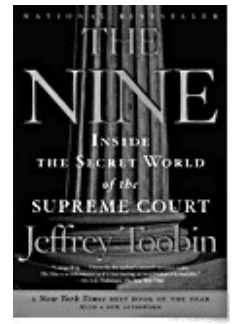




The Nine: Inside the Secret World of the Supreme Court

By Jeffrey Toobin

Reviewed by Noah Domnitz



For most lawyers, taking a moment to pause and think about the United States Supreme Court yields one of those “tingling” moments; the hair on the back of your neck may stand and salute. It is the big game; the top of the heap; the final resting place of issues that transcend and transform American society. There is something about the “end of the line” nature of the Supreme Court that sets it apart from all other courts.

The Supreme Court also seems to symbolize the pure conflict between right and wrong; certainly the Court has inserted itself into such conflicts throughout our country’s history. We all (lawyers and non-lawyers alike) want to believe in the rule of law, and to further believe that when all else fails, the highest court in the land will be there to make things right.

In theory, the Court is supposed to position itself above the fray; above the infighting of Washington politics; and above the standard mire and muck that threatens each day to bog down the inner workings of our government. As this book points out, some versions of the Court have been better at maintaining that posture than others.

Jeffrey Toobin’s book, “The Nine,” walks a tight line between modern legal history lesson and entertaining storytelling. Because of that balancing act, the book offers the reader many chances to choose their own focus. The book is a comingling of Supreme Court case law and the backdrops upon which those cases have been decided. The reader gets to decide whether to focus on the legal foundations of the cases discussed, or the delicate game of chess as played by the Justices in their attempts to shape and sculpt the law into a mass which exists as they believe it should exist. The author, perhaps, pushes the reader ever so slightly to the latter approach.

One piece of formatting that I would like to commend was Toobin’s methodical march through each of the Rehnquist/Roberts Court Justices background and

personal history. Leaving aside the ideological differences the reader may have with some or all of the Justices; these are wildly fascinating and excruciatingly bright individuals. Toobin mercifully allows the readers a break from the pressure-pumping legal theory so that they can step back and see these jurists for who they are. Which one reads briefs only by moving his chair around his chambers to follow the daylight? Which one went through a fundamental shift in legal principles through the study of foreign law? Which one had exactly one cigarette and one “Miller’s Lite” everyday at lunch? I had to re-read the sentence in this book that identified Ruth Bader-Ginsburg’s closest friend on the Court as Antonin “Nino” Scalia. (I looked again when writing this review and, amazingly, the sentence still remains as I first read it.) Future readers should be sure to take the time to consider these magnificent idiosyncrasies identified by the author.

The clear focus of the book, in terms of time period, is the Rehnquist Court. Toobin quickly identifies for the reader the fact that a more historically accurate label for that Court would be: “The O’Connor Court.” Interestingly, Justice O’Connor and Chief Justice Rehnquist met at Stanford Law School (Rehnquist finished 1st and O’Connor 3rd in the same 1952 graduating class) and maintained a friendship that lasted more than 50 years. The friendship, however, did not translate into a legal partnership when it came to jurisprudence. As Toobin observes: “Indeed, more than anyone else on the Court, it was O’Connor who frustrated Rehnquist’s hopes of an ideological transformation in the law and who came, even more than the chief, to dominate the Court.” They shared a passion for State autonomy, but split on many important social issues that came before the court such as privacy, separation of church and state, and gay rights. I’ll leave it to you to figure out which Justice took which side.

It should be pointed out that while Toobin has many interesting anecdotes and

factoids, the book is chocked-full of legal history and analysis. The anecdotes and factoids work to soften the academic nature common to books like these that seem to spiral out of control by their own inertia. I do not claim to have read an exhaustive list of books on the Supreme Court, but of those that I have read, this book does by far the best job of fighting off the weight and friction of academic writing. We all know the feeling: you’re reading a deeply academic text, or one which is loaded with historical legal content, when suddenly your head begins to throb. I predict the reader will never even approach that point with this seamless, captivating text.

The most interesting theme of the book, and the theme best articulated, is the pronouncement that we are in the middle of a war; and this war is not being fought on the classic battlefields. It is a war between the “Conservative” and “Liberal” thinkers (and judges). As if every reader of this review didn’t already know that. The book however grabs the reader by the shoulders and shakes you, as it shouts: “This battle is happening right this moment, and you do not want to lose!”

The Rehnquist Court, through the leadership of its conservative voting block, wanted to reign in the decisions of the Warren Court. In terms of a broad, “thumbs up or thumbs down” grade, the Rehnquist Court failed in their attempt to gut the foundations of the “liberal” Warren Court jurisprudence. The biggest failing in the eyes of the conservative movement, was the inability of the Court, even when packed with Republican appointees, to overturn *Roe v. Wade*. Toobin early and often implores the reader: make no mistake, for the conservatives, *Roe* is the target.

To be clear, it is not that the abortion debate itself captivates the conservatives, but rather, as Toobin points out, *Roe* is, for that group, the symbol of cases in which Justices/Judges have created laws not articulated by the Constitution; it is the symbol of judicial activism. People like Justice Sca-

lia and Justice Thomas actually tear their hair out over Justice Blackmun's decision in *Roe*. Here was a Nixon appointee authoring the expansion of a right to privacy not specifically penned in the Constitution. Toobin offers the reader a chance to be a fly on the walls of the Court members' chambers when those battles were being fought.

As a way of illustrating to the reader that this "war" is still very much going on, Toobin ties the Rehnquist Court's pursuit to the holdovers now on the Roberts' Court. The Rehnquist Court's final shot at *Roe* came in the form of *Planned Parenthood v. Casey* in 1992. The case had been accepted and it dealt with a Pennsylvania law that restricted, in many ways, a woman's access to an abortion. The Third Circuit Court of Appeals had sustained most of the law that included waiting periods for women seeking abortions, mandated lectures to those desiring the procedures, and a provision that required married women discuss the procedure with their husbands. The three-judge panel upheld most of the law, but a majority struck the provision about wives needing to tell their husbands because they feared for violent reactions by husbands to their wives' decisions. The lone dissenter, the one who felt the law in its entirety should be upheld: Judge (now Justice) Samuel Alito, Jr.

The genius of this book can be found in the fact that it does what almost every well-written book on the Supreme Court does — gives the reader a look into this secret world. At the same time it strikes a chord with those readers willing to listen and understand that just because President Bush is gone and Chief Justice Rehnquist was never able to bring about the conservative transformation he desired, the battle is not over and won. Quite the contrary, the bell has rung, and the last round on all of the above issues and in the issues we as members of this organization hold so sacred has yet to be fought.

This fantastic literary work is, for the members of this organization, a call to action; it is a reminder that the battles not yet won can be won, and the battles previously won, can similarly, be lost. I hope you enjoy the book.

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Doubleday, 369 pp.

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