

POLITICS & SOCIETY EDITORIALS

The Editors: It is time for the Kavanaugh nomination to be withdrawn

The EditorsSeptember 27, 2018

Dr. Christine Blasey Ford's testimony before the Senate Judiciary Committee today clearly demonstrated both the seriousness of her allegation of assault by Judge Brett M. Kavanaugh and the stakes of this question for the whole country. Judge Kavanaugh denied the accusation and emphasized in his testimony that the opposition of Democratic senators to his nomination and their consequent willingness to attack him was established long before Dr. Blasey's allegation was known.

Evaluating the credibility of these competing accounts is a question about which people of good will can and do disagree. The editors of this review have no special insight into who is telling the truth. If Dr. Blasey's allegation is true, the assault and Judge Kavanaugh's denial of it mean that he should not be seated on the U.S. Supreme Court. But even if the credibility of the allegation has not been established beyond a reasonable doubt and even if further investigation is warranted to determine its validity or clear Judge Kavanaugh's name, we recognize that this nomination is no longer in the best interests of the country. While we previously endorsed the nomination of Judge Kavanaugh on the basis of his legal credentials and his reputation as a committed textualist, it is now clear that the nomination should be withdrawn.

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If this were a question of establishing Judge Kavanaugh's legal or moral responsibility for the assault described by Dr. Blasey, then far more stringent standards of proof would apply. His presumption of innocence might settle the matter in his favor, absent further investigation and new evidence. But the question is not solely about Judge Kavanaugh's responsibility, nor is it any longer primarily about his qualifications. Rather it is about the prudence of his nomination and potential confirmation. In addition to being a fight over policy issues, which it already was, his nomination has also become a referendum on how to address allegations of sexual assault.

Somewhere in the distant past, at least before the word "Borked" was coined to describe a Supreme Court nomination defeated by ideological opposition, Senate confirmation hearings might have focused on evaluating a nominee's judicial character or qualifications as a legal thinker. But that time is long past. Many cases decided by the Supreme Court itself and thus also presidential nominations to that body (and the Senate hearings that follow) are now thoroughly engaged in deciding "policy by other means." Neither the country nor the court are well served by this arrangement, but refusing to recognize it does nothing to help reverse it.

When Republican leaders in the Senate refused even to hold hearings on the nomination of Judge Merrick Garland, they were not objecting to his qualifications or character but to the likely outcome of his vote on the court were he to be confirmed. When Senate Democrats were mostly united in opposition to Judge Kavanaugh well in advance of any hearings (and before any rumor of Dr. Blasey's accusation was known), they were using the same calculus. While regrettable in both cases, such results are, as we have said before, the predictable outcome of the fact that "fundamental questions of social policy are increasingly referred to the court for adjudication as constitutional issues."

What is different this time is that this nomination battle is no longer purely about predicting the likely outcome of Judge Kavanaugh's vote on the court. It now involves the symbolic meaning of his nomination and confirmation in the #MeToo era. The hearings and the committee's

deliberations are now also a bellwether of the way the country treats women when their reports of harassment, assault and abuse threaten to derail the careers of powerful men.

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While nomination hearings are far from the best venue to deal with such issues, the question is sufficiently important that it is prudent to recognize it as determinative at this point. Dr. Blasey's accusations have neither been fully investigated nor been proven to a legal standard, but neither have they been conclusively disproved or shown to be less than credible. Judge Kavanaugh continues to enjoy a legal presumption of innocence, but the standard for a nominee to the Supreme Court is far higher; there is no presumption of confirmability. The best of the bad resolutions available in this dilemma is for Judge Kavanaugh's nomination to be withdrawn.

If Senate Republicans proceed with his nomination, they will be prioritizing policy aims over a woman's report of an assault. Were he to be confirmed without this allegation being firmly disproved, it would hang over his future decisions on the Supreme Court for decades and further divide the country. Even if one thinks that Dr. Blasey's allegations are not credible, demonstrating them not to be would require further investigations and testimony. This would include calling additional witnesses and assessing further allegations against Judge Kavanaugh from other women, to which Republicans on the committee have been unwilling to commit and which would be divisive in any case.

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There are many good reasons to support the nomination of a qualified judge who is committed to a textualist interpretation of the Constitution to the Supreme Court. Over time, such an approach may return the question of abortion to the states, where it belongs given the Constitution's silence on the matter, and where a more just and moral outcome than is currently possible under *Roe v. Wade* may be achieved. Restoring such a morally complex question to the deliberation of

legislators rather than judges may also bring the country closer to a time when confirmation hearings can truly focus on the character and qualifications of the nominee rather than serving as proxy battles over every contentious issue in U.S. politics.

We continue to support the nomination of judges according to such principles—but Judge Kavanaugh is not the only such nominee available. For the good of the country and the future credibility of the Supreme Court in a world that is finally learning to take reports of harassment, assault and abuse seriously, it is time to find a nominee whose confirmation will not repudiate that lesson.

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