

HOW DID INTENDED VICTIM MIKE PENCE TESTIFY?

As a million outlets have reported, 21 months after Merrick Garland set up a framework that could obtain a for waiver executive privilege for January 6 without violating DOJ contact guidelines, 15 months after all January 6 investigations had converged on Mike Pence, over a year after investigators won precedents that made it possible, yesterday Mike Pence testified to a January 6 grand jury for around five hours.

This is definitely important news, but it is not new news. Given the recent precedent of then still sitting Vice President Dick Cheney giving a transcribed interview for presentation to the CIA Leak case grand jury in August 2004, it's also not anywhere near as unprecedented as some outlets are hyping.

In fact, it's so predictable, I've republished below, in its entirety, the post I wrote in November (before Jack Smith's appointment) arguing that the publication of Pence's book made this testimony far easier, and necessary, to get.

A witness with crucial testimony to a grand jury investigation testified before the grand jury. Far more importantly, the chief intended victim of a violent attack testified to the grand jury.

Little from this interview will be entirely new to prosecutors. I bet they even had a copy of Pence's book with sticky tabs marking key pages. What will be important – and could even impact Smith's charging decision – is whether Pence continued to shade the truth to protect Trump in some key episodes, or provided more honest testimony under oath.

It may actually matter whether Pence testified that he believed all Trump's efforts to undermine the election outcome were

justified. *How* Pence testified about his response to Trump's focus on the rally on December 19 may matter (his role in a meeting with members of Congress on December 21 may be protected under the decision affording him Speech and Debate protection, which is a damned shame).

How Pence told this part of his January 6 story – the meeting he had on January 11 with Trump in its aftermath – may be one of the most important details of Pence's testimony.

I met with the president on Jan. 11. He looked tired, and his voice seemed fainter than usual. "How are you?" he began. "How are Karen and Charlotte?" I replied tersely that we were fine and told him that they had been at the Capitol on Jan. 6. He responded with a hint of regret, "I just learned that." He then asked, "Were you scared?"

"No," I replied, "I was angry. You and I had our differences that day, Mr. President, and seeing those people tearing up the Capitol infuriated me."

He started to bring up the election, saying that people were angry, but his voice trailed off.

I told him he had to set that aside, and he responded quietly, "Yeah."

I said, "Those people who broke into the Capitol might've been supporters, but they are not our movement." For five years, we had both spoken to crowds of the most patriotic, law-abiding, God-fearing people in the country.

For the public version, Pence described being angry *at the rioters*. He described being angry that they had targeted *the Capitol building*.

But just beneath the surface of this description is the disagreement Pence had with Trump. Just beneath the surface of this description is the

obvious tie between Trump's incitement and those rioters. Just beneath the surface of this description is the fact that Trump targeted those rioters at Pence. At Karen Pence. At Charlotte Pence.

Just beneath the surface of this description is Pence's anger at Trump, not just the rioters.

How Pence described being the victim of Trump's incitement matters. It'll matter for the confidence with which Smith may have in a case relying on this testimony. It'll matter for how convincing this case would be for a jury.

After a Year of Executive Privilege Fights, Mike Pence Just Tweeted It Out

The WSJ has published an excerpt – the parts relating to January 6 – from the Mike Pence book coming out next week. It includes descriptions of the following conversations with the then-President, at least some of which Pence was the only witness:

1. Lunch on November 16, 2020, at which Trump said, "2024 is so far off."
2. A call on December 5, on which Trump raised the possibility of challenging the vote.
3. A December cabinet meeting.
4. A December 19 conversation in which Trump mentioned plans for the January 6 rally (which Pence claims to

have thought was a “useful” idea).

5. A January 1, 2021 phone call in which Pence told Trump he opposed Louie Gohmert’s lawsuit arguing that Pence had discretion to decide which votes to count. Trump accused his Vice President of being “too honest” and informed him that, “People are gonna think you’re stupid,” for choosing not to claim the power to throw out votes.
6. A call on January 2 on which Trump said that if Pence, “wimp[ed] out,” he would be “just another somebody.”
7. A meeting involving John Eastman and others on January 4.
8. A meeting involving John Eastman in the Oval Office on January 5.
9. The call Trump made to Pence on January 6 where he again called Pence a wimp.
10. A meeting on January 11, where in response to Trump’s question whether he was scared on January 6, Pence said he was angry, purportedly just about the people “tearing up the Capitol.”
11. An exchange inside the Oval

Office during which Trump told Pence “Don’t bother” to pray for him.

