

Supreme Fiasco: Did the Kavanaugh Drama Just Break the Senate?

September 28, 2018

Americans were riveted on Thursday watching the testimony of Supreme Court nominee Brett Kavanaugh and the woman accusing him of sexual assault, Christine Blasey Ford. Over the course of the eight-hour proceeding, senators quoted vulgar yearbook inscriptions and insulted one another. The tears flowed. The fingers pointed. Sen. Lindsey Graham called the hearings “the most unethical sham since I’ve been in politics.” Senate Democrats blasted Republicans for failing to order up an FBI investigation. It was a daylong fireworks display, alternately heartbreaking, befuddling and enraging, each emotion largely dependent on the viewer’s politics.

There was one thing, however, with which everyone watching would probably agree—that we’ve never seen anything quite like this before. In that light, we’ve asked a team of legal experts to answer two simple, yet revealing questions: Who, between Kavanaugh and Ford, do you find more credible, and what did yesterday’s hearing say about how we confirm Supreme Court justices? Those answers may help us understand how we reached this extraordinary moment—and when, and in what form, we may expect the next one. —*Derek Robertson*

‘A witness who is not credible lashes out at his accusers and assumes a more reasonable demeanor under neutral questioning’

Lara Bazelon is an associate professor at the University of San Francisco School of Law and the author of Rectify: The Power of Restorative Justice After Wrongful Conviction, which will be published in October.

Whom do I find more credible?

A credible witness maintains the same demeanor during direct and cross examination. Under questioning from sex crimes prosecutor Rachel Mitchell, the designated voice of the Republican senators, Ford remained calm and seemed genuinely to try to be as cooperative as possible. At one point she even told Mitchell she had asked an “excellent question.” Mitchell in turn, told Ford how “impressed” she was with her. Indeed, at the end, Mitchell seemed to acknowledge her failure to cast doubt on Ford by lamenting that a question-and-answer format in five-minute increments was not the best way to get to the truth.

When Ford was addressed by the Democrats, who overwhelmingly chose to use their five minutes by lavishing her with praise, the only change in her expression was to blanch occasionally, as if she was embarrassed. At times, she leaned away from the microphone, as if to

place a distance between herself and these over-eager compliment-dispensers. That is what a credible witness does—put distance between herself and the home team while taking great care to be respectful and responsive to her inquisitor.

A witness who is not credible lashes out at his accusers and assumes a more reasonable demeanor under neutral questioning. That is exactly what we saw with Kavanaugh. While a falsely accused man has every right to be angry, Kavanaugh's rage—whether he is innocent or not—played poorly in large part because it was infected with self-pity and devoid of insight. It also played out selectively. With Mitchell, and later with the Republicans who took over the questioning, Kavanaugh was calm and answered directly. When it was the Democrats' turn, Kavanaugh was rude, sneering and combative. A low point—for which he later apologized—came when he repeatedly demanded that Senator Amy Klobuchar answer his question whether she liked beer, in response to her questions about whether he drank excessively. At every turn, he filibustered to avoid answering direct questions, repeatedly refusing to say whether he would ask President Donald Trump to open an FBI investigation and retreating to the same stale talking points. He could not even take responsibility for his own yearbook page.

It was as if Kavanaugh was trying to use his position, privilege and entitlement to bully the senators—and the country—into believing him. That not only displays a lack of judicial temperament, it shows a fundamental misunderstanding of how we decide whom to believe, which is often inextricably bound up with whom we decide to like.

'It would be a great shame and set a terrible precedent to reject a nominee under these circumstances'

Ilya Shapiro is senior fellow in Constitutional Studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.

I found both Ford and Kavanaugh extremely credible, but given the denials of all alleged witnesses to the incident in question, the presumption of innocence was not overcome. It would be a great shame and set a terrible precedent to reject a nominee under these circumstances. In other words, I wish to associate myself fully with the comments of Senator Lindsey Graham, who has really elevated himself through this process—an optimistic sign if the Republicans keep the Senate because he's in line to be the new Judiciary Committee chairman.

But we shouldn't forget that there are no winners here. If Kavanaugh is confirmed, he will carry the same kind of reputational cloud under which Justice Clarence Thomas has lived for 27 years, while a significant chunk of the population will think that he's an illegitimate justice. If he's rejected, then forevermore last-minute smear tactics and bad faith will prevail, and an even greater chunk of the population will lose faith in the Senate.

