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Breaking Silence and Legal Ground

Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court

Jan Crawford Greenburg Penguin: 340 pp., \$27.95

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YOU know the name "Woodward," as in Bob Woodward, whose insider-based accounts of Washington decision-making have been runaway bestsellers since Richard Nixon's downfall. Well, now you should remember the name Greenburg because ABC News reporter Jan Crawford Greenburg's account of what's been happening at the U.S. Supreme Court in recent years is the richest and most impressive journalistic look at the panel since Woodward co-wrote "The Brethren" in 1979.

Greenburg's book is based on "more than one hundred interviews" with "nine Supreme Court justices," "scores of their law clerks," and "scores of current and former administration officials" who helped choose new justices -- from Antonin Scalia in 1986 to Samuel A. Alito Jr. in 2005.

Justices Sandra Day O'Connor, who retired in 2005, and Anthony M. Kennedy talked to Greenburg "on the record" -- O'Connor for four hours -- and boy did they talk.

Most other interviewees spoke "on background," meaning not for direct quotation by name, but Greenburg also recounts newsworthy personal thoughts from the normally reticent Clarence Thomas as well as new Chief Justice John G. Roberts Jr.

There are so many standout stories in "Supreme Conflict" that the book is an absolute must-read for anyone interested in the court. Take Bush vs. Gore, the 5-to-4 decision that resolved the 2000 presidential election. O'Connor told Greenburg that the Florida Supreme Court, whose approval of a partial recount had left the outcome up for grabs, was "off on a trip of its own."

Kennedy was even more outspoken. "A no brainer! A state court deciding a federal constitutional issue about the presidential election?" he exclaimed when Greenburg asked why the justices decided to step in. "Of course you take the case." Alluding to Democratic candidate Al Gore's initial challenge to the Florida tally, Kennedy added that "it would be odd if the people that brought the litigation would later say the courts shouldn't intervene." O'Connor admitted to Greenburg that the written opinion was not "the Court's best effort" and that "given more time, I think we probably would've done better" in explaining the decision, but "it wouldn't have changed the result." Kennedy too told Greenburg that "the problem with Bush v. Gore was that it came so fast, it had to be decided so fast," although "conceptually, it was a case of medium difficulty" and no more. Greenburg's portrayals of O'Connor's and Thomas' experiences on the court break significant new ground. Soon after O'Connor joined the panel in 1981, liberal icon

William J. Brennan Jr. criticized her reasoning in language she found personally offensive. The most pointed remarks were penned by Brennan's law clerks, but their off-putting effect, Greenburg argues, "helped keep the Court's first female justice in the conservative camp longer than she might have been otherwise." O'Connor's move to the center accelerated when Thomas joined the Court in 1991. Although some analysts and pundits disparagingly characterized Thomas as Scalia's "intellectual understudy," Greenburg dismisses those claims as "grossly inaccurate" and describes how Thomas "acted independently of Scalia right from the start."

In persuasive and highly readable detail, Greenburg traces how Thomas, from his first case, "acted as a catalyst, spurring the other justices -- O'Connor, in particular -- to rethink their positions and realign themselves." In that initial case, Thomas hesitantly voted in lone dissent, but then Scalia, Kennedy and the late Chief Justice William H. Rehnquist changed their votes to side with Thomas. In a second case a few days later, Scalia again "changed his vote to join Thomas," as he also did "on several other occasions" during Thomas' first year.

Far from being anyone's follower, Thomas' forceful intellect served to "reshape the Court" in unexpected ways. Just as O'Connor earlier had shied away from moving leftward because of Brennan, Thomas' starkly conservative views "actually pushed moderates like O'Connor further to the left" during the 1990s.

"Supreme Conflict" brims with important new information. Take a trio of executive branch memos Greenburg has uncovered that discuss Scalia, Kennedy and David H. Souter as potential justices before they were nominated. In 1986, a Reagan administration official warned that because Scalia was "prone to an occasional outburst of temper," he might well "rub one of his colleagues the wrong way," as he soon did with O'Connor.

Later that year, an evaluation of Kennedy observed that he generally "seems to favor the judiciary in any contest between the judiciary and another branch," a prescient foreshadowing of his decisions as a justice.

In 1990, just before President George H.W. Bush selected Souter, then an obscure judge from New Hampshire, a memo cautioned that "there is no real basis on which to evaluate his views on many of the key issues that would come before him on the Supreme Court."

When Souter turned out to be a relatively liberal justice, no one could justifiably cry foul.

But Greenburg's most noteworthy achievement is her revelatory account of how Rehnquist, just two months before he died, effectively forced O'Connor to retire a year earlier than she had intended.

Following Rehnquist's diagnosis with terminal cancer in October 2004, justices and court-watchers alike waited expectantly for him to step down no later than the end of the court's term in June 2005.

O'Connor's husband was suffering from Alzheimer's disease, and in late spring 2005 she visited Rehnquist to discuss their futures.

"We don't need two vacancies," he told her. "Let's just wait. Let's talk later."

O'Connor then decided to remain another year. In June 2005, she again spoke privately with the dying Rehnquist, who surprised her by saying, "I want to stay another year," adding, "And I don't think we need two vacancies," meaning two simultaneous retirements in 2006.

O'Connor, Greenburg writes, "was caught off guard. Rehnquist's implication was clear: She must retire now or be prepared to serve two more years.... Rehnquist, ravaged by cancer and desperately ill, was unilaterally deciding both of their fates."

O'Connor "hadn't thought she'd be retiring at the end of the term," but now she had no choice. "Well, okay," she told Rehnquist, "I'll retire then."

When the justices took the bench on the last day of the term, only O'Connor knew that there would be no announcement from Rehnquist. Four days later, she sent her retirement letter to the White House. "You make the decision, and you live with it," she told Greenburg.

Roberts, then an appellate judge, had almost been dropped from President Bush's Supreme Court shortlist after a "brief and awkward" meeting with Bush's top advisors. Only White House deputy counsel William Kelley's efforts kept Roberts among the five finalists whom Bush interviewed personally.

Roberts was Bush's nominee to succeed O'Connor, but just a few weeks later, Rehnquist died, creating the two simultaneous vacancies that he had told O'Connor must be avoided. Bush immediately shifted Roberts' nomination to the chief justiceship.

After the short-lived and embarrassing nomination of Harriet E. Miers, his inexperienced White House counsel, as a female replacement for O'Connor, Bush instead named Alito, an appellate judge who had been runner-up to Roberts for the initial vacancy.

Greenburg narrates the rise of Roberts, the fall of Miers and the sudden emergence of Alito in quick and compelling prose. Whether Alito and the new chief justice will make the Roberts Court more conservative remains to be seen, but "Supreme Conflict" is a supremely informative and reliable insider's guide to the U.S. high court.

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