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The Supreme Court's Second Amendment Appetite

The sound of gunshots is still ringing in the country's ears. Do the justices hear it too?

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With the sound of gunshots still ringing in the country's ears, here's the question of the moment for the Supreme Court: Do the justices hear it too?

Back in January, I devoted my first column of the new year to the growing impatience of some members of the court for a chance to move the boundaries of the Second Amendment from the home — where its 2008 decision in District of Columbia v. Heller had located the amendment's protection of the right to bear arms — out to the wider world. A few weeks later, the court agreed to hear the first Second Amendment case in nearly a decade.

The case seemed so quirky that at first I didn't take this development very seriously. At issue is a New York City regulation that prohibited most licensed handgun owners from taking their guns out of the city, even to a second home or to a shooting range for target practice. No other jurisdiction has so restrictive a policy for those it deems worthy of owning a gun in the first place. A gun owners' group, the New York State Rifle & Pistol Association, challenged the regulation, which dates to 2001, and appealed to the Supreme Court after the federal courts in New York upheld it.

It would be easy for a court, if so inclined, to strike down this regulation while leaving all other gun restrictions intact. But as briefs from gun rights groups began arriving at the court, it became apparent something much more is at stake. Quirky as the regulation might be, this case is potentially the vehicle that Justices Samuel Alito, Clarence Thomas, Neil Gorsuch and Brett Kavanaugh have been waiting for — a chance to turn the ambiguous and quite narrow Heller decision into the constitutional charter for gun rights that the gun lobby had hoped for but has not yet obtained.

Heller was a 5-to-4 decision, and Justice John Paul Stevens, who wrote the principal dissenting opinion, indicated in a memoir published shortly before his death last month that Justice Antonin Scalia, the majority opinion's author, had to compromise to hold his majority. His opinion deemed the right to keep a handgun at home for self-defense as the "core" Second Amendment right and continued: "It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." The court thus left undefined both what it was protecting beyond the "core" and how vigorously courts should scrutinize restrictions that extend out from the home or that deal with other kinds of firearms.

In his memoir, "The Making of a Justice," Justice Stevens described his disappointment at failing to recruit Justice Anthony Kennedy to his side of the argument. His clear suggestion was that it was Justice Kennedy who extracted some of the limiting language as the price for signing the majority opinion. Now, of course, Justice Kennedy is gone. His successor, Justice Kavanaugh, based on the views he expressed while a federal appeals court judge, will have no such diffidence about endorsing a far-reaching Second Amendment.

But while the New York case, which does not yet have an argument date, emerged this spring as a significant test of the justices' Second Amendment appetite, it has become in recent weeks something even more. On July 22, New York City filed with the Supreme Court a "suggestion of mootness" and a request to suspend the briefing schedule. The city explained that two interlocking developments had occurred: In the session just ended, the State Legislature had amended the handgun licensing statute to require localities to allow licensed handgun owners to transport their guns to second homes and target ranges outside the city; and the New York City Police Department, which supervises gun licensing, had amended the prior regulation to permit the same activities. The city argued that since the lawsuit had challenged only the second-home and shooting-range limitations, the plaintiffs now had everything they had asked for and there was nothing left for the Supreme Court to decide.

Ordinarily, the court readily grants a motion to declare a case moot; it did that last year after Congress passed a law that resolved a dispute between Microsoft and the federal government over a warrant for an overseas email account. Ordinarily, but not always. The Rifle & Pistol Association has fought back vigorously, arguing in a 33-page brief that "the city has not even tried to hide the fact that its paramount goal is to evade the prospect of a binding unfavorable decision from this court." Further, the brief argues, the new regulation falls "far short" of satisfying the plaintiffs and is "plainly designed to provide the bare minimum of what the city believes will suffice to

moot this case, and not an inch more." It's clear that the plaintiffs' real argument is with the very idea of regulation: "The city manifestly has not altered its view that any possession of a handgun outside the home, even when the handgun is unloaded and stored away, is a privilege that the city can micromanage, rather than an individual right."

Briefs have come in on both sides of this arcane argument. (The justices rejected the city's request to suspend the briefing.) Moot for real or mootness as gamesmanship? 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? Last week, the justices took the unusual step of putting the mootness dispute on the agenda for discussion at their first closed-door conference of the new term, on Oct. 1.

There's a fascinating transparency to the evident stalemate over whether to keep the case or dismiss it. Plainly, the conservative justices don't want to throw away their shot. (Pardon the irresistible image.) But here's an interesting angle: It takes four votes to accept a case, but it requires five to dismiss a case once accepted. Where is Chief Justice John Roberts?

The chief justice voted with the majority in Heller. But he has not joined the chorus of the justices to his right calling for the court to pick up where Heller left off. That doesn't mean he's not with them. It means we don't know.

But we do know that Chief Justice Roberts is acutely conscious of the tides swirling around the Supreme Court and lapping dangerously at the walls that are supposed to insulate it from politics. Does it bother him that the partisan divide in public opinion about the court is wide and growing wider, as demonstrated in a Pew Research Center poll last week? What does he make of the fact that firearms regulation is rising rapidly on the political agenda in the wake of the mass murders in El Paso and Dayton, Ohio?

The answer to this last question is really the most important. I won't get into the weeds of Second Amendment doctrine here, but if the court rules the way the gun lobby and its lawyers are urging in this case, if it adopts "strict scrutiny" as the only valid judicial approach to assessing the constitutionality of any limitation, then the political branches will effectively lose the ability to enact what the emerging political consensus deems to be common-sense regulations. Is this what the chief justice wants for the court — to pre-empt debate and turn the politics of gun regulation over to the judges?

Of the pile of briefs filed in this case, the one not to be missed was filed on behalf of the student activist group March for Our Lives, formed last year in response to the mass shooting at Marjory Stoneman Douglas High School in Parkland, Fla. It incorporates the voices of nine young people who have experienced gun violence at school, on the street and, in one instance, while teaching Sunday school. Their stories are heart-rending, but that's only part of the point.

The brief's real message lies in the description of the political activity that each young person has undertaken as part of an effort to reset the country's approach to guns. "The court's ruling here must not deprive them of their hope and their ability to effect change through the political process," the young people's lawyers write in the brief. "This court should decline the invitation to claim for itself the authority to set nationwide firearm policy and instead leave these sensitive decisions to the political process."

To rephrase the question I began this column with: Can the justices hear these voices?

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