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What Trump's Supreme Court pick means for the Russia probe

Darrell Samuelsohn

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President Donald Trump's new Supreme Court pick, Brett Kavanaugh, could soon be in a position to address several big legal questions at the center of special counsel Robert Mueller's Russia investigation.

The list includes the question of whether Trump can be subpoenaed to testify in a criminal case; the legal basis for Mueller's probe; Trump's power to fire Mueller; and whether the president can escape criminal liability by pardoning himself.

And then there is the contentious question of whether a sitting president can be criminally prosecuted. Kavanaugh — who investigated President Bill Clinton as a federal prosecutor in the 1990s — has warned in writing against such a scenario.

All are unsettled constitutional questions that have bubbled below the surface of Mueller's investigation, mainly debated by legal scholars. None are yet the subject of court battles, meaning that Kavanaugh, if confirmed, would likely be seated by the time any reach the Supreme Court, which begins its next session in October.

But at least some already seem to have attracted the attention of Senate Democrats gearing up to oppose the conservative federal appeals court judge.

“President Trump is currently a subject of an ongoing criminal investigation, and any nomination of a Supreme Court justice while that investigation continues is unacceptable because of the clear conflict of interest inherent in the President installing someone who could be the deciding vote on a number of potential issues from that investigation that could come before the Court,” Sen. Cory Booker (D-N.J.), said in a statement opposing Kavanaugh's nomination.

The Supreme Court has weighed in on questions related to several past White House scandals. They include a unanimous 1974 ruling that required President Richard Nixon to hand over

documents to Watergate criminal investigators and a 9-0 vote in 1997 that forced President Bill Clinton to testify in a civil lawsuit brought by his former Arkansas state employee, Paula Jones.

While those two precedents are seen as sacrosanct because they were unanimous, Supreme Court experts across the political spectrum say there is still plenty of wiggle room for other significant cases that more directly address some of the questions at the center of the Mueller investigation.

The president, after all, remains a possible subject or even target of the Mueller investigation, which was originally launched to decipher whether there was collusion between his 2016 campaign and the Kremlin but has since morphed to include obstruction of justice questions surrounding his decision to fire FBI Director James Comey.

“I imagine that whatever comes out of this, if anything, will be at the intersection of the Nixon and Jones cases,” said Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute. “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?”

For months, Trump has denounced Mueller’s probe, seeming to set the stage for high-profile legal fights that could land at the Supreme Court. In May, he teased a potential defense against a charge of obstruction of justice with a tweet quoting an ally who had publicly argued that Comey’s firing was a legitimate exercise of presidential power. Last month, the president took aim at Mueller’s authority, declaring the special counsel’s appointment “totally UNCONSTITUTIONAL!”

Trump’s lawyers have stoked controversial legal questions that could wind up before the Supreme Court. Rudy Giuliani, the president’s personal attorney, has said the president “probably” has the power to pardon himself. And the president and his some of his advisers have repeatedly teased their interest in the potential ousting of Mueller and Rod Rosenstein, the deputy attorney general overseeing the special counsel’s probe.

The Supreme Court could also wind up considering legal questions related to other key figures in the Russia probe.

Several legal experts predict that former Trump campaign chairman Paul Manafort, who is fighting Mueller’s charges on tax and bank fraud and failing to register as a foreign agent, might take his case to the high court if convicted.

Meantime, lawyers for a Russian company charged with meddling in the 2016 election filed a legal motion last month in federal district court trying to dismiss its client’s criminal case because Mueller is out of step with the Constitution’s Appointments Clause. And Andrew Miller, a former aide to longtime Trump adviser Roger Stone, made a similar motion in June trying to quash a Mueller subpoena. Miller’s attorneys, who are expected to appear at a closed-door hearing on their motion later this month, said their ultimate aim was to get Mueller’s appointment tossed out by the Supreme Court.

“We’re happy to have a vehicle for a constitutional challenge,” said Peter Flaherty, the chairman of National Legal and Policy Center, a conservative nonprofit that is paying for Miller’s appeal.

Mueller of course will have a big say on whether any topics make it to the Supreme Court, and his team has been relying for legal strategy on Michael Dreeben, the deputy solicitor general with experience arguing more than 100 cases before the nation's highest court.

