

Pence Subpoena Fight Clarified Key Constitutional Principles

By **Scott Coffina** (April 17, 2023)

While most of the attention this month has been on the indictment of former President Donald Trump brought by the Manhattan district attorney, another investigation that potentially carries greater legal peril for Trump took a step forward when former Vice President Mike Pence decided not to appeal a decision requiring him to testify before the grand jury investigating the Jan. 6, 2021, riot at the U.S. Capitol.



Scott Coffina

Ironically, while Pence was a prominent figure in the events of Jan. 6, the actual content of his testimony may be less consequential than the recent rulings that will ultimately require him to testify before the grand jury, given the attendant constitutional issues raised by the subpoena's issuance.

Pence was reportedly was subpoenaed by special counsel Jack Smith in early February.

The unique circumstances of the vice president's role in the Jan. 6 tableau raised several important issues surrounding this subpoena, so a little context may be helpful.

The vice president, in addition to his or her largely undefined role in the executive branch, is designated by Article I, Section 3 of the U.S. Constitution as the president of the Senate, with no vote other than to break ties.

The vice president has another constitutionally defined responsibility in the U.S. Senate established by the 12th Amendment, which states, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

It was this pro forma duty that Pence was set to perform — contrary to the insistence of Trump, on spurious legal grounds, that he reject certain states' electoral ballots — when a crowd challenging the integrity of the 2020 presidential election breached the Capitol, some apparently seeking to harm the vice president, forcing the temporary evacuation of the House chamber.

Smith and a Washington, D.C., grand jury have been investigating Trump's actions in challenging the result of the 2020 election, including whether the former president instigated the riot at the Capitol and whether his attempts to interfere with the electoral counting prescribed by the 12th Amendment constituted crimes.

Several close advisers to the former president have been summoned to the grand jury, including the former vice president.

In mid-February, Pence announced that he would resist the special counsel's subpoena for his testimony, describing it as "unprecedented and unconstitutional."

Although executive privilege could apply to whatever conversations Trump and Pence had regarding the electoral vote certification proceeding, Pence's challenge to the subpoena was based on his legislative role on Jan. 6, for which, he argued, the protections of the speech or debate clause should shield him from testifying.

Pence's objection to the subpoena drew criticism, and not simply from political opponents. Iconic conservative retired U.S. Circuit Judge J. Michael Luttig wrote in *The New York Times* that Pence's resistance to the subpoena would invite an "embarrassing spectacle," and in *The National Review*, commentator Andrew McCarthy characterized Pence's challenge as "frivolous."

Pence's challenge was neither of these things, and it appears that several important constitutional principles — separation of powers, protection against prosecutions that impinge upon or threaten the legislative process — have been vindicated and clarified through this brief litigation, which remains under seal with the court, consistent with routine grand jury practice.

Hardly frivolous, the same U.S. Department of Justice seeking to compel Pence's testimony in its Jan. 6 investigation argued matter-of-factly in 2021 that Pence enjoyed "absolute legislative immunity" from a civil lawsuit brought over the certification proceedings on Jan. 6, due to the speech or debate clause.

Article I, Section 6 of the Constitution states that senators and representatives

shall in all Cases ... be privileged from Arrest during their Attendance at the Session of their respective Houses ... and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Those who were dubious of the former vice president's resistance to the subpoena based on the speech or debate clause raised four main points: (1) by its own terms, the clause's protection is limited to members of Congress, which the vice president is not; (2) that the vice president does not engage in speech or debate, or any legislative activity, when serving as president of the Senate; (3) Jan. 6's proceedings do not implicate the speech or debate clause's protections; and (4) to the extent the vice president might have protection under the clause, he is not immune from appearing before a grand jury investigating criminal activity.

While it is true that the Article I, Section 6 discusses only senators and representatives, the U.S. Supreme Court extended this protection to congressional staffers in its 1972 *Gravel v. U.S.* decision, recognizing that "prior cases have plainly not taken a literalistic approach in applying the privilege."^[1]

The vice president, of course, is not a member of Congress. However, given his constitutional designation as president of the Senate, with constitutionally ordained duties in the legislative branch — breaking a tie, counting states' electoral votes — Pence credibly could assert, based on *Gravel*, that he, too, is protected by the speech or debate clause.

The question then becomes what scope of protection the speech or debate clause offers a vice president. Is it total immunity from even appearing before the grand jury, given the clause's mandate that those covered shall not be questioned in any other place?

Well, no. For just as the Supreme Court has expanded the coverage of the clause beyond simply members of Congress, it has similarly imposed limitations on what protection the clause offers.

In *Gravel*, the Supreme Court distinguished official acts from legislative acts, finding that only the latter was shielded from official inquiry by the speech or debate clause.

However, the court did widen the lane for speech or debate protection beyond pure speech or debate in either chamber of Congress to include committee work and other proceedings where the passage of legislation is considered.

Pence's task on Jan. 6, 2021, certifying states' electoral votes, was certainly an official act; but was it a protected legislative act?

Given that it is a constitutionally mandated act occurring before a joint session of Congress, one could predict, based on prior case law, that the clause would cover Pence's 12th Amendment duties.

Although Pence thus appears to be covered by the speech or debate clause for his Jan. 6 responsibilities as president of the Senate, it does not follow that the grand jury subpoena should automatically have been quashed.

