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Trump's Supreme Court nominee: Rulings favor more power to the president

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Power to the president.

That's been a theme of President Trump's new Supreme Court nominee Brett Kavanaugh, who has written that presidents should be immune from criminal investigations, civil suits or prosecution while in office. As a federal appeals court judge, Kavanaugh has also issued opinions saying presidents should have more power over regulatory agencies that Congress has designated as independent, and should even be able to disregard certain laws they consider unconstitutional.

Those views would seem to hold appeal for a president who is the target of both an independent counsel's investigation and an "Apprentice" contestant's lawsuit, who has challenged the legality of a federal consumer agency and who has denounced courts that ruled against him.

Kavanaugh's "judicial philosophy is very consistent with President Trump's political philosophy," said Jessica Levinson, a Loyola Law School professor in Los Angeles who specializes in election law and governance.

That might not have been predictable from Kavanaugh's work as one of the main authors of independent counsel Kenneth Starr's 1998 report calling for the impeachment of President Bill Clinton. As grounds for impeachment, the report listed not only Clinton's alleged lies under oath about his affair with White House intern Monica Lewinsky, but also lying to the public, through statements to the news media and his staff, and it cited his refusals to testify before a grand jury. The House impeached Clinton for perjury in his sworn statements, but the Senate legally acquitted him by voting to leave him in office.

A 2010 book, "The Death of American Virtue: Clinton vs. Starr," by Duquesne Law Professor Ken Gormley, quoted Kavanaugh as saying in a memo to Starr that Clinton "has disgraced his office, the legal system and the American people by having sex with a 22-year-old intern and turning her life into a shambles — callous and disgusting behavior."

In 2009, however, Kavanaugh largely recanted. In a law review article, he said it now “seems a mistake” to have conducted the investigation while Clinton was in office, because a president should “be able to focus on his never-ending tasks with as few distractions and possible.”

To that end, he said, Congress should pass laws that protect a sitting president from criminal investigation or prosecution as well as civil suits. Those can be pursued once the president leaves office, Kavanaugh said, and the Constitution provides a remedy — impeachment — for a law-breaking president. He did not say how Congress could gather evidence to impeach a president without conducting an investigation.

Congress has not passed any such protective laws, but the Justice Department follows its own internal guidelines that bar prosecution of a president, a prohibition that Special Counsel Robert Mueller is likely to follow if he finds criminal wrongdoing by Trump.

The Supreme Court, on the other hand, has allowed civil suits against a sitting president — a 1997 ruling in a sexual harassment lawsuit against Clinton by former Arkansas state employee Paula Jones, later settled. A federal judge recently cited that ruling in refusing to dismiss a defamation suit against Trump by a woman he called a liar for accusing him of kissing and groping her while she was a contestant on his “Apprentice” television show.

Kavanaugh was appointed to the federal appeals court in Washington, D.C., in 2006 by President George W. Bush, for whom he had previously worked as a lawyer and staff secretary. Several of his rulings have narrowed government regulatory authority on issues such as air pollution and internet service, making it easier for Trump’s administration to substitute its own permissive policies later.

And one ruling, in 2016, struck a blow at a regulatory agency that was set up to be largely independent of presidential power, the Consumer Protection Financial Bureau, established by Congress during President Barack Obama’s administration to oversee lending practices.

The law was unconstitutional, Kavanaugh said, because it created an independent agency with a single director who served a fixed term and could be removed only for misconduct in office. That’s a structure, he said, that permits “arbitrary decision-making” and poses a “threat to individual liberty.” The full appeals court reconsidered his ruling and upheld the bureau’s structure — but by then, Trump had named a new director, Mick Mulvaney, his budget chief, who stripped the bureau of its funding.

Kavanaugh’s rationale in the case “cuts the administrative state to the core,” said Charles Geyh, an Indiana University law professor. He said it was in keeping with an administration that has opposed consumer and environmental regulation.

Opponents of the so-called regulatory state were encouraged.

“You can’t have a fourth branch of government that’s only accountable to itself,” said Ilya Shapiro, a senior fellow at the libertarian Cato Institute, referring to independent regulatory agencies. Rather than allowing agencies to decide the meaning of disputed regulatory laws, Shapiro said, Kavanaugh, like the late Justice Antonin Scalia, has been willing to make that decision himself from the bench.

He’s also willing to let presidents override the law — specifically, Obama’s health care law.

“Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional,” Kavanaugh wrote in a concurring opinion in 2011, when his court denied a challenge to the individual-coverage mandate of the Affordable Care Act, also known as Obamacare.

He cited an opinion by Scalia to the same effect in an unrelated 1991 case. Kavanaugh didn’t define the type of law that “regulates private individuals,” but later, in a 2014 law review article, he appeared to set no such limit, saying a president who considers a law unconstitutional can refuse to follow it “until a final court order says otherwise.”

Geyh said Kavanaugh’s assessment “harkens back to Andrew Jackson’s administration” when the president — for whom Trump has expressed admiration — allegedly dared the Supreme Court to enforce one of its rulings. “Openly defying an order gets us into new terrain,” Geyh said.

But Shapiro said the nominee has shown respect for the Constitution.

There’s a long-standing legal view, he said, that “the parties in a case are bound by a court’s ruling, but beyond that the executive has to interpret the Constitution for himself.”

“It’s a separation-of-powers theory,” Shapiro said, noting that Kavanaugh, in remarks during Monday’s nomination proceedings, declared that “separation of powers protects individual liberty.