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The Oath: The Obama White House and the Supreme Court by Jeffrey Toobin (book review)

John Paul Jones

University of Richmond, jjones@richmond.edu

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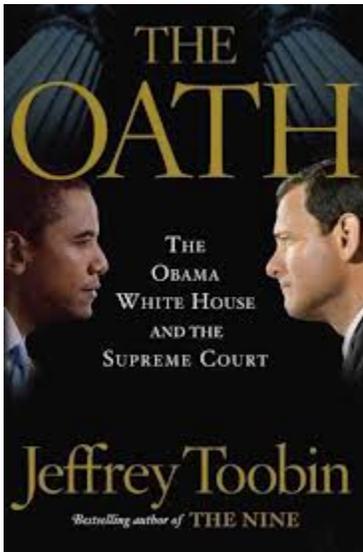
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THE OATH: THE OBAMA WHITEHOUSE AND THE SUPREME COURT by Jeffrey Toobin. Doubleday 2012. Pp. viii/325. ISBN: 978-0-385-52720-0

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For anyone with an interest in the politics of courts, Jeffrey Toobin's *The Oath* is a good read. Laypersons might see it as a busman's holiday for lawyers working in American appellate courts, but NAACA members surely appreciate more than most how unique a judicial institution is the Supreme Court of the United States. Thus, there is much to which those working backstage in other venues can relate, but much more offering them frissons of the unusual.

His publisher presents Toobin as a staff writer for the *New Yorker* and a legal analyst for CNN. Other sources reveal him to be a graduate of the Harvard Law School, who clerked briefly for Judge Lumbard of the United States Court of Appeals for the Second Circuit before joining Lawrence Walsh in prosecuting various White House officials for offenses relating to the Iran-

Contra Affair. Toobin was the junior member of the team that prosecuted Oliver North, at that time the Deputy Director of the National Security Council. Toobin's first book was about that case, and Judge Walsh's opposition to its publication prompted Penguin Books and its young author to seek a court order restraining Judge Walsh from harassing and threatening his former associate. In the end, publisher and author had to settle for a declaratory judgment that the book's publication would not violate the Federal Rules of Criminal Procedure or any contractual or fiduciary duty owed by Toobin to Judge Walsh or the Office of Independent Counsel.

Toobin spins a good yarn from naturally interesting material more or less the product of thorough research and sound analysis. Although the work is not annotated with end- or footnotes, it is followed by a respectable collection of notes spanning eight pages and a very good index.

His book is really two in one, as reflected in its full title, *The Oath: The Obama Whitehouse and the Supreme Court*. The short title aptly describes the book's seventeen-page prologue; the subtitle refers to the 201 pages that follow, reworking several *New Yorker* pieces on the subject. Prologue and essay collection are neatly juxtaposed, artistically more than the sum of the parts.

The short title refers to the oath of office taken by every President of the United

States. It is a curiosity of our national constitution, largely ignored by scholars, that the oath prescribed for the federal president is dictated verbatim in Article II, section 1, clause 8. It obliges him (or her) to faithfully execute the office and to support and defend the Constitution. Why it was deemed necessary to be so specific is lost in time. Elsewhere, in Article VI, section 3, an oath is prescribed for all other officers, state and federal. That prescription calls only for a pledge to support the Constitution. Additional undertakings (like faithfully executing duties) and other details are left for others to supply. That the oath in Article II on the other hand calls for the President to “preserve, protect and defend” the Constitution can be laid to George Mason and James Madison, who successfully moved for amendment of a composition by the committee on detail. As Matthew Pauley has pointed out in his fascinating book about the presidential oath, “office” has long meant “duty.” That leaves us to ponder what else the Framers must have considered the duty of the President, given that they opted for adding to it preserving, protecting, and defending the Constitution.

The weight of available evidence argues against the version of George Washington’s inaugural oath taking that has him supplementing the constitution’s text with “so help me God,” but that tradition is now deeply embedded in Presidential practice. As Toobin points out, while the Constitution specifies who must pledge, exactly what must be pledged, and when (“Before He enter on the Execution of his office”), it is silent about where and about who, if anyone, must assist or even witness. Nevertheless, it is now to be expected that the oath will be “administered” to the President of the United States by the Chief Justice of the United States. The power of that expectation is evident in the episode

that sets apart the first oath taking by President Obama. Administering the oath to the new President, like a clergyman to a bride, Chief Justice Roberts muffed his lines, leaving the oath taker to find his own way. That departure from script so unnerved members of the new administration that a do-over was considered necessary, and a reprise requested of the Chief Justice. It took place later the same day, in the Map Room of the White House. Afterwards, the President signed his first executive order. It is this episode that Toobin recounts in his prologue, setting the stage for the larger story of inter-branch friction that follows.

