



## What does 'incitement' mean, exactly?

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The House of Representatives impeached President Trump, 232-197, Wednesday for "incitement of insurrection" in the wake of the violent mob attack on the U.S. Capitol last week.

The House accused the president of engaging "in high Crimes and Misdemeanors by inciting violence against the Government of the United States," and specifically cited Trump's statements to his supporters at a rally at the Ellipse just before they marched to the Capitol building.

"There, he reiterated false claims that 'we won this election, and we won it by a landslide,'" the impeachment article states.

"He also willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol, such as: 'if you don't fight like hell you're not going to have a country anymore.'"

Legal authorities apply the "Brandenburg Test" to speech to determine whether inflammatory statements are protected under the First Amendment, or could be restricted and considered "incitement."

According to Cornell Law School's Legal Information Center, the two-part test, which originates in Brandenburg vs. Ohio (1969), determines that the government may prohibit speech if it is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action."

Jeffrey Scott Shapiro, a Trump appointee at the U.S. Agency for Global Media who has experience prosecuting protesters for incitement, wrote in a Wall Street Journal opinion piece Sunday that Trump's "critics want him charged for inflaming the emotions of angry Americans," but "that alone does not satisfy the elements of any criminal offense."

Fox News senior judicial analyst Andrew Napolitano argued that "the essence of criminal incitement is immediacy."

"On Jan. 6, because there was time for more speech to rebut what the president said, his words are protected," Judge Napolitano explains. "He cannot be prosecuted or even sued for them."

Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, said that the legal standard isn't as relevant because "impeachment is inherently a political judgment."

"The standard for impeachment -- high crimes and misdemeanors -- is whatever Congress makes it out to be," Shapiro told Fox News. "But fundamentally, it relates to a serious breach of the public trust. Not all crimes are impeachable offenses. If the president was jaywalking and got a ticket, that's not impeachable. And not all impeachable offenses are crimes."

William Galston, a senior fellow at the Brookings Institution, also argued that the president's actions can be impeachable, even if they aren't criminal.

"There are actions that, while not strictly speaking illegal, are violations of the responsibilities that someone undertakes when he enters into a particular office of trust and confidence," Galston told Fox News. "The article of impeachment should be read - this is my bottom line - as accusing the president of violating his oath of office by doing what he did. That's a constitutional standard, but not necessarily a legal standard."

Republican Senate leader Mitch McConnell, R-Ky., said after the House's impeachment vote, the "Senate process will now begin at our first regular meeting following receipt of the article from the House," which is next Tuesday, the day before Trump is set to leave office.

"Given the rules, procedures, and Senate precedents that govern presidential impeachment trials, there is simply no chance that a fair or serious trial could conclude before President-elect Biden is sworn in next week," McConnell said in a statement Wednesday after the House voted to impeach the president for a second time.

That means that Trump's impeachment trial in the Senate will not happen until after President-elect Joe Biden is inaugurated and Democrats gain control of the upper chamber. A trial in the Senate will still be relevant though, because if the Senate convicts the president, then he would be forbidden from running for office again.