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The Time Is Overdue to Fix the Judicial Confirmation Process

From Thomas to Kavanaugh to Cosby, politics must be removed from decisions related to sexual violence allegations, according to Golden Gate University School of Law's Sonia Bakshi and Rachel Van Cleave.

By **Sonia Bakshi and Rachel A. Van Cleave** | July 30, 2021



Sonia Bakshi (L) rising 2L at Golden Gate University School of Law, and Rachel Van Cleave (R) professor of law at GGU Law. Courtesy photo

The Pennsylvania Supreme Court's recent reversal of Bill Cosby's sexual assault conviction is a stark reminder of the need to ensure that policies better serve survivors of sexual violence. Professor Barbara McQuade's recent New York Times op-ed is spot-on in blaming the prior prosecutor, Bruce Castor for his ill-advised and improper unconditional determination not to prosecute Cosby. As a prosecutor, Castor served as the gatekeeper in deciding whether there was sufficient credible evidence to support a conviction. Was Castor's decision politically motivated? Castor was an elected official, so it is difficult to discount this possibility.

Politics must not drive the decisions by those who serve as gatekeepers to justice for survivors of sexual violence.

Reform of the judicial confirmation process is 30 years overdue.

It has been just over two years since Professor Anita Hill stated, "what we want from our leaders is for someone to stand up and say, 'what happened in 1991, what happened in 2018, will never happen again.'"

What has changed? Very little.

When Hill's allegations came to light in 1991, gatekeepers for the Senate Judiciary Committee decided not to investigate corroborating evidence or other allegations. Although there were others who were ready to testify that Hill had told them about Thomas' behavior around the time when it occurred, and others who described similar treatment by Thomas, no one else was called to corroborate Hill. However, in addition to Thomas himself, other women who worked with Thomas were called to bolster his credibility. Their testimony boiled down to "he never engaged in that kind of behavior with us, so he couldn't have said and done what Hill claims." An illogical claim.

The Chair of the Judiciary Committee, then-Senator Joe Biden decided to apply a standard used in criminal law—presumed innocent. As Hill points out, Thomas was not facing criminal consequences; rather, he was being considered for a seat on our nation's highest court. Biden has since apologized to Hill.

Subsequently, 1992 was dubbed the "Year of the Woman" with a record number of women elected to the Senate (four, raising the total to six) and 24 elected to the House following the confirmation hearings of Associate Justice Clarence Thomas. Yet, even after multiple record-breaking years of women joining Congress, nothing has improved during these 30 years to ensure that the judicial nomination process better investigates and addresses allegations of sexual harassment and sexual assault.

Although other women voiced inappropriate and troubling conduct by then-Judge Brett Kavanaugh, only Dr. Christine Blasey Ford testified before the Senate Judiciary Committee in 2018 about how he had sexually assaulted her when they were in high school. The same types of gatekeepers—investigators lacking training and experience in speaking with sexual violence survivors—informed the Chair, Senator Grassley's determination that there was not enough evidence to justify additional investigations or in expanding the hearings. The main novelty was that the Republicans drafted a prosecutor to question Dr. Ford.

Professor Anita Hill recommended specific changes to this process in September 2018, however these did not impact the Kavanaugh hearings, and do not appear to be taken up by the Judiciary Committee, the Biden Administration, or anyone else since then. Instead, Senator Grassley continues to pressure the Department of Justice to pursue the two people who admitted to making up stories about Kavanaugh. The focus should be on designing a process that allows appropriately experienced investigators to hear and examine similar allegations.

Politics must be removed from decisions related to sexual violence allegations.

Just as former prosecutor Castor should not have had the final word as to whether a jury may or may not believe a particular victim, whichever party happens to be in the majority should not have the final word as to whether serious allegations have or have not been adequately investigated.

The #MeToo Movement has thoroughly exposed the many myths surrounding sexual violence, but as Professor Hill pointed out, many gatekeepers have yet to “get it.”

The most recent “Year of the Woman” in 2018 resulted in a significant increase in the number of women in Congress. Changes are beginning to be implemented for reporting sexual harassment by members of congress and their staff. Workplace Sexual Harassment Trainings have become required by law in many states. Attempts to improve reporting and investigation of sexual violence in the military have been renewed. Chief Justice Roberts has established a process for these types of allegations as to current federal judges, the process evaluating a nominee before he or she becomes a judge is essential. All of these steps are promising, but not enough.

Are the sexual harassment trainings accompanied by company leadership promoting a healthy and safe workplace environment for everyone? Do reports of sexual violence in the military go through a neutral third party that is well equipped to handle the reports and its aftermath? Or are we putting Band-aids over the gaping hole of entrenched misogyny and patriarchy?

We are well past the time to heed Professor Hill’s recommendations for ensuring that similar allegations are investigated by people with appropriate experience. The Judiciary Committee must not allow another 30 years to pass before taking concrete and effective steps to fix the confirmation process.

The recent report by the independent commission on sexual violence in the military emphasizes the importance of the leadership qualities of commanders. As Commander in Chief, President Joe Biden must demonstrate these qualities in pushing for reforms of the judicial nomination process. Otherwise, his apology to Anita Hill continues to ring empty.

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