

BRETT KAVANAUGH THINKS THAT JACK SMITH IS AS CRAZY AS KEN STARR WAS

There was a subtle moment in yesterday's SCOTUS hearing on Trump's absolute immunity claim.

Former Whitewater prosecutor Brett Kavanaugh asked Michael Dreeben whether DOJ had weighed in on this prosecution.

Did the President weigh in? he asked. The Attorney General?

JUSTICE KAVANAUGH: As you've indicated, this case has huge implications for the presidency, for the future of the presidency, for the future of the country, in my view. You've referred to the Department a few times as having supported the position. Who in the Department? Is it the president, the attorney general?

MR. DREEBEN: The Solicitor General of the United States. Part of the way in which the special counsel functions is as a component of the Department of Justice.

The regulations envision that we reach out and consult. And on a question of this magnitude, that involves equities that are far beyond this prosecution, as the questions of the Court have –

JUSTICE KAVANAUGH: So it's the solicitor general?

MR. DREEBEN: Yes.

Having been told that Jack Smith consulted with a Senate-confirmed DOJ official on these tough issues, Kavanaugh immediately launched into a

screed about *Morrison v. Olson*, the circuit court decision that upheld the Independent Counsel statute.

JUSTICE KAVANAUGH: Okay. Second, like Justice Gorsuch, I'm not focused on the here and now of this case. I'm very concerned about the future. And I think one of the Court's biggest mistakes was *Morrison versus Olson*.

MR. DREEBEN: Mm-hmm.

JUSTICE KAVANAUGH: I think that was a terrible decision for the presidency and for the country. And not because there were bad people who were independent counsels, but President Reagan's administration, President Bush's administration, President Clinton's administration were really hampered –

MR. DREEBEN: Yes.

JUSTICE KAVANAUGH: – in their view –

MR. DREEBEN: Mm-hmm.

JUSTICE KAVANAUGH: – all three, by the independent counsel structure. And what I'm worried about here is that that was kind of let's relax Article II a bit for the needs of the moment. And I'm worried about the similar kind of situation applying here. That was a prosecutor investigating a president in each of those circumstances. And someone picked from the opposite party, the current president and – usually –

MR. DREEBEN: Mm-hmm.

JUSTICE KAVANAUGH: – was how it worked. And Justice Scalia wrote that the – the fairness of a process must be adjudged on the basis of what it permits to happen –

Kavanaugh slipped here, and described the horror

of "Presidents," not former Presidents, routinely being subject to investigation going forward.

MR. DREEBEN: Mm-hmm.

JUSTICE KAVANAUGH: – not what it produced in a particular case. You've emphasized many times regularity, the Department of Justice. And he said: And I think this applied to the independent counsel system, and it could apply **if presidents are routinely subject to investigation going forward**. "One thing is certain, however. It involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would the reaction be if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as picking the man and then searching the law books or putting investigators to work to pin some offense on him? To be sure, the investigation must relate to the area of criminal offense" specified by the statute, "but that has often been and nothing prevents it from being very broad." I paraphrased at the end because it was referring to the judges.

MR. DREEBEN: Mm-hmm. Yes.

JUSTICE KAVANAUGH: That's the concern going forward, is that the – the system will – when former presidents are subject to prosecution and the history of Morrison versus Olson tells us it's not going to stop. It's going to – it's going to cycle back and be used against the current president or the next president or – and the next president

and the next president after that. All that, I want you to try to allay that concern. Why is this not *Morrison v. Olson* redux if we agree with you? [my emphasis]

Kavanaugh pretended, as he and others did throughout, that he wasn't really suggesting *this* was a case of *Morrison v. Olson* redux; he was just talking hypothetically about the future.

JUSTICE KAVANAUGH: Right. No, I was just saying this is kind of the mirror image of that, is one way someone could perceive it, but I take your point about the different structural protections internally. And like Justice Scalia said, let me – I do not mean to suggest anything of the sort in the present case. I'm not talking about the present case. So I'm talking about the future.

This intervention came long after Kavanaugh suggested that charging Trump with defrauding the US for submitting fake election certificates and charging Trump with obstructing the vote certification after *first* charging hundreds of others with the same statute amounted to "creative" lawyering.

JUSTICE KAVANAUGH: Okay. For other official acts that the president may take that are not within that exclusive power, assume for the sake of argument this question that there's not blanket immunity for those official acts but that to preserve the separation of powers, to provide fair notice, to make sure Congress has thought about this, that Congress has to speak clearly to criminalize official acts of the president by a specific reference. That seems to be what the OLC opinions suggest – I know you have a little bit of a disagreement with that – and what

this Court's cases also suggest.

JUSTICE KAVANAUGH: Well, it's – isn't – it's a serious constitutional question whether a statute can be applied to the president's official acts. So wouldn't you always interpret the statute not to apply to the president, even under your formulation, unless Congress had spoken with some clarity?

MR. DREEBEN: I don't think – I don't think across the board that a serious constitutional question exists on applying any criminal statute to the president.

JUSTICE KAVANAUGH: The problem is the vague statute, you know, obstruction and 371, conspiracy to defraud the United States, can be used against a lot of presidential activities historically with a – a creative prosecutor who wants to go after a president.

But Kavanaugh returned to his insinuation that it was a stretch to prosecute a political candidate for submitting false certificates to Congress and the Archives under 18 USC 371 after his purported complaint about Morrison v. Olson.

Second, another point, you said talking about the criminal statutes, it's very easy to characterize presidential actions as false or misleading under vague statutes. So President Lyndon Johnson, statements about the Vietnam War –

MR. DREEBEN: Mm-hmm.

