BOOK REVIEW

Real World Takeaway in a Behind-the-Scenes Look

The Nine: Inside the Secret World of the Supreme Court
Jeffrey Toobin (Doubleday 2007), 350 pages

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Although *The Nine*[1] is not a new book, it has often made its way to being a recommended read for incoming law students and thus merits an updated review.[2] Written by Jeffrey Toobin in 2007, *The Nine* describes the behind-the-scenes workings of the "Rehnquist Court" during the Clinton and Bush administrations.[3] "The Nine" primarily focuses on the group of Justices that included William Rehnquist, Antonin Scalia, John Paul Stevens, Clarence Thomas, David Souter, Stephen Breyer, Anthony Kennedy, Ruth Bader Ginsburg, and Sandra Day O'Connor.[4] This configuration of the Court cemented its legacy by deciding cases including *Planned Parenthood v. Casey,*[5] *Grutter v. Bollinger,*[6] *Hamdi v. Rumsfeld,*[7] and infamously, *Bush v. Gore.*[8] The Court also overturned *Bowers v. Hardwick*[9] during this time period by its decision in *Lawrence v. Texas.*[10]

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1 JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007).

2 *See, e.g.,* Lee Fisher, *Tuesday Morning Message 5.28.18: "Dean's 2018 Reading List"*, CLEVELAND-MARSHALL COLLEGE OF LAW, https://www.law.csuohio.edu/newsevents/news/tuesday-morning-message-5292018-deans-2018-reading-list.

3 *See* TOOBIN, *supra* note 1, at 1–8.

4 The book focuses primarily on what might be described as the O'Connor dominated Court, but also covers the selection and confirmation processes that led to John Roberts replacing William Rehnquist and Samuel Alito replacing Sandra Day O'Connor, who stepped down to care for her ailing husband. *Id.* at 279–318. The beginning of the book covers the transition from the Burger Court to the Rehnquist Court.

5 505 U.S. 833 (1992) (reaffirming the central tenets of *Roe v. Wade*).

6 539 U.S. 306 (2003) (upholding the University of Michigan law school's affirmative action admissions policy).

7 542 U.S. 507 (2004) (upholding right to detain enemy combatants, but granting U.S. citizen detainees the right to Due Process).

8 531 U.S. 98 (2000).

9 478 U.S. 186 (1986).

10 539 U.S. 558 (2003).

The book is primarily known for its intimate look into how the Rehnquist Court functioned, including the politics of the decisionmaking process, and how the unique natures of personalities fit into what ultimately became the majority decisions of the Court. Although the book is a fascinating look at the functioning of the Court from both a historical and psychological perspective, it is also a gem when it comes to identifying the skills of communication necessary for effective legal advocacy.

If there is one theme evident throughout the book that would please most admirers of good legal writing, it would be the recurring emphasis on "know your audience." The concept of knowing and understanding the expectations of one's audience was evident in every aspect of the Court's functioning, including the interactions the Justices had with each other. "Knowing one's audience" was also an essential attribute of the most successful advocates who came before the Supreme Court to argue cases that would chart the destiny of law in the United States.

The book describes in detail how the Justices dealt with one another for purposes of persuasion. As most are aware, the Court, during the past two decades especially, has generally functioned with a 5-4 split on major decisions. More often than not, the swing vote of the "Nine" during this time period was Justice Sandra Day O'Connor.[11] Both sides needed to use the appropriate persuasive tactics to convince Justice O'Connor to side with their position. Given that Justice O'Connor was a political conservative who prioritized "Solomon like" solutions as well as advancing women's rights, this entailed understanding what O'Connor would or would not sign on to.[12] She disliked "absolutes" where only one side had a takeaway.[13] Nonetheless, she was adverse to reaching decisions, even those that went along with her "middle of the road" mindset, that might erode women's rights.[14]

The knowledge of the "audience" became a well-choreographed play during oral arguments. As good legal advocates know, judges do not always ask questions of the advocates that they would like to have answered.[15] Sometimes the judges ask carefully crafted questions so that the advocates will make points they would like to be making themselves to their fellow jurists.[16] In *The Nine*, Justices often asked questions of the advocates as an attempt to persuade a Justice (often O'Connor) who might

11 *See* TOOBIN, *supra* note 1, at 7.

