying "the integrity of our glorious republic," he further convinced an already

aggrieved crowd of the *necessity* of taking up extreme measures in order to prevent the certification of the Electoral College. He gave those listening an ultimatum: do whatever you can to keep me in power or live in an undemocratic country with an illegitimate leader who will do profound damage to many things you hold dear. By emphasizing to those most inclined to violence the importance of fighting the certification, Trump increased the likelihood of violence occurring.

Lastly, we must determine if Trump's words were "directed to inciting or producing imminent lawless action"—that is, if incitement to violence was his goal. Questions of intent are always difficult to answer, and that is especially the case here given the absence of explicit calls to violence. There still, however, exists evidence that Trump wanted January 6th to unfold along the lines that it did. First, in an interview with radio host Hugh Hewitt, Republican Senator Ben Sasse said multiple White House officials had told him that "as this [the storming of the Capitol] was unfolding on television, Donald Trump was walking around the White House confused about why other people on his team weren't as excited as he was... He was delighted." If it is true that Trump was happy with the insurrection, this suggests that that was his desired outcome from the outset; it seems unlikely that he went from being opposed to violent insurrection in the morning then delighted by violent insurrection later in the afternoon. Trump hoping for violence all along would also explain his initial inaction when his followers broke into the Capitol: hours after the protests had devolved into violence, Trump still had not condemned his followers, instead doubling down and further encouraging the mob by tweeting that Mike Pence had "failed to protect our Country and our Constitution." Such language demonstrates a lack of displeasure with the events that were transpiring.

It may thus plausibly be argued that Trump's speech on the morning of January 6th meets the high standard for incitement that the Supreme Court set in *Brandenburg*. This renders moot Dershowitz's point about constitutionally permissible speech being insufficient grounds for impeachment.