

# REVIEWS

## The Supreme Court

Produced by Thirteen/WNET New York

## The Supreme Court: The Personalities and Rivalries That Defined America

by Jeffrey Rosen

Times Books, 2007

Reviewed by David J. Garrow

**ANY TELEVISION** documentary that features Chief Justice of the United States John G. Roberts Jr. as one of its many “talking heads” is certainly a rare opportunity for viewers to get a personal sense of the man who now leads the U.S. Supreme Court. In the four-part PBS series *The Supreme Court*, Chief Justice Roberts addresses subjects ranging from John Marshall, his most illustrious predecessor, who in the early 1800s institutionalized the court’s power to interpret the U.S. Constitution, to William H. Rehnquist, whom Roberts once served as a law clerk and whose 2005 death led to Roberts’ elevation.

Throughout the series, the producers make use of a veritable army of talking heads. Some interviewees, such as David G. Post of Temple University, R. Kent Newmyer of the University of Connecticut and Lucas A. Powe Jr. of the University of Texas, are superbly well-spoken historians who bring energy and meaning to the narrative. Other academics, however, seem pompous or slightly goofy, and the producers should have reduced their oversized roster to the most compelling speakers.

The first hour focuses largely on Marshall and the story of how he outfoxed President Thomas Jefferson, his political rival, in *Marbury v. Madison*, the 1803 decision in which the court bestowed on itself the power of judicial review. Illustrating a television account of a prenewsreel era requires heavy reliance on static old prints and paintings, but the producers try to enliven the program with reenacted dramatizations of scenes like Jefferson’s inauguration, where Marshall administered the presidential oath of office.

The second hour traces the court’s history from the aftermath of the Civil War to Franklin Roosevelt’s New Deal in the 1930s. Three justices—John Marshall Harlan, Stephen J. Field and Oliver Wendell Holmes Jr.—serve as focal figures. The profusion of academics describing the justices’ jurisprudence, however, makes the show feel like undergraduate constitutional history as taught by a tag team of 15 different professors, none of whom speaks for longer than 90 seconds at a time.

The program also features extensive footage of what’s presented as Holmes’ home library, including a memorable shot of what are depicted as his blood-stained Civil War uniforms. Many viewers might watch this segment and wonder where Holmes’

house is and what its visiting hours are. But this too is only a re-created dramatization. At the location of Holmes’ house, 1720 I St., N.W., in Washington, D.C., now stands only a bland office building.

The final two hours suffer from far more substantive shortcomings. The first, covering the 1940s through the 1960s, is disproportionately focused on Justice Hugo L. Black, a former Ku Klux Klansman and Alabama senator, who became one of the court’s most outspoken liberals in the 1950s. Chief Justice Earl Warren is portrayed as a decidedly secondary figure, and the Warren Court’s most widely praised jurist, John Marshall Harlan II—the grandson of the late 19th-century justice—is never even mentioned.

The late Chief Justice Rehnquist anchors the last hour. Some additional interviewees, including retired Justice Sandra Day O’Connor, *USA Today* reporter Joan Biskupic and A.E. Dick Howard of the University of Virginia, add verve, but this show too is occasionally troublesome. Misleading narration falsely suggests that Justice Harry A. Blackmun was undecided about



Atlanta Daily World editor William Gordon (right) and pressman Kimber Boddie read the *Memphis World’s Brown* coverage. The papers were part of the nation’s first black newspaper chain.



his vote in *Roe v. Wade* until he received advice from his wife and daughters. Justice William J. Brennan Jr., whose role as Earl Warren’s most influential colleague is mentioned just once in the third hour, is featured as Rehnquist’s ideological opposite. The producers, however, allow a conservative former Reagan administration Justice Department official, Charles J. Cooper, to assert that Brennan as a single justice exerted “greater influence on domestic social policy than any president had had.” Biographers of Lyndon B. Johnson would surely challenge the accuracy of that description.

Cooper’s characterization of Brennan is mirrored by a closing comment from Larry D. Kramer of Stanford University, who calls the Supreme Court “a huge institution at the center of American politics.” That theme serves the producers’ grandiose

aspirations, but more careful and measured scholars refrain from such easy exaggerations. In a landmark article in the *Harvard Law Review* this past November, Frederick Schauer of Harvard makes a powerfully persuasive argument that the Supreme Court is actually far less involved in the political issues that most concern Americans than critics of the court regularly claim.

Anyone who chooses to watch these shows must do so skeptically, and the four hours would be far better spent reading Jeffrey Rosen's superbly well-written companion volume, likewise titled *The Supreme Court*. Rosen, a law professor at George Washington University who writes regularly for *The New Republic*, *The Atlantic* and *The New York Times*, is a far more trustworthy guide to the court than the TV documentarians. Rosen too focuses first on Marshall and Jefferson, then on Holmes and the elder Harlan, but he balances his treatment of the Warren Court justices far better than the TV program.

The most valuable parts of Rosen's book concern the Rehnquist and Roberts courts. Rehnquist exemplified what Rosen identifies as the most desirable traits for a Supreme Court justice: "A pragmatic disposition, a degree of humility and common sense, and the ability to interact well in groups—these have proved over time to be more important qualities than academic brilliance or rigid philosophical consistency in determining a justice's long-term influence."

In stark contrast, Rosen identifies Justice Antonin Scalia as a present-day exemplar of undesirable judicial traits. When he joined the court in 1986, Scalia told C-SPAN that "judges ought to make an effort to avoid becoming public figures, because it's not their personalities or their particular viewpoints that they are supposed to be promoting." As Rosen highlights, Scalia has "ignored his own advice" and has repeatedly proven "unable to restrain himself from broadcasting his views on topics unrelated to his judicial duties. By repeatedly inserting his own personality into public debate, he called his impartiality into question."