12 *Id.* at 38–40.

13 *Id.*at 7–8.

14 *Id. at* 39–40.

15 *Id.* at 129–31.

16 *See, e.g., id.* at 82–84, 133–34.

be on the fence regarding a position, or, in other cases, to rescue a position that seemed to be slipping away because of the dominance of one Justice or another, or even when an advocate became trapped by a particular line of questioning.[17]

The author does well to describe the strategic persuasion occurring during oral arguments. Although Clarence Thomas is known not to ask questions, Toobin described how other Justices used the argument as a persuasive performance, doing their best to capitalize on momentum, or, in some cases, derail it.[18] Antonin Scalia was a master of this, often coming up with a "quip" to interrupt the momentum of an argument that seemed to be gaining favor with the swing Justices. Although Scalia's quips often got a laugh from the audience, they were yet another type of persuasive tactic that went on during oral argument.[19]

The book also does well to describe the sophisticated level of persuasion necessary at the Supreme Court level for advocates coming before the Court. Attorneys before the Court are most often chosen purposely for their experience in understanding the nuances necessary in making Supreme Court arguments, and not necessarily for their expertise in a particular field.[20] The key to successful argument for these most elite advocates is having the intuition about what might be happening on the bench and adjusting accordingly. Toobin describes the arguments as a near intricate chess game in which the Justices are attempting to control both the argument and each other to reach a particular result,[21] while simultaneously, the advocates are attempting to control the Justices and, of course, the outcome of the case.[22]

Although the psychology of oral arguments often takes center stage in the book, Toobin does not shortchange the necessary persuasive tactics of the briefs. Toobin points out how advocates attempted to craft even the questions presented in a strategic manner so that certain Justices would respond to the position positively.[23] The book emphasizes that the most successful arguments were not necessarily the most intellectually complete, but the ones that would target the center of the Court.[24] For

17 *Id.* at 126–27.

18 *Id.* at 129–31.

19 *Id.* at 83.

20 *See, e.g., id.* at 158–70 (discussing the "teams" assembled for arguing *Bush v. Gore*).

21 *See, e.g., id.* at 194–95, 219–21.

22 *Id.* at 213–14.

23 *See, e.g., id.* at 46–47, 218.

24 *Id.* at 133–36, 222–27.

that, Toobin points out, advocates needed to be aware of the history of the Court, the political climate, and personalities of the Justices.[25]

As a perfect example of this type of persuasive strategy, in *Grutter v. Bollinger*, which involved a challenge to the University of Michigan Law School's affirmative action policy, the University asked high ranking military officers (including General Norman Schwarzkopf) to write an Amicus Brief arguing that affirmative action was necessary in order to maintain a strong military.[26] Although the Court acknowledged that the need for a diverse military command (brought about through racial preferences) was not directly analogous to racial preferences in law school admissions, the Military's support convinced Justice O'Connor to uphold the racial preference policy as valid. [27]

Overall, the book provides a fascinating look into how the Supreme Court operates and how the personalities and idiosyncrasies of the Justices contribute to decisionmaking. But more than that, the book is an intriguing look at the nuances of persuasive communication on all its levels. The book reaffirms what law school teaches students: it is not enough to know the material; one must still communicate it in a way that will be persuasive for its intended audience.

25 *See, e.g., id.* at 88–98 (discussing the successes of Jay Sekulow, who understood the evangelical shift that was overtaking a large segment of conservatism). *But see id.* at 168–69 (discussing the deficiencies of the advocates in *Bush v. Gore*).

26 *Id.* at 213–14.

27 *Id.* at 214–21.