



## Joan Biskupic on “Nine Black Robes”

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**[00:00:00] Jeffrey Rosen:** Last year's Supreme Court term was one of the most significant in recent history with landmark decisions in cases about abortion, guns, religious liberty, the administrative state, and more. Today, I'm joined by the legendary Supreme Court reporter and CNN legal analyst, Joan Biskupic, author of the new book, *Nine Black Robes: Inside the Supreme Court's Drive to the Right and its Historic Consequences*, to unpack these recent developments.

**[00:00:28] Jeffrey Rosen:** Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to *We The People*, a weekly show of Constitutional debate. The National Constitution Center's a non-partisan non-profit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. *We The People* friends, as I said, this is a weekly show of Constitutional debate, and usually we convene liberal and conservative scholars to discuss the issues of the day. Today, we're going to try something a little different, a reporter's chat among old friends to discuss the evolution of the court over the past 30 years. That's about how long Joan Biskupic and I have been covering the Supreme Court. Joan began as a reporter for *USA Today*, and I started right out of law school as the legal reporter for the *New Republic*. Today, we'll talk about Joan's new book and compare notes about these historic developments. Welcome, Joan, back to *We The People*.

**[00:01:22] Joan Biskupic:** Thanks, Jeff. And, you know, I think I've talked to you about, just about everyone one of my books, so it's fitting, and I love your audience. So thank you.

**[00:01:30] Jeffrey Rosen:** Well, thank you. And, Joan, you've been covering the court for decades with such distinction, and we've been friends for almost the same period of time. I thought it might be useful for *We The People* listeners just to have the insight of your neutral and keen reporter's eye on the transformation of the court. I thought we'd begin with the jump called *Stevens Archives*, 'cause you were

there yesterday, or maybe even late last night. What did you find in the Stevens Archive, and what would you like to share with our listeners?

**[00:02:01] Joan Biskupic:** You know, Jeff, I actually remember when we first encountered each other in the Supreme Court in the early '90s. I was with the Washington Post, and if I remember right, you had just come off of one of your judicial clerkships and were writing for the New Republic. And I... But I have to say about yesterday's opening of the John Paul Stevens papers at the Library of Congress, I anticipated the day. I was so thrilled to be going, and I was first in line.

**[00:02:29] Jeffrey Rosen:** [laughs]

**[00:02:29] Joan Biskupic:** I just love... You know, I, and one of my bosses says, "Jeez, it's like a kid in a candy shop." But it truly is. I just love being able to get into the archives of these justices who made agreements with the Library of Congress to donate their papers after they've passed away. And just as Stevens's papers offer us the first bird's-eye-view of what the court was doing during the 1994 to 2004 period, as you know well, it's rare that justices turn over their papers, but it's not exceedingly rare, because in the early '90s, we had the papers of Justice Thurgood Marshall and Justice Harry Blackmun that extended up to 1994. So this new batch gives us the next decade through the eyes of Justice John Paul Stevens. And just quickly for our listeners, all sorts of documents that shed light on the justices as they were struggling with early gay legal rights cases, abortion cases.

**[00:03:31] Joan Biskupic:** But the one that I went to first was *Bush v. Gore*, because the Stevens papers give us the first-ever look of what was going on behind the scenes during *Bush v. Gore*, and as you remember, when that opinion came down on December 12th, 2000, handing the White House to George W. Bush and cutting off the Florida recounts, it was an unsigned opinion. So I wanted to see who influenced it. And the opinion was actually written by Justice Kennedy we learned yesterday. But beginning with a framework that had been offered by Justice Sandra Day O'Connor who, as you know well, was my first biographical subject. And she, as I like to say, came to Washington knowing how to count votes from her days as an Arizona State Senator. And, you know, she was the first woman on the court, but I always regarded her as a very shrewd politician on the court, too.

**[00:04:25] Jeffrey Rosen:** Wow. That's so wonderful that you were able to look at the *Bush v. Gore* archives. You know, right after the case came down, Justice

Ginsburg called me and told me that Kennedy had written the opinion. The New Republic had published a cover story called Disgrace, and Justice Ginsburg agreed and signed it and was absolutely livid about that opinion. And in your new book, *Nine Black Robes*, you tell the remarkable story that I hadn't known that Justice Scalia was so offended by Justice Stevens's suggestion that the court was being political and casting doubt on the principle actions of the Florida Supreme Court, that he objected. Tell us more about that and about Justice Stevens who also, and he told me this in an interview, was, never got over that *Bush v. Gore*, and felt that it was just like a case he had in Chicago where the majority was totally cynical about the role of lower court judges.

