

## Prior To Joining SCOTUS, Justice Kavanaugh Consistently Rejected The Idea That Any Discussions Of Presidential Immunity Apply To Former Presidents, Claiming That They Are Fair Game For Criminal Prosecution Upon Leaving Office

**SUMMARY:** With the Supreme Court set to hear arguments for Trump's election fraud case in April 2024, there has been heightened scrutiny on the justices' track records regarding constitutional questions of presidential immunity. Multiple pieces of evidence spanning decades of **Brett Kavanaugh's** career [show](#) that the justice has advocated for presidential immunity for *sitting* presidents but has always stated that former presidents would be subject to criminal prosecution via the courts upon leaving the Oval Office.

Three pieces of evidence are noteworthy:

- **During his SCOTUS confirmation hearings**, Kavanaugh stated that "[the executive branch is subject to the law, subject to the court system](#)" and that "no one is above the law in our constitutional system."
- In a **1998 *Georgetown Law Journal* article**, Kavanaugh [repeatedly stated](#) that former presidents were subject to prosecution, going as far as to write that "there is simply no danger that [a president's] crimes would go criminally unpunished; the only question is when they can be punished."
- In a **2009 *Minnesota Law Review* article**, Kavanaugh argued that Congress should pass a law shielding sitting presidents from prosecution, but [assured that presidents must still face justice after leaving office](#).

In both his SCOTUS confirmation hearing and *Georgetown Law Journal* article, Kavanaugh paid particular attention to *The Federalist* No. 69, which he claimed established that "the executive branch is subject to the law, to the courts."

Despite this, during his confirmation hearing, Kavanaugh claimed he has "[never taken a position](#)" on the constitutional question of presidential immunity and "would have a completely open mind." Legal experts have [disputed this](#) by pointing to writing from the *Georgetown Law Journal* article, in which Kavanaugh clearly wrote that "the Constitution itself seems to dictate" certain mechanisms for addressing presidential misconduct, and claimed that the uncertainty he created around his views meant that he must recuse himself from any cases that take up questions of presidential immunity.

**In A Supreme Court Confirmation Hearing, Brett Kavanaugh Agreed That “No One Is Above The Law In Our Constitutional System” And Stated That “Under Our System Of Government, The Executive Branch Is Subject To The Law, Subject To The Court System, And That’s An Important Part Of [...] The Constitutional Structure”**

**During His Supreme Court Appointment Confirmation Hearings In 2018, Brett Kavanaugh Said That “No One Is Above The Law In Our Constitutional System” And That “The Executive Branch Is Subject To The Law, Subject To The Court System”**

**September 5, 2018: Brett Kavanaugh Took Questions From Congress In Hearings Addressing On His Nomination To The Supreme Court.** “SEPTEMBER 5, 2018 | CLIP OF SUPREME COURT NOMINEE BRETT KAVANAUGH CONFIRMATION HEARING, DAY 2, PART 1.” [C-SPAN, [9/5/18](#)]

**In His Confirmation Hearings, Kavanaugh Said, “No One Is Above The Law In Our Constitutional System.”** “Kavanaugh: ‘Thank you Mr. Chairman. To begin with, you’re correct, no one is above the law in our constitutional system. [In] Federalist 69, Hamilton makes clear all the ways that the executive branch as designed by the framers of the Constitution was different from the monarchy. Under our system of government, the executive branch is subject to the law, subject to the court system, and that’s an important part of Federalist 69, it’s an important part of the constitutional structure.’” [C-SPAN, [9/5/18](#)]

- **Kavanaugh Continued, “Under Our System Of Government, The Executive Branch Is Subject To The Law, Subject To The Court System, And That’s An Important Part Of Federalist 69, It’s An Important Part Of The Constitutional Structure.”**  
“Kavanaugh: ‘Thank you Mr. Chairman. To begin with, you’re correct, no one is above the law in our constitutional system. [In] Federalist 69, Hamilton makes clear all the ways that the executive branch as designed by the framers of the Constitution was different from the monarchy. Under our system of government, the executive branch is subject to the law, subject to the court system, and that’s an important part of Federalist 69, it’s an important part of the constitutional structure.’” [C-SPAN, [9/5/18](#)]