Every one of these conversations are ones that would traditionally have been covered by Executive Privilege. Trump claimed such exchanges were covered by Executive Privilege starting over a year ago. Both Pence’s top aides – Greg Jacob and Marc Short – and three White House Counsels claimed such exchanges were covered by Executive Privilege this summer, and only in recent weeks did Beryl Howell override the claims of Pence’s people.

And yet, all the while, this book was in the works, including just on this topic, eleven conversations directly with the former President, many of them conversations to which Pence was the only witness.

Much of this description is self-serving (as most autobiographies are), an attempt to craft his support for challenging the election but not rioting. The excerpt, at least, does not disclose the advice that led him to reject Trump’s demand that he throw out votes.

This passage, in particular, seems to project any testimony that Eastman knew the request of Pence was illegal onto Greg Jacob, not himself.

On Jan. 4, the president’s chief of staff, Mark Meadows, summoned me to the Oval Office for a meeting with a long list of attendees, including the legal scholar John Eastman. I listened respectfully as Mr. Eastman argued that I should modify the proceedings, which require that electoral votes be opened and counted in alphabetical order, by saving the five disputed states until the end. Mr. Eastman claimed I had the authority to return the votes to the states until each legislature certified which of the competing slate of electors for the state was correct. I had already

confirmed that there were no competing electors.

Mr. Eastman repeatedly qualified his argument, saying it was only a legal theory. I asked, "Do you think I have the authority to reject or return votes?"

He stammered, "Well, it's never been tested in the courts, so I think it is an open question."

At that I turned to the president, who was distracted, and said, "Mr. President, did you hear that? Even your lawyer doesn't think I have the authority to return electoral votes." The president nodded. As Mr. Eastman struggled to explain, the president replied, "I like the other thing better," presumably meaning that I could simply reject electoral votes.

On Jan. 5, I got an urgent call that the president was asking to see me in the Oval Office. The president's lawyers, including Mr. Eastman, were now requesting that I simply reject the electors. I later learned that Mr. Eastman had conceded to my general counsel that rejecting electoral votes was a bad idea and any attempt to do so would be quickly overturned by a unanimous Supreme Court. This guy didn't even believe what he was telling the president.

By context, Pence asked Eastman whether Eastman thought Pence had "the authority to reject or return votes." Eastman's response, without qualification that he was addressing just one of those two items, was that, "it's never been tested in the courts." Then, by Pence's telling, he directly told the then-President that Eastman had only said that *returning* votes to the states would be illegal. But that's not what Eastman

responded to! He responded to both, and did so in front of Trump.

By stating that Eastman later told his general counsel, Greg Jacob, that the Supreme Court would overturn any effort to reject the votes, rather than just return them, Pence is making Jacob the key witness, and he's telling the story in such a way that Trump was not directly a witness to the conversation.

Maybe it really happened like Pence tells it. Maybe not. There were other attendees (including, probably, Jacob), and some of them have likely already described what they saw to the grand jury.

But this protective telling of the story is particularly interesting given this description of how, on January 1, Pence told Trump he didn't have the authority to decide which votes to count.

Early on New Year's Day, the phone rang. Texas Rep. Louie Gohmert and other Republicans had filed a lawsuit asking a federal judge to declare that I had "exclusive authority and sole discretion" to decide which electoral votes should count. "I don't want to see 'Pence Opposes Gohmert Suit' as a headline this morning," the president said. I told him I did oppose it. "If it gives you the power," he asked, "why would you oppose it?" I told him, as I had many times, that I didn't believe I possessed that power under the Constitution.

This is the first, in the excerpt, that he describes telling this to Trump. But he also says he had already told him the same, "many times." The circumstances of those conversations would be really critical for pinpointing the timeline of Trump's machinations and the extent that Pence warned him they were illegal.

For months, the press has been squawking about

how unprecedented it would be to subpoena the former Vice President. But he just made the case for doing so, right here.