**[00:05:21] Joan Biskupic:** Justice Stevens is, I found him to be an incredible figure in the law from the time I knew him. He served remarkably long from 1975 until the year 2010, one of our longest-serving justices ever. And he happens to come from the south side of Chicago, my [laughs] where I come from. He was on the better side of the road I have to say then I was where I grew up, but I still so appreciated his sort of down-to-earth, mid western sensibility. And he was a modest person, and he really had ideals that he played out in his jurisprudence. Remember, he was appointed by a Republican president, and ended up becoming someone who was to the left of the bench, but that was as the bench evolved. And he took things very seriously.

**[00:06:09] Joan Biskupic:** And one thing you might be recalling as you're talking about how he couldn't get over *Bush v. Gore*. You know, remember Justice Scalia in his usual blustery way said, "Get over it," but Justice Stevens really could not. And he concluded his dissent in that case with something along the lines of—I'm not gonna be able to repeat it exactly—but it was something along the lines of, we see where the majority has put the winner of this 2000 election, with George W. Bush, but we can also tell you who the loser is here, and that's the nation's confidence in the rule of law and the courts. And I was struck, Jeff, by how vivid and palpable his dismay at his colleagues was, but how that stood out at the time, but how today, that's almost commonplace from outside critics to even some of the justices themselves as they have pointed fingers and spoken of distrust among the nine.

**[00:07:07] Jeffrey Rosen:** That's so true and such a powerful way of framing the transformation inside and outside the court from the long period Justice Stevens served to today. Well, I want to pull way back, but you allow us to do that because you've written such a panoramic history of the recent Supreme Court. And I'd love

you to describe—as neutrally as possible, lets both of us put on our reporter and Supreme Court observer hats—what happened, and as you tell the story, President Reagan was elected on a platform to rollback aspects of the new deal and a great society, and reduce the size of federal government, and he pledged to do that by appointing strict constructionists and originalist justices who would reverse what he perceived to be the excesses of the Warren court, and he did just that beginning with the failed nomination of Robert Bork, and then culminating in the successful nominations by President Trump. Is that a fair way of framing it, and how would you describe the transformation that you tell so well in this book?

**[00:08:11] Joan Biskupic:** Well, I think you're right to even think about Reagan. Some people go all the way back to Nixon, but Reagan did it with more focus. But even as he did, even as he tried hard to choose a certain kind of justice, look who he ended up with. The kind of conservatives that you and I first knew when we were covering the court in the early 1990s were people like Justice O'Connor and Justice Kennedy. They're people who, today, could look like liberals compared to some of our conservatives, and I find that really noteworthy.

**[00:08:45] Joan Biskupic:** When I was working for the Washington Post, I had a 5/4 court. And I always described it as the five conservative justices and the four liberals. But it's such a different—now 6/3—court, with the super majority of conservatives, and they're of a different stripe. So as effective as President Nixon and President Reagan were in choosing justices, it really pales when you think of George W. Bush and especially Donald Trump's appointees. They're kind of like no-fail choices. And part of that is because when George H. W. Bush chose David Souter, and David Souter quickly aligned with John Paul Stevens and then other justices on the left like Harry Blackmun and Ruth Bader Ginsburg and Stephen Breyer, it caused this new mantra to emerge, no more Souters, and it gave the Republican presidents after George H. W. Bush, his son George Bush included and Donald Trump, really did not want to make the same mistake. And they relied heavily on the Federalist Society to do that.

**[00:09:58] Joan Biskupic:** And one thing, just again, stepping back and trying to look at this transformation as neutrally as possible, Don McGahn expresses it well. Don McGahn became Donald Trump's White House counsel, and he used to scoff at people who said that President Trump was outsourcing judicial selection to the Federalist Society. He would scoff and say, "No, it's insourcing. We are the Federalist Society inside the White House, and we are frankly inside the castle."

And I thought Don McGahn, for as blunt as he was and as effective as he was in judicial selection, said what was true.

**[00:10:39] Jeffrey Rosen:** You have a chapter in your book called The Triumvirate, it describes the role of Don McGahn, Mitch McConnell, and Leonard Leo from the Federalist Society. Tell us about how the three of them worked together to transform the courts.