**In A 1998 Law Review Article, Kavanaugh Wrote Numerous Times That A Former President May Be Criminally Prosecuted After Leaving Office, Arguing That Any Insulation Against Prosecution Should Apply Only To Sitting Presidents, So That They May Run The Country Unimpeded**

## **In A 1998 Law Review Article, Kavanaugh Wrote That “The Constitution Itself Seems To Dictate” That Criminal Prosecution Of A President “Can Occur Only After The President Has Left Office”**

**1998: Brett Kavanaugh Published An Article In The *Georgetown Law Journal* Titled, “The President And The Independent Counsel.”**

THE PRESIDENT AND THE INDEPENDENT COUNSEL, 86 Geo. L.J. 2133

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86 Geo. L.J. 2133

Georgetown Law Journal

July, 1998

Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond  
Contribution

[Brett M. Kavanaugh](#)<sup>al</sup>

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[*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**In The *Georgetown Law Journal* Article, Kavanaugh Wrote That “The Constitution Itself Seems To Dictate [...] That Congressional Investigation Must Take Place In Lieu Of Criminal Investigation When The President Is The Subject Of Investigation, And That The Criminal Prosecution Can Only Occur After The President Has Left Office.”** “The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh Attributed The Above Point To Article 1, Section 3, Clause 7 Of The United States’ Constitution, Which He Quoted In A Footnote.** “[Footnote] 66 See U.S. CONST, art. I, § 3, cl. 7 (‘Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.’)” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]
- **In The Footnote, Kavanaugh Quoted The Constitution As Stating That ““The Party Convicted Shall Nevertheless Be Liable And Subject To Indictment, Trial Judgement And Punishment, According To The Law.”** “[Footnote] 66 See U.S. CONST, art. I, § 3, cl. 7 (‘Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.’)” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

## **Kavanaugh Wrote In Numerous Instances That A Former President May Be Criminally Prosecuted After They Have Left Office, And That He Was Merely Objecting To The Prosecution Of A *Sitting* President, Which He Argued Would Inevitably Become Politicized And Could Be “Disabling” To Our Government**

In The *Georgetown Law Journal* Article, Kavanaugh Wrote That “The Framers Thus Appeared To Anticipate That A President Who Commits Serious Wrongdoing Should Be Impeached By The House And Removed From Office By The Senate—And Then Prosecuted Thereafter.” “The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh: “The Constitution Itself Seems To Dictate, In Addition, That Congressional Investigation Must Take Place In Lieu Of Criminal Investigation When The President Is The Subject Of Investigation, And That Criminal Prosecution Can Occur Only After The President Has Left Office.”** “The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**Kavanaugh: “In The Constitutional Debates, Gouverneur Morris Explained That The Senate Should Try Impeachments, And That The President Would Be Liable To Prosecution Afterwards.”** “The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion ‘to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.’ In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh: “The Federalist Papers Similarly Point Out That” A President Who Has Been Removed From Office Via The Impeachment Process “Will Still Be Liable To Prosecution And Punishment In The Ordinary Course Of Law.”** “The Federalist Papers similarly point out that: “the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law...” [Footnote] 80 THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh: In *The Federalist*, Alexander “Hamilton Further Noted That The Checks On A President Include That He Shall Be ‘Liable To Be Impeached, Tried, ... And Removed From Office; And Would Afterwards Be Liable To Prosecution And Punishment In The Ordinary Course Of Law.’”** “Hamilton further noted that the checks on a President include that he shall be ‘liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law...’ [Footnote] 81 THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**Kavanaugh: “Judge George MacKinnon, Too, Argued That ‘A President Is subject To The Criminal Laws, But Only After He Has Been Impeached By The House And Convicted By The Senate And Thus Removed From Office.’”** “Judge George MacKinnon, too, argued that ‘a President is subject to the criminal laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office.’” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**Kavanaugh Noted That “As An Extreme Hypothetical, Some Might Ask What Would Happen If The President Murdered Someone Or Committed Some Other Dastardly Deed.”** “As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh: “If The President Murdered Someone Or Committed Some Other Dastardly Deed [...] We Can Expect That The President Would Be Quickly Impeached, Tried, And Removed; The Criminal Process Then Would Commence Against The President.”** “As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]
- **Kavanaugh: “There Is Simply No Danger That Such Crimes Would Go Criminally Unpunished; The Only Question Is When They Can Be Punished.”** “There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**In This Section Of The Law Review Article, Kavanaugh Argued That There Were Important Pragmatic Reasons For Shielding A Sitting President From Criminal Prosecution For As Long As They Were In Office.** “Regardless [of] how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh Argued That Shielding Sitting Presidents From Criminal Prosecution Would “[Disentangle] The Appearance Of Politics From Special Counsel**

