

# JAMES BOASBERG LIKENS TRUMP'S DEMANDS ON PENCE TO A BRIBE

"There is no dispute in this case that Pence lacked the authority to reject certified electoral votes, [redacted]."

That's the foundational principle of the opinion DC Chief Judge James Boasberg wrote on March 27, finding that just a limited number of topics about which DOJ wanted to question Mike Pence were covered by Speech and Debate.

Boasberg unsealed the ruling on Friday.

Trump had no standing in this dispute – his ability to prevent Pence's testimony was limited to Executive Privilege claims, which had already decided months earlier with Pat Cipollone and others. So on the matter of whether Pence had any authority to reject the certifications, the two parties before Boasberg were always in agreement.

From that agreement, then, Boasberg treated Trump's pressure on Pence to do so anyway as akin to the bribe at issue in *US v. Brewster*, a 1972 ruling that held that a conversation in which a Senator accepted a bribe was not protected under Speech and Debate Clause.

Brewster reflects the commonsense proposition that the Clause does not protect conversations whose principal purpose is to convince a Member to do something the Member cannot lawfully do.

[snip]

The bottom line is that conversations exhorting Pence to reject electors on January 6th are not protected. They fall under Brewster's rule that

communications urging a legislator to act unlawfully or *ultra vires* are not preparatory – or at most are only incidentally so – to a legislative function.

That thinking is in no way controversial (unless you adhere to John Eastman's unmoored theories about the Electoral College Act).

But the means by which Boasberg came to this decision are important for another reason.

That's because "otherwise unlawful act" is a key part of the debate – currently before the DC Circuit – about the meaning of "corrupt purpose" in 18 USC 1512(c)(2), particularly as it applies to January 6. Conservatives on the court want to adopt a rule saying that an act is only "corrupt" if someone is seeking a personal benefit – a definition that would apply to Trump far more easily than the hundreds of other January 6 suspects charged with obstruction. Liberals want to adopt a rule saying something is corrupt more broadly. But the happy middle, a stance first adopted by Trump appointee Dabney Friedrich in December 2021, would hold that an action to obstruct the vote certification is "corrupt" if it is otherwise illegal, one of two decisions on which Boasberg built his own decision upholding the obstruction statute for January 6.

And Boasberg's decision builds off the premise that Trump's demands asked Pence to do something he couldn't lawfully do.

Akin to bribe.

It's just a small part of the many pieces that will go into a potential Trump charge. But an important one.

The DC Chief Judge has treated Trump's demands that Pence reject the vote certifications as an otherwise illegal act.