The special counsel's office, which declined comment for this story, has fought back against some early challenges to its authority, which comes under Justice Department regulations issued in 1999 that state a special counsel can be hired as a department employee in cases presenting a conflict of interest or "other extraordinary circumstances."

On perhaps the most pressing legal question — whether Mueller would seek a subpoena for an interview with Trump — Mueller's office hasn't given any indication where it stands.

Such a fight would likely first wind through lower federal courts, which could take at least six months and maybe much longer. "That'd be the fastest track to the Supreme Court," said Jonathan Turley, a George Washington University law professor.

Supreme Court experts say a subpoena fight could also prompt other questions at the heart of the Mueller probe, from the constitutionality of his appointment to a broader debate over whether the Justice Department can investigate a sitting president.

William Yeomans, a fellow at American University's law school and a former chief counsel to the late-Sen. Edward Kennedy, said he's watching to see whether the court might try to distinguish between a sitting president being told to hand over audio tapes, as Nixon was in the case decided in 1974, and a president being asked to give personal testimony, as Trump is.

"This should not be, but could be, construed by a conservative court to make a constitutional difference," he said.

Trump's allies insist the law is on their side.

"The issue of a president's testimony is sitting out there to be decided someday. I think the president wins," said Joseph diGenova, a former federal prosecutor whom Trump considered hiring as his lawyer earlier this year. He argued that any attempt by Mueller to force the president's testimony via subpoena would be deemed an "abuse of the grand jury" that gets "roundly shot down" by the court's conservative majority.

Trump and his attorneys have also embraced the conservative legal theory known as the "unitary executive," which says a president can't be subject to an investigation from a branch of the government—in this case the Justice Department—that he also leads. Corey Brettschneider, a political science professor at Brown University, warned that the next Supreme Court may be more inclined to follow that same path.

"A justice devoted to the 'unitary executive' theory might write such a decision and in the process overturn *U.S. v. Nixon*, suggesting the Court was wrong to bind Nixon's administration to the legal demands of a special prosecutor," he said.

Such a decision, he added, would be a "profound misreading of the Constitution" that ignites Trump's critics.

“It would make Nixon's outrageous claim that ‘when the president does it, that means it is not illegal’ into law,” he said. “And it would betray the central constitutional rejection of monarchy in favor of the idea that no person, not even a president, is above criminal investigation.”

Kavanaugh has first-hand experience with a federal investigation of a president. In the late 1990s he served on then-independent counsel Kenneth Starr’s team of prosecutors investigating Clinton, and helped write critical parts of Starr’s official report documenting Clinton’s affair with White House intern Monica Lewinsky and his efforts to conceal the relationship.

Later, in a 2009 article for the *Minnesota Law Review*, Kavanaugh wrote that presidents should be immune while in office from “time-consuming and distracting” criminal investigations. “Like civil suits, criminal investigations take the President’s focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President.”

In the same article, Kavanaugh said the primary recourse for a “bad-behaving or law-breaking President” is impeachment. “No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress,” he wrote, adding that an impeached former president was “still subject” to criminal prosecution after leaving office.

Even before Trump’s announcement, several Senate Democrats had already called on his nominee to recuse his or herself if questions surrounding Mueller make it to the Supreme Court. “The president should not be permitted to appoint a justice who will decide whether or not he complies with a subpoena to testify before a grand jury or pardons himself,” Democratic Sen. Richard Blumenthal, a member of the Judiciary Committee, said on CBS’s “Face the Nation” earlier this month.

And in a Monday night statement opposing his nomination, Sen. Bernie Sanders (I-Vt.) noted with disapproval that Kavanaugh “believes a president can only be indicted after he leaves office and should not be subjected to civil suits while in office.”

But some court watchers said it’s a mistake to predict how a post-Kennedy court, even with Kavanaugh on the bench, might rule on Mueller-related topics.

“It’d be foolish to assume there’s a five-justice lock on any of these questions,” said Turley, a frequent defender of the Trump presidency who said he’d be “surprised” if foundational cases like *U.S. vs. Nixon* or *Clinton v. Jones* were overturned by the conservative majority.

“The Supreme Court is by its nature an incrementalist body,” he said. “Particularly on the subpoena question I’d be surprised to see a majority form over a new and sweeping vision of executive power. To overturn Nixon would be a change that’d rival *Marbury v. Madison* in terms of its impact on the three branches.”