



## Senate Democrats would have Brett Kavanaugh cause a constitutional crisis

Philip Wegmann

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Just two days after his nomination, Senate Democrats have started asking Brett Kavanaugh to promise a constitutional crisis. They want the Supreme Court nominee to recuse himself from any cases related to special counsel Robert Mueller's Russia probe.

Democrats on the Senate Judiciary Committee plan to put the question to Kavanaugh during his confirmation hearing. Sen. Richard Blumenthal, who sits on the committee, explains the rationale.

"I'm a no on this nominee," the Connecticut Democrat said from the Supreme Court steps. "My colleagues should be no on this nominee unless Judge Kavanaugh specifically commits that he will recuse himself on any issues that involve President Trump's personal financial dealings or the special counsel."

Kavanaugh must take a knee, Senate Democrats argue, because he would be "the swing vote" on cases concerning whether President Trump can legally pardon himself, be compelled to testify before a grand jury, or can be indicted. Never mind his decade of experience on the D.C. Circuit Court of Appeals and ignore his admirable application of an apolitical originalism.

As they would have it, Kavanaugh is disqualified from answering constitutional questions about executive prerogative because of a decade-old law review article.

Writing for the *Minnesota Law Review*, Kavanaugh recommended in 2009 that Congress pass a law immunizing presidents from civil suits and criminal indictments until their term in office is over. Based on his own experience prosecuting former President Bill Clinton as part of Kenneth Starr's office, he came to believe that the pressures of the presidency are so severe and so unrelenting as to justify such a law.

It was a specific policy recommendation, not a general legal declaration. Regardless, it has become popular to accuse Kavanaugh of pushing for an imperial presidency.

And that's dangerous. Assume for a moment that Kavanaugh makes a grand bargain. To make it the Supreme Court chambers, the judge promises in Senate committee rooms to recuse himself from such cases. Unlikely but not impossible, this scenario sets up a constitutional crisis.

It's true that the Supreme Court ruled unanimously in 1974 that President Nixon had to turn over his secret recordings and then unanimously again in 1997 to compel Clinton to testify in the sexual harassment lawsuit brought by Paula Jones. Other than that, there are more big questions than big answers.

"I imagine that whatever comes out of this, if anything, will be at the intersection of the Nixon and Jones cases," Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, told Politico. "That is, if the president can be compelled to turn over documents in a criminal investigation and to testify in a civil suit, what about testifying in a criminal investigation?"

But if Kavanaugh bows out, he won't be there to answer. He will be somewhere in his chambers while his eight other colleagues are on the court tempting fate with their even numbers. If the Supreme Court splits 4-4, which they did twice after the passing of Justice Antonin Scalia, the bench defers to the opinion of the lower court. Imagine the madness.

The Mueller investigation has steadily been advancing and apparently closing in on this president. Big legal questions will need supreme answers if the special prosecutor tries to press charges against the president. If these questions go to the Supreme Court and the Supreme Court chokes up, it will be an invitation to defy the judiciary as non-authoritative. It will be a recipe for a disaster between the branches, all because Democrats wanted to win some political points.