**Investigations” And “Greatly Expedite Those Investigations Where The President Otherwise Would Be One Of The Subjects Of The Investigation.”** “Regardless [of] how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

- **Kavanaugh Argued That Any Attorney General Or Special Prosecutor Charged With Criminally Investigating The President Would Be Unable To “Avoid The Inevitable Charges That He Is Politically Motivated.”** “In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]
- **Kavanaugh Went On To Note That “The Reason[s] For Such Political Attacks Are Obvious,” And To Warn That “The Indictment Of A President Would Be A Disabling Experience For The Government As A Whole...”** “The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President’s political party—and thus also for the political, economic, social, diplomatic, and military causes that the President champions.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

**Kavanaugh Brought Up Watergate Special Prosecutor Leon Jaworski, Who He Claims “Thought It Would Be Irresponsible Conduct To Recommend That The Grand Jury Return An Indictment Against The President.”** “Watergate Special Prosecutor Jaworski... thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him...” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

- **Kavanaugh Quoted Jaworski As Writing That ““An Indictment Provoking A Necessary Lengthy Legal Proceeding Would Either Compel The President’s Resignation Or Substantially Cripple His Ability To Function Effectively [...] As The Nation’s Chief Executive Officer.””** “Watergate Special Prosecutor Jaworski... thought it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him: [T]he impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President’s resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation’s Chief Executive Officer.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

**Kavanaugh Echoed Jaworski’s Sentiments Several Paragraphs Later, Arguing That “The Constitutional Mechanism Of Impeachment Recognizes, At Least Implicitly, That Criminal Prosecution Of A Sitting President Is Fraught With Peril—Virtually Untenable As A Matter Of Practice And Unwise As A Matter Of Policy.”** “The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is

fraught with peril—virtually untenable as a matter of practice and unwise as a matter of policy.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

- **Kavanaugh: “If [The President] Is To Be Removed, The Entire Government Would Likely Suffer, The Military Or Economic Consequences To The Nation Could Be Severe, And The President’s Political Party (And The Causes He Champions) Would Almost Certainly Be Devastated.”** “If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President’s political party (and the causes he champions) would almost certainly be devastated.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]
- **Kavanaugh Concluded That “Those Repercussions” Are So Severe That They “Should Not Result From The Judgment Of A Single Prosecutor [...] And A Single Jury.”** “If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President’s political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor— whether it be the Attorney General or special counsel—and a single jury.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

### **Kavanaugh Cited Multiple Instances In Which The Constitution’s Framers Asserted That A President Who Is No Longer Serving In Office Would “Be Liable To Prosecution And Punishment In The Ordinary Course Of Law”**

In The *Georgetown Law Journal* Article, Kavanaugh Wrote That The Framers “Appeared To Anticipate That A President Who Commits Serious Wrongdoing Should Be Impeached By The House And Removed From Office By The Senate—And Then Prosecuted Thereafter.” “The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

**Kavanaugh: “In The Constitutional Debates, Gouverneur Morris Explained That The Senate Should Try Impeachments, And That The President Would Be Liable To Prosecution Afterwards.”** “In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards.” [Georgetown Law Journal via the Wall Street Journal, [1998](#)]

- **Gouverneur Morris Was A Framer Who Drafted The Constitution’s Preamble And Was Dubbed “The Penman Of The Constitution” For His Significant Influence “In Creating The Language And Structure Of The Constitution.”** “We start with Gouverneur Morris, the New Englander who, along with Pennsylvania’s James Wilson, gave the Preamble its unforgettable text: ‘We the People’... Morris was just 35 years old at the time of the Constitutional Convention. At the Convention, he was highly

instrumental in creating the language and structure of the Constitution, as by his namesake, the ‘Penman of the Constitution.’” [National Constitution Center, [6/8/20](#)]