**[00:10:51] Joan Biskupic:** Yes, they were proud of it. I mean, I give them their due for their effectiveness, and will start right away with then senate majority leader Mitch McConnell, who's still with us. Again, you know, all these people who be... We're talking today about a lot of long-serving individuals, and Mitch McConnell is definitely in that category. And he single handedly ensured no considerations of President Obama's choice of a successor to Antonin Scalia, when he passed away, and that was in February of 2016. Just as Scalia died on February 13th of 2016. And Mitch McConnell, that weekend, oh, he was so shrewd, decided on the spot, "We are not even gonna, we're not gonna hold hearings for whoever Barack Obama chooses," and of course, he ultimately did nominate but couldn't get confirmed at all, Merrick Garland who was then on the DC Circuit.

**[00:11:44] Joan Biskupic:** But Mitch McConnell was, it was President's Day weekend, and Mitch McConnell said it was lucky for him that the senate was in recess that weekend because he could, on his own, decide and say out loud, "We are going to delay, we're not gonna hold any hearings," and none of his Republican caucus could say, "Really?" You know, like, "This is February. The election's not until November. You sure we want to do this?" And Mitch McConnell even said he was glad that nobody was around to have to challenge him on that from his own party. Because he got that marker put down, it stayed down, it was effective, and that seat was open, then, for Donald Trump to put Neil Gorsuch in as the first of his three appointees. And then we know what happened then with Brett Kavanaugh as the second choice, and then Ruth Bader Ginsburg dies in September of an election year, far after a February. She dies on September 18th, and Mitch McConnell is still wearing his majority leader hat, says, "Oh, we'll be able to get Amy Coney Barrett through very quickly," and did. She was seated about a month after Justice Ginsburg's death. And as we all know, the rest really is history, transformation of constitutional law rights.

**[00:12:59] Jeffrey Rosen:** It's an amazing story. You tell that so well. And remarkable to see McConnell deciding on his own to change the senate standard.

In a Zelig footnote role in my life, I was an intern for Joe Biden during the Bork hearings and played a very minor role contributing to the speech he gave in the senate which asserted for the first time that senators could review the judicial philosophy of nominees. Before, the senate was just supposed to review qualifications. Senator Biden remained very proud of that, which he felt was a sort of path-breaking moment. But as you describe it, Senator McConnell took things much further by basically just saying, "We're not gonna confirm a nominee from the opposite party."

**[00:13:41] Joan Biskupic:** Can I just tell you, I love your footnote there, because one that I would add is after Joe Biden made that speech and other Democrats made their speeches against Robert Bork, then a younger Senator McConnell, this was in 1987, closed out the debate with saying essentially, "You will rue the day. I will remember this." And I can't even count anymore how many times Mitch McConnell has said, "You will rue the day," and been able to come through with his threats [laughs], and you know, warnings, threats, whatever. And as I said, I count him as very effective. But Bork has always been on his mind, and it certainly was when he saw the opening of the Scalia seat.

**[00:14:24] Jeffrey Rosen:** Great warnings about ruing the day. And as you say, McConnell warned Harry Reid and lots of other folks, and indeed, they did rue the day. Well, let's go back to Bork. It was a, it's a transformative moment in our judicial history. And Robert Bork embraced a philosophy of originalism and textualism that ultimately gave the majority on the Supreme Court. And you reflect on Justice Scalia reading the Federalist Papers and saying that six can do much more than five, that a super majority is much more confident. But talk about how disciplined and effective Republican presidents were in nominating textualist and originalist judges, and what is the importance of textualism and originalism in the transformation of the court?

**[00:15:12] Joan Biskupic:** It's entirely because you have, you've seen it in obviously the justices' decision to reverse Roe v. Wade and their decision to apply new standards to gun regulation, to enhance Second Amendment rights. When then Judge Bork and new Justice Scalia talked about textualism and originalism, they were off on the fringe. The very first justice I ever interviewed was Justice Scalia in 1990. I went to his chambers, and I was covering The Hill at the time, so I was very interested in his idea of how to read legislative statutes and legislative history. He didn't believe in referring to legislative history. He wanted to only look at the

text. And that was such a fringe idea, but now as Elena Kagan would say, we're all textualists now. And it's so true. It took off.

