CONGRESS: PLEAE STOP "SaVE-ING" WOMEN!

Q: **A bipartisan Senate bill known as the Campus Accountability and Safety Act (CASA) has been getting a lot of press. If it's bipartisan, it must be a good bill for women, right?**

A: Sexual assault is a bipartisan issue not because both sides care equally about preventing violence against women on campus but because both sides are equally NOT committed to solving the problem. Sexual assault has always been a politically invisible problem because, frankly, sexual access to female bodies has always been a bipartisan male entitlement. As a practical matter, this means that when lawmakers claim a new law will be "good" for women, chances are that's not the real story.

It's hard for the public to know why certain laws are bad for women when they're being promoted in the media as good laws for women, especially when advocacy groups support the bad laws. The public has little understanding of the ways that women's and victims' groups are under tremendous political pressure to support terrible laws so they don't lose government funding. This co-optation of advocacy groups has been a serious problem for many years.

Advocacy groups should have been out in droves protesting the 2013 Campus SaVE Act, which changed the law to allow school to subject victims of gender-based civil rights offenses to second-class justice on college campuses. But advocates stayed silent because the bill provided new funding for ineffective "education" programs. In other words, groups sold out women's safety and equality for a few training dollars.

Wendy Murphy was removed from an advisory board at Security on Campus (a Pennsylvania-based victim advocacy group) after she publicly criticized Senator Bob Casey (D-PA) for disrespecting women by filing the SaVE Act. It's tough to fight for women's equality and safety when advocates facilitate the very silencing and mistreatment of women they purport to disdain.

Q: SaVE is already law, but higher education lobbyists want Congress to enact another campus-related bill, known as CASA. How will this affect college women?

SaVE was signed into law in March 2013 and took effect one year later. It allows schools to subject civil rights violence against women to weaker laws and policies on campus, compared to Title IX policies, and compared to the policies schools apply in the redress of civil rights assaults based on race and national origin. One key provision provided that women would no longer be entitled to "equitable" redress on campus.

A federal lawsuit was filed to stop SaVE from being enforced on college campuses on the grounds that it violated women's civil and constitutional rights to subject them to second-class treatment. Dr. Bernice Sandler ("Godmother of Title IX") helped prepare the suit.

The lawsuit to stop SaVE was approved to proceed by a D.C. federal court on March 6, 2014, the day before SaVE was slated to take effect. The court eventually ruled that SaVE could have "no effect" on Title IX because the law did not "directly" amend Title IX. This was welcome news, however, soon after the lawsuit was filed President Obama announced that he saw a need for "corrective" legislation to address the problem of campus sexual assault. This was odd because only weeks earlier, before the lawsuit was approved to proceed, he and many members of Congress, including Claire McCaskill, held press conferences celebrating SaVE as a law that would adequately solve the campus sexual assault problem. After the lawsuit was approved, Obama declared a need for a new federal law, and McCaskill announced that she would soon convene hearings on the issue of campus sexual assault.

McCaskill then crafted a bill known as the Campus Accountability and Safety Act ("CASA"). If enacted in its current form, it will directly weaken Title IX, exacerbate problems caused by SaVE, and lead to even more sexual assault on college campuses.

Q: Why is CASA bad for women?

A: Among other things, CASA will allow "confidential advisors" to

"inform" victims that they need not report a sexual assault to anyone, and that they need not cooperate with civilian or campus-based law enforcement officials. This is strange. Why would Congress want to deter women from reporting sexual assaults when many studies show that the biggest problem on campus is extremely low reporting rates? Indeed, women are more likely to report sexual assault in the "real world" and in the hyper-masculine military, than on college campuses. Deterring reports on campus will lead to higher ACTUAL incidence rates, and falsely low numbers in annual campus crime reports.

Another dangerous provision in CASA would require civilian law enforcement officials to enter into memoranda of understanding ("MOUs") with schools such that police effectively become agents of the schools. Police departments that refuse to sign MOUs will be reported to the Department of Justice. These MOUs will transform police officials into school officials, which will mean police reports become confidential school records, unavailable to the public under FERPA and related privacy laws.