I don't have any easy answers for how to improve the process going forward. I don't even think things will improve once Donald Trump—whose election has never been accepted by Democrats—has left the White House. The only real solution is to reduce the Supreme Court's importance by reducing the power of the federal government and thus the range and significance of the issues that the Court has to decide. Only hewing to constitutional structure can preserve the republic, but of course that's a much larger discussion.

‘I believe Ford ... because of the indicia of truth that emanates from the totality of the evidence’

Mari Matsuda is a law professor at the University of Hawaii's William S. Richardson School of Law.

Whom do you believe when two witnesses testify with earnest commitment to their irreconcilable positions, showing real emotion, and apparent sincerity? I believe Ford. Not because she is the woman, not because she represents “my side” in open political warfare, but because of the indicia of truth that emanate from the totality of the evidence. I believe that Kavanaugh’s show of anger and hurt was real. Anger and hurt are what I would expect to see if he is innocent. The problem is, it is also what I would expect to see if he did assault Ford but either forgot the incident in a beer-infused summer, or remembers it but believed, all his life, that transgressions of this type would “stay at Georgetown Prep.” This is as it was for generations of powerful men who partied hard, transgressed and got away with it. It is plausible that the pain we witnessed was the pain of loss of entitlement, and the anger—uncontrolled even as he spoke to U.S. senators who are entitled to respectful address under rules of decorum—was that of a man who feels someone is stealing something from him.

Ford, on the other hand, presents no motive for falsehood. She felt a civic duty to present her evidence before Kavanaugh’s nomination. Her goal was not political. She did not want to stop all Republican nominees from going forward. She wanted only to stop one who, she knew, had committed an act of moral turpitude. Her demeanor was profoundly honest, never overstating what she remembered, never resorting to form-cast talking points. Her face exuded effort at careful accuracy. The fact that she came forward only now makes perfect sense to every woman who has experienced assault. Often staying silent is the best way to get your life back, given the reality that speaking up can get you nowhere, or worse.

As a lawyer, I listened carefully to the claims made that “all the alleged witnesses deny knowledge of the party.” These witnesses were not available for cross examination. If they were, we could clarify whether “have no knowledge,” is the same as “it is not possible I was ever at a gathering of this type.” Given the amount of drinking that reportedly went on in the prep school culture of this time and place, it is believable that the other witnesses have no active memory of this informal gathering. This does not mean it didn’t happen.

Finally, I put together all the bits of fibbing Kavanaugh has engaged in, all the way back to stating that he had no knowledge of the pornography-sharing, harassing habits of Judge Alex Kozinsky, a mentor he was close to, even though Kozinsky’s habits were common knowledge. Then there is the “I like beer, I did sometimes drink too much, but I never had a memory lapse from drinking” line, repeated like rote in the testimony, along with the rewriting of sex/drinking references he has made in the past, to make them laughably innocent. A sexual slur becomes a drinking reference, a sloppy drunk reference becomes fibbing braggadocio, throwing up jokes were not about drinking—he has stomach issues, the “alumnius” slur against a woman was a mere gesture of admiration and friendship. This effort to repaint the past is not consistent with Kavanaugh’s known association, not just in high school, but in college, with groups that favored copious amounts of liquor and demeaning treatment of women. His fraternity was notorious for this at Yale. We never got an honest answer about the drinking. Is that, I wonder, because it leads to the next question: “Is it possible this happened and you just don’t remember?”

When I recommend students for clerkships, I often refer to a “reputation for integrity that is beyond reproach.” When I am asked to recommend students for the bar, or when the FBI comes around asking about students for security clearances, I use the same standard. I have no doubt whatsoever about the character of those I recommend, or I would not make the recommendation. That is the requirement for positions of trust, and it is not met here.

Some politicians are suggesting that the confirmation process is a “circus” tainted beyond repair. It is not. Not every candidate will have credible accusations of sexual assault leveled against them. We will not see this every time. We can also move away from ideological litmus tests. Requiring Federalist Society approval for Republican candidates is what has politicized this appointment from the start. I clerked for a wise and respected federal judge, Herbert Choy, a Republican appointed to the Ninth Circuit by Richard Nixon. He was chosen not because he passed a right-wing loyalty test, but because he was a widely respected lawyer and gentleman. His appointment sailed through, as did that of his replacement, an equally respected Republican corporate litigator. Kavanaugh spent his entire career deeply immersed in the right wing of his party. To complain now that the process is “politicized,” raises the question “by whom”?

