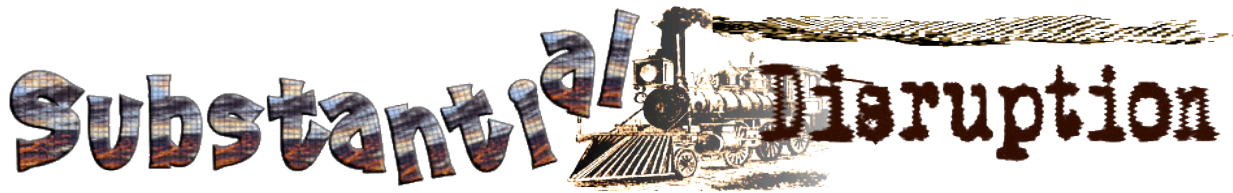


Substantial Disruption



Parsing the Kavanaugh Konundrum. A Q-and-A.

By Mike Tully

This coming Thursday, Christine Blasey Ford is scheduled to testify before the Senate Judiciary Committee regarding her allegation that Supreme Court Nominee Brett Kavanaugh attempted to rape her when they were high school age. What are the issues and how should the Committee approach the hearing?

1. Republicans cried “foul” when they learned of the allegations against Kavanaugh quite late in the process. Do they have a point?

Yes. Democrats would feel sand-bagged if the shoe was on the other foot. The hearing had ended and all that was left for the Senate Judiciary Committee was a vote on whether to recommend Kavanaugh’s appointment to the full Senate. Then, California Senator Diane Feinstein notified her Committee colleagues of a letter from a constituent alleging Kavanaugh sexually assaulted her when both were high school age. Kavanaugh was a 17-year old senior; Ford, the alleged victim, was a 15-year old sophomore. Feinstein could have handled the matter better and Republicans are justified in feeling exasperated – but there’s more at stake than the tender feelings of Committee Republicans.

2. How could Feinstein have handled the matter more appropriately?

With the benefit of “20-20 hindsight,” here’s what Feinstein should have done: As soon as she read Ford’s letter, Feinstein should have reminded Ford that her primary duty is to the country, not to her. While Ford requested confidentiality, somebody who wants to keep a secret does not tell it to a United States Senator. In my experience, somebody who tells you an important fact, then says, “Don’t tell anybody,” *really wants you to tell somebody*. Then, if – or, more likely, when – it gets out, they can say, with feigned plausibility, they didn’t want the information to become public and it was not really their fault it got out.

Feinstein should have immediately advised Ford she would give the information to the FBI to include in its background investigation. The Senator should have warned Ford that, while she would ask the FBI to conceal her identity, there was no guarantee it would be protected. If the FBI determined the assault might have occurred, the Bureau would have to disclose its finding to the Committee, in which case Ford’s name would come out. In other words, Feinstein could have advised Ford her identity could remain confidential if the FBI determined there was no cause to believe the assault had occurred but, if the FBI found cause to believe it happened, Ford’s name would be disclosed and she would have to testify.

3. Is the passage of time since the alleged assault a problem?

Yes, but it’s not dispositive. Passage of time erodes the provability of any case. Witness memories fade. Witnesses die or become infirm, or just disappear. Evidence fades, becomes corrupted or is lost. When

there is a he said – she said situation, which describes most sexual harassment allegations, the timing of any report is important. I once investigated a case at a school district in which a young female employee accused a male senior administrator of sexual harassment. The accused had committed sexual harassment in the past and was a notorious “player,” so it wasn’t a reach to believe he had committed the acts alleged. Unfortunately, the victim did not come forward for several months, even though she knew the District had a Department that investigated sexual harassment complaints. In fact, she met privately with the Department’s Director the day after the alleged harassment and said nothing about it. She finally disclosed it after hiring an attorney. When investigators deal with a he said – she said case, they look for contemporaneous reporting. Effective corroboration of what happened behind closed doors includes a distraught victim whose memory is fresh and emotional injury still raw. Waiting for weeks, months, or even years weakens the case. When an alleged victim has an opportunity to confidentially discuss it with the appropriate authority and declines to mention it, the complaint will almost surely fail. Hers failed.