**Kavanaugh: “The Federalist Papers Similarly Point Out That” A President Who Has Been Removed From Office Via The Impeachment Process “Will Still Be Liable To Prosecution And Punishment In The Ordinary Course Of Law.”** “The Federalist Papers similarly point out that: ‘the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law...’ [Footnote] 80 THE FEDERALIST NO. 65, supra note 76, at 398-99 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**Kavanaugh: Alexander “Hamilton Further Noted That The Checks On A President Include That He Shall Be ‘Liable To Be Impeached, Tried, ... And Removed From Office; And Would Afterwards Be Liable To Prosecution And Punishment In The Ordinary Course Of Law.’”** “Hamilton further noted that the checks on a President include that he shall be ‘liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law...’ [Footnote] 81 THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

### **In Remarks That Would Later Be Echoed In A 2009 Law Review Article, Kavanaugh Argued That “Congress Should Establish That The President Can Be Indicted,” But “Only After He Leaves Office”**

**Kavanaugh: “Congress Should Establish That The President Can Be Indicted Only After He Leaves Office Voluntarily Or Is Impeached By The House Of Representatives And Convicted And Removed By The Senate.”** “Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**In A 2009 *Minnesota Law Review* Article, Kavanaugh Argued That “It Would Be Appropriate For Congress To Enact A Statute Providing That Any” Civil And Criminal Suits Against The President “Be Deferred While The President Is In Office.”** “With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred while the President is in office... Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President.” [*Minnesota Law Review*, [2009](#)]

- **Kavanaugh: “In Particular, Congress Might Consider A Law Exempting The President—While In Office—From Criminal Prosecution And Investigation.”** “In particular, Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel.” [*Minnesota Law Review*, [2009](#)]



**In Both His Supreme Court Confirmation Hearing And The 1998 Georgetown Law Journal Article, Kavanaugh Cited *The Federalist* No. 69 As Establishing That The President Is Not Above The Law**

**2018: In His Supreme Court Confirmation Hearings, Kavanaugh Cited *The Federalist* No. 69 As Establishing That “The Executive Branch Is Subject To The Law [And] The Court Systems”**

September 5, 2018: Brett Kavanaugh Took Questions From Congress In Hearings Addressing On His Nomination To The Supreme Court. “SEPTEMBER 5, 2018 | CLIP OF SUPREME COURT NOMINEE BRETT KAVANAUGH CONFIRMATION HEARING, DAY 2, PART 1.” [C-SPAN, [9/5/18](#)]

- **In His Confirmation Hearings, Kavanaugh Quoted *The Federalist* No. 69, Stating That “Hamilton Makes Clear All The Ways That The Executive Branch As Designed By The Framers Of The Constitution Was Different From The Monarchy.”**  
“Kavanaugh: ‘Thank you Mr. Chairman. To begin with, you’re correct, no one is above the law in our constitutional system. [In] Federalist 69, Hamilton makes clear all the ways that the executive branch as designed by the framers of the Constitution was different from the monarchy. Under our system of government, the executive branch is subject to the law, subject to the court system, and that’s an important part of Federalist 69, it’s an important part of the constitutional structure.’” [C-SPAN, [9/5/18](#)]
- **Kavanaugh Continued By Saying That “Under Our System Of Government, The Executive Branch Is Subject To The Law, Subject To The Court System,” Which He Called “An Important Part Of *Federalist* 69.”** “Kavanaugh: ‘Thank you Mr. Chairman. To begin with, you’re correct, no one is above the law in our constitutional system. [In] Federalist 69, Hamilton makes clear all the ways that the executive branch as designed by the framers of the Constitution was different from the monarchy. Under our system of government, the executive branch is subject to the law, subject to the court system, and that’s an important part of Federalist 69, it’s an important part of the constitutional structure.’” [C-SPAN, [9/5/18](#)]

**In A 1998 Georgetown Law Journal Article, Kavanaugh Quoted A Section Of *The Federalist* No. 69 That Asserted That A President Who Has Been Removed From Office “Would Afterwards Be Liable To Prosecution And Punishment In The Ordinary Course Of Law”**

1998: Brett Kavanaugh Published An Article In The *Georgetown Law Journal* Titled, “The President And The Independent Counsel.” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

In The *Georgetown Law Journal* Article, Kavanaugh Quoted Alexander Hamilton’s Writing In *The Federalist* No. 69. “Hamilton further noted that the checks on a President include that he shall be ‘liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law...’ [Footnote] 81 THE

FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

- **Kavanaugh Quoted Hamilton’s Writing In *The Federalist* No. 69: “Hamilton Further Noted That The Checks On A President Include That He Shall Be ‘Liable To Be Impeached, Tried, ... And Removed From Office; And Would Afterwards Be Liable To Prosecution And Punishment In The Ordinary Course Of Law.’”** “Hamilton further noted that the checks on a President include that he shall be ‘liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law...’ [Footnote] 81 THE FEDERALIST NO. 69, supra note 76, at 416 (Alexander Hamilton).” [*Georgetown Law Journal* via the Wall Street Journal, [1998](#)]

**In A 2009 Law Review Article, Justice Kavanaugh Wrote That “No One Is Above The Law” And That “An Impeached And Removed President Is Still Subject To Criminal Prosecution Afterwards”**

**In A 2009 *Minnesota Law Review* Article, Justice Kavanaugh Argued That It Would Serve National Interests For The President To Be Able To Defer Lawsuits Against Them Until After Their Term So That They Could “Focus On [Their] Never-Ending Tasks” With Few Distractions**

**2009: Justice Brett Kavanaugh Published An Article In The *Minnesota Law Review* Titled “Separation Of Powers During The Forty-Fourth Presidency And Beyond.”** [*Minnesota Law Review*, [2009](#)]

- **At The Time, Kavanaugh Was A Judge Serving On The District Of Columbia Circuit Court Of Appeals.** “[Footnote] † Judge, United States Court of Appeals for the District of Columbia Circuit.” [*Minnesota Law Review*, [2009](#)]
- **The *Minnesota Law Review* Article Was Adapted From Remarks Kavanaugh Delivered In 2008 At The University Of Minnesota Law School.** “This Article is adapted from remarks I made at the University of Minnesota Law School on October 17, 2008—about two weeks before the presidential election.” [*Minnesota Law Review*, [2009](#)]

**Kavanaugh’s Law Review Article Included A Section Titled, “I. Provide Sitting Presidents With A Temporary Deferral Of Civil Suits And Of Criminal Prosecutions And Investigations.”** “I. PROVIDE SITTING PRESIDENTS WITH A TEMPORARY DEFERRAL OF CIVIL SUITS AND OF CRIMINAL PROSECUTIONS AND INVESTIGATIONS.” [*Minnesota Law Review*, [2009](#)]

**In The First Section Of His *Minnesota Law Review* Article, Kavanaugh Argued That “It Would Be Appropriate For Congress To Enact A Statute Providing That Any” Civil And Criminal Suits Against The President “Be Deferred While The President Is In Office.”** “With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred while the President is in office... Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President.” [*Minnesota Law Review*, [2009](#)]

- **Kavanaugh: “In Particular, Congress Might Consider A Law Exempting The President—While In Office—From Criminal Prosecution And Investigation.”** “In particular, Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel.” [*Minnesota Law Review*, [2009](#)]

**Kavanaugh: “Having Seen First-Hand How Complex And Difficult That Job Is, I Believe It Vital That The President Be Able To Focus On His Never-Ending Tasks With As Few Distractions As Possible [...] [And] That The President Should Be Excused From Some Of The Burdens Of Ordinary Citizenship While Serving In Office.”** “Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible. The country wants the President to be “one of us” who bears the same responsibilities of citizenship that all share. But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office.” [*Minnesota Law Review*, [2009](#)]

- **Kavanaugh Argued That “The Indictment And Trial Of A Sitting President [...] Would Cripple The Federal Government,” Noting That “Such An Outcome Would Ill Serve The Public Interest.”** “The indictment and trial of a sitting President, moreover, would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas. Such an outcome would ill serve the public interest, especially in times of financial or national security crisis.” [*Minnesota Law Review*, [2009](#)]

**Kavanaugh Stressed That “No One Is Above The Law... The Point Is Not To Put The President Above The Law Or To Eliminate Checks On The President, But Simply To Defer Litigation And Investigations Until The President Is Out Of Office”**

**Kavanaugh Noted In The *Minnesota Law Review* Article That “One Might Raise At Least Two Important Critiques... The First Is That No One Is Above The Law In Our System Of Government.”** “One might raise at least two important critiques of these ideas. The first is that no one is above the law in our system of government.” [*Minnesota Law Review*, [2009](#)]