**[00:16:06] Joan Biskupic:** And what has happened, though, is it, the originalism and textualism can arguably serve either side of the ideological spectrum, but right now, it only serves [laughs] the conservative side. And you referred nicely to something Justice Scalia had said to me when... You know, I spent so much time with him. I just enjoyed him so much. For the book I did on him, which followed the Sandra Day O'Connor one, I was with him more than a dozen times, and he gave me so much. He opened his mind and his approach to law and life to me so much. But one thing he said about his tenure as the faculty advisor to the Federalist Society, which was just starting in the early 1980s when he was a University of Chicago professor, he talked about the importance of like-minded people having fellowship in their own company among each other, and that's how he saw the Federalist Society serving conservative ideals.

**[00:17:09] Joan Biskupic:** And I recall that in the book, as you're mentioning, when I mentioned the power of having six conservatives versus just five conservative justices, with five, the liberals can pick off one, you know, it's easier for one of them to think, "Yeah, like I could be persuaded to the middle." But just having one more justice in the camp, certain em- I believe has emboldened the right wing in a way that I never would have guessed, you know, that the difference between five and six somehow is greater than just a single more vote.

**[00:17:45] Jeffrey Rosen:** It really is. And you also note that textualism and originalism could favor either side, and indeed, it was initially promised as a way of constraining policy preferences just as Scalia said that the whole point was that it would force judges to follow the law and not their preferences. And yet, as you note, the liberal descenders are saying that the conservatives are playing Whack-A-Mole with text and history and are shifting the baseline in each case to reach their preferred result. What to make of this debate?

**[00:18:18] Joan Biskupic:** Well, it's awfully one-sided. You know, we're down to just three liberals on the court now. And we're down to... Let's just take, for example, Justice Elena Kagan, who certainly showed tendencies toward the center in various cases, she was actually, as... Jeff, since you've been around almost as long as I have, we remember back in 2010, she was not, like, the first choice of the left or progressives. And that's, you know, in 2009 when President Barack Obama chose Sonia Sotomayor, there were plenty of people who would have preferred

Elena Kagan. But Justice Sotomayor was regarded as somebody who was more to the left. And indeed, then the following year when President Obama did choose Elena Kagan, it's not like she was viewed as the lefty candidate. She was somebody who was happy to try to broker the middle with recently retired Justice Stephen Breyer.

**[00:19:15] Joan Biskupic:** So she talked about textualism, and she at ti- she has written plenty about her views on originalism, but it's not the brand of originalism that's been embraced by this court, so it's almost as if these kinds of labels have become meaningless. And there was a line that you will remember from your DC Circuit days yourself when you were a law clerk there. One of the judges referred to the whole idea of legislative history as going to a cocktail party and looking for your friends in the crowd. You know, you look for, you can look for your arguments within the text, or your arguments within originalist history as easy as you could look for your own favorite policy arguments. And that's what, I think that's what's happened is that some of these labels, if they were ever effective, and, you know, arguably, they weren't even that effective for the start, have sort of been watered down over time to mean what an individual justice wants them to mean.

**[00:20:17] Jeffrey Rosen:** Just to put the argument on the other side, strict constructionism has been deployed since the days of Thomas Jefferson to constrain federal power and enforce individual liberties like property rights and free speech. And generally it's favored libertarian results, and loose construction, favored by Hamilton, has tended to favor more federal power and, at least in the 20th century, more progressive results. So this battle of methodologies or political philosophies goes back to the beginning of the republic. And the court has shifted from conservative to liberal and back based on which methodology is in the ascendent. So, though you can quibble about the application in particular cases, is it fair to say that, broadly, this is part of a deeply-rooted historical pattern?

**[00:21:04] Joan Biskupic:** Oh, absolutely. I would not deny that at all. I do think that these approaches date back centuries. It's that now, the justices themselves... So, and I would rather put this in the competing justices' words more than my own, they argue about whether they've lost all meaning, given, you know, or departed so much from their roots. And let's use it as an example, one that I'm sure everyone listening knows of, in the 2020 case of *Bostock versus Clayton County*, in which the justices, through a textualist reading, voted six to three to expand the notion of Title VII of the 1964 Civil Rights Act to cover workers who are claiming sex discrimination including based on sexual identity and LGBTQ status. And it was



written by Justice Neil Gorsuch who does claim the mantle of both originalism and textualism. And it was signed, then, by Chief Justice John Roberts, but also by Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. And they believed that they were adopting a textualist view of Title VII. And that's what won the day.

