

# POLITICO

## What Should the Senate do with Brett Kavanaugh?

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In a dramatic turn, Christine Blasey Ford, a professor at Palo Alto University, is accusing Supreme Court nominee Brett Kavanaugh of sexually assaulting her when they were in high school in suburban Maryland. He has categorically denied the allegation, and Republicans are indicating they intend to move ahead with a confirmation vote scheduled for later this week. Democrats, along with several GOP senators—Jeff Flake of Arizona and Bob Corker of Tennessee—are calling for a pause while the Senate investigates Ford's story. Here's what our panel of legal scholars thinks should happen next:

### **'The Judiciary Committee should investigate'**

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

The woman who has accused Supreme Court nominee Judge Brett Kavanaugh of sexual assault has now come forward. What should the Senate do? The Judiciary Committee should investigate the matter, potentially hold additional hearings, and if necessary delay voting on the nomination, as recently suggested by GOP Senator Jeff Flake. Given that the alleged events in question occurred over 35 years ago, when Kavanaugh was 17 and the accuser 15, getting at the truth may be very difficult, or even impossible. But the committee should at least try.

What should the standard of proof be? A Supreme Court confirmation hearing is very different from a criminal trial, where guilt must be proven beyond a reasonable doubt. Denying a person a lifetime position of vast power on the nation's highest court is not the same thing as taking away his or her liberty. It is reasonable to set a lower threshold for the former than the latter.

At the same time, it would be a mistake to put nominees in the position of having to definitively prove that accusations leveled against them are false. If that becomes the norm, virtually any nomination could be derailed by unsubstantiated accusations concerning alleged wrongdoing that occurred decades ago. I would thus tentatively suggest that the right standard is that of preponderance of evidence. If the evidence indicates that it is more likely than not that a Supreme Court nominee is guilty of serious wrongdoing, that should be sufficient to reject the nomination.

There is some merit to the idea that we should discount accusations about long-ago events that occurred when the perpetrator was a minor. But whether such issues can be ignored completely depends on the seriousness of the charge and the importance of the position for which the person

is being considered. Sexual assault is a serious crime and a seat on the Supreme Court is a position of vast power.

The situation may change radically if other women come forward with plausible accusations of sexual assault or harassment. Regardless, fair-minded observers should keep an open mind and should encourage the Senate to conduct as unbiased an investigation as possible. Sadly, that may be too much to expect in this era of poisonous partisan bias.

**‘This accusation cannot responsibly be ignored’**

*Laurence H. Tribe is Carl M. Loeb university professor and professor of constitutional law at Harvard Law School.*

This accusation of sexual assault is no longer either anonymous or uncorroborated and cannot responsibly be ignored just because of its unfortunate timing, given how much is at stake. Due process both to Professor Ford as the alleged victim and to Judge Kavanaugh as the accused require that the confirmation process be put on hold while the truth of the matter — including the truth of the nominee’s recent categorical denial under oath — is thoroughly explored. That process should include opportunities both for Professor Ford and for Judge Kavanaugh to testify publicly, under oath, and subject to cross-examination about these charges. It is premature to consider what weight to give to this matter until the facts are fully ventilated.

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**‘The Senate must slow down’**

*Abbe R. Gluck is professor of law and faculty director of the Solomon Center for Health Law and Policy at Yale Law School.*

As we assess the latest allegations, we must insist that the Supreme Court stand for something outside of politics; otherwise we should just elect our judges. Above all, it must stand for the rule of law. This means we should expect a court on which judges abide by precedent and so do not always vote their political leanings and personal biases. That’s why it is wrong for anyone who believes in the role that law plays in our society to insist that a candidate is unacceptable merely because he or she does not mirror his or her own ideological positions. But the rule of law also demands due process. The Republican Party started us down this destructive path with its illegal blocking of Merrick Garland’s nomination; Democrats should have protested as loudly then as they have now, but it is better late than never.

Even before the recent allegations surfaced, the Senate’s rushed and non-transparent process—a process that alarmingly reflects the broader deterioration of the Senate as an institution—should have been slowed down. It was a slap in the face to those (including me) who knew Judge Kavanaugh personally and were trying to keep an open mind about the merits of his confirmation after a full review of the record. The Senate has put no one at ease about confirmation or the future of the court. The very serious allegations of this weekend raise the stakes even further, and require thorough and transparent review. If Kavanaugh, or anyone else, is ultimately to be confirmed, it should be based on a process that reflects on and enhances the legitimacy of the institution on which the justice will sit. The Senate must slow down and not hold a vote until the entire record can be examined, and that includes both the unreleased papers as well as a full airing of the matters associated with the personal allegations against Kavanaugh.

