

'The Supreme Court Is Not Well. And the People Know It.'

By Garrett Epps, The Atlantic

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A new guns case reveals that the once-noble institution has died, and we're left working with its corpse.

The Supreme Court as we once knew it—as a national institution that could at least sometimes stand apart from partisanship—died last year. The ongoing fight over its corpse spilled into public view last week.

On Thursday, 53 United States senators—every member of the Republican caucus—wrote a “letter” to the clerk of the Supreme Court assuring the justices that the Republican Party has their back. The Democrats, the senators told the Court, pose “a direct, immediate threat to the independence of the judiciary.”

The spat is about guns. The Court has granted review in a Second Amendment case entitled *New York State Rifle & Pistol Association Inc. v. City of New York, New York*, which (nominally) tests an obscure New York City ordinance governing how firearms owners could—note the past tense—travel with their weapons.

Under city law as it was when the case began, New Yorkers with a “premises” license had to keep their guns in their homes at all times, except when being taken to a licensed target-shooting facility for practice and training. But those facilities had to be in New York City itself. “Premises” licensees could not put their guns in their trunk and drive out of town for any reason—not to go to a gun range, not to compete in a shooting match, not to take the guns to a second home.

The plaintiff in this case is the New York branch of the National Rifle Association, and three of its members who said the restrictions on transport violated their Second Amendment rights. When the Court granted review, bells rang on both sides of the gun wars, because the justices had not agreed to hear a Second Amendment case in almost a decade. In 2008, the Court held, 5–4, that the Second Amendment protects a personal “right to bear arms”; two years later, it held, again 5–4, that this right applied against both federal and state governments. After that, the Court refused all pleas to consider gun cases, leaving the lower courts to test different local gun laws. By and large, local and state gun laws—licensing, background checks, assault-weapon and large-capacity-magazine bans—survived those challenges.

But then Justice Brett Kavanaugh replaced Justice Anthony Kennedy. In an opinion while on the D.C. Circuit, Kavanaugh had proposed a radical approach that might shred most local gun laws. The New York case, it was thought, might be the one in which the new post-Trump Court revealed its Second Amendment cards.

New York's state and city governments went into overdrive. The City repealed the offending transportation limits; the state legislature passed a statute banning the City from ever adopting them again. New York then told the Court the changes rendered the case "moot"—that is, in effect over, because the plaintiffs had what they'd asked for. The Court is supposed to dismiss moot cases, because there is no more "case or controversy" for the Court to resolve.

The gun-rights advocates were incensed. This response from the Cato Institute in an amicus brief was typical: "Americans deserve clarity when it comes to abuses of their fundamental rights. This Court should not reward, in any way, Gotham's bad faith attempt to keep the law unclear at the expense of the people."

"Moot for real or mootness as gamesmanship?" the legendary Supreme Court correspondent Linda Greenhouse asked in *The New York Times*. "Moot as in 'nothing left to argue about ever again' or moot as an example of 'voluntary cessation' that can be renounced at some future date?"

The Court is scheduled to decide whether to go forward with the case on its first conference, on October 1.

Enter five Democratic senators, who on August 12 filed an unusual (shall we say) amicus brief. Written by Senator Sheldon Whitehouse of Rhode Island, the brief pointed out what everyone already knew—that the plaintiffs care less about out-of-state gun ranges in New York and more about "a [Court] majority's help with their political 'project.'" (The other senators are Richard Blumenthal of Connecticut, Dick Durbin of Illinois, Kirsten Gillibrand of New York, and Mazie Hirono of Hawaii.)

From there, the brief launched into a freewheeling discussion of recent politics surrounding the Court: the Republican blockade that kept Justice Antonin Scalia's seat open for a year; the Trump campaign's proclamation that the Court seat, and the federal courts, were on the 2016 ballot; the involvement of the National Rifle Association and the Federalist Society in judicial selection once Donald Trump took office; the flow of "dark money" into advocacy groups such as the Judicial Confirmation Network for advertisements supporting the nominees Neil Gorsuch and Kavanaugh; the long string of 5–4 decisions favoring Republican and conservative causes and splitting the Court on precisely partisan lines; and recent poll numbers showing that more and more Americans believe (in the words of one poll) that the Court "should be restructured in order to reduce the influence of politics."

The brief concluded: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.' Particularly on the urgent issue of gun control, a nation desperately needs it to heal."

That brief was tone-deaf at best and threatening at worst. Anybody who finds it objectionable won't get a fight from me. But at least it was a brief, filed by consent of

the parties in conformity with Rule 37. And at least it came out and said what it meant: the Court's legitimacy is leaking.

Thursday, the Republicans struck back. There's no rule that permits the filing of random "Yo bros" letters with the Court. The letter also lacks the candor of the Whitehouse brief. Look at this: "Judicial independence is under assault. Democrats in Congress, and on the campaign trail, have peddled plans to pack this Court with more justices in order to further their radical legislative agenda ... [Those plans] are a direct, immediate threat to the independence of the judiciary and the rights of all Americans."

To convey how cynical this is, imagine that in 1937, Franklin D. Roosevelt had proposed his "Court packing" plan—and then accused Republicans of seeking to make changes in the sacred number of justices. The Court is already packed; the packing began in February 2016, with Scalia's death, and continued with the Gorsuch nomination and Kavanaugh's tantrum before the Judiciary Committee. And the packing effort has not even paused; Mitch McConnell has publicly said that regardless of the "election-year rule" he invented to block President Barack Obama's nomination of Merrick Garland, Republicans will confirm another justice to the Court if a vacancy occurs next year.

In fact, some Republicans openly opine that the Court issue is what won them the 2016 election—and when pressed about their lack of legislative accomplishments, they point with pride to their partisan makeover of the federal bench. Must we also be subjected to their solemn panegyrics to "judicial independence"?