- **Kavanaugh: “I Strongly Agree With That Principle [That No One Is Above The Law].”** “One might raise at least two important critiques of these ideas. The first is that no one is above the law in our system of government. I strongly agree with that principle.” [*Minnesota Law Review*, [2009](#)]
- **Kavanaugh: “But [Noting That No One Is Above The Law] Is Not Ultimately A Persuasive Criticism Of These Suggestions. The Point Is Not To Put The President Above The Law Or To Eliminate Checks On The President, But Simply To Defer Litigation And Investigations Until The President Is Out Of Office.”** “One might raise at least two important critiques of these ideas. The first is that no one is above the law in our system of government. I strongly agree with that principle. But it is not ultimately a persuasive criticism of these suggestions. The point is not to put the President above the law or to eliminate checks on the President, but simply to defer litigation and investigations until the President is out of office.” [*Minnesota Law Review*, [2009](#)]

## **Kavanaugh Was Very Clear: “An Impeached And Removed President Is Still Subject To Criminal Prosecution Afterwards”**

**In The *Minnesota Law Review* Article, Kavanaugh Wrote That “If The President Does Something Dastardly, The Impeachment Process Is Available.”** “If the President does something dastardly, the impeachment process is available.” [*Minnesota Law Review*, [2009](#)]

**Kavanaugh: “An Impeached And Removed President Is Still Subject To Criminal Prosecution Afterwards.”** “If the President does something dastardly, the impeachment process is available. No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress. Moreover, an impeached and removed President is still subject to criminal prosecution afterwards.” [*Minnesota Law Review*, [2009](#)]

## **In An Opinion Piece, Harvard Law Professor Noah Feldman Argued That Kavanaugh’s *Minnesota Law Review* Article Supports The Position That The President Can Be Investigated While In Office—And By Extension, Upon Leaving It**

**Legal Scholar Noah Feldman Has Argued That Kavanaugh’s Writing In The *Minnesota Law Review* Article Implies That Presidents—Sitting And Former Alike—Are Not Shielded By Special Immunity And Lawfully Face Criminally Investigated.** “In 2009, Kavanaugh proposed that Congress might pass a law that would protect the president from investigation and indictment while in office. That’s the part that some Democrats are focusing on now — because Kavanaugh was saying that he thought it was a bad idea to go after the president. But from a legal and constitutional perspective, Kavanaugh wasn’t saying that the courts should find that the president shouldn’t be investigated or indicted. To the contrary. He was saying that Congress should pass a law ensuring that result, because without it, the president was open to being investigated — and maybe even indicted.” [Bloomberg, [7/10/18](#)]

- **Noah Feldman Is A Constitutional Law Scholar Who Is The Felix Frankfurter Professor Of Law At Harvard Law School.** “Noah Feldman; Felix Frankfurter Professor of Law; Director, Julis-Rabinowitz Program on Jewish and Israeli Law.” [Harvard.edu, accessed [3/5/24](#)]
- **Feldman: “From A Legal And Constitutional Perspective, Kavanaugh [...] Was Saying That Congress Should Pass A Law Ensuring” The President Isn’t Investigated Or Indicted, “Because Without It, The President Was Open To Being Investigated.”** “But from a legal and constitutional perspective, Kavanaugh wasn’t saying that the courts should find that the president shouldn’t be investigated or indicted. To the contrary. He was saying that Congress should pass a law ensuring that result, because without it, the president was open to being investigated — and maybe even indicted.” [Bloomberg, [7/10/18](#)]
- **Feldman Argued That “If A Law By Congress Is Necessary To Fix The Problem, It Follows That Without Such A Law, It Is Perfectly Permissible Under The Constitution To Investigate A Sitting President.”** “If a law by Congress is necessary to fix the problem, it follows that without such a law, it is perfectly permissible under the Constitution to investigate a sitting president, as Starr did.” [Bloomberg, [7/10/18](#)]

## **Kavanaugh Later Claimed The *Minnesota Law Review* Article Did Not Reflect His “Constitutional Views” And That He Has A “Completely Open Mind”—Driving Legal Experts To Call For His Recusal From Cases Involving Questions Of Presidential Immunity**

### **In His Confirmation Hearings, Kavanaugh Claimed That His Writings In The 2009 *Minnesota Law Review* Article “Were Ideas For Congress To Consider,” And “Not My Constitutional Views”**

