Book review: *The Brethren updated*

**The nine: inside the secret world of the Supreme Court**
by Jeffrey Toobin

[1] The title is misleading and this reviewer speculates that it was forced upon the author by a publisher seeking more sales with a racy title: while the workings of the US Supreme Court are not transparent they can hardly be called secret.

[2] Where Woodward and Armstrong’s *The Brethren* (1979) was founded upon the transitions from Presidents Johnston to Nixon and Chief Justices Warren to Burger in the late 1960s the current volume covers the changeover from Chief Justice William Rehnquist to John Roberts in 2005. At a stretch it could be said to include the transition from Presidents Clinton to [George W] Bush. Both volumes expound the thesis that the changeovers mark a distinctive turn to the right by the Court. With hindsight the 1979 thesis was wrong (or at least mistimed by decades) and it may be that the conservative leaning of the Court commenced with Nixon and took almost 40 years to accomplish.

[3] This and other similar books canvassing US judicial selection only serve to emphasise the value of our current Australian procedure for judicial appointments which has recently again come under public discussion following the appointment of Chief Justice French to the vacancy caused by the mandatory retirement of Gleeson CJ. It will arise again next year with the retirement of Kirby J. The clamour for change to the Australian procedure might be lessened with a greater appreciation of the problems associated with the US process.

[4] Ironies abound: the move to the centre by Justice Kennedy (appointed by President Reagan in 1987) was brought about in part by the unilateral exercise of US superpower by the second President Bush. The Republican conservatives nowadays consider Kennedy to be one of the most dangerous men in America. Similar observations could be made of the Court’s other centrists at the time: Justices O’Connor and Souter.
[5] That Justice Sandra Day O’Connor felt compelled to surrender her much enjoyed position on the Court in order to provide the necessary care for her husband suffering from Alzheimer’s disease leaves her with idle time on her hands now that the accelerated deterioration of her husband’s condition has meant she cannot provide that care and she has given up her seat for no real cause. Her regret can only be compounded by her view that the justice appointed to succeed her was incapable of understanding that “[w]omen do not lose their constitutionally protected liberty when they marry.”

[6] Because of Chief Justice Rehnquist’s ill health and frailty, Justice O’Connor had confided in him her desire to retire from the Court to care for her husband. Because of her respect for the workings of the Court, she would be prepared to delay her resignation by a year if the Chief Justice also intended to retire – she was of the view that the Court would be better served if it were not to be subject to two new replacement justices simultaneously. Because Rehnquist was confident that he would serve out at least another term, Justice O’Connor tendered her resignation to the President. In actual fact, shortly thereafter the Chief Justice’s mortality caught up with him and brought about the very situation – two simultaneous vacancies – she had sought to avoid.

[7] That the present CJ, John Roberts, might yet prove to be one of the most important and influential judges in the history of the US Supreme Court is a consequence of the liberal Democrat opposition which had refused to vote on his nomination to the Federal Court of Appeals in the dying days of the administration of the first president Bush in 1992. His failure to gain confirmation saw Roberts embark upon a career in private practice that made him the country’s pre-eminent appellate advocate and unquestionably well-qualified to be appointed in 2005. In 1992, when his nomination was not proceeded with, he was merely one of many talented conservative Republican lawyers. In 2005, when his confirmation sailed through, he was unquestionably the best qualified of all the conservative field considered by the second President Bush. At no stage was Roberts’s suitability for appointment to the Supreme Court disputed. Nor could it have been.

[8] Roberts, nominated to fill the vacancy created by Justice O’Connor’s resignation in July 2005, was in line to be the first law clerk to serve alongside the justice for
whom he had clerked (having clerked for Rehnquist in 1980-1). That was not to be
with Rehnquist’s death on September 3 and on September 5 President George W
Bush “bumped” Roberts to take the seat of the deceased Chief Justice. [Justice
Samuel Alito would be later nominated and confirmed to take the place of Justice
O’Connor in 2006.]

[9] This text is a worthy companion to *The Brethren* – that it falls short of its high
standard is praise for the earlier rather than criticism of the epigone.  

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