# Requiem for the Supreme Court

Through the 20th century, the Court stood as an independent arbiter of the rule of law. It is a unifying, national institution no longer.

Oct 7, 2018

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What, I asked my parents, was the Supreme Court?

It was the mid-1950s. I was a white boy in the upper South. Around me, adults could not stop talking about the Supreme Court. They spoke of it as a distant force, a threat. The Court had told the white South to change the way it lived. Most white people I knew felt intensely that the Court intervention, and the Court itself, were illegitimate. Our local newspaper, the Richmond News Leader, led a national campaign to say that Southern white people need not follow the Court’s orders. If white Southerners just resisted––delayed compliance, refused Court orders, closed all public schools if necessary––eventually the nation would see that no mere court could trump the authority of Southern white majorities.

Then, in 1957, the governor of Arkansas tried it. He blocked a Court order to desegregate Little Rock’s Central High School and sent National Guard troops to prevent desegregation. He was not bound by Brown v. Board of Education, he said.

But the Supreme Court [said he was](https://www.law.cornell.edu/supremecourt/text/358/1). “The federal judiciary,” the Court said in the only opinion in its history signed by all nine members of the Court, “is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”

President Dwight Eisenhower, who had never expressed any enthusiasm for school desegregation, had already sent the U.S. Army into Little Rock because the Court’s orders must be obeyed.

It was a turning point in American history. The long revolution of the civil-rights movement, and the social revolution of the 1960s and ’70s, changed our national life, largely for the better. The changes came not from elites, but from ordinary Americans––African Americans who refused to accept subordinate status; women who would no longer accept male domination; young people who rebelled at the killing in Vietnam. Historians and social scientists debate whether Court decisions can produce social change, but one fact is undeniable. During this part of our history, when ordinary citizens demanded change from their governments, the Supreme Court often stood ready to guarantee their right to do so.

Local sheriffs could not arrest civil-rights protesters because they objected to their message, the Court held. Children could not be forced to pray Christian prayers in public schools, nor be disciplined for silently protesting against war. Elected leaders had a First Amendment right to oppose the Vietnam War. Southern politicians could not use defamation law to close down critical coverage of their racial policies. Sexual dissenters could write and publish about erotic matters. Local authorities could not use the idea of “decency” to suppress dissenting speech.

The president could not refuse the order of a federal court by refusing to provide his tapes to a federal prosecutor.

As a young man––not yet a lawyer––I took for granted the Court’s role as an enforcer of national boundaries. The Court defended them by majorities that knew no party. The chief justice, Earl Warren, was a Republican politician who had run for vice president on his party’s ticket. The Court’s two leading liberals, William J. Brennan and Arthur Goldberg, were appointed by presidentsfrom different parties. Lewis Powell, who became the Court’s swing justice, had spent his life in the service of business and established power, but when he took the bench, he defied the president who had elevated him.

The Court’s path was a wavering one. Sometimes it was tolerant of injustice; sometimes it moved ahead of where society was and (as in the case of the death penalty) backtracked. But as the turn of the century came and went, its decisions still often pointed the way to a more perfect union. Women could not be jailed for having an abortion. Virginia could not exclude women from the state military academy on the grounds that soldiering was not women’s stuff. States could not pass laws designating LGBT people as inferior and less deserving of rights, or jail them for consensual sex. Marriage rights extended to same-sex couples.

These decisions were controversial. Many people considered many of them wrong. But this was the nation’s Court; its decisions were rooted in the Constitution and in a shared interest in national unity.

Throughout all of this, Democratic and Republican appointees on the Court clashed, crossed, and formed coalitions. Neither those who praised it nor those who cursed it regarded the Court as the instrument of party politics.

But that idea began to fray. Opinion-writer politesse would require me to say or imply that the decay in the Court’s standing was the fault of “both sides,” or of both “right and left.”

But I cannot. It simply is not true.

One party made the Supreme Court a partisan issue. First Richard Nixon and then Ronald Reagan made attacks on the Court part of Republican Party dogma. Some will see the rejection of Judge Robert Bork by the Democratic-controlled Senate in 1987 as a product of partisanship; others may see it as one of its causes. But I think no fair-minded person could deny that a major barrier was crossed in 1991 when a Republican president, for political reasons, appointed a justice who was manifestly unqualified for the office, and who faced numerous, credible claims of sexual misbehavior as a government official. It was hard to watch the nominee testify in October 1991 without concluding that Anita Hill had told the truth and that Thomas had lied. But the administration pushed ahead regardless. This was the first major step over a dangerous threshold.