Police files about violence against women on college campuses are currently public records, as are all police reports about all criminal acts, whether they occur on college campuses or not. The public has a right to know about criminal activity, and to obtain copies of police reports related to criminal activity.

CASA will change the status of police reports from public records to confidential school records, which will not only deter reporting but also prevent the public and outside agencies, such as the Office for Civil Rights at the Department of Education, from obtaining truthful information about actual incidence rates. It will also prevent oversight agencies from holding schools accountable for the mishandling of sexual assault on college campuses.

CASA will also give schools new immunity from liability because it will allow officials not to redress, or even count for statistical purposes, incidents of violence against women that are not "formally reported." Current law requires schools to respond under a "knew or should have known" standard, but CASA will change that rule such that even if school officials know of a serious incident, they need not take effective steps to address it if it is not "formally reported." This rule will not apply to any

other category of civil rights violence on campus, only violence against women, and because "confidential advisors" will be allowed to "advise" victims to file "informal" reports, it will be impossible to know about these incidents, or uncover whether the "advisor" inappropriately misled victims to choose "informal" reporting without full awareness of the consequences of "informal reporting." For example, anecdotal evidence indicates that "confidential advisors" often inform victims that only an "informal" report will ensure her confidentiality. This is false, but the claim often compels victims to opt for an "informal" option without understanding that it will render her report invisible, even for statistical counting purposes, and will prohibit outside law enforcement and civil rights agencies form becoming involved, and holding schools accountable if her situation is mishandled on campus.

Put another way, CASA will change current law by allowing schools to "know" about even the most horrific acts of violence against women, and do absolutely nothing about it.

Current law, including Title IX and Title IV of the Civil Rights Act of 1964, requires that schools respond under a "knew or should have known" standard. This generous standard is important because it requires schools to be proactive and to take "effective steps" to stop sex-based harms irrespective of whether a particular victim makes a formal report. Obviously, a heightened duty of care better protects women as a class. Importantly, if CASA is enacted, the "knew or should have known" standard will continue to apply to all other forms of civil rights violence on campus, such as race and religion-based assaults, which begs the question: what happens when school officials "know or should know" of a sexual assault against a black woman? Will they be allowed under CASA to ignore the sex-based piece and treat it as "informal," while remaining mandated to address the race-based piece under civil rights laws, for which the informal option will still be illegal? How would such a policy that divides a single incident into two very different types of legal proceedings even work, as a practical matter?

Q. What law could Congress enact that would be good for college women?

Women don't need better laws because they are already protected by the

gold standards of Title IV of the Civil Rights Act of 1964, and Title IX. These civil rights laws guarantee women full educational equality, and protection against sex-discrimination exactly on par with all other protected class categories, such as race and national origin. No law could provide better protection than full equality.

That said, Congress could enact a bill to overturn the problems they created in the SaVE Act, in which they could do the following:

1. *Abolish SaVE altogether.*

2. *Codify explicitly that all sex-based discrimination, harassment, and violence must be subjected to exactly the same standards as those that apply to discrimination, harassment, and violence on the basis of race, national origin, sex, etc.*

It's been more than forty years since women were added to the protections of Title IV, and Title IX became law. Women have waited long enough for their rightful seat at the civil rights table of justice. These important civil rights laws should be strictly enforced as intended, once and for all.

Women may never have the lobbying power of higher education, but they can and should mobilize to prevent Congress from enacting laws that subject women to second-class treatment. Women should also aggressively use the courts and make constitutional and civil rights claims demanding that they receive exactly the same treatment under the law as all other protected classes of people.

Q: The American Council of Trustees and Alumni opposes CASA on the grounds that campus sex assault should be dealt with off campus, by civilian law enforcement officials. They say police are better trained to handle the problem, and that dealing with sexual assault on campus drives up administrative costs. The stated mission of this organization includes the goal of ensuring affordable high-quality college education.

