

"I Still Like Smear": The Senate Judiciary Committee's Obstructing Politics Surrounding The Kavanaugh Hearing and A Solution to The Chaos That Ensued

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**“I STILL LIKE SMEAR”:
THE SENATE JUDICIARY COMMITTEE’S
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THE KAVANAUGH HEARING AND A
SOLUTION TO THE CHAOS THAT ENSUED**

Frank J. Tantone*

On October 5, 2018, the United States Senate Judiciary Committee voted to advance now-Justice Brett Kavanaugh’s nomination to the Supreme Court.¹ He was confirmed to the U.S. Supreme Court the next day.² Justice Kavanaugh subsequently took the constitutional and judicial oaths of office, and officially became the 114th Justice of the United States Supreme Court,³ after months of Senate Judiciary hearings and processes unlike any the country had seen before.

The roller coaster of events surrounding Justice Kavanaugh’s confirmation process began on July 9, 2018, when President Donald Trump announced his selection for the highest court in the land in a live press conference.⁴ After months of rumors regarding the pick, and a selection process that saw Justice Kavanaugh make a list of finalists alongside notable favorites like Judge Amy Coney Barrett of the Seventh Circuit and Judge Thomas

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¹ Sophie Tatum, *Brett Kavanaugh’s nomination: A timeline*, CNN, <http://www.cnn.com/interactive/2018/10/politics/timeline-kavanaugh/> (last visited Mar. 6, 2019).

² *Id.*

³ *See id.*

⁴ *See id.*

Hardiman of the Third Circuit,⁵ Kavanaugh was selected by the President to replace the retiring Justice Anthony Kennedy. While many critics saw Justice Kennedy as a “swing vote” on the Court,⁶ Kavanaugh was considered “a stalwart originalist” in his judicial philosophy.⁷

At the inception of the confirmation process, many issues cited and debated were primarily based on the logistics of the Senate and Supreme Court bench itself. First, the Republican Party held a slight 51-49 majority in the Senate,⁸ and Justice Kavanaugh had testified in his previous confirmation hearing for circuit court judge for The District of Columbia Circuit that he was a registered Republican.⁹ However, several Republican Senators, like Lisa Murkowski of Alaska and Susan Collins of Maine, were considered less than certain about voting for Justice Kavanaugh’s confirmation based on their divergent opinions on abortion rights and the Affordable Care Act.¹⁰ So, political alignment of the Senators would clearly play a big part in the process. Second, the Supreme Court would be replacing the expansive philosophy on social issues from Justice Kennedy¹¹ with the originalist approach of Kavanaugh.¹² The former circuit court judge fielded four days of intense questions from the Senate Judiciary Committee that covered his legal philosophy, previous judicial decisions, and even

⁵ Grace Panetta, *THE FINAL FOUR: Get to know the finalists for Trump’s Supreme Court pick, and where they stand on key issues*, BUS. INSIDER (Jul. 9, 2018, 4:14 PM), <https://www.businessinsider.com/supreme-court-finalists-trump-kavanaugh-amy-coney-barrett-kethledge-hardiman-2018-7#brett-kavanaugh>.

⁶ See Katie Reilly, *How Anthony Kennedy’s Swing Vote Made Him ‘the Decider’*, TIME, <http://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/> (last updated June 27, 2018, 4:30 PM ET).

⁷ See Brian Bennett, *How Brett Kavanaugh Could Change the Supreme Court—and America*, TIME (July 12, 2018), <http://time.com/5336621/brett-kavanaugh-supreme-court/>.

⁸ Joe Perticone & Skye Gould, *Here’s the final count of which senators voted to confirm Brett Kavanaugh*, BUS. INSIDER (Oct. 6, 2018, 4:00 PM), <https://www.businessinsider.com/brett-kavanaugh-senate-vote-who-will-support-vote-against-2018-7>.

⁹ *Confirmation Hearing On The Nomination Of Brett Kavanaugh To Circuit Judge For The District Of Columbia Circuit: Hearing Before the Comm. on the Judiciary*, 109th Cong., 2nd Sess. 33 (2006).

¹⁰ Tatum, *supra* note 1.

¹¹ See Anthony M. Kennedy, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy (last visited Jan. 23, 2019).

¹² Alex Swoyer, *Brett Kavanaugh best described as ‘originalist,’ say legal scholars*, WASH. TIMES (Sept. 3, 2018), <https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/>.

2019]

"I STILL LIKE SMEAR"

67

attempts to uncover his political opinions.¹³ Nevertheless, each issue would soon take a back seat to bombshell allegations, and the resulting salacious behavior of the Committee that would dominate the confirmation process in the coming months.¹⁴

The Washington Post, on September 16, 2018, published a shocking story that some politicians in the know had been clamoring about for days.¹⁵ The subject of the piece was Dr. Christine Blasey Ford, a professor of psychology and research psychologist from California, who had finally gone public with a wild accusation of attempted sexual assault against Kavanaugh.¹⁶ Specifically, Dr. Ford alleged that while at a party in high school in the 1980s, she was cornered by Kavanaugh and his friend, Mark Judge, in an empty bedroom.¹⁷ Once trapped in the room, Kavanaugh had allegedly attempted to sexually assault her while covering her mouth with his hand as she screamed for help and Mr. Judge complacently looked on.¹⁸ Dr. Ford claimed she was afraid Kavanaugh would rape her, and might accidentally kill her, during the encounter.¹⁹ She further claimed she ultimately escaped the room before being sexually assaulted but harbored the anxiety from the encounter for decades.²⁰ In response to the *The Washington Post's* piece, Kavanaugh "categorically and unequivocally" denied the allegations saying, "I did not do this back in high school or at any time."²¹

Nevertheless, these allegations ignited a nationwide controversy on Capitol Hill, in the media, and amongst fellow Americans. The allegations dominated the nation's news cycles in the coming months and even led to additional testimony—beyond

¹³ See Tatum, *supra* note 1.