JUSTICE KAVANAUGH: – say something's false, turns out to be false that he says about the Vietnam War, 371 prosecution –

MR. DREEBEN: So –

JUSTICE KAVANAUGH: – after he leaves

office?

None of this intervention made any sense; it wouldn't even have made sense if offered by someone who hadn't criminalized an abusive, yet consensual, blowjob for years.

After all, contrary to the demands of many, Merrick Garland *didn't* appoint a Special Counsel until Trump declared himself a candidate. By that point, hundreds of people had already been charged under 18 USC 1512(c)(2) and DOJ was at least four months into Executive Privilege fights over testimony from Mike Pence's aides and Trump's White House counsel. Jack Smith was appointed nine months after Lisa Monaco publicly confirmed that DOJ was investigating the fake electors and six months after overt subpoenas focused on the scheme came out (to say nothing of the treatment of Rudy Giuliani's phones starting a year earlier).

This is not a Morrison v. Olson issue.

Rather, Kavanaugh is using his well-established hatred for Morrison v. Olson to complain that Trump was investigated at all – and that, after such time that a conflict arose, Garland appointed a non-partisan figure to head the already mature investigation.

It was one of many examples yesterday where the aggrieved white men on the court vomited up false claims made by Trump.

Kavanaugh made no mention of the appointment of Robert Hur – not just a Republican but a Trump appointee who had deprived Andy McCabe of due process – to investigate Joe Biden for precisely the same crime for which Trump was charged. That'll become pertinent at such time as Donald Trump's claim to Jack Smith's appointment gets to SCOTUS. After all, in that case, Trump will have been similarly treated as Joe Biden. In that case, Hur's distinction between Biden's actions and Trump's *should* (but probably won't) reassure the right wing Justices that Trump was not selectively prosecuted.

Speaking of things Kavanaugh didn't mention, his false complaint – and which Clarence Thomas raised as well – comes at a curious time.

Because of Aileen Cannon's dawdling, Trump's challenge to Jack Smith's appointment won't get to SCOTUS for months, if ever.

But Hunter Biden, whose challenge to David Weiss' appointment takes the same novel form as Trump's – an appropriations clause challenge – may be before the Third Circuit as soon as next week. In a passage of Abbe Lowell's response to Weiss' demand that the Third Circuit give Lowell, an observant Jew, three days including Passover to establish jurisdiction for his interlocutory appeal, Lowell scolded Weiss for presuming to know the basis of his appeals.

The Special Counsel boasts that it prepared its motion in "two days" (Mot.Exped.3), but the legal errors that permeate its motion to dismiss only underscore why more time is needed to adequately research and thoughtfully brief the jurisdictional issues for this Court. The Special Counsel ignores numerous bases for jurisdiction (e.g., 28 U.S.C. §§ 1291 (collateral order doctrine), 1292(a)(1) (denial of Appropriations Clause injunction), and 1651 (mandamus)) over this appeal, and the legal claims it does make are flatly wrong, compare Mot.6 (falsely claiming "all Circuit Courts" reject reviewing denials of motions to enforce plea agreements as collateral orders), with *United States v. Morales*, 465 F. App'x 734, 736 (9th Cir. 2012) ("We also have jurisdiction over interlocutory appeals of orders denying a motion to dismiss an indictment on the ground that it was filed in breach of a plea agreement.")

In addition to mandamus (suggesting they may either attack Judge Noreika's immunity decision directly or ask the Third Circuit to order

Delaware's Probation Department to approve the diversion agreement that would give Hunter Biden immunity), Lowell also invoked an Appropriations clause injunction – basically an argument that Weiss is spending money he should not be.

Normally, this would never work and it's unlikely to work here.

But even on the SCO challenge, there are a number of problems in addition to Lowell's original complaint: that Weiss was appointed in violation of the rules requiring someone outside of DOJ to fill the role.

For example Weiss keeps claiming to be *both* US Attorney and Special Counsel at the same time (most obviously in claiming that tolling agreements signed as US Attorney were still valid as Special Counsel), or the newly evident fact that Weiss asked for Special Counsel status *so that* he could revisit a lead he was ordered to investigate – in the wake of Trump's complaints to Bill Barr that Hunter Biden wasn't being investigated diligently enough – back in 2020, a lead that incorporated Joe as well as Hunter Biden, a lead that uncovered an attempt to frame Joe Biden, an attempt to frame Joe Biden to which Weiss is a witness.

The oddities of Weiss' investigation of Joe Biden's son may even offer another claim that the right wing Justices claim to want to review. Jack Smith claims to have found only two or three charges with which Kavanaugh, who insists (former) Presidents can only be charged under statutes that formally apply to Presidents, would leave available to charge a President. But there's one he missed: 26 USC 7217, which specifically prohibits the President from ordering up a tax investigation into someone, which Lowell invoked in his selective and vindictive prosecution claim. Lowell has not yet proven that Trump directly ordered tax officials, as opposed to Bill Barr and other top DOJ officials, to investigate Hunter Biden for tax crimes. But there's a lot of circumstantial evidence that Trump pushed such an

investigation. Certainly, statutes of limitation on Trump's documented 2020 intrusions on the Hunter Biden investigation have not yet expired.

The Hunter Biden investigation has all the trappings of a politicized investigation that Kavanaugh claims to worry about – and with the Alexander Smirnov lead, it included Joe Biden, the Morisson v. Olson problem he claims to loathe.

That's a made to order opportunity for Brett Kavanaugh to restrict such Special Counsel investigations.

Except, of course, it involves Democrats.