

## Rules of Credibility

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The combatants in the case of *Ford v. Kavanaugh* claim that what has been occurring nationally is not a “trial,” but it certainly has been treated as a trial by the media. The live coverage of the testimony in this drama reminds a casual observer of the OJ Simpson case. America was riveted to the trial of the former football star, whose fall from grace has continued unabated.

What kind of trial precisely is *Ford v. Kavanaugh*? Clearly, it is not a criminal case. In a criminal case, there is a presumption of innocence beyond a reasonable doubt. The government puts its case on first, and the defendant does not even have to testify. The question in a criminal case is whether the evidence put on by the People is convincing beyond a reasonable doubt. A reasonable doubt is that which a person would entertain in most important events of their life.

Is the case of *Ford v. Kavanaugh* a civil trial? In a civil case, the plaintiff must put on their evidence or they will be non-suited. The case must be proven by a preponderance of the evidence. Generally speaking, a preponderance of the evidence is to be imagined like a scale of justice, with each side putting their evidence on their side of the scale. If the plaintiff is able to tip the scale ever so slightly (the language of the law in Pennsylvania), then the plaintiff wins and has proven their case.

I was fortunate to serve as a law clerk in federal court and watch many trials. As an active trial lawyer, I have had the great honor and privilege of serving on the Pennsylvania Supreme Court Standard Jury Instruction Committee. As law clerk, lawyer and member of the Committee, I have written and considered what jurors are told in a wide variety of cases. We instruct jurors about how to evaluate credibility.

In a jury trial, the folks who are evaluating the facts are laypeople who have little or no knowledge of the case at issue. They are supposed to be fair-minded people who will consider the evidence in the courtroom and nothing else. The jury system is the hallmark of our constitutional grandeur in the United States of America. Jurors are told how they should evaluate the credibility of witnesses, and we trust them to do their job honestly. Most of the time, the jury system works well.

There are other systems of justice in the United States. There are a wide variety of administrative courts. In the olden days, we used to say that we had a tripartite system of government: the Legislative, the Executive and the Judicial. We now have a fourth branch of government, the Administrative. The Administrative system adjudicates claims concerning workers’ compensation, unemployment compensation, zoning issues, and a myriad of other disputes. Those cases are not decided by a jury. Rather, there is a professional, usually but not always a government official, whose job it is to evaluate credibility and make a decision. For most people in America, they will experience Administrative determinations as to whether they are responsible in some particular way

far more than they will ever experience the jury system. The system of Administrative justice in the United States can ruin a person's life or provide them an opportunity to succeed.

The spectacle taking place in Washington, *Ford v. Kavanaugh*, is much more like an administrative trial. In cases of administrative adjudication, there is usually some right of appeal, although it may be very limited.

In the case of *Ford v. Kavanaugh* there must still be credibility determinations just as administrative law judges, referees and judges make every day throughout this country. The rules governing those adjudications are not remarkable. Decisionmakers must consider how the person behaves on the witness stand; their body language; whether they are contradicted; whether the testimony is supported by other evidence; and many other factors. It may surprise many people to know that courts routinely rule that circumstantial evidence has just as much weight as direct evidence. Circumstantial evidence gives rise to many examples, the most common having to do with thunderstorms. If you hear rumble and see flashes of lightning, at the same time you hear a pitter-patter sound, then it is a reasonable deduction that it is raining outside. Many judges do not like to give examples because circumstantial evidence can be found under lesser circumstances than the example given.

It is unquestionable to any legitimate observer that the outcome of the trial of *Ford v. Kavanaugh* will depend heavily upon the credibility of the witnesses in terms of how they testify, what they look like, and their overall demeanor. Demeanor is a big deal in judging credibility. However, the decisionmakers must also evaluate whether there is supporting evidence. In this case, claims that others were present when the assault took place are undermined by the denials of those witnesses. The fact that others claim similar assaults by Judge Kavanaugh may or may not come into evidence depending upon a myriad of factors.

In civil administrative proceedings, we see people denied jobs or tenure all the time because of some relatively minor blemish in their record. Injustice frequently occurs where there is little or no right to appeal and an administrative law judge has made a decision based on a minimal amount of evidence. That being said, the system of administrative justice in the United States works generally well and there is no revolutionary discussion about getting rid of the Administrative branch of government which affects our lives every day much more than the other three branches.

What would the typical administrator do in terms of giving Judge Kavanaugh a job based upon what the examiner has heard? Predictions are always dangerous, but most administrators, hearing the evidence adduced to date, would be reluctant to deny the applicant the job.

This is no ordinary job. The job sought by Judge Kavanaugh is that of a Justice of the United States Supreme Court for the entirety of his life, which could be several decades. What is really occurring, therefore, is not a trial but rather a political food-fight. There are

those who want Judge Kavanaugh on the bench because they agree with what they believe his judicial philosophy will be, and there are those who hate the man's guts because he was nominated by President Trump and they believe that his views on social issues will be opposed to their own. Much as the media, and sometimes the public, has made the case of *Ford v. Kavanaugh* into a trial, even if an administrative trial, the matter is proceeding as nothing more than an ordinary dispute over sociopolitical views.

Those who are talking about evidence, impeachment, credibility and demeanor as though there was a real case of *Ford v. Kavanaugh* need to have their brains adjusted. Whether one supports Kavanaugh or does not want to confirm has everything to do with an uncertain prediction as to how Justice Kavanaugh would rule on cases that he has probably thought little or nothing about. Whether a Justice Kavanaugh would turn into an Earl Warren, a super-liberal whose impeachment conservatives sought even though he was nominated by President Eisenhower, remains to be seen. We do not know for sure how Justice Kavanaugh would rule on any social issue, although his detractors are not willing to take any chances.

Let us remember that the trial of Judge Kavanaugh is not a trial at all, but rather a dispute over political opinions.

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