¹⁴ See *id.*

¹⁵ See Emma Brown, *California professor, writer of confidential Brett Kavanaugh letter, speaks out about her allegation of sexual assault*, WASH. POST (Sept. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html?utm_term=.1b09a952c54c.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ Mairead McArdle, *Kavanaugh Categorically Denies Sexual-Misconduct Allegation*, NAT'L REVIEW (Sept. 14, 2018, 2:10 PM), <https://www.nationalreview.com/news/brett-kavanaugh-categorically-denies-sexual-misconduct-allegation/>.

the initial Committee hearing—over the course of about nine hours from both Dr. Ford and Justice Kavanaugh.²² Dr. Ford provided several hours of emotionally charged testimony, attempting to provide clarity to the piece in *The Washington Post*.²³ Her compelling testimony detailed the effects of the trauma and how it had impacted her life over the course of the past 30-plus years since the alleged incident.²⁴ However, her recollection also lacked numerous key details of the alleged encounter or otherwise clouded the timeline of events.²⁵ Her testimony altered between casting the events in 1982 and simply sometime in the 1980s, gave conflicting accounts regarding the number of people at the party and in the bedroom on the night of the incident, and several aspects of her personal life contradicted her characterizations of how the subsequent trauma affected her.²⁶

Justice Kavanaugh testified that afternoon, in a blistering vociferous response that covered his qualifications for the bench, his personal life, and even painstaking detail of his personal calendars he maintained as a teenager.²⁷ The reception of Kavanaugh's testimony by the Committee bore a striking contrast to that in response to Dr. Ford's testimony. The Committee disregarded any level of objectivity in interrogating Kavanaugh about his drinking habits, every waking hour of his life in the

²² See generally *LIVE: Professor Christine Blasey Ford & Supreme Court nominee Judge Brett Kavanaugh testify (Day 1)*, C-SPAN (Sept. 27, 2018), <https://www.youtube.com/watch?v=7zVOkb3CdZ0>.

²³ See Emily Tillett, et al., *Christine Blasey Ford concludes testimony, "100 percent" sure Kavanaugh assaulted her*, CBS NEWS (Sept. 27, 2018, 2:58 PM), <https://www.cbsnews.com/live-news/brett-kavanaugh-hearing-confirmation-today-christine-blasey-ford-sexual-assault-allegations-live/>.

²⁴ See generally Dylan Scott, *The 7 most important moments from Christine Blasey Ford's Senate testimony*, VOX (Sept. 27, 2018, 3:10 PM), <https://www.vox.com/policy-and-politics/2018/9/27/17910214/christine-blasey-ford-senate-testimony-brett-kavanaugh-hearing>.

²⁵ See Paul Sperry, *Eight big problems for Christine Blasey Ford's story*, N.Y. POST (Sept. 25, 2018, 6:57 PM), <https://nypost.com/2018/09/25/eight-big-problems-for-christine-blasey-fords-story/>.

²⁶ See Margot Cleveland, *Christine Blasey Ford's changing Kavanaugh assault story leaves her short on credibility*, USA TODAY (Oct. 3, 2018, 4:00 AM), <https://www.usatoday.com/story/opinion/2018/10/03/christine-blasey-ford-changing-memories-not-credible-kavanaugh-column/1497661002/>.

²⁷ See Richard Wolf, et al., *Kavanaugh-Ford hearing: '100 percent certain' vs. '100 percent certain'*, USA TODAY (Sept. 27, 2018, 12:01 PM), <https://www.usatoday.com/story/news/politics/2018/09/27/brett-kavanaugh-christine-ford-assault-hearing-tests-supreme-court-me-too-movement/1434845002/>.

2019]

"I STILL LIKE SMEAR"

69

summer of 1982, and even a ludicrous allegation of gang rape.²⁸ This was not a judicial proceeding, so the lack of burden of proof or evidentiary standards required by law allowed the Committee to venture into these lurid areas premised only on information gleaned from inadmissible hearsay statements and documents that no one ever proved actually existed.²⁹ The strenuous day of questioning finally concluded that evening. Less than two weeks later, Kavanaugh was sworn in by President Trump officially becoming the newest Associate Justice of the United States Supreme Court.³⁰

The incredible events and raucous behavior by members of the Committee that colored Justice Kavanaugh's confirmation process rose to a level of intensity and virulence never seen before in this specific area of American government and politics. Nevertheless, the most analogous situation that somewhat closely reflects the events that transpired in 2018 occurred seventeen years earlier. President George H.W. Bush, on July 1, 1991, nominated then-District of Columbia Circuit Court Judge, Clarence Thomas, to replace Justice Thurgood Marshall on the Supreme Court.³¹ Thomas's confirmation hearing was also opposed from the outset but by civil rights and feminist organizations pointing to Thomas's criticism of the shortfalls of affirmative action programs, along with suspicions that he did not support the *Roe v. Wade* decision.³² However, the opposition to his nomination would soon ratchet up exponentially.

After the confirmation hearing concluded, a report of an FBI interview with Anita Hill, an African American attorney who previously worked for Thomas at the Department of Education

²⁸ See Ashe Schow, *BREAKING: Kavanaugh Responds To Gang-Rape Accusations: From The Twilight Zone*, THE DAILY WIRE (Sept. 26, 2018), <https://www.dailywire.com/news/36349/breaking-kavanaugh-responds-gang-rape-accusations-ashe-schow>.