Ford’s allegations are more serious than what the school district employee alleged. She reported an attempted rape; the school district employee reported light touching and a soft kiss on the back of her neck, which is troubling, but not in the same league as forcibly holding a girl down while trying to rip off her clothes and covering her mouth when she tried to scream. That’s much harder to talk about, especially for a 15-year old who doesn’t think anybody would believe her. It’s not uncommon for victims of sexual assault to keep quiet for fear or shame, sometimes for years, sometimes forever. Most sexual assaults are never reported. That Ford did not officially report the assault for years does not automatically refute her story, but makes it more difficult to prove, although she told her husband a few years ago and disclosed the assault to a counselor. The fact she still shows signs of PTSD – such as requiring a bedroom with two escape routes – suggests something traumatic happened to her.

The passage of time did not undermine the case against Jerry Sandusky at Penn State. His victims were always considered believable, as are the victims of Catholic clergy. The passage of time did not help former Speaker of the House Dennis Hastert conceal inappropriate sexual behavior from his days as a wrestling coach. It certainly did not help Bill Cosby. Given sufficient evidence, a sexual crime can be proven years after the fact – but it’s not easy.

4. Is there persuasive evidence of attempted sexual assault by Judge Kavanaugh?

Possibly. If the facts are confined to his word against hers, then the evidence is not sufficient. There must be corroboration. The most effective corroboration – an emotional contemporaneous report – does not seem to be available. There is no evidence that Ford complained to a friend at the party, or immediately afterward. There was no contemporaneous writing, such as a letter to a confidante or diary entry. There was, however, an apparent witness, a friend of Kavanaugh’s named Mark Judge. Ford said Judge was in the room during the assault. Judge claims he does not remember such an incident and does not want to testify about it under oath. It’s rare for a third person to be present. Judge’s testimony is critically important and it would constitute investigative malpractice not to interview him. An investigator who failed to question such a witness would be disciplined for gross incompetence.

The Committee should also interview accusers Deborah Ramirez and Julie Swetnick. If there are allegations with similar facts – such as a drunken attack during a party – then the testimony could help

prove the assault on Ford not only happened, but was consistent with Kavanaugh's drunken behavior at parties in his youth. That's also corroboration.

5. Should the FBI investigation be reopened to look into the claims of Ford, Ramirez, Swetnick, and any other victim who comes forward, as well as potential witnesses?

Yes. FBI investigations are routine in federal judicial appointments and need to be as thorough as possible – especially with a Supreme Court nomination.

6. How else can we determine who's telling the truth?

Examine witness credibility. When I conducted workplace investigative interviews, I began with the assumption the witness was telling the truth. If his or her story was the same as what I later heard from other witnesses, then it's likely the witness was honest. However, if what the witness told me is inconsistent with other witnesses, or from forensic exhibits (like email messages or voice mail recordings), then it's likely the witness was not truthful. That's what we mean by "trying the facts." You try them on until they don't fit.

The other credibility test regards motive. People act in furtherance of what they believe to be their own self interest and will lie or tell the truth accordingly. When I have to resolve a conflict between witnesses, I consider whether a witness finds it in his or her interests to lie. Most investigative targets will lie to avoid being held accountable. In Judge Kavanaugh's case, being held accountable would mean not serving on the Supreme Court. If Kavanaugh is lying, it's because he wants to be a Supreme Court Justice. Every guilty target has an incentive to lie.

What of Ford? What is her incentive to lie? She didn't want to come forward and knew her life would be overturned if she did – and it was. Unless there was some reward to compensate for the hell she and her family are going through, it's hard to believe she would see it in her personal and professional interests to lie about the assault allegation.

7. Why is it important for the Judiciary Committee to hear from Ford and other witnesses?

To ensure a suspected sexual assailant doesn't serve on the Supreme Court.

The Judiciary Committee should not only hear from Ford and Kavanaugh, but also Judge, Ramirez, Swetnick, and anybody else with relevant knowledge. The Committee should review available forensic evidence, such as Ford's counselor's notes. If there is a reasonable doubt about Kavanaugh's innocence, he should not join the Court. When the consequence is a lifetime appointment to the nation's highest court, the "reasonable doubt" burden of proof is reversed. In a criminal case, reasonable doubt means you're acquitted. With a Supreme Court appointment, reasonable doubt means you don't get it.