Similar to the position the court has consistently taken regarding executive privilege, it has established limitations on speech and debate protection, particularly regarding investigations into potential criminal activity.

In *Gravel*, the court stated, "[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct ... or to frustrate the grand jury's inquiry."

There are two other recent data points surrounding speech or debate clause litigation to consider.

First, the U.S. Court of Appeals for the Eleventh Circuit denied a request by Sen. Lindsey Graham, R-S.C., to quash a grand jury subpoena in an investigation into alleged interference with Georgia's vote count in the 2020 election.[2]

Graham thus had to appear before the grand jury, but the court drew a line between the senator's formal and even informal investigatory activity related to Georgia's vote certification — which the court held was protected legislative conduct — and communications with the Trump campaign, "public statements regarding the 2020 election, and efforts to 'cajole' or 'exhort' Georgia election officials," which the court determined was unprotected nonlegislative conduct.

Second, the U.S. Court of Appeals for the District of Columbia Circuit heard arguments in February on whether the DOJ should be able to access Rep. Scott Perry's, R-Pa., cell phone in connection with the Jan. 6 investigation.

The court signaled it may find middle ground on the scope of speech or debate protection with regard to the congressman's communications, suggesting that informal fact-finding was protected, while expressing concern that members would try to take that indulgence well beyond the legislative realm.[3]

So, the legal landscape Pence faced when he sought to quash the special counsel's grand jury subpoena involved:

- A reasonable basis to assert that the speech or debate clause applied to him while serving as president of the Senate, and while engaging in the constitutionally mandated certification of the electoral vote before a joint session of Congress on January 6;

- An uphill climb to avoid appearing before the grand jury entirely, given the Supreme Court's history of deference toward grand jury process in criminal cases, dating back to Watergate; and
- Reasonable limitations placed upon the scope of questions posed to the vice president, and on the assertion of speech or debate privilege by the vice president, with questions concerning the vote certification on Jan. 6 receiving the most protection, and questions relating to other issues surrounding Trump's efforts to challenge the 2020 election result receiving less protection.

It seems the Washington, D.C., district court's decision on Pence's challenge aligned with these parameters.

On March 28, Chief U.S. District Judge James Boasberg reportedly ruled that Pence must appear before the grand jury, but does not have to answer questions related to his actions on Jan. 6. He apparently must testify about any illegal acts committed by Trump, however.

CNN and others described the court's decision requiring Pence to testify as a "[b]ig win for [the] special counsel," but characterizations of this still-sealed ruling may well depend on where one stands politically.[4]

The decision, as it has been reported, can be seen just as easily as a big win for Pence — or more accurately, for the principle of separation of powers and for the institution of the vice presidency — given that the court recognized that performing his duty as president of the Senate to certify the electoral vote count warrants speech or debate protection, an outcome that was deemed a long shot by some.

The former vice president seems satisfied by the outcome, or at least resigned to the fact that it is the best he could hope for. On April 5, through a spokesperson, Pence announced he would not appeal the district court's decision.

Realistically, it is too soon to declare a winner in the battle over Pence's anticipated grand jury appearance, unless the only goal of the special counsel was to get the former vice president in the witness chair.

There could be future court activity once Pence is questioned and the limits of the speech or debate protection afforded to his Jan. 6 activities are probed.

Questions related to the vice president's Jan. 6 responsibilities seem to be off-limits, but questions about Trump's potentially illegal actions are not. These two boundaries may collide if and when prosecutors ask Pence about what Trump tried to persuade him to do or not to do on Jan. 6 in the run-up to that fateful day, and whether such pressure by the president can be viewed as an illegal attempt to overturn the 2020 election results.

Finally, a note about executive privilege: Pence did not assert executive privilege in his challenge to the special counsel's subpoena, but Trump did attempt to block Pence's appearance before the grand jury on that basis, and has reportedly appealed Judge Boasberg's decision requiring Pence to appear.

Trump moved to block the appearances of several other close advisers before the Jan. 6 grand jury based on executive privilege, and has lost across the board, with the District of Columbia circuit court denying an emergency appeal earlier this month.

It is difficult to imagine the district court treating Pence differently than those other close presidential advisers in the context of executive privilege, particularly in a criminal investigation, so one should not expect that to be an impediment to Pence's grand jury appearance.

Barring a development with Trump's appeal, Pence will likely appear before the Jan. 6 grand jury in the near future.

The significance of his testimony may hinge on how the parties — and if necessary, the court — navigate the parameters of the speech or debate privilege, and how much information Pence will be able to contribute, not so much about the day of Jan. 6, 2021, but about the pressures he was under prior to that day not to certify the electoral vote count.

Scott A. Coffina is a partner at Montgomery McCracken Walker & Rhoads LLP. He formerly served as associate counsel to President George W. Bush, senior deputy chief counsel to New Jersey Gov. Chris Christie, and as an assistant U.S. attorney. He recently completed a five-year term as the county prosecutor for Burlington County, New Jersey.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Gravel v. United States*, 408 U.S. 606 (1972).

[2] *Fulton County Special-Purpose Grand Jury v. Graham*, 2022 WL 13682659 (11th Cir. Oct. 10, 2022).

[3] *In re Sealed Case*, No. 23-3001 (D.C. Cir).

[4] <https://www.cnn.com/2023/03/28/politics/mike-pence-grand-jury-testimony/index.html>.