²⁹ See Adam J. White, *The Democrats' "Flight 93" Nomination*, THE WEEKLY STANDARD (September 26, 2018, 8:06 AM), <https://www.weeklystandard.com/adam-j-white/brett-kavanaugh-christine-blasey-ford-and-the-senates-burden-of-proof>.

³⁰ Tatum, *supra* note 1.

³¹ See Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES (July 2, 1991), <https://www.nytimes.com/1991/07/02/us/supreme-court-conservative-black-judge-clarence-thomas-named-marshall-s-court.html>.

³² See Robert C. Smith & Richard Seltzer, *Contemporary Controversies and the American Racial Divide* 68 (Rowman & Littlefield 2000).

and the Equal Opportunity Employment Commission, was leaked.³³ The report detailed what Hill characterized as sexual harassment and sexually charged comments directed at her by Thomas that she viewed as “behavior that is unbecoming an individual who will be a member of the Court.”³⁴ Thomas vehemently denied the allegations and the Senate’s reopening of the process, calling it “a circus,” “a national disgrace,” and “a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas”³⁵ Like the confirmation process hearing for Justice Kavanaugh, these allegations caused the Senate to reopen the process and elicit additional testimony from both Hill and Thomas. The Senate Judiciary Committee was not fully convinced of the allegations, splitting its vote 7-7, sending the nomination to the full Senate for a vote without a recommendation.³⁶ Thomas was eventually confirmed by a 52-48 Senate vote.³⁷

The reemergence of the Senate Judiciary Committee’s politics in Supreme Court confirmation hearings requires a critical examination of the Committee’s capacity to even carry out its confirmatory function without assistance. What started as vicious, unsubstantiated claims brought against an aspiring Supreme Court Justice in the summer of 2018, were magnified to an all-out political assault on Capitol Hill once again carried out by Democratic members of the Committee that fall. National media then became enthralled with the idea of members of the Committee broadcasting orders, both inside and out of the hearing, for “men in this country . . . to just shut up” about the

³³ See *Thomas Second Hearing Day 1, Part 1*, C-SPAN (Oct. 11, 1991), <https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1>.

³⁴ See REUTERS, *The Thomas Nomination; Excerpts From Senate’s Hearings on the Thomas Nomination*, N.Y. TIMES (Oct. 12, 1991), <https://www.nytimes.com/1991/10/12/us/the-thomas-nomination-excerpts-from-senate-s-hearings-on-the-thomas-nomination.html?pagewanted=12>.

³⁵ ASSOCIATED PRESS, *Thomas Excerpts: This Today Is a Travesty. I Think That It Is Disgusting*, L.A. TIMES (Oct. 12, 1991), http://articles.latimes.com/1991-10-12/news/mn-155_1_judge-thomas.

³⁶ See *Judiciary Committee Votes On Recent Supreme Court Nominees*, COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes> (last visited Jan. 23, 2019).

³⁷ See CNN LIBRARY, *Clarence Thomas Fast Facts*, CNN (Feb. 21, 2019, 3:13 PM), <https://www.cnn.com/2013/03/07/us/clarence-thomas-fast-facts/index.html>.

2019]

"I STILL LIKE SMEAR"

71

issues at hand, and pleas for Justice Kavanaugh to order an additional FBI investigation into the charges against him.³⁸

The substance of the Committee's inquiry during the Kavanaugh hearing was not the only transparent political attack on Justice Kavanaugh, in him defending his summer vacations, inside jokes in his yearbook, and lack of awareness of Dr. Ford's testimony since he was preparing for his;³⁹ the actual procedures proposed by the Committee in carrying out its function only strengthened the conclusion that this hearing was set up to be political fanfare and not Constitutional process.

For example, one of the more glaring holes in the Senate Democrats' plan for re-hearing was the proposal that Justice Kavanaugh, the accused for the purposes of this hearing, would testify before Dr. Ford did.⁴⁰ This is, of course, antithetical to the processes we preserve to provide the accused with a fair trial, hearing, or notice to be heard.⁴¹ The proposal would have allowed the accuser to craft a story to poke holes in the defense, while the defense would be left to merely broad explanations without notice of the particularities of the charges against him. Another pitfall of the confirmation hearings, not corrected by the Committee, was the lack of an objective threshold for evidence to meet in order to be entered into the record for consideration.⁴² On this note, we saw numerous letters and statements enter the record without proper corroboration, the source being questioned or otherwise vetted, or even the contents of the statements being confirmed for their

³⁸ See Amanda Prestigiacomo, *WATCH: Men Need To 'Just Shut Up,' Yells Democratic Senator Hirono In Outrageous Rant*, THE DAILY WIRE (Sept. 19, 2018), <https://www.dailywire.com/news/36067/watch-democrat-senator-hironos-nasty-anti-man-rant-amanda-prestigiacomo>.

³⁹ See Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page Is 'Horrible, Hurtful' to a Woman It Named*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html>.

⁴⁰ The condition that Ford testifies second was included in the list of conditions submitted through her attorney to the Committee, and subsequently accepted by Senate Democrats. See Leigh Ann Caldwell, et.al., *Kavanaugh accuser lays out testimony conditions, doesn't want to be in same room*, NBC NEWS (Sept. 20, 2018, 10:48 PM), <https://www.nbcnews.com/politics/congress/kavanaugh-accuser-lays-out-conditions-her-testify-about-alleged-assault-n911706>.

⁴¹ A fair trial, a hearing, and notice to be heard are all touchstones of the Due Process Clause of the Fifth Amendment. See CONST. amend. V.