‘There is no rational evidence that Judge Kavanaugh sexually assaulted anyone’

Elizabeth Price Foley is Professor of Law at the Florida International University College of Law.

In civilized societies that embrace due process of law, rational decision-making—including credibility assessment—can only be achieved by a “preponderance of the evidence” standard. This means that, for a rational determination to be reached, the decision-maker(s) must find that, under the totality of the circumstances, it is “more likely than not” that the allegation is true.

Credibility is not assessed on the basis of gender, the nature of an allegation, or one’s political affiliation. Any rational credibility determination requires unbiased consideration of the totality of the circumstances.

Applying the preponderance standard to the allegations levied against Kavanaugh, is it more likely than not that he sexually assaulted Ford? No rational decision-maker could so find, for numerous reasons.

First, Ford’s allegations are vague in numerous material details, including time, place and number of individuals present at the alleged event. Second, all individuals Ford claims were present at the event have denied, under penalty of perjury, that it ever took place, including one of Ford’s best girlfriends, Leland Ingram Keyser. Third, Kavanaugh has unequivocally denied ever attending any such event, or ever assaulting Ford at any time. Thus, all alleged participants at the event, except for Ford, agree that the event—much less the sexual assault—never even happened. Fourth, hundreds of character witnesses—many of them women—have provided statements regarding Kavanaugh’s exemplary character since childhood, including his respect for, and long-time mentorship of, women.

Recognizing the inherent weakness of an allegation that lacks any corroboration—and indeed is unanimously refuted—the Democrats shifted their attention to establishing a pattern of sexual misconduct by Kavanaugh. Deborah Ramirez and Julie Swetnick then suddenly came forward

with claims. But Ramirez herself once admitted to being unsure if the individual who groped her at an alcohol-infused Yale undergraduate party was Kavanaugh, and the *New York Times* could not find a single corroborating witness despite contacting several dozen party attendees. Julie Swetnick claimed that, as a college student, she attended high school parties in which Kavanaugh witnessed (but she does not say participated in) gang rape. Swetnick's claims, brought forth by the hyperpartisan Democratic lawyer Michael Avenatti, remain utterly uncorroborated and are so sensational as to be inherently incredible when weighed against the totality of the evidence.

At today's Senate Judiciary hearing, the Democrats shifted their attention once more, to drinking alcohol. Their chief argument seems to be that Kavanaugh's youthful consumption of beer should create a reasonable inference that Kavanaugh committed sexual assault.

But fundamental fairness suggests that drinking alcohol—even to excess—does not create a rational inference of sexual assault. Uncorroborated, sensational allegations do not create a rational inference of sexual assault. Kavanaugh's gender, his race, his economic status do not create a rational inference of sexual assault.

In short, under the totality of the evidence adduced, there is no rational evidence that Kavanaugh sexually assaulted anyone, including Ford. While some may choose to believe Ford for various reasons—such as believing women, believing Democrats, hating Donald Trump or believing all allegations of sexual assault—such beliefs, while passionately held, are not rational credibility determinations but biased ones. They would never be accepted in any court, or in any other fair decision-making process of a civilized society.

'Unless the old rules are put back in place... the credibility of the court will be grievously damaged'

Bruce Ackerman is Sterling Professor of Law and Political Science at Yale University.

The Kavanaugh fiasco was made possible by the earlier decision authorizing only 51, rather than 60, senators to confirm appointments to the Supreme Court. This made it unnecessary for presidents to appeal to centrists of the opposing party in making nominations. Unless the old rules are put back in place—very unlikely—the credibility of the court will be grievously damaged by a series of hyperpoliticized appointments by future administrations, whether they be Republican or Democratic.

'I found Ford objective and highly credible'

Peggy Cooper Davis is the John S. R. Shad Professor of Lawyering and Ethics at NYU Law School.

Whom do you find more credible?

I found Ford objective and highly credible. I found Kavanaugh intemperate, deeply hostile and surprisingly partisan; these things diminished his credibility.

What does today's hearing say about how we confirm Supreme Court justices?

The difficulty is not the confirmation process. The difficulty is a patriarchal culture in which male entitlement and rage drown out legitimate but more moderate and responsible voices.

