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Mike Pence Seeks Refuge in the Speech or
Debate Clause

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Former Vice President Mike Pence plans to invoke the Speech or Debate Clause as justification for challenging a subpoena issued by Special Counsel Jack Smith in his investigation of former President Donald Trump's efforts to overturn the 2020 election. Pence's claim to immunity from the subpoena shines a spotlight on an important but largely inconspicuous constitutional provision. Article I, section 6 protects "Senators and Representatives" from arrest "for any Speech or Debate in either House," and stipulates that "they shall not be questioned in any other Place."

Pence argues that when he performed his constitutional duty to preside over the certification of Electoral College votes on January 6, 2021, he was acting in his capacity as President of the Senate and thus enjoyed protection under the Speech or Debate Clause. Pence believes he cannot be compelled to testify before a grand jury on matters relevant to Trump's scheme to derail the peaceful transition of power to President Joe Biden.

Pence's claim is ironic and dubious. Recall that he enthusiastically embraced, as a member of the executive branch, Trump's assertion of "executive privilege" to prevent his testimony before the January 6 congressional committee. Now, he asserts that his January 6 role of opening envelopes and counting votes, which he has described as purely ministerial and devoid of discretion, was "legislative" in nature. Questions

abound. What is the purpose of the Speech or Debate Clause? Does it clothe the vice president with protection afforded elected members of the House and Senate?

The Speech or Debate Clause was enshrined in the Constitution as a means of enabling congressional representatives to fulfill their public duties. Justice Joseph Story, writing in his magisterial three volume work, *Commentaries on the Constitution* (1833), provided the rationale: "When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison."

The importance of the Speech or Debate Clause, which Justice Story and other writers contemporaneous with the framing of the Constitution characterized as "vital" to the exercise of every other power and duty vested in Congress, may be glimpsed in its enduring usage across the centuries, plumbing the depths of English legal history. The privilege from arrest while traveling to and from Parliament, and protection against being "questioned" in any "other place" for a speech made during a legislative session, was viewed by the founders as an "immemorial right." These ancient privileges were secured in The English Bill of Rights in 1689, applied to members of the Continental Congress, and appeared almost verbatim in the Articles of Confederation and early state constitutions. They were universally admired principles.

The historic and universal admiration of these principles, however, doesn't mean that former Vice President Pence will be successful in his assertion of the Speech or Debate Clause to defy a subpoena to require his testimony before a grand jury assembled by

the Department of Justice. There is, first of all, his own confusion about which branch of government the vice president serves when presiding, by virtue of Article I, section 3, clause 4, as president of the Senate, a post which imposes as its sole duty, breaking tie votes and making parliamentary rulings.

Pence, it is familiar, has claimed residence in both branches, as a means of protecting him from what most Americans would require as a "duty" to testify about crimes committed on January 6, that he witnessed. To assert executive privilege to refuse to appear before the January 6 Committee, as Pence did, is to present himself as a member of the executive branch.

That argument undercuts Pence's claim to protection under the Speech or Debate Clause. The provision was designed to encourage and protect full participation in the debates of the legislature. The vice president as president of the Senate, as Pence has stated, plays only a "ministerial" role. The vice president is not an integral part of the Senate's legislative functions. The vice president is not elected by the Senate, as are all other leaders in the upper chamber, and does not participate in debates.

Another way of looking at the vice president's status as president of the Senate is through the lens of impeachment. A Senator is not a "civil officer" within the meaning of the Impeachment Clause, but the vice president is and, consequently, may be impeached and removed from office. In addition, members of the Senate may be removed from the body, under the Expulsion Clause—Article I, section 5, clause 2—but the vice president is immune from expulsion. At all events, the Senate, not surprisingly, has not assigned much power to an officer not responsible to it.

In the end, as Alexander Hamilton explained it, the vice president's role as president of the Senate,

was required in order to avoid deadlock. Moreover, a state would be underrepresented if one of its two Senators relinquished his seat to chair the sessions. The origins and practice of the Speech or Debate Clause lend no support to Pence's effort to find refuge in it.