⁴² See Norm Ornstein, *The Senate Shreds Its Norms*, THE ATLANTIC (Sept. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/senate-kavanaugh/569596/>.

veracity.⁴³ Instead, these inadmissible hearsay statements were tacitly entered into the record, and the accused was left to fend them off from the perspective that the Committee had already accepted them as reliable.

The commentary herein primarily addresses the Kavanaugh confirmation process, in analyzing Dr. Ford's claims in substance, the Senate's handling of those claims, and the resulting effects on all parties involved. It also proposes a solution that would avoid the confusion, divisiveness, and the media circus that surrounded the Kavanaugh hearings if a similar situation presents itself in the future, while still retaining the integrity and purpose of the confirmation process. First, the committee must be assured of the ripeness of claims that could jeopardize a candidate's confirmation. Second, the confirmation process must have a reliably objective method of receiving evidence of alleged wrongdoing on the part of the candidate.

The ripeness of the claim potentially effecting confirmation should be limited to a definitive timeframe. For instance, in the context of a Supreme Court confirmation hearing, the committee should restrict the hearing to claims involving events alleged to have occurred since the candidate's last confirmation hearing. Since virtually all Supreme Court candidates now are looking for elevation from a different federal judgeship, the candidates have already been vetted by the committee once before. Kavanaugh's 2006 circuit court confirmation hearing was no stranger to contentious arguments from the Committee and nevertheless should have been the proper venue to hear Dr. Ford's claims as they relate to his judicial career, since those claims date back to the 1980s.⁴⁴

Similarly, if an allegation based on known events is not addressed in a previous confirmation hearing, it should operate like preclusion would in a civil case, meaning the Committee would effectively not have "jurisdiction" to hear it. Further, there could be an exception for those events that, while occurring beyond

⁴³ *See id.*

⁴⁴ *See* THE ASSOCIATED PRESS, *Q&A from Kavanaugh's 2006 confirmation hearings*, AP NEWS (Aug. 28, 2018), <https://www.apnews.com/26222be147d94bbab527c2f1bc4fe4c3> (showing some questions asked of and answered by Kavanaugh were controversial.).

2019]

"I STILL LIKE SMEAR"

73

the ripeness requirement, have since resulted in a civil judgment, agency finding, or criminal conviction against the candidate.

Next, the hearings should be strictly limited to evidence that meets the relevance standard of the Federal Rules of Evidence, while still qualified as admissible hearsay.⁴⁵ Much of the circus inside the hearing, promoted by the media outside the hearing, involved claims such as the ones alleged by Ms. Swetnick, that would not have met the federal rules standards on reliability and trustworthiness.⁴⁶ If there is an accepted practice that such claims will not be entertained, then the media coverage would hopefully reflect the idea that only evidence admissible in the confirmation hearing can affect the final determination of nomination. This could be aided by the retention of a non-partisan hearing officer in charge of making these rulings. While the committee may have been on to something in utilizing Rachel Mitchell, the sex crimes prosecutor, for Justice Kavanaugh's confirmation hearing, she was not utilized for the entire hearing and her role was unrefined.⁴⁷ In the future, the hearing officer should make evidentiary rulings only according to the Federal Rules of Evidence.⁴⁸ That way, the questioning can be left solely to the Committee members instead of the members sharing the responsibility with another individual. Further, the Committee would be limited to questions involving evidence that has met an objective standard for admission.⁴⁹

The confirmation process of Justice Kavanaugh suffered in a more severe way than that of Justice Clarence Thomas, in the vindictive and political escapades of the Committee. Nevertheless, the confirmation hearing still exhibited similar hazards. As this commentary demonstrates, limiting inquiry into

⁴⁵ See FED. R. EVID. 401. (defining the test for relevance); see also FED. R. EVID. 801. (defining what qualifies as hearsay.).

⁴⁶ See Ron Elving, *Kavanaugh's Confirmation Hearings: What's Wrong with This Picture?*, NPR (Sept. 6, 2018, 5:00 AM), <https://www.npr.org/2018/09/06/645099204/kavanaughs-confirmation-hearings-whats-wrong-with-this-picture>.

⁴⁷ See Clare Foran, *GOP Senators Abandon Female Outside Counsel at Kavanaugh Hearing*, CNN, <https://www-m.cnn.com/2018/09/27/politics/rachel-mitchell-prosecutor-kavanaugh-hearing/index.html?r=https%3A%2F%2Fwww.google.com%2F> (last updated Sept. 28, 2018, 12:29 AM).

⁴⁸ See Kyron Huigens, *No, Brett Kavanaugh is Not on Trial - but if He Were, He'd Be in Trouble*, N.Y. L. J. (Sept. 26, 2018, 6:55 PM), <https://www.law.com/newyorklawjournal/2018/09/26/no-brett-kavanaugh-is-not-on-trial-but-if-he-were-hed-be-in-trouble/>.

⁴⁹ See FED. R. EVID. 402.

alleged misconduct from a finite period, while considering supporting evidence that meets an objective evidentiary standard as determined by a non-partisan adjudicator would make great strides in giving a public hearing for credible allegations of misconduct. It would also limit political grandstanding within the hearing, which in turn, would quell much of the media circus since there would be a more definitive scope for the proceedings.