**[00:22:29] Joan Biskupic:** But Justice Alito in a dissent said the majority wants to claim the mantle of Justice Scalia's textualism, but it's flying a false flag as in a pirate ship. So it's not just me saying that there have been a lot of cross currents here and a lot of claims of disingenuousness, the justices have gone public with these. But to go to your original question, yes, the roots of these competing judicial interpretive methods go back centuries. And maybe students of history might say they always had a political overlay, because that's the nature of the country.

**[00:23:18] Jeffrey Rosen:** Absolutely. So well-put. And you're so right that Bostock shows the malleability of these methodologies and the fact that they can be used to deploy either side, which calls into question their ability to constrain judges. On the other hand, the defenders say, "Well, you may disagree about the application, but at least you're debating the text and history of the Constitution and not moral philosophy or a judge's policy preferences and so forth." So it just means that law professors and the National Constitution Center are gonna be busy for decades hosting these debates as we do every week on We The People about methodologies, and it's so important for our listeners to learn about them so they can make up their own minds. Maybe just one more reflection. You spent time with Justice Scalia, you wrote that biography of him. He turns out to have been, in retrospect, one of the most influential justices of the century.

**[00:24:09] Joan Biskupic:** Absolutely. He always had such a forceful personality and so well-articulated where he was coming from. And, as you know, he won over even his ideological opposite, Ruth Bader Ginsburg, with the sheer force of his personality. Someone recently asked me to recount when they first met, and I remember her telling me in an interview when she first heard him speak, way back when in the '70s when they were both professors, and she said she agreed with not a word he said, but she was so entranced, "Who is this man?" And then they both end up on the DC Circuit together, become fast friends, edit each other's opinions, and he had a winning personality that, and his ideas obviously became the ideas of the day once the country became more conservative and once the courts became more conservative. And he often said he was writing his dissents for students and for future lawyers and for future jurists. And it turns out he was absolutely right.

**[00:25:19] Jeffrey Rosen:** You also wrote a superb biography of Chief Justice John Roberts. And in a large part, your new book, *Nine Black Robes*, is the account of how John Roberts lost his court, and how his Hamiltonian vision of judicial legitimacy and non-partisan adjudication was rejected. Tell us about that story as it unfolds in *Nine Black Robes*.

**[00:25:46] Joan Biskupic:** I have a lot of regard for Chief Justice Roberts, and I am very aware, since I've studied so deeply his biography, how much he was a winner for most of his life. This was a guy who had a lot of advantages, was super smart, really applied himself. His classmates from his days in prep school, a boarding school in Indiana, talked about he would be up early studying, he'd be late at night studying. He just, he left nothing to chance. He worked very hard. He rose to the occasion of the gifts that he had been given. He was very smart, very able, and became this star advocate before the Supreme Court arguing 39 cases. He was regarded as the gold standard. He comes on the Supreme Court, and he has a court that, in many ways, was ready-made for him because it was leaning conservative at the time. But he, in time, it became much more conservative, and it started that the rightward shift then disrupted his notion, as he put during this own confirmation hearings, that the law should not jolt America. And he saw his colleagues ready to do things that were more radical than what he wanted.

**[00:27:10] Joan Biskupic:** And he did not have the skillset that Sandra Day O'Connor did. You know, I mentioned that Sandra Day O'Connor came knowing how to count votes, she was the social glue of the court, and he somehow rubbed some of his colleagues the wrong way. So when he gets to this pivotal moment in 2022... I mean, there were plenty of pivotal moments before then, but let's just take the *Dobbs* case in 2022 when he's desperately trying to get his colleagues on the right to not go so far as to completely overturn *Roe v. Wade*, to uphold the Mississippi ban on abortion at 15 weeks, which already would have been a departure from *Roe v. Wade* because of its viability standard. But he's trying to get this compromise. He just cannot move.

**[00:28:03] Joan Biskupic:** Two justices who I think at another time might have been open to it, and that would have been Brett Kavanaugh and Amy Coney Barrett, mostly Brett Kavanaugh, because Brett Kavanaugh and he had known each other from the early '90s when they first worked in the Solicitor General's Office. But the weight of the others on the side with Brett Kavanaugh just pulled so far and were suspicious of John Roberts by that point that he could not make progress. And, of course, the leaked document didn't help him in any way. But I would have

never predicted when I was writing *The Chief*, at a time when he was essentially at the height of his powers, right after Justice Kennedy left in 2018, John Roberts became the ideological center of the court as well as the man who was so powerful because of being Chief Justice and having the power of assignment. But so much of that began to slip as the court membership truly shifted.

