



### THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT

BY JEFFREY TOOBIN

Doubleday, New York, NY, 2012. 352 pages, \$28.95 (cloth), \$16.00 (paper)

### THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION

BY MARCIA COYLE

Simon & Schuster, New York, NY, 2013. 416 pages, \$28.00.

#### Reviewed by Elizabeth Kelley

What accident in the publishing world allowed two significant books on the present-day Supreme Court to be published within months of each other? In September 2012, Jeffrey Toobin, a staff writer at *The New Yorker* and the critically acclaimed author of *The Nine: Inside the Secret World of the Supreme Court*, published *The Oath: The Obama White House and the Supreme Court*. Then, in May 2013, Marcia Coyle, chief Washington correspondent for *The National Law Journal*, published *The Roberts Court: The Struggle for the Constitution*.

If you had to pick one of the two, which should you choose? My answer is both. Although overlap is inevitable when dealing with a substantially similar period in time, the two books are different in tone and thematic organization. Indeed, it's like e-mail notifications you receive from Amazon.com: If you enjoyed such-and-such, then you'll like this one as well.

Both Toobin and Coyle are legal journalists whose coverage of the Supreme Court has become familiar to television audiences. Toobin is a legal analyst for CNN, who comments on everything from Casey Anthony to George Zimmerman. Coyle is a regular on PBS NewsHour, parsing Supreme Court decisions. When they speak on TV, their eyes dance. I imagine that both would tell you that they have the best jobs in the world. But the similarities end there. Toobin is at times respectfully irreverent and the master of the sound bite. Coyle borders on wonkish and takes her role as a journalist

very seriously. Their books reflect these differences.

The title of Toobin's *The Oath* refers to the bungled oath that Chief Justice Roberts administered to Barack Obama in 2009 on the steps of the Capitol, which he followed with a private oath hastily scheduled for later that evening. Toobin uses that incident to contrast the backgrounds, careers, and ideologies of Roberts and Obama. He takes us behind the scenes to the incidents that led to the Court's historic decision to uphold the President's health care plan—a 5-to-4 opinion made possible by the Roberts' surprise vote.

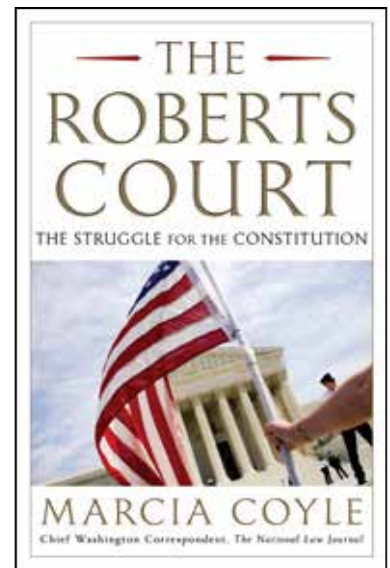
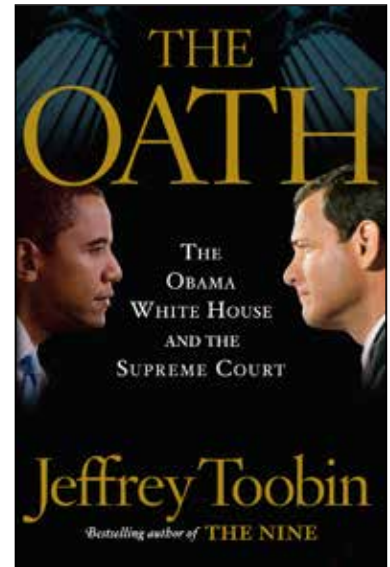
Some reviewers have criticized *The Oath* for its use of others' reporting. But Toobin conducted dozens of his own interviews, and his stature as a legal journalist gave him the access to do so. Furthermore, wherever he acquired it, Toobin distills his information into a readable, penetrating narrative, which is richly footnoted. Toobin's telling of the story of the first and second oaths, for example, is a masterpiece of both suspense and analysis.

What makes *The Oath* such a (dare I say?) fun read are the details that humanize the justices. For example:

The last day of a term always arrived laden with drama. Almost invariably, it was when the Court's most important and controversial decisions of the year were announced or when the justices revealed their plans to retire. As a rule, it was also a time when the justices were both tired and sick of one another. Everyone needed a haircut and a vacation.

We learn that, as a member of the cafeteria committee—an assignment given to the most junior justice—Justice Elena Kagan created a seismic change by ordering a frozen yogurt machine. And we learn that Justice Antonin Scalia, who can reduce the most seasoned litigators to jello, wept when Chief Justice Roberts announced in court the death of Martin Ginsburg, Justice Ginsburg's husband.