‘Today’s hearing broke the way we confirm Supreme Court justices’

Victoria Bassetti is a fellow at the Brennan Center for Justice. She was a Democratic subcommittee chief counsel on the Senate Judiciary Committee.

Whom do you find more credible?

I found Ford more credible. She was calm and collected. In contrast, Kavanaugh was angry, confrontational and at times rambling. He was openly partisan, even threatening.

However, my ability to judge their credibility would have been vastly improved if the committee had undertaken a thorough and professional investigation and if it had called other witnesses. The Committee did neither Ford nor Kavanaugh nor the American public any favors when it refused to ask for an FBI inquiry.

What does today’s hearing say about how we confirm Supreme Court justices?

Today’s hearing broke the way we confirm Supreme Court justices. It was an imperfect system before. A lot of people were bruised in the process, and we were rarely much the wiser about a prospective justice’s philosophy or thinking. But in its own way, it mostly worked. A year and a half ago, the confirmation hearing for Neil Gorsuch featured some deep questioning around his jurisprudence and some of his specific decisions. It also, of course, had its fair share of evasive answers. Even two weeks ago, the Kavanaugh hearings revealed a lot about his thinking on *Chevron* deference and how the Supreme Court deals with unenumerated rights.

It was always, of course, a political process. And like so much of today’s politics, it has reached the intractable tribal, shouting phase. How to de-escalate? First, completely rework the confirmation process. The current members of the Senate Judiciary Committee—the ones who are screaming at one another today—need to step away for a while. Second, turn the confirmation process over to a new special committee that lays out its procedures well in advance. Finally, take the time to do things right. There is never a need to rush to confirm someone to a lifetime appointment on the Supreme Court.

‘The Senate hearing ... was a due process disaster’

Deborah Rhode is the Ernest W. McFarland Professor of Law at Stanford Law School.

The Senate hearing concerning Kavanaugh’s confirmation was a due process disaster. Although the questioning was clearly more civil than in the case of Clarence Thomas, it raised many of the same concerns. In the Thomas hearings, the committee declined to call witnesses who would have corroborated Anita Hill’s testimony. In the Kavanaugh hearings, the committee not only refused to call critical witnesses, including the friend who was allegedly in the room at the time of the assault, but also refused to order an FBI investigation, a standard procedure when credible accusations are leveled at an applicant for high office. Kavanaugh, when questioned about this failure, was also unwilling to call for such an investigation or give a reason why. Equally problematic was the rudeness and belligerence with which he evaded answering questions.

Surely he must have appreciated why the Democratic members of the committee and the American public wanted an impartial FBI inquiry into claims by a woman with no obvious motive to lie. There is no evidence to suggest that she was part of what he asserted was a “calculated orchestrated political hit.” And if that remains the Republican response to growing concerns about this candidacy, it will be a travesty of justice and a betrayal of what Kavanaugh has repeatedly insisted that he wants: a confirmation process and a Supreme Court that is above partisanship.

The hearing ‘indicate[s] a deep problem with the composition of the Senate’

Michele Landis Dauber is the Frederick I. Richman Professor of Law at Stanford Law School.

Whom do you find more credible?

In the end, it was the laughter Ford remembered. Being humiliated, her pain and terror as sport for these two prep school bullies. And a million hearts broke simultaneously. A million tears slid down a million cheeks and we knew, just like we knew about Brock Turner. She could have saved the cost of the lie detector. That was quickly confirmed by Kavanaugh himself who dropped his carefully scripted persona as a hail-fellow-well-met and become the belligerent Mr. Hyde described by his freshman roommate at Yale. No imagination required.

This isn’t 1991, and the Republican high-tech slut shaming isn’t going to work this time. This time we are ready for it and we are going to hold any Republican who votes to confirm this monumentally unfit nominee accountable at the polls.

What does today’s hearing say about how we confirm Supreme Court justices?

I don’t think that this indicates a problem with the confirmation process. It does indicate a deep problem with the composition of the Senate, and also with the fact that there has not been to this point an organized electoral force against sexual harassment and violence against women. Women voters have to send the message that we will hold elected public officials accountable when they commit abuses or when they enable others to commit them. We are 51 percent of registered voters, and we don’t have to accept a situation where the harms we experience as women are dismissed.

