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9-20-2018

## How Strong Does the Evidence Against Kavanaugh Need to Be?

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### Recommended Citation

Shaw, Katherine A., "How Strong Does the Evidence Against Kavanaugh Need to Be?" (2018). *Online Publications*. 23.

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# How Strong Does the Evidence Against Kavanaugh Need to Be?

Even if it wouldn't support a criminal conviction or civil liability, a merely credible allegation is enough to disqualify him.

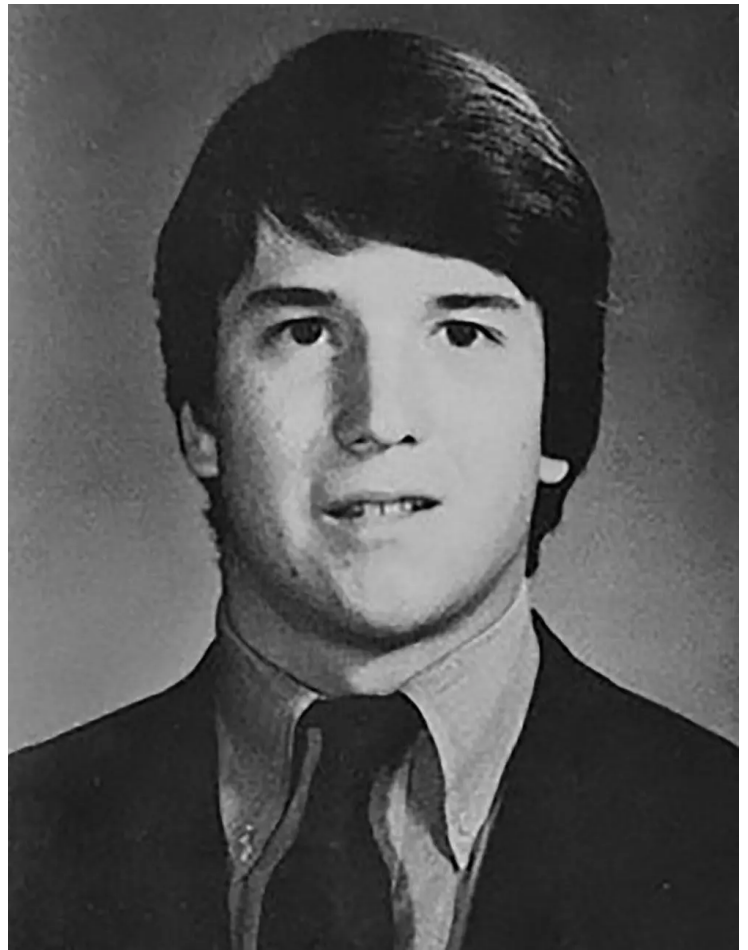
Sept. 20, 2018

By **Kate Shaw**

Ms. Shaw is a law professor.



Christine Blasey Ford as a junior in high school.



Brett Kavanaugh in the 1983 Georgetown Preparatory School yearbook.

The allegation made by Christine Blasey Ford — that at age 15 she was the victim of a sexual assault by a 17-year-old Brett Kavanaugh — has not only upended Judge Kavanaugh's Supreme Court confirmation hearings, but has also left Americans wondering what standards should apply to an accusation like this.

It's natural to place this sort of accusation within a criminal-justice framework: the burden of proof beyond a reasonable doubt; the presumption of innocence; the right to confront and respond to an accuser. If Judge Kavanaugh stood criminally accused of attempted rape, all of that would apply with full force. But those concepts are a poor fit for Supreme

Court confirmation hearings, where there's no presumption of confirmation, and there's certainly no burden that facts be established beyond a reasonable doubt.

What matters here isn't law as much as politics — though not (or not just) partisan politics. Confirmation hearings are also about *constitutional* politics — the debate, involving both institutions of government and the polity, about what the Constitution means and requires.

So what standard should the Senate use in evaluating the claims made by Dr. Blasey and in deciding how they bear on Judge Kavanaugh's fitness for a seat on the Supreme Court? The Senate's approach to its constitutional "advice and consent" obligation has always depended on context. A number of factors matter: the timing of the vacancy; the justice being replaced; the nominee's likely impact on the ideological makeup of the court; even the popularity of the president (very popular presidents have always had more leeway when it comes to picking justices). Then, of course, there's the nominee.

Nominations have failed — that is, been withdrawn or voted down — for various reasons. Sometimes it's because a majority of the Senate rejects a nominee's vision of the Constitution and the role of the court. That was the case with Judge Robert Bork, a Reagan nominee whose skepticism about the Constitution's protection of privacy and liberty convinced a majority of senators that he was simply too far right of the mainstream to be confirmed.

Other nominations have been unsuccessful because of private conduct. Another Reagan nominee, Judge Douglas Ginsburg, withdrew from consideration after the press uncovered reports of marijuana use that the F.B.I. had failed to unearth. And the Senate blocked President Lyndon Johnson's attempt to elevate Abe Fortas to chief justice after evidence emerged that as a sitting member of the court, Justice Fortas had also been serving as a *de facto* adviser to the president, and after questions were raised about the propriety of outside payments he had received while on the court.

These allegations weren't tested with the rigor that would have attached to judicial proceedings; neither evidence nor testimony (where it was given — Judge Ginsburg withdrew before testifying) was subject to the sort of adversarial testing that would occur in a court of law. But in each case, a constellation of considerations, both political and constitutional, operated to defeat nominations of individuals who were certainly qualified, by conventional metrics, to sit on the Supreme Court.

This context-dependent approach arguably leads to the conclusion that the existence of credible allegations against Judge Kavanaugh should be disqualifying, especially if further corroborating evidence emerges. That's true even if the evidence wouldn't support a criminal conviction or even civil liability.

Judge Kavanaugh has been nominated to fill a pivotal seat on the court. For many people, what's at stake in this nomination isn't just abortion and contraception rights, but also women's ability to participate meaningfully (to paraphrase the Supreme Court in *Planned Parenthood v. Casey*) in the economic and political life of the nation. So if members of the Senate conclude that a credible accusation of sexual misconduct has been made against Judge Kavanaugh, that should be enough to disqualify him from a seat that might allow him to cast the deciding vote on matters of women's liberty and equality. Beyond these issues, the court is balanced on a knife edge on a range of questions that will affect everyone in the country, regardless of sex.

In this way, the accusations against Judge Kavanaugh are directly connected to his ability to perform the job — to rule in ways that members of the public trust and accept as legitimate, whether or not they agree with him. In 2018, more than half of Americans approved of the Supreme Court. In an era of meager faith in public institutions (Congress's approval ratings hover around 17 percent), the relative trust in the court is a striking and important fact. But even more than a heartening fact, it's critical to the court's functioning: The public's perception of the court as legitimate is in many ways the source of its power.

Putting Judge Kavanaugh on the Supreme Court in light of credible allegations against him could raise troublesome questions about the court's legitimacy. And that's a genuine problem, both for the court's ability to function and more broadly for the rule of law.

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