

# TRUMP'S IMPEACHMENT DEFENSE IS SILENT ABOUT HIS UNCONSTITUTIONAL DEMAND OF MIKE PENCE

There are some weaknesses and gaps in the House impeachment case against the former President (which I'll probably return to).

But there's one giant gap in Trump's defense.

Generally, Trump argues three things: his incitement was speech protected by the First Amendment. The House moved too quickly to impeach but having impeached him while he was still President the Senate can't now try him, as required by the Constitution. Along the way he makes a soft case that his attempts to undermine the election results can't be proven to be unjustified (in at least two places, those claims are demonstrably false).

But I'm most struck by Trump's silence about his treatment of Mike Pence.

The House brief mentions Pence, by title and sometimes by name, 36 times. Those mentions include a description of how Pence was presiding over the counting of the electoral vote, how he fled when Trump's mobsters flooded into the Capitol, how the attackers targeted him by name, how Secret Service barely kept him safe, how Trump's own actions made Pence's danger worse.

The House brief dedicates a section to how Pence refused to do what Trump explicitly asked him to do, to unilaterally discount certain electoral votes.

## C. Vice President Pence Refuses to Overturn the Election Results

By the time the rally began, President Trump had nearly run out of options. He

had only one card left to play: his Vice President. But in an act that President Trump saw as an unforgivable betrayal, Vice President Pence refused to violate his oath and constitutional duty—and, just hours later, had to be rushed from the Senate chamber to escape an armed mob seeking vengeance.

In the weeks leading up to the rally, President Trump had furiously lobbied Vice President Pence to refuse to count electoral votes for President Biden from any of the swing states.<sup>68</sup> These demands ignored the reality that the Vice President has no constitutional or statutory authority to take that step. Over and over again, President Trump publicly declared that if Vice President Pence refused to block the Joint Session from finalizing President Biden's victory, then the election, the party, and the country would be lost. "I hope Mike Pence comes through for us, I have to tell you," President Trump said in Georgia on January 4.<sup>69</sup> The next day, he tweeted: "If Vice President @Mike\_Pence comes through for us, we will win the Presidency."<sup>70</sup> President Trump reiterated this demand just hours before the rally: "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"<sup>71</sup> On the morning of January 6, President Trump reportedly told Vice President Pence, "You can either go down in history as a patriot, or you can go down in history as a pussy."<sup>72</sup>

Later that day, while President Trump was speaking at his rally, Vice President Pence issued a public letter

rejecting President Trump's threats. "It is my considered judgment," he wrote, "that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."<sup>73</sup>

This letter sounded the death knell to any peaceful methods of overturning the election outcome. It was well known that the House and Senate were going to count the lawfully certified electoral votes they had received. President Trump's efforts to coerce election officials, state legislatures, the DOJ, Members of Congress, and his own Vice President had all failed. But he had long made it clear that he would never accept defeat. He would fight until the bitter end. And all that remained for President Trump was the seething crowd before him—known to be poised for violence at his instigation—and the Capitol building just a short march away, where Vice President Pence presided over the final, definitive accounting of President Trump's electoral loss.

The House brief describes how, even as Pence released his letter saying that he could not, constitutionally, do what Trump asked, Trump demanded again that the Vice President do anything besides certify the vote.

He also demanded again that Vice President Pence illegally interfere with the work of the Joint Session—a position that the Vice President rejected even as President Trump spoke.

The House brief then describes how the rioters threatened to, "hang Mike Pence" and left targeted threats for him.

Videos of the events show that dozens of

the insurrectionists specifically hunted Vice President Pence and House Speaker Nancy Pelosi—the first and second in the line of Presidential succession, respectively. “Once we found out Pence turned on us and that they had stolen the election, like, officially, the crowd went crazy,” said one rioter. “I mean, it became a mob.”<sup>98</sup> Rioters chanted, “Hang Mike Pence!”<sup>99</sup> Another shouted, “Mike Pence, we’re coming for you ... fucking traitor!”<sup>100</sup>

[snip]

One of them shouted “Trump won that election!” on the Senate dais where Vice President Pence had presided.<sup>115</sup> Another rioter climbed onto the dais, announcing that “I’m gonna take a seat in this chair, because Mike Pence is a fucking traitor.”<sup>116</sup> He left a note on the Vice President’s desk stating, “ITS ONLY A MATTER OF TIME / JUSTICE IS COMING.”<sup>117</sup>

It describes how, even as the attack was going on, Trump continued to complain that Pence had upheld his own oath to the Constitution.

