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December 10, 2017: When Can Due Process Be Dispensed With?

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Title: When Can Due Process Be Dispensed With?

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12/10/2017—President Trump makes the point about Roy Moore, the Republican candidate for Senate and the subject of sexual predation allegations, that his denials also have to be taken into account. Of course, President Trump is making no effort to resolve these conflicting claims and so one must be suspicious of his real motive for saying this, which is unquestionably to get Moore elected and worry about sexual predation later.

But Garrison Keillor similarly claimed to have been fired without a chance to tell his side of the story about allegations of sexual harassment and he plainly wanted a full investigation.

So, the question remains—when is it appropriate to dispense with due process—not as a legal matter but as a matter of fairness?

The seemingly obvious answer is never, but that is not right even when due process is legally required. For example, sometimes denials are not relevant to the issue at hand. If a law professor on a team trip invited a student to a hotel room and had sex, the claim later that the sex had been consensual would be irrelevant. (It would be relevant to a criminal prosecution for rape of course). The faculty member would be fired for having sex with a student. Consent is irrelevant to that question.

More to the point in a lot of these cases is that the denials are equivocal. That suggests that something like this happened but maybe to somebody else. Judge Alex Kozinski says of allegations that he showed porn to law clerks, “I have no recollection of that happening.” This is not a denial, it is an evasion. The only appropriate response would have been, “I know that did not happen because I have never done anything like that in my life.” That is what I would say if a former student alleged I had shown her porn on my computer.

But the fact that Democrats are not immediately calling for Kozinski’s resignation shows how much politics are involved in even this wave of maybe finally cleansing the workplace of sexist hostility toward women. While liberals like Masha Gessen of the New Yorker calls the half of the country that voted for Clinton—of course more than half—[“morally superior”](#)—that is by no means apparent. Both sides have forced out congressional representatives—Republicans forced out Tim Murphy in October when evidence showed he urged his lover to get an abortion and Trent Franks is resigning now over urging aides to become surrogates bearing his child.

And neither side has yet shown it is willing to do so when there would be a serious political consequence. I believe the reason Judge Kozinski has not yet faced calls on the left to resign is because President Trump would replace him with a conservative judge. Eventually the hypocrisy of this double standard will be too much and the Judge will be forced out, but the immediate lack of reaction is pretty telling.

On the Republican side, there is the now common denial of trust that permits decent people to mouth things that are not true. Most people voting for Moore are claiming to believe that the allegations are not true. But how they could not be true is never made clear—just how does a 30 year old man date a fourteen or seventeen year old girl without committing the crime of sexual assault of an underage person? Here is an example where due process would really be helpful since it would finally show what a predator Moore is. Anyway, voting for Moore, like wanting to keep the Judge, shows how sick America is when it comes to partisanship.