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**‘Let the political chips fall where they may’**

*Ilya Shapiro is senior fellow in constitutional studies at the Cato Institute.*

The only thing to do at this point is to let the full Senate vote, with each senator considering this late-breaking allegation however he or she chooses. Nothing can be gleaned from further investigation—a he-said/she-said from the mists of time isn’t prone to resolution—and Judge Kavanaugh has passed half a dozen FBI background checks anyway. It’s certainly fishy that something like this comes out at the 11th hour, more than three months after Kavanaugh was nominated—more than 15 years since he was nominated to the D.C. Circuit—and after a full slate of hearings (open and closed-door) and senatorial meetings. Even if the claim is true, how do we weigh it against the exemplary life the nominee has led as an adult? These are all things for senators to consider when they vote.

Of course, all this takes place amid a broken public discourse and poisoned politics, with attempts to impugn Judge Kavanaugh for liking baseball too much or (the horror!) having been in a fraternity in college—not to mention the rolling filibuster and orchestrated protests that punctuated the confirmation hearings, which were really the first Democratic primary debate of the 2020 presidential campaign. Any Republican nominee is now subject to character assassination because of the apocalyptic narrative Democrats bring to Supreme Court fights and for being picked by Donald Trump, whose election the left has never accepted and whose authority to make picks has been further questioned after the indictments and criminal pleas of several associates. Indeed, Justice Neil Gorsuch continues to be seen as illegitimate by many progressives because he “stole” Merrick Garland’s seat (though of course Garland was never attacked personally). The only way to end this circus is to vote on Kavanaugh and let the political chips fall where they may.

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**‘The Senate must engage in due diligence’**

*Sanford V. Levinson is a professor of law at the University of Texas Law School and professor of government at the University of Texas, Austin.*

Now that the accusation is no longer anonymous—and Kavanaugh is denying it categorically rather than, for example, citing it as a regrettable but unrepresentative incident from a previous lifetime—the Senate has the regrettable duty to engage in due diligence. I’m frankly uncertain what my response would be if Kavanaugh had immediately owned up to the accusation and noted, by stipulation, accurately that it was a one-time event that he genuinely regrets in every conceivable way. Perhaps it’s because I’m male (and of a certain age) that I’d be willing to imagine letting it go, as it were. Those who disagree may well be correct that the statute of limitations never runs on sexual assault. For better or worse, I don’t get to vote on this.

But if he’s lying by suggesting there’s no truth at all to the accusations (including the accuser’s against-interest admission that she, like everyone else, was drunk in what was likely a highly sexualized context, where it would not be at all surprising if a guy tried to see how far he could get with someone perceived as a potentially compliant girl—we’re talking about well-off teenagers, after all) then that should in fact be disqualifying, and one would hope that Republican Senators besides Susan Collins and Lisa Murkowski (including, perhaps, the moralistic Ben

Sasse) would slow down the McConnell-Grassley juggernaut. As we've learned since Watergate, the coverup is often worse than the crime, and at least as illuminating about the character of the person engaging in the coverup—see Bill Clinton and his lies about Monica Lewinsky.

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### **'The process is completely broken'**

*John Culhane is distinguished professor of law at Delaware Law School, where he teaches courses in constitutional and family law.*

Now we have a name behind the allegations of sexual assault levied against Brett Kavanaugh: Christine Blasey Ford. These confirmation hearings have been a maelstrom from the beginning, and, in a sad way, this revelation could end up being just another item being thrown into the vortex. The entire nomination and confirmation process for Supreme Court justices is completely broken. Even if the Judiciary Committee is forced to delay the hearings for a minute because of retiring GOP Senator Jeff Flake's call to hear Ford's story, the likeliest result is still confirmation.

Even in this #metoo moment, women's stories aren't consistently heard. The president is credibly accused of sexual misconduct, but nothing happens. So, it seems, will be the case here. And the message sent is clear: If you've been the victim of a sexual assault, don't come forward. President Trump's accusers have been ignored by a compliant Congress, and, in the context of the Supreme Court, it seems we've made no progress since the Clarence Thomas-Anita Hill debacle more than 25 years ago. Hill's conduct and rectitude have offered a decades-long, silent reproach to the senators who responded to her courageous testimony by vilifying and downplaying her credible accusations, and my guess is that things will go the same way now. Flake's position – for which he deserves some credit – will likely allow her to be listened to, but not *heard*. Senators on both sides will grandstand (except, perhaps, for Minnesota Sen. Amy Klobuchar), and no one's mind will likely be changed.