I. THE CURRENT PROCEDURAL RULES OF SUPREME COURT JUSTICE CONFIRMATION HEARINGS

Presently, a candidate for Justice of the United States Supreme Court is first nominated by the sitting President pursuant to Article II of the United States Constitution and subsequently confirmed by a U.S. Senate vote.⁵⁰ “Presidents are, for the most part, results-oriented. This means that they want Justices on the Court who will vote to decide cases consistent with the president’s policy preferences,” while also demonstrating integrity and impartiality.⁵¹ After nomination, the Senate Judiciary Committee, the committee specifically devoted to overseeing nominations by the executive branch, will then conduct hearings to assess a nominee’s fitness to serve on the highest court of the land.⁵² The Committee carries out an intermediary step in the appointment process, in between Presidential nomination and full Senate confirmation vote.⁵³ If the nominee passes muster after examination by the Committee, he/she is then referred to the Senate in full for a confirmation vote.⁵⁴ Today, the Committee’s role is broken down into three stages: (1) investigative questioning before the public hearing, (2) the public hearing consisting of the

⁵⁰ See U.S. CONST. art. 2, § 2, cl. 2; *Nomination and Confirmation Process*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=365722&p=2471070> (last visited Mar. 10, 2019).

⁵¹ *Supreme Court Appointment Process: President’s Selection of a Nominee*, EVERYCRSREPORT.COM (Jun. 27, 2018), <https://www.everycrsreport.com/reports/R44235.html#fn37> (quoting George L. Watson & John Alan Stookey, *Shaping America: The Politics of Supreme Court Appointments* 58-9 (New York, HarperCollins College Publishers, 1995)).

⁵² See *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, EVERYCRSREPORT.COM (Aug. 14, 2018), <https://www.everycrsreport.com/reports/R44236.html>.

⁵³ See *id.*

⁵⁴ *Id.*

2019]

"I STILL LIKE SMEAR"

75

nominee's live testimony, and (3) a decision on what recommendation to make to the full Senate.⁵⁵ This commentary focuses on the second step in the Committee's process.

According to the Standing Rules of the Senate, Rule XXVI, "[e]ach committee shall adopt rules (not inconsistent with the Rules of the Senate) governing the procedure of such committee."⁵⁶ The Standing Rules put only minimal constraints on the rulemaking powers of each senate committee, in noting that the committee must require potential witnesses to submit a written statement ahead of their live testimony unless good cause is shown for proceeding without such statement, and the Committee must publicly announce the time and place for each hearing it holds.⁵⁷

At current juncture, the Committee conducts its hearings without any standards of relevance or reliability to the evidence proposed for admission into the record for such hearings.⁵⁸ Instead, the Committee members tend to apply determinations of political usefulness to each piece of evidence.⁵⁹ As explained more fully below, through the lens of the Justice Kavanaugh confirmation hearings, if Congress or the Committee were to enact rules of procedure that required consideration of relevancy and hearsay in confirmation hearings,⁶⁰ it would result in a more focused appointment process and limit the potential political outrage both inside and outside of the hearing.

⁵⁵ See Barry J. McMillion, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, CONGRESSIONAL RESEARCH SERVICE (Aug. 14, 2018), 1, <https://fas.org/sgp/crs/misc/R44236.pdf>.

⁵⁶ STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, Rule XXVI, <https://www.govinfo.gov/content/pkg/SMAN-110/pdf/SMAN-110.pdf>, (last visited Jan. 23, 2019).

⁵⁷ STANDING RULES OF THE UNITED STATES SENATE, Rule XXVI Committee Procedure, 32, <https://www.rules.senate.gov/rules-of-the-senate> (last visited Jan. 24, 2019).

⁵⁸ Elizabeth DeCoux, Note, *Does Congress Find Facts or Construct Them? The Ascendance of Politics over Reliability, Perfected in Gonzales v. Carhart*, 56 CLEV. ST. L. REV. 319, 379 (2008).

⁵⁹ *Id.*

⁶⁰ Congress itself would have to enact these rules of procedure for its own hearings, and while this commentary focuses on confirmation hearings of Supreme Court nominees, the proposed rule would likely have to take the form of one applicable to either all Congressional hearings in general, or more specifically, all confirmation hearings in general.

II. APPLYING THE RULES OF RELEVANCY AND HEARSAY TO SUPREME COURT CONFIRMATION HEARINGS

The principles behind the Federal Rules of Evidence regarding relevancy and hearsay would provide great benefits to the confirmation process of aspiring Supreme Court Justices.⁶¹ Although this commentary does not advocate for the full implementation of all the Federal Rules of Evidence (“FRE”), it is nevertheless useful to operate off of the FRE concerning relevance and hearsay.⁶²

FRE 401 states that evidence is relevant when “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”⁶³ FRE 402 qualifies that proposed evidence is admissible unless superseded by the Constitution, federal statute, or other rules prescribed by the FRE or the U.S. Supreme Court.⁶⁴ Finally, FRE 403 states that potentially relevant evidence may nevertheless be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues”⁶⁵

Hearsay is a statement that was made by someone other than by a witness while testifying at the hearing in question and that is offered to prove the truth of the matter asserted.⁶⁶ A statement can be in words or conduct that is intended by the actor as a substitute for words.⁶⁷ In any analysis of possible hearsay, the arbiter must first determine whether the statement being offered is in fact hearsay and being offered for the truth of the matter asserted.⁶⁸ “If the statement is hearsay, step two is a

⁶¹ *E.g.* The Federal Rules of Evidence will exclude “evidence [that] is of unquestioned relevance” due to circumstances ranging from “inducing decision on a purely emotional basis,” to “nothing more harmful than merely wasting time.” These rules serve as a guide for the handling of situations for which no specific rules have been formulated. This allows for uniformity in the confirmation process of aspiring Supreme Court Justices. FED. R. EVID. 403 advisory committee’s note.

⁶² DeCoux, *supra* note 58, at 380.

⁶³ FED. R. EVID. 401.

⁶⁴ FED. R. EVID. 402.

⁶⁵ FED. R. EVID. 403.

⁶⁶ *See* FED. R. EVID. 801(c).

⁶⁷ FED. R. EVID. 801(a).

