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POLITICS

Brett Kavanaugh's Sexual-Assault Hearing Raises Debate Over Standard of Proof

Senators caught between pressure to believe sexual-assault victims and the presumption of innocence until proven guilty



Regardless of whether Supreme Court nominee Brett Kavanaugh is confirmed, the manner in which lawmakers respond to him and his accuser could have political ramifications in the midterms. PHOTO: JOSHUA ROBERTS/REUTERS

By Kristina Peterson and Brent Kendall

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WASHINGTON—Senators are grappling with a central question underpinning Thursday's testimony from Christine Blasey Ford, the woman who has accused Supreme Court nominee Brett Kavanaugh of sexual assault: How much proof is required?

The question is fraught because Dr. Ford's allegations are being tested in the political arena, which has far blurrier rules than a court of law.

"There's no clear answer to that that I know of," said Sen. Angus King of Maine, an independent who caucuses with Democrats and has decided to vote against the nomination. "There has to be a fair balancing of the issues. You can't say one side or the other automatically wins just by making a statement."

Judge Kavanaugh has denied the allegations.

The debate reflects a tension between a tenet of the #MeToo movement—that victims of sexual misconduct, who often don't report incidents until years later, should be believed—and the bedrock judicial principle that individuals are presumed innocent until proven guilty.

Republicans have stressed that presumption.

“We’re supposed to uphold fairness and the presumption of innocence,” Senate Majority

Leader Mitch McConnell (R., Ky.) said on the Senate floor Tuesday. “No matter how loudly my Democratic colleagues try to say otherwise, we have never been—and don’t wish to be—a society in which a single, uncorroborated allegation, disputed by everyone who supposedly has some knowledge of it, can float out across decades and wield veto power over somebody’s life.”

Beyond challenging that characterization of the evidence, Democrats situate Dr. Ford’s allegations within a list of other reasons they question Judge Kavanaugh’s fitness for a lifetime appointment to the high court. The issue, they say, is less whether a particular incident can be indisputably proven than the nominee’s overall qualifications.

“No one has spelled out what our standard of proof is, but this much I know—no one, not any single American, is entitled to a seat on the Supreme Court,” said Sen. Dick Durbin (D., Ill.).

In today’s partisan environment, many senators already have made up their minds on whether to support Judge Kavanaugh’s nomination. But aside from whether the judge is confirmed, the manner in which lawmakers respond to him and Dr. Ford could have political ramifications in November’s midterm elections.

In 1991, many lawmakers were criticized for how they navigated Anita Hill’s sexual-harassment allegations against then-nominee Clarence Thomas from when the two worked together at the Department of Education and the Equal Employment Opportunity Commission, charges he denied. The episode helped lead to the election of a new crop of women to Congress.



Back then, senators grappled with the same burden-of-proof questions. “I did not run for the U.S. Senate to become a judge,” said then-Sen. Joe Biden, the Delaware Democrat who chaired the Clarence Thomas hearings and later became vice president.

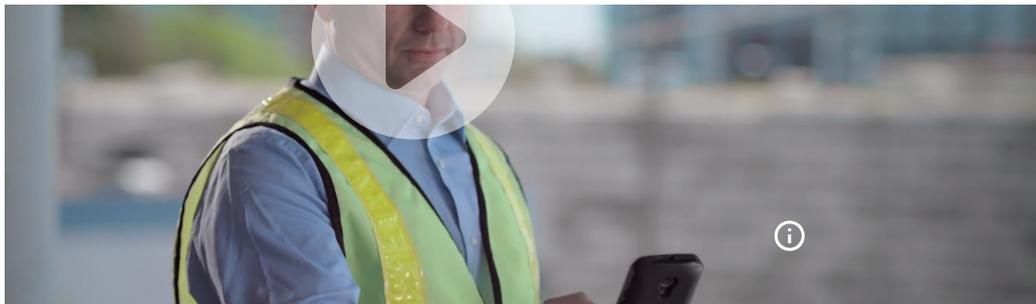
Missouri Republican Sen. John Danforth, one of Justice Thomas’s biggest supporters, said at the time that “the burden against the accuser must be very heavy in a case such as this, to discourage exactly the kind of process that we have seen.”

Sen. Alan Dixon, an Illinois Democrat, said he found both Ms. Hill and Justice Thomas credible, making it “impossible to get to the bottom of this matter.” He voted in favor of Justice Thomas’s confirmation, and the next year faced a successful primary challenge from Carol Moseley Braun, who became the first African-American woman to serve in the Senate.

In the case of Dr. Ford, who alleges that Judge Kavanaugh assaulted her at a party when they were teenagers in the early 1980s, no eyewitnesses have backed up her claims. Three people she has identified as attending the party have said they have no memory of the alleged assault. Dr. Ford’s lawyers have said the incident is naturally more memorable for Dr. Ford.

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On Wednesday morning, her lawyers released affidavits from her husband and three friends, all of whom said she told them about the alleged assault before Judge Kavanaugh was nominated.

Judge Kavanaugh's lawyers say her allegations fall short of what would be needed to prosecute a criminal case—where the allegation would need to be proven beyond a reasonable doubt—or in a civil case, where the plaintiff must show that a preponderance of the evidence supports the claim.

Judge Kavanaugh himself is unhappy that his confirmation process has been delayed by an allegation he believes would never advance in a legal proceeding, a person close to him said.

Dr. Ford's lawyers have described Thursday's hearing as a way of uncovering facts.

"Neither Dr. Blasey Ford nor Judge Kavanaugh is on trial," Michael Bromwich, one of Dr. Ford's lawyers, wrote to Judiciary Committee Chairman Chuck Grassley (R., Iowa.) "The goal should be to develop the relevant facts, not try a case."

Lawyers for sexual-assault victims said claims such as Dr. Ford's must be evaluated in light of the reality that many people wait years to report them, out of fear that they will be blamed or disbelieved.

One relevant question is whether those making the allegations have any motivation to lie, said Diane Seltzer Torre, a lawyer who has represented women alleging sexual misconduct. After that, it becomes an assessment of credibility among all parties, she said.

"Essentially when you boil it down to its most basic parts, this is a job interview," Ms. Torre said.

In a confirmation process, senators get to determine what standards they will use, a situation that leaves them accountable to only themselves and, ultimately, voters.

—Peter Nicholas and Natalie Andrews contributed to this article.

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