Whereas *The Oath* focuses on just one Supreme Court case—*National Federa-*



*tion of Independent Business v. Sebelius*, upholding the individual mandate in the Patient Protection and Affordable Care Act, known as Obamacare—Marcia Coyle's *The Roberts Court* focuses not only on *Sebelius*, but on three other cases: *Parents Involved in Community Schools v. Seattle School District No. 1*, the Seattle-Louisville public school integration decision; *District of Columbia v. Heller*, the Second Amendment case; and *Citizens United v. Federal Election Commission*, the campaign-finance case. And, although Toobin concentrates on the justices as well as the politics of the Obama White House,

Coyle examines the players behind the four cases she discusses: the litigants and their lawyers.

The subjects of Coyle's four cases—health care, race, guns, and money—are volatile and divisive, but *The Roberts Court* reminds us that flesh and blood human beings brought these issues to the Court. For example, Coyle goes into great detail about the motives behind the parents in Seattle and Louisville who brought lawsuits against their school districts. They were simply parents who wanted the best education for their children; racial politics was the last thing on their minds. Similarly, Coyle brings us close to the lawyers behind the gun litigation. The story is a simple one: two lawyers having a cocktail one night in Washington, D.C., talking about their favorite issue, gun ownership, and brainstorming about the perfect plaintiffs to challenge the District's gun ban and, ultimately, to get the Supreme Court to rule that the Second Amendment protects an individual's right to possess a firearm.

We learn about the odysseys of these cases through the lower courts, the litigation strategies behind them, and how the Supreme Court arrived at its decisions. We learn much about how the Court really works—how it decides which cases to hear, whether oral arguments make a difference, and other details. We even learn a bit about the professional relationships between the justices:

Another justice asked, "Who on the Court is the sort of person who is going to carry a grudge? Nino Scalia isn't going to carry a grudge. Clarence Thomas is going to pat you on the back and give you a hearty laugh all the time. That's a big part of it." In general, one justice explained, "There's a lot of mutual esteem and mutual affection. There have been times on the Court when that hasn't been true, but I don't find it surprising that it is true now when I think about it. We have to live with each other for a long time. It's a lot more enjoyable if you like the people you work with, and this is a likable set of people."

In *The Roberts Court*, Marcia Coyle notes, "The late Justice Harry Blackmun, after being interviewed on C-SPAN many

years ago, told me that he did not think the Supreme Court should be a great mystery to the American people." Although Coyle as well as Toobin have indeed made the Court less mysterious, it is its very air of mystery that makes the Court and its nine justices topics of which we never tire. ☉

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## A DEATH AT CROOKED CREEK: THE CASE OF THE COWBOY, THE CIGARMAKER, AND THE LOVE LETTER

BY MARIANNE WESSON

New York University Press, New York, NY, 2013. 378 pages, \$29.95.

### Reviewed by Michael Ariens

The "whodunit" lives in law professor Marianne Wesson's *A Death at Crooked Creek*. Her book tells the story of one of the most intriguing mysteries in American legal history: who was shot and killed at Crooked Creek, Kan., on a late winter's day in 1879? For evidence teachers (among whom Wesson is one), and possibly even law students slogging their way through hearsay and its exceptions, *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), is a classic 19th-century mystery story. The case, in which the Supreme Court adopted an exception to hearsay for statements of present intention (now found in Federal Rule of Evidence 803(3)), raises the question: Was the deceased John W. Hillmon, who had recently taken out the extraordinary sum of \$25,000 in life insurance, or was it Frederick Adolph Walters, an itinerant who had left Iowa a year earlier, and who had wandered about much of

the middle of the United States, including Kansas, during that time? Wesson, who first became intrigued by the mystery when taking an evidence course, became obsessed (in a good way, it appears) with solving this enduring mystery, and to my mind, does so. As should always be the case when reviewing a whodunit, I shall not spill her solution. Instead, I will offer some background of the case, and describe Wesson's interesting and provocative approach to writing about *Hillmon*.

In March 1879, a man was shot and killed when a bullet discharged from a Sharps rifle in Barbour (now Barber) County, Kan., in the frontier southwestern part of the state. John Brown (apparently no relation to the abolitionist) admitted that he was holding the rifle when it accidentally discharged and a bullet struck John Hillmon in the face, killing him instantly. Hillmon had recently taken out three life insurance policies totaling \$25,000, payable to his new bride, Sallie Hillmon, including one policy he had bought just two weeks before his death. The insurance companies refused to pay on the ground of fraud. Given the circumstances of the case, including Hillmon's relative impecuniosity, the high amount of the insurance, the manner of death, the interest of Sallie's cousin and Hillmon's sometime employer, Levi Baldwin, in both the litigation and the insurance proceeds, and the modest inquest in Barbour County—as well as several notorious instances of life insurance fraud that had come to light at about this time—the insurance companies refused to pay Sallie Hillmon. The insurance compa-