A: This group lacks basic understanding of civil rights laws because schools do not have the discretion NOT to deal with violence against women AS a civil rights issue. Schools are mandated to provide civil rights redress for all victims of all forms of civil rights harms, including sexual assault, so this

group is either ill-informed or unconcerned about women's safety and equality under educational civil rights laws.

The idea of sexual assault as both a real world crime and a civil rights offense on campus is not new. Nor does the fact that a single offense creates different types of legal redress options present an "either or" question for victims. Sexual assault on campus is always a "this and" issue, meaning police and prosecutors have a duty to deal with the criminal investigation, and schools officials have a duty to deal with the civil rights nature of the very same incident. They are not mutually exclusive, and the systems serve very different purposes and public policy goals.

Schools obviously have the capacity to deal with violence against women as a civil rights issue on campus, just as they have been dealing with violence based on race, religion, etc., for decades, without controversy. There is nothing special about violence against women that poses unusual legal questions or disproportionate financial burdens on schools. Sex-based civil rights proceedings can and should be resolved in a matter of days, just as schools resolve race-based assaults in a matter of days. It is unnecessary to have protracted investigations, and boondoggle thirty-page policies, etc., ONLY for violence against women. Indeed, it is illegal under civil rights laws to separate out ONLY violence against women for different treatment. Yet many schools do exactly that. More lawsuits aimed at forcing schools to revoke their segregationist gender-based violence policies would help to bring sexual assault back into the fold of civil rights redress policies where it has belonged since 1972.

Treating women as fully equal campus citizens does not impose significant burdens on schools, though school officials sometimes claim they cannot act swiftly against offenders of sex-based harms because they must comply with the "due process" rights of accused students. This is incorrect. The United States Supreme Court has made clear in many of its decisions that there are no "due process" rights for college students because there is no constitutional right to remain in college. An argument can be made that a public college might be obligated to provide minimal due process prior to expulsion or long-term suspension in jurisdictions where state law guarantees college students a right to due process, but private schools are never subject to such a mandate. Moreover, school officials on a near daily basis expel students who use or sell drugs on campus in a matter of days,

without conducting lab tests to prove that suspected illegal drugs are, in fact, illegal drugs. Yet such lab tests are mandatory under real world "due process" principles. If schools can expel a student without complying with "due process" in drug cases, they can surely do the same for students who abuse women. Indeed, if a student who smokes pot can be punished swiftly, then a student who commits a sexual assault can and should be expelled even faster because sexual assault is a much more serious offense that, as a civil rights issue, injures both the victim AND the entire campus community.

Q. What is the core message that schools and Congress are missing?

Violence against women is always a civil rights issue. Period.

The reason this message is important includes that civil rights laws provide gold standard legal protections for victims that are easier to prove, and fairer to women, than criminal law standards. For example, criminal law terms such as non-consent, and even the trendy "affirmative consent" rule, are much harder to prove compared to the civil rights definition of consent, which asks only whether the victim "welcomed" or "wanted" the conduct.

More importantly, when students are taught that sexual assault is a civil rights issue, they naturally become more invested in solutions, because the very purpose of civil rights laws is to ensure that whole communities feel injured by the harms caused to individuals. This is why we all feel injured by racist violence even if we are not personally racial minorities. When whole communities feel injured by individual assaults, whole communities feel engaged in effective redress and prevention.

Most schools never communicate this simple idea to their students. They waste precious time and resources instead trying to teach students about the law of consent, which only incites offenders to figure out ways to commit assaults without going over the line. For example, most schools have policies that allow offenders to claim they "made a mistake" about whether a victim consented to sexual contact, even if she was unconscious.

This is like teaching students that some racist assaults are OK, so long as the assailant claims that he or she "made a mistake" about whether a black victim "consented" to racist violence. Ridiculous, right?

Women want and deserve nothing more than the same respect and legal protections that all other students enjoy under civil rights laws. It's that simple.