**[00:29:01] Joan Biskupic:** And now, what I say is he's still prevailing. You know, he's obviously prevailing on race, he's prevailing on church/state matters. But he does not have the mantle of leadership that he once had, and you see it not only, Jeff, in some of these rulings, but you see it at this point when so many outsiders are questioning the court's ethics and integrity. And he cannot get the court to [laughs] enforce its own code of conduct, code of ethics. And I think that also shows how his leadership has been weakened.

**[00:29:39] Jeffrey Rosen:** That's so interesting. As you know, I have great sympathy for Chief Justice Roberts's vision of the court as an arbiter of non-partisan legitimacy. And I'm so interested in your account of why he wasn't able to succeed. Why did the other justices not trust him, and could a different chief have succeeded once Justice Barrett was appointed and the numbers shifted, or was it impossible given their more conservative philosophies?

**[00:30:11] Joan Biskupic:** I think that's a terrific question, and I've wrestled with it myself, because I have, I hold a lot of respect for the chief. I've also been aware of some of his tactics that have turned off his colleagues. I've documented his two switched votes in the *Obamacare* case that really caused distrust, particularly on the part of, well, Justice Scalia for sure, but Justice Scalia's gone, but on remaining justices Clarence Thomas and Samuel Alito. And other things that the chief had done. The chief can be, for all his up-front skills and interest in integrity, he can also be fairly cagey at times. And that has made, again, Justice Thomas quite suspicious of his ways.

**[00:31:04] Joan Biskupic:** But, you know, like all... So many players in Washington have those sides in how they operate. Things that, you know, people are very complex, and I don't know if another chief justice could have done differently with these nine. Once you had the third Trump appointee in Justice Amy Coney Barrett, and we all knew her record, you know, I'm not... She had made clear what she was all about, even though she might have been pitched just slightly differently during the confirmation hearings, but actually, you know, on that, Lindsey Graham said right up front, "This is the first time that someone who

has openly talked about being anti-abortion has been nominated." And President Trump said, "I will put justices on the court who want to roll back Roe v. Wade," and indeed he did. So it was all out there in many ways despite things that Susan Collins might have said or other senators might have said.

**[00:32:04] Joan Biskupic:** So these three justices appointed by Donald Trump came with their own agendas, even though they might not have wanted to own them in the senate confirmation process, they had them. And that's what, frankly, got them the nominations. So, if the chief had been able to woo any of them, maybe another chief might have. Maybe someone like Sandra Day O'Connor might have been able to do it, but I don't come readily to a conclusion that someone else could have completely changed the outcome of Dobbs.

**[00:32:43] Jeffrey Rosen:** You report that, despite The Wall Street Journal piece saying that the chief was trying to flip Kavanaugh, he never came close to succeeding.

**[00:32:56] Joan Biskupic:** Boy, you know, Jeff, your question is so timely, because it was just one year ago to May 2nd that that leak happened. And I, that very day, earlier in the day, that leak came out at 8:32. This is how much that's seared in my memory. That leak came out that night. And earlier in the day, because of something The Wall Street Journal had written, like, five days earlier in its own editorial page... The Wall Street Journal, I should say, has been the beneficiary of personal leaks from various justices, and they have taken advantage of that in writing their editorials. And they wrote an editorial suggesting that the chief might be making progress with someone like Brett Kavanaugh to prevent reversal of Roe. And I took that very seriously since I know about the journal's pipeline to the court.

**[00:33:45] Joan Biskupic:** And so that Monday I was doing a lot of reporting. And before I went home that day, I said to one of my bosses, I said, "I think I could probably write a story about how the chief is actually trying to pick off Justices Kavanaugh and maybe even Barrett too, but has not made any headway, that those five votes," which I had known what the vote had been... You know, I wasn't gonna report any of this, 'cause my usual MO is to reconstruct a case after we know what happened, because I know how much can change in June at the very end. So I went home that day saying, you know, "I think we can write a story just saying that this is the state of play, but that anything can change."

