



Donald Trump's legal woes shadow Supreme Court nominee Brett Kavanaugh before confirmation hearing

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Brett Kavanaugh has yet to serve a day on the Supreme Court, but he already faces calls to recuse himself from potential cases involving his benefactor, President Donald Trump.

The argument goes: If Kavanaugh wins Senate confirmation after his Judiciary Committee hearing next week, he could tilt the balance of power on the high court to conservatives – possibly for decades to come.

Long before that, the court could be asked to referee a dispute involving Trump. Could he be indicted? Subpoenaed? Could he fire special counsel Robert Mueller or order the Russia investigation closed? What constitutes obstruction of justice? Could he even pardon himself?

Kavanaugh may find himself in the middle of those questions. He would owe his lofty position to the president who nominated him.

What's more, he is an advocate of a "unitary executive" model of government, in which the president wields more power. In 2009, he wrote that presidents should be immune from criminal investigations and prosecutions, as well as personal civil suits, until after leaving office.

"I believe it vital that the president be able to focus on his never-ending tasks with as few distractions as possible," Kavanaugh wrote. He recommended that Congress pass a law exempting the president from prosecution, investigation – even questioning.

The combination of factors led liberal interest groups to urge that the Senate delay Kavanaugh's confirmation hearing, which is set to begin Tuesday. Short of that, they want him to pledge that he would stand aside in cases involving the president.

"A Justice Kavanaugh could be deciding the entire fate of a Trump presidency and Donald Trump's entire future," says Neera Tanden, president of the liberal Center for American Progress. "We could have a 5-4 decision, and I think people would forever question it."

Recusals are up to each justice and customarily are reserved for cases in which he or she has had prior involvement or a personal stake in the outcome. Kavanaugh has played no direct role in any of the controversies that could land the president in court.

"He has not been a part of any suits related to President Trump, special counsel Mueller or the subjects of the Russia investigation," says Gabe Roth, executive director of Fix the Court, which

advocates for judicial transparency. "Whatever Kavanaugh's views on the unitary executive may be, the letter of the conflict-of-interest law does not suggest that a recusal on Trump-Russia would be required."

Nixon, Clinton ... and Trump?

Conservative groups say charges that Kavanaugh would be compromised on a Trump lawsuit are unfounded. They note that Justices Sonia Sotomayor and Elena Kagan did not recuse themselves from challenges to the Affordable Care Act, even though it was the signature achievement of President Barack Obama, who nominated them.

"No nominee should ever make a blanket promise to recuse from cases merely because those cases are very important to the president who picked him," says Ed Whelan, president of the conservative Ethics and Public Policy Center and a Kavanaugh defender.

In 1974 and again in 1997, the Supreme Court issued unanimous verdicts against sitting presidents who had nominated some of the justices.

In *U.S. v. Nixon*, the court ruled 8-0 that President Richard Nixon had to turn over tape recordings that implicated him in the Watergate cover-up. Chief Justice Warren Burger, a Nixon appointee, wrote the opinion and was joined by two of the president's other nominees.

Justice William Rehnquist, who later became chief justice, recused himself because of his close association with John Mitchell, the former attorney general and Nixon re-election campaign director later sent to prison for Watergate crimes.

Kavanaugh has lauded the Nixon ruling several times, even calling it one of the "greatest moments in American judicial history." But during a panel discussion in 1999, he said it might have been "wrongly decided – heresy though it is to say so – " because it enforced a subpoena from a subordinate executive branch official.

In the latter case, *Clinton v. Jones*, the court ruled 9-0 that President Bill Clinton could not delay until he was out of office a sexual harassment lawsuit brought by former Arkansas state employee Paula Jones. Two Clinton nominees who are still on the court, Justices Ruth Bader Ginsburg and Stephen Breyer, joined the opinion.

Kavanaugh was a lawyer on independent counsel Ken Starr's staff in the late 1990s and helped write its scathing report on Clinton, which led to the president's impeachment. But in 2016, he said the Supreme Court's 1988 decision upholding provisions of the independent counsel law should be overturned.

The law expired in 1999, when it was replaced by Justice Department regulations governing special counsels, including Robert Mueller. Critics of the law, including dissenting Justice Antonin Scalia at the time, called it an infringement on a president's executive power.

"It's been effectively overruled," Kavanaugh said at the American Enterprise Institute event in 2016, "but I would put the final nail in."

'Disingenuous' argument?

Liberal groups wasted no time raising the issue of recusal after Kavanaugh's nomination July 9. The next day, two of them posted a column in *The New York Times*.

"We have never had a nominee who was chosen by a president identified as the subject of a criminal inquiry – one that already has resulted in serious charges against top aides and could implicate the president himself," wrote Caroline Fredrickson, president of the American Constitution Society, and Norman Eisen, chair of Citizens for Responsibility and Ethics in Washington.

"If he's already said that he doesn't think the president should be indicted, that the president should be subjected to a subpoena, shouldn't he recuse himself?" Fredrickson says.

The issue picked up steam last week when Michael Cohen, the president's personal lawyer and fixer, pleaded guilty to violations of campaign finance law and implicated the president in payoffs during the 2016 campaign to a former Playboy model and a porn star. Senate Democratic leader Charles Schumer, D-N.Y., called it a "game-changer."

"The Senate should not confirm a man to the bench who believes presidents are virtually beyond accountability, even in criminal cases," Schumer said.

Michael Waldman, president of the Brennan Center for Justice at New York University School of Law, is writing a book on U.S. v. Nixon. He says Kavanaugh's view on immunizing presidents from investigations "is a license for lawbreaking."

Ilya Shapiro, senior fellow at the libertarian Cato Institute, calls that "a disingenuous political argument."

"Kavanaugh has neither taken a position on the Mueller investigation nor is otherwise any more 'tainted' than any nominee of any president under investigation," Shapiro says.