In His Confirmation Hearing On September 5, 2018, Brett Kavanaugh Claimed That In The 2009 *Minnesota Law Review* Article, He Merely “Proposed Some Ideas For Congress To Consider.” “Kavanaugh confirmation hearing, Sept. 5. There is often a good amount of reading the tea leaves to gauge how a Supreme Court nominee might rule on a given subject. And during the confirmation hearing, Kavanaugh refused to reveal how he might rule on the constitutionality of an indictment of a sitting president. And he warned not to interpret his opinions in the *Minnesota Law Review* as answering that question. ‘I proposed some ideas for Congress to consider,’ Kavanaugh said at the confirmation hearing. ‘Here’s the bottom-line point. They were ideas for Congress to consider. They were not my constitutional views.’” [WHYY, [9/8/18](#)]

- **Kavanaugh: “Here’s The Bottom-line Point. They Were Ideas For Congress To Consider. They Were Not My Constitutional Views.”** “And he warned not to interpret his opinions in the *Minnesota Law Review* as answering that question. ‘I proposed some ideas for Congress to consider,’ Kavanaugh said at the confirmation hearing. ‘Here’s the bottom-line point. They were ideas for Congress to consider. They were not my constitutional views.’” [WHYY, [9/8/18](#)]

### **In The Hearing, Kavanaugh Claimed He Had “Never Taken A Position” On The Constitutional Question Of Whether A Sitting President Could Be Criminally Indicted And “Would Have A Completely Open Mind” If Ever Faced With A Case That Addressed That Question**

On The Question Of Whether A Sitting President May Be Constitutionally Indicted, Kavanaugh Said, “If A Case Came Up [Where] Someone Was Trying To Say This Is A Constitutional Principle, I Would Have A Completely Open Mind On That Because I’ve Never Taken A Position On The Constitution On That Question.” “If a case came up that — where someone was — someone was trying to say this is a constitutional principle, I would have a completely open mind on that because I’ve never taken a position on the Constitution on that question,” he said. “I’ve only put out proposals for you all to study, to think about the balance of a president fighting a war, leading a war and a president subject to say, ordinary civil lawsuits as in the Clinton versus Jones case.” [WHYY, [9/8/18](#)]

## **Legal Experts Bob Bauer And Ryan Goodman Have Claimed That Kavanaugh’s Comments About His “Open-Mindedness,” Taken Alongside His Legal Writings, Create Uncertainty Around His True Position, Which Means That He Should Recuse Himself From Cases That Address Questions Of Presidential Immunity**

September 2018: Bob Bauer And Ryan Goodman Published An Opinion Piece Titled, “Judge Kavanaugh’s Testimony On His Constitutional View Of Presidential Immunity Is Misleading—And It Also Clinches The Case For Recusal.” “Judge Kavanaugh’s Testimony on His Constitutional View of Presidential Immunity is Misleading—and It Also Clinches the Case for Recusal.” [Just Security, [9/6/18](#)]

- **Bob Bauer Served As White House Counsel Under President Obama And Is A Professor At New York University School Of Law.** “Bob Bauer is professor of practice and distinguished scholar in residence at the New York University School of Law and co-director of NYU Law’s Legislative and Regulatory Process Clinic. Bauer served as White House Counsel to President Obama from 2009 to 2011. In 2013, the President named him to be co-chair of the Presidential Commission on Election Administration. In 2021, President Biden named him to be co-chair of the Presidential Commission on the Supreme Court of the United States.” [New York University School of Law, accessed [3/5/24](#)]
- **Ryan Goodman Is Co-Editor-In-Chief Of The Legal Analysis Website *Just Security* And A Professor At New York University School Of Law.** “Ryan Goodman (@rgoodlaw) is founding co-editor-in-chief of Just Security. He is the Anne and Joel Ehrenkranz Professor of Law and Co-Director of the Reiss Center on Law and Security at New York University School of Law. He served as Special Counsel to the General Counsel of the Department of Defense (2015-16).” [Just Security, accessed [3/5/24](#)]
- **The Article Was Published In *Just Security*, Which Claims To Be “An Online Forum For The Rigorous Analysis Of Security, Democracy, Foreign Policy, And Rights [...] Based At The Reiss Center On Law And Security At New York University School Of Law.”** “*Just Security* is an online forum for the rigorous analysis of security, democracy, foreign policy, and rights. Founded in 2013, we aim to promote principled and pragmatic solutions to problems confronting decision-makers in the United States and abroad. Our expert authors are individuals with significant government experience, academics, civil society practitioners, individuals directly affected by national security policies, and other leading voices. Our Board of Editors includes a broad range of leading experts on domestic and international law and policy. *Just Security* is based at the Reiss Center on Law and Security at New York University School of Law.” [Just Security, accessed [3/5/24](#)]

