

A note on the presidential insurrection

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By

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Donald Trump Joe Biden

With a view to prevent any further violence, President Trump's Twitter and other social media accounts were suspended and some of his tweets were censored, leading to the President's son, Donald Jr., taking to Twitter himself to question the validity of censorship by a company, and its congruity with 1st Amendment provisions. Intriguingly, the events that occurred on the 6th are remarkably similar to events that occurred close to 52 years previously. In 1969, the US Supreme Court delivered their judgement in *Brandenburg*. Brandenburg, who was one of the leaders of the K.K.K (a white supremacist group) was arrested and charged with advocating violence and terrorism as a means for achieving reform.

The primary piece of evidence against him was a video clip, in which Brandenburg made a speech to those who had assembled at his rally. In his speech, he suggested violence against the Government, and requested his followers to join him in Washington. Brandenburg claimed protection under the 1st Amendment, and all 9 judges of the US Supreme Court agreed with him. In their judgement, the judges held that "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." Thus, under this, the standard of review required firstly, an express advocacy in violation of law, secondly, such an advocacy has the propensity to cause immediate illegal action, and thirdly, there must be done with an intention to cause this illegality.

With this, the standard to get a conviction for mere advocacy had been set extremely high, as there must not only be advocacy for imminent illegal action but there must also be an intention for it as well. In a rousing speech which bore an odd resemblance to Mark Antony's speech at Caesar's burial, President Trump iterated his complaints against the media, against the election being stolen due to voter fraud. "There's never been anything like this. We will not let them silence your voices. We're not going to let it happen. Not going to let it happen..." he said. To this, the crowd chanted, "Fight for Trump! Fight for Trump! Fight for Trump!". In the moment after this, he proceeds to tell them, "There's never been a movement like this ever, ever for the extraordinary love for this amazing country and this amazing movement. Thank you", to which the crowd replies with chants of, "We love Trump! We love Trump! We love Trump!". With all the guns loaded, he tells finally presses the trigger, telling them "...we fight. We fight like Hell and if you don't fight like Hell, you're not going to have a country anymore... So

we're going to, we're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol." Taking his cue, the mob of supporters stormed into the Capitol in a naked attempt to overawe the Congressmen, and violence and destruction of property soon began.

If we analyse portions of his speech here, President Trump appears to be advocating an imminent lawless action as per the Brandenburg standard, and given the numbers, and their proximity to the Capitol, there was a clear threat for lawless action to occur rapidly. However, it is the intent, which would remain problematic to establish, as his actions during and after the incident would probably indicate otherwise. It is here that it becomes clear to see that immediately after the crowd reacted to his speech, a necessity for suspending the President's Twitter sprang up, so as to arrest the likelihood of further violence, and Twitter, being a private forum, was entitled to regulate content, since the repeated judgements of the Roberts Court has held that by action under the 1st Amendment will lie against the Government. What will be intriguing to see in the coming days is how the court reconciles this with the judgement of a lower court, which had last year barred the President from blocking his followers, calling his account a public forum. It will also be interesting to see how the Courts in future decides on the issue of the whether public forum provided by a private company, can be regulated in any manner to manage public participation, and resolve its possible conflict with the individual's first amendment rights.

While this issue may be far down the road in future, a more immediate question that needs to be resolved in light of the presidential insurrection is how far constitutional accommodations be provided to those who use the constitutional platform to break the democratic machinery itself? As the motions for impeachment begins, we will surely see more about this in the coming days.

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