The next step came in 2000, when five Republican appointees on the Court extended its authority to decide a national election, in defiance of federal statutes, the Constitution’s text, and their own frequently expressed pieties about “our federalism.” The Court has aggressively made itself part of partisan politics, but even then, some of the justices who dissented were Republican appointees.

Partisanship sputtered for the next decade and a half. John Roberts was confirmed as chief justice with the votes of 22 Democrats––half of the party’s Senate caucus. Samuel Alito was the object of an attempted filibuster by Democrats, but was still confirmed with four Democratic votes. Sonia Sotomayor won nine Republican votes; Elena Kagan got five Republican votes and lost one Democratic vote. Justice Anthony Kennedy continued to move back and forth within the Court across partisan lines.

As the new Court settled in, people began to wonder whether the wounds of 2000 might be closing.

Then, in 2016, Justice Antonin Scalia died.

President Barack Obama, facing a Republican Senate, carefully nominated a moderate whom even Senator Orrin Hatch had previously designated as acceptable to both sides. But then the rules changed. Scalia’s seat, Senate Majority Leader Mitch McConnell said, would not be filled, no matter what. Republicans had a majority in the Senate and could use it for any purpose they wished—including making the Supreme Court seat a plum partisan patronage job to be filled after the next presidential election. Republican nominee Donald Trump assured Republican voters that he would appoint justices who would “automatically” overturn Roe v. Wade. To make this clearer, he released a short list of nominees, in effect putting their names on the presidential ballot besides his. Another threshold was crossed: A Court seat was a partisan prize, its holders subject to popular vote.

That brings us to the last few weeks in Washington, when the Senate Judiciary Committee met under the pretext that it would listen to testimony from an ordinary American, Christine Blasey Ford. In the rawest yet most plainly sincere terms, Ford told the committee that the nominee, as a teenager, had drunkenly tried to force himself on her. Many in the committee room, and millions watching, believed her.

The answer, when it came—from the nominee, from his supporters, and finally and most shockingly from Trump himself—was a perfect whirlwind of male aggression and dominance. The aim, which was largely successful, was simply to remove Ford from the equation and turn the subject to raw power and its prerogatives. The debate and the vote that followed were not about the Court, not about the law; they were about the Republican Party. They were about teaching the rest of us that we cannot refuse what Trump and McConnell want. They were a demonstration that in the new order there is no individual, no norm, no institution not subject to the control of the ruling party.

After the Senate confirmed Brett Kavanaugh on Saturday, I remembered that boy six decades ago who asked his parents, What was the Supreme Court?

The Supreme Court, they told me, was an institution to which they felt a deep allegiance, whether they agreed with its decisions or not. In their lives, and in the lives of all around me, I saw a society reluctantly but inevitably summoned to move forward not simply by the language of the Constitution but also by acceptance of the Court as an independent arbiter of the rule of law.

Critically, skeptically, but deeply, I loved that Supreme Court. Where is it? Where is the Court that claimed it was at least striving to transcend partisan politics?

That Court is gone forever. We will spend at least the rest of my lifetime fighting over its rotting corpse. No prating about civility can change that fact. The fight is upon us now, and the party that shirks it will be destroyed.

In Robert Bolt’s screenplay for Lawrence of Arabia, Prince Faisal speaks to Major T. E. Lawrence of the glories of medieval Islamic civilization: “In the Arab city of Córdoba, there were two miles of public lighting in the streets when London was a village,” he says.

But in the 20th century, Faisal sees that before him is not glory but war. “Now my father is old,” he says. “And I, I long for the vanished gardens of Córdoba. However, before the gardens must come the fighting.”

I, too, long for vanished gardens fair beyond words, for that long, eventful postwar peace in the shadow of the law and the Supreme Court that clumsily preserved it.

We did not know then that shadows were falling on that peace; we did not suspect then how fragile those institutions were; we did not imagine then how eagerly some of our fellow Americans would pull them down.