**In Their Article, Bauer And Goodman Wrote That The “Case For [Kavanaugh’s] Recusal [From Cases Testing The President’s Legal Immunities] Is Stronger Than Ever.”** “For all the contentiousness so far of the Kavanaugh confirmation hearings, the question of the nominee’s recusal from cases testing the president’s legal immunities seems to be fading from view. However, if the record is clear on any point, it is that case for recusal is stronger than ever.” [Just Security, [9/6/18](#)]

**In The Article, Bauer And Goodman Note Kavanaugh's Assertion In His 1998 *Georgetown Law Journal* Article That "The Constitution Itself Seems To Dictate, In Addition, That Congressional Investigation Must Take Place In Lieu Of Criminal Investigation When The President Is The Subject Of Investigation, And That Prosecution Can Occur Only After The President Has Left Office."** "What's more, the panel was for a symposium organized by the *Georgetown Law Journal*. A few months later, Kavanaugh published his written contribution to the symposium and it is in that law review article he cites the Framers and text of the Constitution chapter and verse for his view that 'the Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.'" [Just Security, [9/6/18](#)]

- **Bauer And Goodman Argue That Kavanaugh's Writings Mean That "There Is A Question, A Very Live One, Of Whether, If Confirmed, He Would Come To The Court Committed On This Constitutional Position."** "We're now to the point where Judge Kavanaugh's parsing and semantic qualifications are plain to observe. So there is a question, a very live one, of whether, if confirmed, he would come to the Court committed on this constitutional position." [Just Security, [9/6/18](#)]
- **They Also Note Kavanaugh's Statement During His Confirmation Hearing Claiming That He "Would Have A Completely Open Mind On That Because I've Never Taken A Position On The Constitution On That Question."** "It is striking that in his testimony, Judge Kavanaugh also states the test for the required 'open-mindedness' on issues that come before the Court. He told Senator Diane Feinstein: 'If a case came up where someone trying to say this is a constitutional principle, I would have a completely open mind on that because I've never taken a position on the Constitution on that question.'" [Just Security, [9/6/18](#)]
- **Bauer And Goodman Argue That The "Impossible To Escape" Uncertainty Of Whether Kavanaugh Actually Has An Open Mind, Or Whether He Lied About This During His Confirmation Hearings, Means That Kavanaugh Must "Remove Himself From Any Court's Engagement With These Issues."** "We're now to the point where Judge Kavanaugh's parsing and semantic qualifications are plain to observe. So there is a question, a very live one, of whether, if confirmed, he would come to the Court committed on this constitutional position. That question will not be resolved as a result of the hearings. He will stick to his current position, the Democrats will dispute it, and the Republicans will stand by him. But it is impossible to escape the uncertainty on this point, which should be enough for a Justice concerned with the legitimacy of the Court and public perceptions of the standing of the Justices, to remove himself from any Court's engagement with these issues." [Just Security, [9/6/18](#)]
- **Bauer And Goodman: "It Could Not Now Be Clearer That As A Result Of His Writings And Public Statements, Judge Kavanaugh Cannot Meet His Own Test Of 'Open-Mindedness'" And Must Recuse Himself From Presidential Immunity Cases.** "Judge Kavanaugh was correct to hold those two factors up as the standard: whether he has "taken a position" on the constitutional question and whether he would therefore be able to approach such a case with an "open mind." It could not now be clearer that as a result of his writings and public statements, Judge Kavanaugh cannot meet his own test of 'open-mindedness.' If confirmed, Judge Kavanaugh should have to recuse himself from participation in any cases that take up these issues of presidential immunities. And it should now go without saying that any such recusal would have to cover both a

president's immunity from investigation as well as indictment and prosecution." [Just Security, [9/6/18](#)]

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