**[00:34:25] Joan Biskupic:** So when that, when Politico published that draft, I immediately sensed that it was real. They obviously had done their own verification, but I knew in the moment that, boy, it was real. I was surprised a bit at the date, the February 10th date, because I thought that that meant that Justice Alito had turned that around so quickly, 'cause they had voted in mid-December in conference to reverse Roe. And he had probably, frankly, started writing it before that vote. But, and that he had had five justices on it. So I think... And then after that, I found out through my own reporting that the chief continued to try to broker some sort of deal at the middle. But what I believe is that if he had had any chance of picking off Justice Kavanaugh, once that leak came out and everything was public, there's very strong language of Justice Alito and what appeared to be five solid votes, that nothing was gonna change. So it made the chief's effort all but impossible. And it turned out it was. It was impossible.

**[00:35:33] Jeffrey Rosen:** So interesting, Joan. This is fascinating inside baseball. But I heard you say that it might have been a justice who leaked The Wall Street Journal that Chief Justice Roberts was trying to peel off Justice Kavanaugh.

**[00:35:47] Joan Biskupic:** Oh, yeah.

**[00:35:48] Jeffrey Rosen:** And the effect of the leak was to solidify Justice Kavanaugh. So do you think both the justice who leaked to The Journal and perhaps the ultimate leaker of the opinion were conservatives trying to pin down Justice Kavanaugh?

**[00:36:01] Joan Biskupic:** No. And just so everybody's clear, I- [laughs] I know that there is a very close connection between certain justices on the court and The Wall Street Journal editorial page. And through some intermediaries, too, you know, I just, you know, I just sort of [laughs] judicial knowledge, as they say. So anyway, I just know that. And it's, hey, look, I'm always, I'm talking to these people all the time. I want to know what's going on. I do not begrudge any news organization an ability to get inside information, so let's just say that, too. More power to anybody who can find out what's going on. But I have never thought that the actual leaker of the opinion happened to be a justice.

**[00:36:52] Joan Biskupic:** I know lots of people think that, lots of people think it was a justice or a justice's spouse or even a clerk. And I just don't, but I have no, I have no evidence. I say that I'm, I intend not to go to my grave not knowing who leaked it, but I also don't know anything one year later that I could say was solid

evidence of who, how that document got into the hands of Politico. I mean, I have various theories of how it might have changed hands, and, you know, how it could have gotten there, but I can say that the result was that the chief was not gonna be able to get what he wanted. And I think that there's a very good argument—and I might even accept it—that Brett Kavanaugh was never going to switch. Brett Kavanaugh was never gonna switch, he had decided, you know, based on, frankly, some other things that he had written and what he felt in his heart, that he was ready to reverse *Roe v. Wade* despite what Susan Collins might have claimed she heard from him, despite what wishful thinkers at the center of the court might have thought. But he might not have ever been interested in switching.

**[00:38:01] Jeffrey Rosen:** Fascinating. So you tell the inside story of several important cases where there were switches. For example, Chief Justice Roberts switched his vote in the Trump census case in light of evidence that he thought showed that the government's reasons were pretextual. Maybe highlight a few more of those cases, and then tell us whether after the appointment of Justice Barrett, you think that those switches in important cases are likely to take place or not.

**[00:38:30] Joan Biskupic:** Yeah. Don't I wish I knew right now [laughs]. But I, you know what I... Some of the others in there in addition to the census one, I detail a pact between Justice Kennedy and the chief back in 2017 in two gay right's cases that followed the years after *Obergefell versus Hodges*, where what I found interesting... What I learned of the two, the negotiations between Chief Justice Roberts and Justice Kennedy. I was glad to get that information, but I also found it all the more interesting because Justice Kennedy had written the landmark ruling declaring that same-sex couples had a constitutional right to marriage. And the chief had dissented and used his first and only ever dissent from the bench to protest that decision. But, you know, again, as I say of Chief Justice Roberts, he's always recalibrating and trying to figure out what's the best way to operate to get what he wants. And in that case, he realized, you know, if you can't beat them, join them. And he then worked with Justice Kennedy to get what he wanted in some followup cases on gay legal rights.

**[00:39:44] Joan Biskupic:** What's going on now? Okay, so you have... There are certain justices who lend themselves to this kind of negotiation. And one thing I say in my piece that I wrote about Sandra Day O'Connor in the *Bush v. Gore* papers, after studying Justice O'Connor so deeply back in the early 2000s, I realized her MO was to get out early and often. She would... Before they even held

oral arguments, before anybody had circulated draft opinions, she was buttonholing colleagues. She was always getting out early to try to figure out where did she think the case should go based on her reading of the facts and the law, and how could she get the results she wanted. So she was given to that. Chief Justice Roberts I think is an incredibly strategic thinker and is given to a version of that. Justice Kagan certainly, Justice Breyer from his days in the senate was always trying to think about where can we find common ground here. And, you know, when you're on the liberal side, that's your best move because you don't have the votes.