Rosen also obtained an interview with

Chief Justice Roberts. Asked about his 17 predecessors, Roberts answered that "certainly a solid majority of them have to be characterized as failures." Roberts strongly criticized the issuance of fractured decisions, remarking that the court "over the past thirty years has been eroding, to some extent, the capital that Marshall built up" with unanimous rulings two centuries ago.

Roberts told Rosen that the court needs to "refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution." Those are exceptionally strong public words from a sitting chief justice, but Roberts went on to speak of what he called "the failure in *Bush v. Gore*," the controversial court ruling that decided the 2000 presidential election. "It's a high priority to keep any kind of partisan divide out of the judiciary," he said, and only time will tell whether Roberts' own votes will live up to that standard.

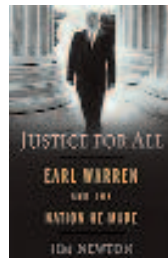
Rosen observes that Roberts exhibits "a temperament that suggests he has many of the personal gifts and talents of the most successful justices" in the court's history. Rosen may well be right, and his book is a wonderfully informative guide to the Supreme Court both past and present.

## Justice for All: Earl Warren and the Nation He Made

By Jim Newton

Riverhead/Penguin, 2006

Reviewed by Chuck Leddy



**AFTER HIS** appointment as chief justice of the United States in 1953, Earl Warren emerged at the center of a national controversy that continues to rage. Warren helped trigger the civil rights movement and unabashedly championed civil liberties, but he also fueled an ongoing debate on the proper role of judges. Current attacks on "activist judges," such as those in Massachusetts who ruled in favor of gay marriage in 2004, are a continuing critique of Earl Warren's position as an unelected "legislator on the bench."

Nominated by Dwight Eisenhower, who would later consider the move one of the biggest mistakes of his presidency, the new chief justice wasted no time in making his mark. In his first major decision—1954's *Brown v. Board of Education*—Warren successfully lobbied his new

judicial colleagues to issue a unanimous decision that contravened six decades of judicial tolerance of state-sanctioned racial discrimination.

*Los Angeles Times* journalist Jim Newton has done a wonderful job describing Warren's long career, and the majority of the book is devoted to his time on the bench in California before he became chief justice. This is by far the most valuable and trailblazing part of the biography. While Newton is not a lawyer or a constitutional scholar, he has a masterful understanding of the history of Warren-era California.

Earl Warren was born in Los Angeles in 1891, and grew up in Bakersfield. He first became interested in the law at the age of 12, says Newton, when he attended a sensational local murder trial. Warren's father was a staunch railway union member who was fired for his union activities. Young Earl would become a Progressive Republican, though his political record in California was beset by ideological inconsistencies.

As assistant district attorney of Alameda County, Warren built his reputation by putting corrupt government officials and gamblers behind bars. In 1936 he successfully prosecuted four union members accused of murdering their boss, calling the murder conspiracy "communistic" and earning the enmity of California's leftist unions. When pro-union Democratic Governor Culbert Olson visited the convicted killers in prison and considered pardoning them because of alleged irregularities in their prosecution, an enraged Warren ran for governor against Olson and was elected to his first of three consecutive terms.

California's economy boomed due to defense spending during World War II, allowing Warren to increase state spending for social services while cutting taxes. He was considered a bipartisan leader of rare common sense. Yet Warren infamously supported interning California's Japanese after Pearl Harbor. Only in his posthumously published memoirs would the stubborn Warren express regret for his role in the whole episode.

Republican presidential standard-bearer Thomas Dewey selected Warren as his running mate in his unsuccessful 1948 campaign. Warren's chances in the 1952 Republican presidential primaries disap-

peared when General Dwight Eisenhower became the instant frontrunner. California Senator Richard Nixon promised to support Warren's candidacy, but secretly worked for Eisenhower and became the war hero's running mate. Warren never forgave Nixon's backstabbing, and the two remained enemies for life. Yet Warren and Eisenhower hit it off and despite loathing Nixon, Warren worked for the victorious Republican ticket. A grateful Eisenhower promised him the first open seat on the Supreme Court; when Chief Justice Fred Vinson died a year later, Earl Warren got the nod.

Warren's brilliant political skills molded the majorities behind his judicial opinions. A court that had been fractious under Vinson became cohesive under Warren. Still, Warren did meet with opposition, most famously from Justice Felix Frankfurter, who preferred that judges defer to the legislature instead of trying to decide "political" issues like *Brown*, which began 15 years of judicial activism led by the hard-charging Warren.

In addition to supporting civil rights and the rights of the criminally accused, the Warren Court established a judicially created "right of privacy" that would become the legal foundation for *Roe v. Wade*. Critics accused Warren of usurping authority belonging to the states and chided him for handcuffing law enforcement with the *Miranda* decision, which guaranteed rights for those accused of a crime. Warren courted more controversy by heading the commission that investigated the assassination of President John Kennedy. When the commission reported that Lee Harvey Oswald had acted alone, conspiracy theorists howled their disagreement.

Earl Warren remains the most divisive judge in American history, hailed by liberals as a patron saint and demonized by conservatives as a black-robed dictator. Jim Newton's exhaustively researched and elegantly written biography won't settle the longstanding debate, but it shows that Warren was neither saint nor Satan, but a man who, over a long career, did his best to render justice as he saw it. □

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