We also don’t have to accept stooges like Lindsey Graham literally screaming at women like Dianne Feinstein about how unfair it is to consider Kavanaugh’s disgusting history of yearbook misogyny in determining whether to promote him. We can’t even imagine a female senator screaming like that even though today they had a damn good reason to do it, and we all know it and we all know why.

‘With a lifetime appointment to the Supreme Court at stake, it is important to make every effort to get things right.’

Ilya Somin is a law professor at George Mason University and an adjunct scholar at the Cato Institute. He is the author of Democracy and Political Ignorance: Why Smaller Government is Smarter.

I thought Christine Blasey Ford was credible. It is hard to deny she genuinely believes that Brett Kavanaugh assaulted her. In addition, Rachel Mitchell, the lawyer tasked by committee Republicans with questioning her, could not poke any meaningful holes in her story.

Kavanaugh's anger and belligerence struck me as less persuasive than Ford's calmer demeanor. Some of his insinuations of being a victim of a left-wing conspiracy (motivated by "revenge for the Clintons," among other things) seem excessive and inappropriate for a Supreme Court nominee, who is supposed to maintain political neutrality. That said, it is not surprising that a man who is falsely accused (or believes himself to be) would feel great anger and might engage in rhetorical excesses that would not occur at other times.

More generally, we should be wary of judging the witnesses based on our subjective impressions of demeanor. Studies show that most people are not as good at detecting liars as they think they are. And we also should not dismiss the possibility that one or both witnesses' recollections of long-ago events could be seriously inaccurate even if they genuinely believe they are telling the truth.

Our judgment may be even more flawed in a case where it is likely to be compromised by ideological and partisan bias. One of the most striking aspects of commentators' reactions to yesterday's hearing (and sexual assault accusations more generally) is the extremely high correlation between what people think of the allegations and whether they believe Kavanaugh should be confirmed aside from them. Liberals who opposed to Kavanaugh before the accusations overwhelmingly believe they are both accurate and disqualifying. Most conservatives who like Kavanaugh's jurisprudence believe that the accusations are false, or at least insufficiently proven to warrant rejection of the nomination. As a matter of logic, it should be possible to simultaneously believe that Kavanaugh is a great jurist, yet also likely guilty of sexual assault, or, conversely, that his jurisprudence is badly flawed, yet Ford's accusations are insufficiently proven to be disqualifying. The fact that these two positions have so few adherents is a strong sign that reactions to the accusations and hearing are heavily influenced by "motivated reasoning"—the tendency to interpret evidence in accordance with political and other preconceptions.

While it may be difficult to assess the witnesses' credibility, one thing that is not credible is the GOP majority's unwillingness to pause the process for a more thorough investigation of Ford's charges and those of Kavanaugh's other two accusers. It could be that such an investigation would reveal little new information. But we cannot know for sure until we try. With a lifetime appointment to the Supreme Court at stake, it is important to make every effort to get things right.

What can be done to improve the nomination process? I am not sure very much can. Most of the flaws in it are manifestations of the deep polarization and partisan hostility that have infected so many other political institutions. The system is already very effective at screening applicants for professional qualifications, and for potential flaws in their background that the FBI can identify and investigate in advance. On the other hand, the system is clearly terrible at handling accusations that arise relatively late in the process, after the president and his party are already strongly committed to the nominee, and the opposition has strong incentives to seize on anything that might derail him or her. At that point, politicians and activists on both sides often have strong incentives to prioritize political agendas over getting at the truth. This problem is worthy of serious consideration. But at least at this point, I don't see any easy fix for it.

‘These hearings reveal, yet again, why Washington is held in such low esteem’

Saikrishna Prakash is the James Monroe Distinguished Professor and Miller Center Senior Fellow at the University of Virginia.

The process has been broken for awhile. For decades now, some judicial nominees have had to wait years for consideration by the Senate. The use of holds and blue slips was a source of interminable delays. Many worthy presidential nominees just gave up and withdrew from consideration. Judge Merrick Garland fell victim to that sorry bipartisan tradition of delaying tactics.

For as long as I can remember certain nominees have been smeared in no holds barred, brass knuckles fights. It happened with Judge Robert Bork. It happened with Justice Clarence Thomas. Kavanaugh is the latest victim of the “by any means necessary” school of politics. I very much doubt he will be the last.

These hearings reveal, yet again, why Washington is held in such low esteem. I’m afraid it will have to get a lot worse before it has any chance of getting any better.