The subtitle of *The Oath* is “The Obama White House and the Supreme Court.” Far less attention is paid the former than the latter. Toobin’s focus is primarily on the contemporary Court of which John Roberts is the Chief Justice. His story really centers on the Supreme Court’s treatment of three prominent cases inviting constitutional review: *District of Columbia v. Heller* (2008), *Citizens United v. Federal Election Commission* (2010), and *National Federation of Independent Business v. Sebelius* (2012).

Writers of history differ in their perspectives. Some tell how giants among men dictate momentous events; others tell how circumstances control mere mortals. Toobin is to be counted among the former. His Manichaen conceit pits a Tory Chief Justice against a Progressive President in a struggle for the soul of modern American constitutional law. That is as good a narrative as any, but a reader’s consent ought to be informed by an appreciation that history itself is without form, as opposed to the products of journalists and historians, whose writing supplies narrative form along with polarizing perspective. Toobin’s history makes a good story, but what

happened in the Supreme Court during the period in question might be told by other authors in stories equally compelling but decidedly different. Toobin's accounts of the appointments of Justices Sotomayor and Kagan, for example, heavily emphasize President Obama's decision making, but another rendition might emphasize instead the part played by members of the Senate.

That the President and Chief Justice under discussion are even masters of their own fates, much less mechanics of constitutional destiny, is far from clear. While there is some evidence to buttress Toobin's portrayal of John Roberts as signals caller for the Court, there is also plenty to the contrary. Granted that a Chief Justice enjoys by tradition special power of assignment when it comes to drafting an opinion for the Court, but on that basis to rename the Kennedy Court seems hasty.

In terms of Supreme Court history, The Oath is a relatively shallow dig. Among the cases with which it is preoccupied is *Citizens United v. Federal Election Commission*, in which the Court, by reference to the First Amendment, held unenforceable certain regulatory restrictions on the financing of political campaigns. In that case, the Court declared unconstitutional restrictions on donations by corporations, on the assumption that corporations have rights similar to natural persons when it comes to putting their money where their mouth might be regarding a political issue. Toobin pronounces the decision radical, even while conceding that the presumption that corporations have judicially enforceable rights against government is at least as old as *Santa Clara County v. Southern Pacific Railroad Co.* (1886), a case about California's taxation of railroad property. A curious thing about that particular precedent

is that the question of a corporation's standing to assert the right to equal protection of the laws is not addressed in the opinion by Justice Harlan for a unanimous Court. Rather, at the opening of the argument, Chief Justice Waite admonished the advocates that arguments of that question pro or con would be unwelcome. The point of law is made only in a headnote, presumably the product of the Supreme Court's reporter, Bancroft Davis, a former railroad company president. In any event, the matter is so long settled that, if any rule of constitutional interpretation might be treated as black letter, corporate personhood surely qualifies. The larger point is that today's Supreme Court has acted more like Supreme Courts of yore than Toobin would have a reader believe.

Some dogs just seem to invite kicking, and *Lochner v. New York* (1905) is one of them. Toobin treats *Citizens United* as the latest in a series of judicial perversions of the Fourteenth Amendment the most outrageous of which was the case of *Lochner*, a Utica cookie maker who worked his bakers longer hours than allowed by law. Dispassionately read, the opinion for the Court in that case had implications that deserve to be labeled, as Toobin does, "breathtaking." But Toobin reinforces myth when he says that "The Court basically asserted that all attempts to regulate the private marketplace, or to protect workers, were unconstitutional." To the contrary, the opinion for the Court conceded state powers of police as applied to commerce, reaffirming *Holden v. Hardy* (1898). The fault to be found with *Lochner* is the Court's more subtle assertion of judicial competence to overrule legislative judgments that such intervention was warranted. Presuming he has read Justice Peckham's opinion, Toobin the Harvard-trained jurist surely knows

better, but Toobin the pundit has succumbed to sensationalism.

For anyone who was in a coma, Toobin offers a convenient summary of what happened to the Patient Protection and Affordable Health Care Act of 2010 in *National Federation of Independent Business v. Sebelius*. Broccoli as trope, the buzz about Solicitor General Verilli's oratory, and the wild card played by Chief Justice Roberts at decision time; it is all here. But somebody else would have to point out that a necessary inference of the conclusion that Congress cannot dictate market entry by reference to Article I, section 8, clause 3 leaves Congress with less interstate commerce regulating power than the states, that is, with power less than plenary.

One more thing: in harmony with conventional wisdom, Toobin casually attributes to the Great Chief Justice the

procedural reform that produced joint opinions of the Court in lieu of opinions by each participating justice. Toobin's weakness for the epic surfaces even in this tangent to his central theme. As Bill Casto has pointed out, the procedural reform in question is properly attributed to John Marshall's predecessor, Oliver Ellsworth, who brought it with him from the supreme court of Connecticut. So much credit is rightfully heaped on Marshall that it is a shame to deny Ellsworth any part of what little has been afforded him.

As short stories go, "The Oath" is a good read. As popular history, so is "The Obama White House and the Supreme Court." The two are bound together – literally and figuratively, but the latter needs to be taken with a grain of salt, like a movie by Oliver Stone.