Just over thirty minutes later, at 2:24 PM, while rioters were still attacking police and after Vice President Pence had been evacuated from the Senate floor, President Trump again tweeted to excoriate the Vice President for refusing to obstruct the Joint Session: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution.”<sup>144</sup> President Trump thus singled out Vice President Pence for direct criticism at *the very same time* the Vice President and his family were hiding from a violent mob provoked by President Trump. [emphasis original]

In other words, a key part of the House brief describes Trump giving Pence an illegal order, and then, after Pence refused to follow that order and announced he would do his own Constitutional duty, Trump took actions to focus the anger of the mob on his own Vice President.

It's not just what Trump said *about* Pence, the incitement of an assassination attempt against his Vice President that Trump claims is protected by the First Amendment, but it's about an illegal order Trump gave to Pence, which Pence duly ignored.

That order was unconstitutional, and as such is not protected by the First Amendment.

Trump's brief, by contrast, mentions the Vice President (only by title) just three times, two of which are simply citations from the House brief. The sole mention of the man he almost got hanged involves a concession that the Vice President was, indeed, presiding over the counting of the votes.

It is admitted that on January 6, 2021 a joint session of Congress met with the Vice President, the House and the Senate, to count the votes of the Electoral College.

But in response to the second citation from the House brief mentioning Pence, Trump instead pivots to defending the Republican members of Congress challenging state results. As part of that discussion, Trump denies any intention of interfering with the counting of Electoral votes. That denial focuses exclusively on the actions of Members of Congress, not Pence.

6. He also willfully made statements that, in context, encouraged – and foreseeably resulted in – lawless action at then Capitol, such as: “if you don't fight like hell you're not going to have a country anymore.” Thus, incited by President Trump, members of the crowd he had addressed, in an attempt to, among

other objectives, interfere with the Joint Session's solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious act.

Answer 6: Admitted in Part, denied in part. It is admitted that persons unlawfully breached and vandalized the Capitol, that people were injured and killed, and that law enforcement is currently investigating and prosecuting those who were responsible. "Seditious acts" is a term of art with a legal meaning and the use of that phrase in the article of impeachment is thus denied in the context in which it was used. It is denied that President Trump incited the crowd to engage in destructive behavior. It is denied that the phrase "if you don't fight like hell you're not going to have a country anymore" had anything to do with the action at the Capitol as it was clearly about the need to fight for election security in general, as evidenced by the recording of the speech. *It is denied that President Trump intended to interfere with the counting of Electoral votes.* As is customary, Members of Congress challenged electoral vote submissions by state under a process written into Congressional rules allowing for the respective Houses of Congress to debate whether a state's submitted electoral votes should be counted. In 2017, Democratic Members of Congress repeatedly challenged the electoral votes submitted from states where President Trump prevailed. In 2021, Republican Members of Congress challenged the electoral votes submitted

from states where President Biden prevailed. The purpose of the Joint Sessions of Congress in 2017 and on January 6, 2021 was for Members of Congress to fulfill their duty to be certain the Electoral College votes were properly submitted, and any challenges thereto properly addressed under Congressional rules. Congress' duty, therefore, was not just to certify the presidential election. Its duty was to first determine whether certification of the presidential election vote was warranted and permissible under its rules. [my italics]

Trump undoubtedly solicited Members of Congress to do just that, challenging individual states, which was itself an abuse of power (indeed, one weakness of the House brief is they don't mention Rudy Giuliani's second attempt to call Tommy Tuberville asking for a specific delay on vote counting, which shows that Trump was indeed trying to use the mob to delay the certification).

But Trump also made an explicit demand of Pence, one Pence refused. That demand, by itself, was proof that Trump intended to interfere with the Constitutional counting of votes.

And he doesn't address that – speech which is in no way protected – in his defense.

Nor does he address how he almost got Pence killed.