⁶⁸ Vincent DiCarlo, *Summary of the Rules of Evidence*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/summary-of-the-rules-of-evidence.html> (last visited Jan. 23, 2019).

2019]

"I STILL LIKE SMEAR"

77

determination of whether the hearsay statement fits into one of the exceptions to the hearsay rule.”⁶⁹ While hearsay statements are subject to numerous exceptions—and exemptions to those exceptions—for the sake of brevity, this commentary will examine only those that would have influenced the Kavanaugh hearings, while still maintaining that the full implementation of the FRE hearsay rules would best enhance the confirmation process.

With the summation of the relevancy and hearsay rules laid out, we now turn to several key pieces of evidence accepted by the Committee into the record during the Kavanaugh hearing and how the additional strictures on the hearing would affect the consideration of this evidence.

A. Dr. Ford’s Polygraph Test Results

First, the Committee accepted into the record a polygraph test, administered by a retired FBI agent about a month before the Committee’s hearings, in which Dr. Ford detailed her allegations against Justice Kavanaugh.⁷⁰ The agent who administered that test, Jeremiah P. Hanafin, found that Dr. Ford was being truthful and that it was his professional opinion that Dr. Ford’s responses “[were] not indicative of deception.”⁷¹ However, when considered under the proposed admissibility rules regarding relevancy and hearsay, the polygraph results should not have been admitted into the record during the hearing.⁷²

For example, Federal courts have long held that polygraph test results are inadmissible due to serious concerns surrounding their reliability; and with good reason.⁷³ Polygraph tests are not

⁶⁹ *Id.*

⁷⁰ Bill Hutchinson, *Kavanaugh Hearing: A Look at His Calendar and Other Key Pieces of Evidence*, ABC NEWS (Sept. 27, 2018 4:51 PM ET), <https://abcnews.go.com/beta-story-container/US/key-pieces-evidence-senate-judiciary-committee-evaluate-head/story?id=58104968>.

⁷¹ *Id.*

⁷² See Jeffrey Bellin, *The Significance (If Any) for the Federal Criminal Justice System of Advances in Lie Detector Technology*, 80 TEMP. L. REV. 711, 727 (2007). See also FED. R. EVID. 402; FED. R. EVID. 801(c).

⁷³ See Emily Zanotti, *Kavanaugh Accuser Provides Polygraph To Senate Committee, Details Contradict Earlier Statements*, THE DAILY WIRE (Sept. 26, 2018), <https://www.dailywire.com/news/36363/kavanaugh-accuser-provides-polygraph-senate-emily-zanott>; see also *The Truth About Lie Detectors (aka Polygraph Tests)*, AM. PSYCHOL. ASSOC. (Aug. 5, 2004), <https://www.apa.org/research/action/polygraph.aspx> (The “[s]o-

considered accurate measures of veracity because so long as the responder believes he or she is telling the truth, the polygraph will not detect signs of untrustworthiness.⁷⁴ Furthermore, there is a growing consensus among some legal scholars that polygraph results are also inadmissible due to hearsay concerns.⁷⁵ Any proponent of polygraph results inherently contends that the results are: “(1) an out-of-court statement by the defendant or another witness, and (2) expert testimony that the out-of-court statement is true.”⁷⁶ Thus, the concerns surrounding reliability permeate the analysis of relevance, in potential unfair prejudice to the accused and misleading the fact finder, and hearsay, in promoting an out of court statement offered for the truth of the matter asserted therein without any certainty as to its reliability.⁷⁷

Moreover, as explained by the American Psychological Association (“APA”), several questioning techniques are used in polygraph tests with the most widely used test format for subjects in criminal incident investigations being the Control Question Test (CQT).⁷⁸ The APA explains that:

[t]he CQT compares responses to ‘relevant’ questions (e.g., ‘Did you shoot your wife?’), with those of ‘control’ questions.⁷⁹ The control questions are designed to control for the effect of the generally threatening nature of relevant questions.⁸⁰ Control questions concern misdeeds that are similar to those being investigated, but refer to the subject’s past and are usually broad in scope; for example, ‘Have you ever betrayed anyone who trusted you?’⁸¹

called ‘lie detection’ involves *inferring* deception through analysis of physiological responses to a structured, but unstandardized, series of questions.” (emphasis original).

⁷⁴ See AM. PSYCHOL. ASSOC., *supra* note 73.

⁷⁵ See Jeffrey Bellin, *The Significance (If Any) for the Federal Criminal Justice System of Advances in Lie Detector Technology*, 80 TEMP. L. REV. 711, 727 (2007).

⁷⁶ *Id.* at 728.

⁷⁷ See *id.* at 728, 731.

⁷⁸ See AM. PSYCHOL. ASSOC., *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

2019]

"I STILL LIKE SMEAR"

79

More physiological responses to relevant questions than to control questions leads to a result of "deception," more responses to control questions leads to a result of non-deception.⁸² If there is no difference between the frequencies of responses to the two types of questions, the test result is considered "inconclusive."⁸³ In summation, as the APA points out, "[t]here is no evidence that any pattern of physiological reactions is unique to deception."⁸⁴ Therefore, the results produced by these tests cannot accurately show the subject's honesty or dishonesty, regardless of the context in which it is administered.

Likewise, the results of Dr. Ford's polygraph test, based on events alleged to have occurred some-thirty-five-years prior, should not have been accepted into the record during the Committee's hearing. Doing so allowed the Committee to consider untrustworthy statements that bore no relevance to whether the claims asserted therein were more or less likely to have occurred. Based on how Democratic members of the Committee tacitly endorsed this so-called evidence once admitted into the record,⁸⁵ the imposition of some objective standard of admissibility would have led to a drastically different hearing and media coverage thereof.

