

“We now have the opportunity to create a new financial system that will do what human beings need a financial system to do; to create a new economic system that will create meaningful jobs, decent work for all those who want it, one in which the divide between the haves and have-nots is narrowing, rather than widening; and, most importantly of all to create a new society in which each individual is able to fulfill his aspirations and live up to his potential, in which we have created citizens who live up to shared ideals and values, in which we have created a community that treats our planet with the respect that in the long run it will surely demand. These are the opportunities. The real danger now is that we will not seize them.”

Srdan Karalic

Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court**. New York: Anchor Books, 2008. 452 s. ISBN 978-1-4000-9679-4

The Nine: Inside the Secret World of the Supreme Court offers a great insight into the inner world of the Supreme Court, based on interviews with the justices themselves and over seventy five law clerks. Toobin's narrative starts in 1980 on the day that Ronald Reagan was elected president and he traces the changes of the court, in terms of justices, landmark decisions, and ideological shifts (or lack thereof), until the selection of Barack Obama as the Democratic presidential candidate in 2008. Throughout this narrative Toobin provides outstanding insights into the backgrounds and personalities of each of the nine judges who served under Rehnquist (Sandra Day O'Connor, Clarence Thomas, Davis Souter, Stephen Breyer, Anthony Kennedy, Ruth Bader Ginsburg, Antonin Scalia and John Stevens) giving the reader an understanding of the beliefs and experiences that inform each of their Supreme Court decisions and dissents.

Toobin also provides outstanding analysis and description of each of the major court decisions in the twenty years that the book covers. His access to the law clerks and justices allow him to describe the intricate details of how the justices appealed to one another on certain issues, and the inner torment that the justices felt on matters of immense personal interest. He chronicles in great detail the torment of O'Connor over the Casey case and the way in which she came to an agreement with Souter and Kennedy to work secretly on an opinion in the case. We also get great detail regarding Bush v Gore and the Guantanamo Bay controversy.

The prevailing theme of *The Nine* is the ideology of the Court and the way that the appointment of justices is influenced tremendously by the ideology of both the justice themselves and that of the presiding president. Toobin looks in great detail at the selection processes undertaken by Clinton and Bush, in their attempts to fulfill manifesto promises and the ideological desires of their parties. The issue of Roe v Wade features prominently throughout the book, signaling its continuing importance in American politics, as well as alerting an outsider reader such as myself to just how much of a contested and controversial

issue it remains in the U.S. With this in mind Toobin attempts, through all aspects of his narrative, to “plumb the court’s deepest mystery; why a tribunal so stuffed with Republicans hasn’t shifted more radically rightward.”¹ Common sense would suggest that a strong Republican presence on the bench would allow the party to achieve its greatest aim by overturning the Roe decision. Instead, Toobin paints a picture of a court where moderation prevails “the court is defined more by continuity than change” (p. 27), but where political agendas still hold sway.

As mentioned, Toobin’s focus is very much on how political ideology affects the decisions of the court. One of his main arguments is the extent to which the political leaning of the president affects the court, with one of his closing points being that “one factor – and one factor only – will determine the future of the Supreme Court: the outcomes of presidential elections” (p. 395). However, the evidence for such a claim, both in the rest of the book and in reality, is limited.

Toobin himself spent the opening chapters of the book summarizing how, despite the bubbling of a “conservative revolution” and the appointment of three supposedly conservative justices by Ronald Reagan, such a shift to the right failed to materialize. He states in the first chapter that “With Rehnquist, O’Connor, Scalia, Kennedy, Souter and Thomas completing the roster, how could the conservative cause lose?” (p. 26) and then proceeds to tell us how the moderate view of some justices, and the personal concerns of O’Connor, led to the decision being maintained. This would imply that when faced with decisions of huge social significance the justices are more than willing to depart from the goals and ideals of the president that elected them, with O’Connor in particular playing a crucial role in “upholding the essence of Roe” (p. 62), and thus making Toobin’s argument that the outcomes of elections drive the path of the Court obsolete.

