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Too Much Opinion and Hearsay, Too Little Fact

## 'The Nine' by Jeffrey Toobin

An opinion-based look at the justices of the U.S. Supreme Court

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IN recent years the annual workload of the U.S. Supreme Court has shrunk further and further. In the 1980s, the court was hearing and deciding as many as 175 cases a year; in its two most recent terms the totals have dropped to 82 and now a century-long low of 68. The justices insist that the shrinkage is not intentional, and legal scholars cite a bevy of reasons, such as fewer disagreements among lower courts, for the reduced numbers.

But the "incredible shrinking docket," as some wags now call it, hasn't led to a decline in the volume of critical commentary about the high court. When the latest term ended June 28, a flock of op-ed articles denounced its rulings, including one that makes pay discrimination more difficult to litigate and another that curtails school districts' ability to consider race when assigning students to campuses. Both decisions may turn out to have far less impact than critics fear, but as ABC News correspondent Jan Crawford Greenburg observed, "some of the liberal commentary" at term's end was "almost breathtaking in its over-the-top-hysteria."

An example may well be Jeffrey Toobin, a staff writer at the New Yorker and a legal analyst for CNN, who calls the year just ended an "epochal term" for the court in his new book, "The Nine." Toobin's fifth book -- previous ones include accounts of the O.J. Simpson case, the impeachment of President Clinton and the 2000 presidential election -- showcases debatable opinions rather than thorough research or original reporting.

Some shortcomings immediately stand out. Almost a decade ago, another book on the court wrongly alleged that the late Chief Justice William H. Rehnquist repeatedly tried to delay the court's consideration of an important abortion case so that it could not be decided before the 1992 presidential election. The docket sheet on the case has disproved that claim, but Toobin repeats the erroneous story, notwithstanding the now-available papers of former Justice Harry Blackmun, which document that the only delay -- of just one week -- stemmed from Justice David H. Souter's request to restate the questions presented in the case.

Toobin also writes that Rehnquist, who died in 2005, suffered from diminishing "intellectual energy" and "stopped trying" to influence the outcome of cases as early as 1998. Reporters who

have covered the court on a daily basis during those years scoff at Toobin's unsupported contention. (He also asserts that one law clerk pushed another into a courtyard fountain during the 1999-2000 term. But those who cover the court say the only such incident they know of occurred in 1989, a full decade earlier.)

Toobin devotes two chapters to *Bush vs. Gore*, the case that decided the 2000 presidential election. He asserts, based on unidentified sources, that Justice Anthony M. Kennedy was overly eager for the court to resolve the dispute even before it came to them. He also stresses that Justice Stephen G. Breyer felt that the Florida Supreme Court's decision to order a statewide recount "didn't pass the smell test." He relies heavily on not-for-attribution comments from law clerks who worked for the court that year, and he states that the clerks "set the tone in the building" each year, not the justices.

Toobin decries as "inept and unsavory" the way the court reached its 5-4 decision, swinging the election to George W. Bush. He suggests that Justice Sandra Day O'Connor's vote sprang from the fact that "she still loved" the Republican Party. More notably, he claims that Souter was so "shattered" that he "seriously considered resigning" and "wept" over "his colleagues' . . . crudely partisan" actions in the case. Souter is well-known for spurning the private, off-the-record chats that most of the justices regularly have with reporters, so journalists often turn to Souter's friend, former GOP Sen. Warren B. Rudman of New Hampshire, for guidance on Souter's views.

Rudman has denounced Toobin's claims that Souter cried and considered resigning as deserving of "the Pulitzer Prize for fiction." "Nobody is closer to David Souter than I am and that story is false," Rudman angrily told the *New Hampshire Union Leader* this month. Toobin, he added, "never talked to me. You'd think he would have called me," rather than make such a dramatic claim based solely on some anonymous source. Toobin, in an e-mail to the *Wall Street Journal's* legal blog, responded: "I trust that when [Rudman] reads 'The Nine' in its entirety, he will find the portrait of his friend Justice Souter nuanced and accurate."

Toobin further argues that the aftereffects of the ruling in *Bush vs. Gore* include the "transformation" of Justice Kennedy into a far more liberal jurist. Grandiloquently declaring that "the Court and the nation would never be the same," he also contends that Kennedy, whose views he disparages as "intellectually incoherent," "was shaped by one influence in particular -- his exposure to foreign law and foreign judges," a reference to his annual summer sojourns in Salzburg, Austria, home to many international judicial symposiums.

In recent years, any high court ruling citing legal developments elsewhere in the world has drawn angry condemnation from Justice Antonin Scalia and a host of conservative politicians and commentators. Toobin asserts that foreign contacts have had "a profound impact on the Court," pushing it "and especially Kennedy -- to the left." But he fails to square this claim with Kennedy's decisive votes during the most recent term, which undeniably turned the court into what even he calls "a dramatically more conservative institution." Such an exaggerated characterization of Kennedy suggests a calculated desire to invite controversy.

Toobin's treatment of other court members is similarly disdainful. He calls Justice Ruth Bader Ginsburg "an icy character" who is "slightly disengaged from the real world," and he asserts that

Breyer is "renowned among law clerks for conducting high-volume discussions of Court business in restaurants and other public places." Justice Clarence Thomas and the now-retired O'Connor receive gentler treatment, and Toobin says relatively little about the two newest members, Chief Justice John G. Roberts Jr. and Samuel A. Alito Jr. He applauds O'Connor as "the most important woman in American history," but makes much of Thomas' tardiness in submitting a manuscript to his publisher without mentioning that Thomas' autobiography, "My Grandfather's Son," is coming out on schedule Oct. 1.

In his epilogue, Toobin disputes Roberts' avowal that judges "are like umpires" and "are not politicians." In fact, Toobin declares, "it is ideology, not craft or skill, that controls the outcome of cases," and "what matters is not the quality of the arguments but the identity of the justices." And since ideology "means everything on the Supreme Court," one factor alone will determine the court's future: "the outcomes of presidential elections."

Who will name the successors for the justices most likely to retire next -- Justices John Paul Stevens, Souter and Ginsburg -- is indeed important, but Toobin's insistent reductionism of justices' decision-making to the sole dimension of left-right ideology is far too shallow. Legal scholars such as Harvard's Frederick Schauer warn about pundits' "tendency to exaggerate the Court's importance" and oversimplify its decisions. That admonition is essential when confronted with so purposely provocative a book as "The Nine."

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