B. Kavanaugh's Childhood Calendar

The second key piece of evidence considered during the confirmation hearing was the childhood calendar of Justice Kavanaugh.⁸⁶ The calendar was noticeably worn over the past few decades, and included notations of Kavanaugh's exams, athletic events, and social engagements over the course of the 1982 summer.⁸⁷ More specifically, the calendar lists numerous football

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Jon Queally, *As Ford Polygraph Made Public, Senate Judiciary Democrats Unified: Kavanaugh Should Immediately Withdraw*, Common Dreams (Published Sept. 26, 2018), <https://www.commondreams.org/news/2018/09/26/ford-polygraph-made-public-senate-judiciary-democrats-unified-kavanaugh-should>. In the wake of admitting and considering the polygraph results, every Democratic member of the Senate Judiciary Committee called on Judge Kavanaugh to "immediately resign," while urging President Trump to "immediately withdraw the nomination of Brett Kavanaugh."

⁸⁶ Hutchinson, *supra* note 70.

⁸⁷ *Id.*

workouts and movie showings, as the young Justice Kavanaugh was on summer vacation, yet the school football team held practices throughout the break.⁸⁸ Some of the events listed names of friends, including Mark Judge, who was allegedly at the infamous party.⁸⁹

In contrast to the polygraph test above, the calendar—if offered by Kavanaugh in light of the rules herein being installed—could be accepted into evidence.⁹⁰ First, while the calendar is certainly dated, it is of the upmost relevance to claims of wrongdoing alleged to have occurred in that same year.⁹¹ Furthermore, the calendar passes muster of the proposed rules of evidence pursuant to the “best evidence rule.”⁹² The rule stands for the proposition that if a proponent is trying to prove a material fact by offering the contents of a document, they must “produce the original document unless there is some good reason not to.”⁹³ The purpose behind the rule is to ensure the record contains the actual language of a document whenever that language is at issue.⁹⁴ The calendar is the best evidence of the content therein, that being Kavanaugh’s whereabouts during the summer of 1982.⁹⁵ The whereabouts are material in this case, since they may make the alleged wrongdoing more or less likely; in this case, less likely.

C. *Dr. Ford’s Testimony Regarding Therapists’ Notes*

Although Dr. Ford provided several hours-worth of testimony in connection with her allegations, the portion regarding her therapists’ notes is most crucial for this commentary. Dr. Ford

⁸⁸ Joshua Barajas, *See 4 months of Brett Kavanaugh’s calendar from 1982*, PBS (Sept. 26, 2018 04:51 PM EST), <https://www.pbs.org/newshour/politics/see-four-months-of-brett-kavanaughs-calendar-from-1982>.

⁸⁹ *Id.*

⁹⁰ *See generally* FED. R. EVID. 1002.

⁹¹ Hutchinson, *supra* note 70; FED. R. EVID. 401.

⁹² FED. R. EVID. 1002; Michelle L. Querijero, *Chapter 9: Documentary Evidence*, in A PRACTICAL GUIDE TO EVIDENCE IN CONNECTICUT 9-i, 9-8 (Mark S. Baldwin, Stephen R. Klaffky & Dylan P. Kletter, eds. 2013), https://shipmangoodwin.com/files/19628_Chapter09Final.pdf.

⁹³ FED. R. EVID. 1002; Querijero, *supra* note 92 at 9-8.

⁹⁴ Querijero, *supra* note 92 at 9-8.

⁹⁵ Daniel Arkin, *See Brett Kavanaugh’s 1982 summer calendar, the time of Christine Blasey Ford’s assault accusation*, NBC NEWS: Supreme Court (Sept. 26, 2018, 1:18 PM), <https://www.nbcnews.com/politics/supreme-court/see-brett-kavanaugh-s-1982-summer-calendar-time-christine-blasey-n913411>.

2019]

"I STILL LIKE SMEAR"

81

testified that during 2012 and 2013 she discussed the alleged attack with her therapists.⁹⁶ While she claimed that she reviewed these notes prior to testifying, her secondhand account of the notes never explicitly stated that the notes include Kavanaugh by name.⁹⁷ Instead, Ford testified that it was her husband who claimed during the sessions that she had previously identified Kavanaugh as the attacker in earlier accounts of the events.⁹⁸ While she had previously provided portions of the notes to *The Washington Post*, which eventually gave rise to the piece originating this controversy, Ford and her legal team repeatedly refused to offer them during the numerous hours of testimony.⁹⁹ In fact, Ford testified that she wasn't even sure whether the Post reporter saw the notes directly, or she simply provided her own account of the notes herself.¹⁰⁰

Moreover, Rachel Mitchell, the prosecutor assisting with the questioning of Ford, noted that Ford's husband claimed in therapy sessions that Ford previously named Kavanaugh as the attacker as early as 2012, once Kavanaugh's name was already being floated as a Supreme Court candidate if Governor Mitt Romney were to win the 2012 election.¹⁰¹ She also noted, "Dr. Ford refused to provide *any* of her therapy notes to the committee."¹⁰² In sum, there were serious credibility concerns regarding this portion of Ford's testimony in particular, before considering that her retelling of the contents of the notes should have been barred on hearsay grounds.¹⁰³

As a preliminary matter, Ford offering the content of the notes to the committee almost certainly waived the psychiatrist-patient privilege.¹⁰⁴ Also, to the extent that Ford's written statement

