

# Will Trump End Campus Kangaroo Courts?

Democratic senators, a New Jersey task force and even the ABA mobilize against due process.

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Is the Education Department preparing to dial back the Obama administration's assault on campus due process? In late June, Candice Jackson, who in April became acting head of the department's Office for Civil Rights, made her first public remarks about the regulatory regime she inherited. Ms. Jackson said she is examining her predecessors' work but offered no specifics about when, or if, Obama-era mandates will be changed.



Candice Jackson in 2005. Photo: Associated Press

Beginning in 2011, the Obama administration used Title IX—the federal law banning sex discrimination at schools that receive federal funds—to pressure colleges and universities into adopting new procedures for handling sexual-misconduct complaints. At most schools, accused students already faced secret tribunals that lacked basic due-process protections. But the Education Department mandated even more unfairness. It ordered schools to lower the standard of proof to “preponderance of the evidence” instead of the “clear and convincing evidence” standard that some schools had used. It required schools to permit accusers to appeal not-guilty findings and discouraged allowing students under investigation to cross-examine their accusers.

As a result, scores of students have sued their colleges, alleging they were wrongfully accused. They have won more than 50 decisions in state and federal court since 2012, while nearly 40 complaints have been dismissed or decided in the colleges’ favor.

Ms. Jackson has already reversed another Obama-era policy that sought to tip the scales in favor of accusers. Earlier this year, BuzzFeed revealed that her predecessor, Catherine Lhamon, had ordered that whenever someone filed a Title IX complaint against a school with the Education Department, the civil-rights office would investigate every sexual-assault allegation there over several years. The shift sometimes led to reopening cases in which accused students already had been cleared. Ms. Jackson argued last week that this policy—which Ms. Lhamon never announced publicly—treated “every complaint as a fishing expedition through which our field investigators have been told to keep searching until you find a violation rather than go where the evidence takes them.”

These first signs of renewed fairness have elicited strong protests. Last week 34 Democratic senators, led by Washington’s Patty Murray, sent a letter to Education Secretary Betsy DeVos accusing her of endorsing “diminished”

enforcement of federal civil-rights laws. The senators did not even make a pretense of caring about due process for the accused. Congressional Republicans have mostly remained silent.

Late last month a task force appointed by Gov. Chris Christie released a report on how New Jersey institutions should respond to sexual assault on campus. The panel, dominated by academic administrators and victim advocates, based most of its work on the assumption that university investigations are meant to validate accusations rather than test them.

The report urged Garden State schools to ensure that “equal representation is provided to survivors and the accused” and to develop “an investigation and adjudication model that honors the survivor [and] the respondent.” To describe an accuser as a “survivor” before the complaint is adjudicated is to prejudge the case. Patricia Teffenhart, one of the task force’s leaders, implicitly concedes the point: She told me the panel did intentionally “interchange (at times) the words ‘survivor’ and ‘complainant,’ ” so as to “avoid seeming to be one-sided.”

Ms. Teffenhart added that the task force paid “specific attention” to the accused’s ability to mount a defense, and the report does recommend that schools appoint an “adviser” for students charged with sexual assault. But it neuters that safeguard by urging colleges to ensure the adviser is “without a voice” in disciplinary hearings. That leaves students who have no legal training to fend for themselves, often against college lawyers or administrators who know and control the proceeding.

A mid-June report on campus sexual assault from, of all organizations, the American Bar Association also played down the importance of lawyers to a fair disciplinary process. The ABA task force recommended that if a college does permit accused students to have a lawyer—and many don’t—cross-

examination by the defense should be forbidden. In the ABA's view, lawyers should submit questions to the disciplinary panelists, who can then decide whether, and in what form, to ask them.

The Supreme Court has called cross-examination "the greatest legal engine ever invented for the discovery of truth." The ABA urges its abolition on campus to prevent "the potential trauma from having a victim be directly questioned by her assailant"—again, presuming the accused student guilty.

The ABA at least expressed concern about the preponderance-of-evidence mandate. But numerous proposals from blue-state legislators have sought to codify this and other prejudicial procedures into state law. California already has done so. Meanwhile, six California schools have been on the losing end of lawsuits filed by accused students. And in the highest-profile university victory, an appellate judge compared the University of California, San Diego's procedure to a kangaroo court during oral arguments, only to uphold it when he and two colleagues decided the case.

Ms. Jackson has one of the most thankless jobs in Washington—seeking to vindicate procedural norms and basic fairness on an issue that triggers intense emotional responses. She deserves all the support she can get.

*Mr. Johnson is a Brooklyn College historian and co-author, with Stuart Taylor, of "The Campus Rape Frenzy: The Attack on Due Process at America's Universities" (Encounter, 2017).*