This debacle can be traced back to Trump's insistence on nominating Kavanaugh despite warnings that he would be a difficult candidate to push through on an expedited basis. The rush to judgment has led to all kinds of norm-shattering, "see-no-evil" process in the Judiciary Committee, as the great majority of potentially relevant documents remain hidden from public view. There's already plenty of evidence of Kavanaugh's dishonesty based on the few, presumably "safer" documents that have managed to crawl into the sunlight. But the rush to seat Kavanaugh before the Supreme Court begins its fall term next month has led the GOP majority to stand behind its unprecedented decision to push forward without the benefit vital information — which, based on what we already know, seems quite likely to be damaging, perhaps disqualifying. So, I expect the freight train to keep on course, even if the vote is delayed for a few minutes.

If the GOP wants some credibility on this issue, it should appoint a neutral fact-finder to investigate Ford's claim. The FBI's function is different, and Trump has managed to politicize the bureau to the point that whatever conclusions it might reach would not be accepted by one side. Then the Senate can decide what to do with whatever that fact-finder discovers. But that's entirely too rational a process to commend itself to our broken Senate.

### **'A perfect sandbag'**

*Richard A. Epstein is Laurence A. Tisch professor of law, the New York University School of Law, senior fellow, the Hoover Institution, and the James Parker Hall distinguished service professor of law emeritus, the University of Chicago Law School.*

The Democratic resistance to the Kavanaugh nomination has been an all-out assault on his judicial philosophy and personal integrity from the moment that it was announced. I have no doubt that any senator has the full and complete right to vote whatever way he or she thinks fit on the nomination. And I have no doubt that if the Democrats held a majority of the seats in the Senate, they could have stonewalled this nomination, just as the Republicans did with Merrick Garland. It is well-established constitutional law that the Senate need not call a hearing, let alone schedule a vote. In retrospect, the decision not to hold any hearings on Garland should be regarded as a wise and humane political decision, because it spared Garland and the nation a similar disgraceful exhibition of intolerance that some conservative opponents of Garland may well have launched to tarnish his confirmation chances.

But this last-ditch decision to sabotage Kavanaugh at the 11th hour is a disgusting piece of political propaganda. Christine Blasey Ford behaved wholly improperly when she decided to write a letter only to “a senior Democratic lawmaker,” in which she made the most serious allegations of sexual assault against Kavanaugh. At the very least, she ought to have handled matters wholly differently. If she wanted to keep matters confidential, she should have sent that letter to President Trump and to Senator Chuck Grassley (R-Iowa), the chairman of the judiciary committee. She also should have sent it to the FBI for investigation. And she should have done all of these things at the earliest possible moment, in time for a principled and neutral examination to take place before the Senate hearings took place. Then, she should have sat for a cross-examination.

Putting the information exclusively in the hands of key Democrats thus invited the wholly corrupt strategy that has now unfolded. First, the Democrats would try to discredit Kavanaugh by engaging in a set of procedural antics and obnoxious substantive questions during the hearing, without mentioning this letter. When that strategy abjectly failed, they knew they had to go to Plan B, which was to release the letter and the allegation days before the confirmation vote. A perfect sandbag, for the Democrats knew full well that there was no time to respond to them, without causing an enormous delay in the confirmation hearings. Their hope was, and is, to create a huge media circus that would take weeks if not months to sort out. Shipwreck this nomination. Make it impossible for the current Senate to pass on any subsequent nominee before January. Then take control of the Senate and create a stalemate that could run on until the next presidential election.

And for what? Ford, Kavanaugh’s accuser, maintained a stony silence on these allegations for more than 35 years. At no point did she raise them in connection with the Senate confirmation hearings before Kavanaugh was confirmed in 2006. Kavanaugh has categorically denied the allegations. Late last week, Mark Judge, his alleged accomplice, denounced the allegations as “absolutely nuts.” No other woman has ever made any allegation of this sort against Kavanaugh. and 65 women have written an explicit letter in his defense. Kavanaugh is right not to respond beyond his categorical denial, knowing full well that further comment would only draw him further into a vortex on which credibility determinations would be unending. And the Senate is right to continue with the confirmation vote. The institutional damage to the Senate, the Supreme

Court, and the nation has already been enormous. What is left now is only the sorry task of damage containment. What sane judge would like to be the next Supreme Court nominee?