

GUEST ESSAY

# Mike Pence's Dangerous Ploy

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**By J. Michael Luttig**

Mr. Luttig, a former judge on the United States Court of Appeals for the Fourth Circuit, provided advice to then-Vice President Pence on the run-up to the Electoral College count on Jan. 6, 2021.

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Former Vice President Mike Pence recently announced he would challenge Special Counsel Jack Smith's subpoena for him to appear before a grand jury in Washington as part of the investigation into former President Donald Trump's efforts to overturn the 2020 presidential election and the related Jan. 6 attack on the U.S. Capitol. Mr. Pence claimed that "the Biden D.O.J. subpoena" was "unconstitutional" and "unprecedented." He added, "For me, this is a moment where you have to decide where you stand, and I stand on the Constitution of the United States." Mr. Pence vowed to take his fight all the way to the Supreme Court.

A politician should be careful what he wishes for — no more so than when he's a possible presidential candidate who would have the Supreme Court decide a constitutional case that could undermine his viability in an upcoming campaign.

The former vice president should not want the embarrassing spectacle of the Supreme Court compelling him to appear before a grand jury in Washington just when he's starting his campaign for the presidency; recall the unanimous Supreme Court ruling that ordered Richard Nixon to turn over the fatally damning Oval Office tapes. That has to be an uncomfortable prospect for Mr. Pence, not to mention a potentially damaging one for a man who — at least as of today — is considered by many of us across the political spectrum to be a profile in courage for his refusal to join in the attempt to overturn the 2020 election in the face of Donald Trump's demands. And to be clear, Mr. Pence's decision to brand the Department of Justice's perfectly legitimate subpoena as unconstitutional is a far cry from the constitutionally hallowed ground on which he stood on Jan. 6.

Injecting campaign-style politics into the criminal investigatory process with his rhetorical characterization of Mr. Smith's subpoena as a "Biden D.O.J. subpoena," Mr. Pence is trying to score points with voters who want to see President Biden unseated in 2024. Well enough. That's what politicians do. But Jack Smith's subpoena was neither politically motivated nor designed to strengthen President Biden's political hand in 2024. Thus the jarring dissonance between the subpoena and Mr. Pence's characterization of it. It is Mr. Pence who has chosen to politicize the subpoena, not the D.O.J.

As to the merits of his claim, The New York Times and other news media have reported that Mr. Pence plans to argue that when he presided over the joint session of Congress on Jan. 6 as president of the Senate, he was effectively a legislator and therefore entitled to the privileges and protections of the Constitution's "speech or debate" clause. That clause is intended to protect members of Congress from questioning and testifying about official legislative acts. Should the courts support his claim, Mr. Pence would not be required to comply with Mr. Smith's subpoena. Mr. Pence may also be under the impression that the legal fight over his claim will confound the courts, consuming months, if not longer, before he receives the verdict — but it's unclear what he hopes to gain from the delay. One would have thought Mr. Pence would have seized the propitious opportunity afforded him by Mr. Smith, most likely weeks or months before he even decides whether he will run for the presidency.

If Mr. Pence's lawyers or advisers have told him that it will take the federal courts months and months or longer to decide his claim and that he will never have to testify before the grand jury, they are mistaken. We can expect the federal courts to make short shrift of this "Hail Mary" claim, and Mr. Pence doesn't have a chance in the world of winning his case in any federal court and avoiding testifying before the grand jury.

Inasmuch as Mr. Pence's claim is novel and an unsettled question in constitutional law, it is only novel and unsettled because there has never been a time in our country's history where it was thought imperative for someone in a vice president's position, or his lawyer, to conjure the argument. In other words, Mr. Pence's claim is the proverbial invention of the mother of necessity if ever there was one.

Any protections the former vice president is entitled to under the "speech and debate" clause will be few in number and limited in scope. There are relatively few circumstances in which a former vice president would be entitled to constitutional protection for his conversations related to his ceremonial and ministerial roles of presiding over the electoral vote count. What Mr. Smith wants to know about are Mr. Pence's communications and interactions with Mr. Trump before, and perhaps during, the vote count, which are entirely fair game for a grand jury investigating possible crimes against the United States.

Whatever the courts may or may not find the scope of any protection to be, they will unquestionably hold that Mr. Pence is nonetheless required to testify in response to Mr. Smith's subpoena. Even if a vice president has speech or debate clause protections, they will yield to a federal subpoena to appear before the grand jury. This is especially true where, as here, a vice president seeks to protect his conversations with a president who himself is under federal criminal investigation for obstructing the very official proceedings in which the special counsel is interested.

Mr. Pence and his inner circle should be under no illusion that the lower federal courts will take their time dispensing with this claim. The courts quickly disposed of Senator Lindsey Graham's speech or debate clause claim, requiring him to testify before the grand jury empaneled in Fulton County, Ga. — and his claim was far stronger than Mr. Pence's. In the unlikely event that Mr. Pence's claim were to make it to the Supreme Court, it, too, could be expected to take swift action.

Mr. Pence undoubtedly has some of the finest lawyers in the country helping him navigate this treacherous path forward, and they will certainly earn their hefty fees. But in cases like this, the best lawyers earn their pay less when they advise and argue their clients' cases in public than when they elegantly choreograph the perfect exit in private — before their clients get the day in court they wished for.

Mr. Pence's lawyers would be well advised to have Jack Smith's phone number on speed dial and call him before he calls them. The special counsel will be waiting, though not nearly as long as Mr. Pence's lawyers may be thinking. No prosecutor, least of all Mr. Smith, will abide this political ploy for long. And Mr. Pence shouldn't let this dangerous tactic play out for long. If he does, it will be more than he wished for.

It is a time-tested axiom in the law never to ask questions you don't know the answer to. This should apply to politicians in spades. But the die has been cast by the former vice president. The only question now is not whether he will have to testify before the grand jury, but how soon. The special counsel is in the driver's seat, and the timing of Mr. Pence's appearance before the grand jury is largely in his hands. Mr. Smith will bide his time for only so long.

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