

Trump Supreme Court pick: I would 'put the nail' in ruling upholding independent counsel

By [Manu Raju](#), CNN Senior Congressional Correspondent

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(CNN) — Judge Brett Kavanaugh two years ago expressed his desire to overturn a three-decade-old Supreme Court ruling upholding the constitutionality of an independent counsel, a comment bound to get renewed scrutiny in his confirmation proceedings to sit on the high court.

Speaking to a conservative group in 2016, [Kavanaugh bluntly said he wanted to "put the final nail"](#) in a 1988 Supreme Court ruling. That decision, known as *Morrison v. Olson*, upheld the constitutionality of provisions creating an independent counsel under the 1978 Ethics in Government Act -- the same statute under which Ken Starr, for whom Kavanaugh worked, investigated President Bill Clinton. The law expired in 1999, when it was replaced by the more modest Justice Department regulation that governs special counsels like Robert Mueller.

The comments are certain to get new attention amid his confirmation proceedings given that President Donald Trump and his campaign remain under investigation by Mueller -- and alongside the skepticism Kavanaugh previously expressed over whether a sitting president can be indicted.

Whether that means Kavanaugh views Mueller's appointment and investigation itself as unconstitutional is unclear, given the special counsel works directly for the Justice Department under a different set of rules that governed the independent counsel.

Yet the 2016 remarks, which have not been previously reported, are consistent with Kavanaugh's judicial record expressing disdain for the *Morrison* ruling.

Asked at an American Enterprise Institute event in March 2016 if he could think of a case that deserved to be overturned, Kavanaugh said: "Yes." Asked if he could specify a case, Kavanaugh first responded: "No," prompting laughter from the audience.

He then volunteered this: "Actually, I'm going to say one. *Morrison v. Olson*. It's been effectively overruled, but I would put the final nail in," according to a video of the event.

There are important differences between the regulation governing Mueller and the independent counsel law. Unlike the independent counsel, Mueller reports directly to the Justice Department, and has less independence. But the special counsel cannot be removed without "good cause" under regulations that may withstand legal scrutiny because of the *Morrison* decision.

At the core of the 1988 ruling is the idea that Congress can create an independent investigative mechanism within the executive branch and insulate that investigation from direct control by the President -- by preventing the removal of the independent counsel except for good cause. Although a court of appeals panel had struck down the independent counsel law, the Supreme Court upheld it, concluding that it was not inconsistent with the separation of powers for Congress to create such a check on the President.

But conservatives like Kavanaugh have long celebrated the solo dissent of the late Justice Antonin Scalia from that ruling -- and the "unitary executive" theory it embraces, under which it is argued that it is unconstitutional for any executive branch officer to be insulated from presidential control.

If Kavanaugh provided a fifth vote for overturning the *Morrison* case, it could have implications for the Mueller

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Mueller's appointment as a special counsel, like the independent counsel law itself, prohibit Mueller from being fired without good cause.

It's uncertain whether Kavanaugh's hostility to the Morrison case means that he would view Mueller's appointment itself as unconstitutional -- or if he simply believes that Mueller could be fired for any or no reason.

This distinction could be crucial if, among other things, the Supreme Court ultimately rules on a subpoena forcing Trump to testify in the Mueller investigation. Moreover, his views also could mean he'd be skeptical of legislation approved in April by the Senate Judiciary Committee that would make it even harder for Mueller to be removed without good cause.

Legal experts say Kavanaugh has expressed his distaste for the Morrison ruling in several opinions. Taken with his legal writings expressing skepticism that a sitting president can be indicted, experts say Kavanaugh could be a voice on the court pushing back on investigations of a president.

"His views of the President's constitutional authority would call into question at least some of the means through which a sitting president can be investigated," said Stephen Vladeck, a University of Texas law professor and CNN Supreme Court analyst. "There's no question other investigative avenues remain, especially through Congress. But the 'unitary executive' theory that Judge Kavanaugh has so often embraced is difficult to reconcile with even a somewhat-independent prosecutor within the executive branch who doesn't serve at the pleasure of the President."

Vladeck added: "The more important question is whether there would be four other votes to go along with him."

The White House declined to comment.

Kavanaugh's views are undoubtedly shaped by his experience working with Starr from 1994-1998, as Starr served as the independent counsel investigating the Clinton White House. Kavanaugh later worked in the Bush White House, including as an associate counsel from 2001-2003 and as a staff secretary from 2003-2006 before being confirmed for a seat on the US Court of Appeals for the District of Columbia Circuit.

In a 2009 Minnesota Law Review article, Kavanaugh detailed his concerns about indicting a sitting president, saying his views had changed over the issue since the 1980s and 1990s.

"Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible," he wrote. "The country wants the President to be 'one of us' who bears the same responsibilities of citizenship that all share. But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office."

Kavanaugh's confirmation prospects hinge on a handful of moderate Senate Republicans and Democrats, who are keeping their powder dry until after they meet with him and after his confirmation hearings.

Senate Judiciary Chairman Chuck Grassley told CNN Tuesday it's still unclear when confirmation hearings will be held, or whether they'll occur before September, saying that the panel needs to review a wide swath of documents, including from his time at the Bush White House.

Grassley said there are "roughly millions" of pages of documents, but he signaled he was not going to ask for every single one of them, as Democrats have demanded. He expected document production to occur on a rolling basis.

"You could probably get them all if you want to take a year to do it," Grassley said. "But obviously, you're going to only ask for what's relevant."

Among the biggest questions Kavanaugh is bound to face: Whether he'd respect Supreme Court precedent. During the March 2016 event, Kavanaugh addressed that as well, noting that not all precedent should be considered settled law.

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which upheld segregation on the basis of race.

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