On the other hand the case of *Bush v Gore* provides a degree of evidence of how much the decisions of the justices are affected by their politics and ideologies. We are clearly told how Rehnquist, Scalia and Thomas predictably sided with Bush and how O’Connor’s agreement was almost guaranteed (p. 200). However O’Connor chose to side with Kennedy’s alternative majority opinion because she “did not relish the idea of joining with the three conservative judges on such a politically charged case” (p. 200), denoting an awareness amongst the justices of how their political roots are perceived as being a determining factor by the public. This awareness is also expressed regarding Souter in *Casey*, where Toobin accuses him of being naive in his belief that law could be separated from outside events (p. 61). This suggests that appearing neutral is important for many justices and that they resent the accusations of the Court serving a political agenda, undermining Toobin’s argument that the president influences the path of the court. Also, I am wary of Toobin accusing Souter of being “naive” as it points to a real bias on Toobin’s part and I believe undermines the neutrality and validity of his argument. He is clearly liberal in his opinions and at times this overruns the narrative and forces the reader to see things a certain way, ignoring alternative arguments.

¹ David Margolick, “Meet the Supremes,” *The New York Times*, September 23, 2007, <http://www.nytimes.com/2007/09/23/books/review/Margolick-t.html>.

Furthermore, whilst Toobin states that O'Connor allied with Kennedy to ensure she was in the middle, her favored position on the court according, she also demanded a provision on the opinion stating that the decision made by herself and Kennedy was "limited to present circumstances" (p. 203). This is crucial in the debate over the political allegiance of the justices. By including such a provision O'Connor was clearly helping Bush in the immediate circumstances and by departing from the traditional role of the court to advance the interests of a presidential candidate she strongly supported O'Connor is adding fuel to the fire that the politics of the judges affects their decisions.

It would therefore seem that there is a degree of accuracy in Toobin's claim that presidency affects the path of the court because at times it appears that the judges have a strong allegiance to the party that appointed them and have a desire to help them achieve their political goals. The situation is complicated though by the fact that the Court took a moderate route for much of the Rehnquist years when one would have expected them to become inherently conservative. If the court did not take that direction when it had a conservative majority it would seem that such an argument is irrelevant in the broader context of the Supreme Court.

I therefore feel that Toobin's argument that the presidency determines the decisions of the court to be exaggerated but not completely inaccurate. Politics undoubtedly has a role in the Supreme Court because the Justices have to be aware of the public feeling over the key issues that are brought to the court. But Toobin seems to imply, in light of *Bush v Gore*, that the Justices will twist the law to favor the party in power. Whilst there is certainly evidence for this, I feel it is a gross exaggeration, as seen in the early Rehnquist years, hence Toobin contradicts himself in the text.

Finally, Toobin asserts that the Bush appointments of Roberts and Alito are what will finally give the conservatives the votes needed to achieve their aims. Toobin suggests that as of September 2008 the conservatives were within one vote of total control, but how much can Alito and Roberts really change the direction of the court? There will always be Justices who are more moderately inclined and aware of public opinion to counter any real revolution. Furthermore, with Obama's presidency Supreme Court appointments are, by Toobin's logic, likely to be liberal. Any revolution is likely to be stalled for the duration of Obama's presidency and unless the Republicans gain massive support and the luck of many appointments in the near future such a revolution seems unlikely to ever happen.

In conclusion, whilst I very much enjoyed *The Nine* I believe that there are flaws in Toobin's main arguments and that his liberal bias very much affects the accuracy of his predictions for the future of the court. One could be forgiven for taking his view as the truth when coming to the book relatively uninformed. His style of writing, novelistic with huge emphasis on character, gives a personality to each judge which makes the reader view them as principled human beings and makes it easy to read each of their decisions ideologically. However, this is undoubtedly the purpose of anecdotes and helps Toobin drive home his point and paint a picture of Justices that are severely influenced by their beliefs and ideals. I feel that such an argument must be taken with a pinch of salt, because if the Supreme Court is led by the president then it will fail to fulfill its judicial role.

Hannah Wilkes