⁹⁶ Byron York, *Byron York: Kavanaugh investigators need to see Christine Blasey Ford's therapy records*, WASHINGTON EXAMINER: Opinion, (Oct. 2, 2018, 8:51 PM), <https://www.washingtonexaminer.com/opinion/columnists/byron-york-kavanaugh-investigators-need-to-see-christine-ford-therapy-records>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ Chris Murray, *Why Brett Kavanaugh Should Sue Christine Blasey Ford For Defamation*, THE FEDERALIST (Oct. 17, 2018), <http://thefederalist.com/2018/10/17/brett-kavanaugh-sue-christine-blasey-ford-defamation/>.

provided to the Committee at the outset of the hearing contained information regarding the therapy notes, that portion of the statement should have been excluded pursuant to the Best Evidence Rule, explained above.¹⁰⁵ The original version of the notes definitely still exists since Dr. Ford claimed to have reviewed them before testifying, and in conjunction with communicating her story to *The Washington Post*, while still refusing to physically produce them to the Committee.¹⁰⁶ For this reason, even the secondhand account of the therapist notes should have been excluded under this theory.¹⁰⁷ To be sure, “[a]s a corollary to the requirement to produce the original document, the rule also prohibits a witness from testifying from memory as to the language contained in a document.”¹⁰⁸ The purpose of the expansive Best Evidence Rule is to ensure that the original document provides the fact finder with an accurate depiction of its content, especially compared to what can easily become an inaccurate recollection of that content.¹⁰⁹ Here, the admitted existence of the notes, coupled with the repeated refusals to provide same, clearly demonstrates that the Committee should have precluded the secondhand account provided by Dr. Ford, unless the notes were provided beforehand. Thus, another piece of so-called evidence in the Kavanaugh hearing would not have passed even an elementary test for reliability under the hearsay rules.

III. ISSUES REGARDING PRECLUSION

It is worth a brief mention of how the proposed rules regarding preclusion would operate, despite the fact that it would not have played a role in the Kavanaugh hearings. For purposes of this commentary, the proposed rules would operate similarly to claim preclusion in the litigation context, otherwise known as res

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ FED. R. EVID. 1002; Querijero, *supra* note 92.

¹⁰⁸ Querijero, *supra* note 92, at 9-8. (“This can be stated ‘the document speaks for itself,’ and, therefore, the witness’s recollection is not the best evidence.”).

¹⁰⁹ *Id.*

2019]

"I STILL LIKE SMEAR"

83

judicata.¹¹⁰ "Claim preclusion applies when the parties to a lawsuit have previously litigated a claim and have obtained a final judgment on the merits of that claim," and the prevailing party again attempts to litigate the claim.¹¹¹ The defending party would then defend itself based on res judicata and presumably have the case dismissed.¹¹² Similarly, claims that have been already litigated between an accuser and the accused-nominee would not be the subject of testimony in a confirmation hearing, but instead their outcomes would be accepted into the record as matters of fact.¹¹³

IV. QUIETING THE MEDIA CIRCUS

It is undisputed that the nomination of Justice Kavanaugh, along with the alarming allegations from Dr. Ford, dominated the news cycle for weeks. However, the coverage of the events was evidently biased against Kavanaugh. For example, according to a poll conducted by Hill.TV and the HarrisX polling company along with a survey by American Barometer, forty-five percent of respondents saw the coverage as biased against Kavanaugh, while only twenty percent thought it was favorable to Kavanaugh, and thirty-five percent thought it was neutral.¹¹⁴ Further, the Committee's unrestrained approach to the hearing promoted "[a] world where anyone can be accused of anything that occurred decades ago without providing evidence or any corroborating witnesses to support the claim—all while it destroys that person's career and family as a consequence."¹¹⁵ It is clear that the confirmation process, at least for Supreme Court nominees, is in need of fundamental reform. If the Senate Judiciary Committee adopts rules of objective reliability when conducting their

¹¹⁰ Aaron Larson, *Issue Preclusion and Claim Preclusion: How Prior Litigation Can Block Your Claim*, EXPERTLAW (May 8, 2018), <https://www.expertlaw.com/library/civil-litigation/issue-preclusion-and-claim-preclusion>.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ Julia Manchester, *45 percent say media coverage was biased against Kavanaugh*, HILL (Oct. 8, 2018), <https://thehill.com/hilltv/what-americas-thinking/410409-45-percent-say-media-coverage-was-biased-against-kavanaugh>.

¹¹⁵ Joe Concha, *Media bias against Kavanaugh is overwhelming*, HILL (Oct. 3, 2018 11:45 AM EDT), <https://thehill.com/opinion/judiciary/409655-media-bias-against-kavanaugh-is-overwhelming>.

84 *JRNL OF CIVIL RIGHTS & ECONOMIC DEVELOPMENT* [Vol. 33:1

hearings, it would serve as a basis for common understanding on how the Senate will handle and react to allegations similar to the ones brought by Dr. Ford against Justice Kavanaugh. This would hopefully direct the media to a more focused and fair approach in covering the hearings, since there would be objective rules of procedure known to everyone that would facilitate the admission of evidence at those hearings.

CONCLUSION

The rules proposed herein would serve several purposes. First, the rules would provide an objective standard for admitting evidence that will be considered in the Committee's recommendation to the full Senate and the full Senate's vote for confirmation. Second, they would provide much needed clarity and predictably to confirmation hearings, especially when there is a chance of political divisiveness surrounding them, which has increasingly been the case in recent years. Third, the rules aspire to ease the media circus surrounding future hearings that may be as contentious as the Kavanaugh hearing. If there was a generally accepted procedure that the public and the media were aware of, there would hopefully be less divisiveness based on the shared understanding of what could and could not be disputed at the hearing. If the Committee continues to refuse to install objectively reasonable rules of procedure for its confirmation hearings, it will only heighten the chances for a smear campaign similar to the one in connection with Kavanaugh hearing in the future.