**[00:40:50] Joan Biskupic:** I think probably a version of that is naturally going to be going on just because that's the nature of small group decision making. But we don't have the same kinds of people who might be as adept at it working now. First of all, we really don't have a center. We don't have a center anymore because it is, you know, it's a 6/3 court. And the chief has an interest in creating some sort of center for institutional reasons at the court, but he's gonna, you know, he'll obviously get those on the left to work with him at times because they don't have much more, anywhere else to go.

**[00:41:29] Joan Biskupic:** But will he be able to lure back Justice Kavanaugh who seemed to be an early partner of his? Will he be able to make headway with Amy Coney Barrett? I don't know. I mean, he's got, his background is not unlike Amy Coney Barrett's in some ways. He was reared in Indiana. You know, she spent a lot of time there in South Bend. He's always been a Notre Dame fan. So they have some points of personal connection that he might not share with all the other justices. But I have to say, I don't have a strong handle yet on exactly how Justice Barrett operates. I'm always looking for new data points about her approach.

**[00:42:11] Jeffrey Rosen:** Really interesting. Much of the answer will hinge on the majority's attitude toward precedent. Justice Sotomayor, in a recent opinion, accused the majority of being impatient, of being in a hurry to overturn decades of precedent. Chief Justice Roberts obviously would like to move incrementally for the legitimacy of the court. Do you have the sense that any other members of the new majority might be inclined to move a little slower rather than fast?

**[00:42:39] Joan Biskupic:** I love that you just plucked that quote out of Justice Sotomayor's, 'cause that rang really true with me. I think that Justices Thomas and Alito are in a hurry. Now, they're both just in their 70s, which in Supreme Court

terms is pretty young, frankly [laughs]. So, but they seem both very much in a hurry. They might be instructed by, you know, sudden death of Justice Scalia, although he was on the cusp of turning 80. They're both aware that anything can happen, and why not work with the majority they have, and maybe Justice Thomas feels like he dissented so long, and now, he's having his day, which he is. So why not be in a hurry? And Justice Alito, why not be in a hurry? But I do think that the personalities that I've observed of Justices Kavanaugh and Barrett would not put them necessarily in that category, that they would be more in the category of the chief, of thinking all in good time. We can go where we want to go, but why do we have to go so fast?

**[00:43:47] Joan Biskupic:** Now, Justice Gorsuch, who I didn't mention initially in the category with Justices Alito and Thomas, I think tends more in that direction. He's a really confident jurist. I know that you have spent time with him, and you know, I'd be interested in your assessment of him, but I think Neil Gorsuch is very independent, very confident, willing to go it alone, and I think that he'd be more inclined to move faster rather than slower. But he, too, is, you know, he's a relatively young jurist, and things could cha- things could slow down a bit with him.

**[00:44:30] Jeffrey Rosen:** Justice Gorsuch, as you know, is honorary co-chair of the National Constitution Center along with Justice Breyer, and we're really honored to have both of them. And much of the answer will turn on their attitude toward precedent and how Justice Gorsuch and the other textualist and originalist justices view precedent as part of their judicial philosophy. Justice Breyer helped me understand this. He said that it's not about partisan politics of the court. It really is about judicial philosophy, which can correspond to political philosophy, but is not about partisan results. So I guess it remains to be seen what the role of precedent is in textualism, originalism. But the early signs are that the textualist and originalist justices don't especially weigh precedent heavily. Obviously, that's the lesson of *Dobbs*. And therefore, I guess it's just a matter of prudence about how fast they want to go.

**[00:45:24] Joan Biskupic:** That's right. That's right. And you know, I would also just say to, just a plug for your mission, is that it is good to remind regular folks and lawyers and anyone in a position of power in the law, the roots of these theories and sort of how, why they developed and why they became so instructive and influential, and how they can maybe in some ways be returned to those roots.



**[00:45:54] Jeffrey Rosen:** Absolutely. Well, there's this roiling debate in the country right now about the legitimacy of the court, about judicial ethics, and the justices, as you note in the book, disagree about what the source of the court's legitimacy is. Justice Roberts says public disagreement with the result shouldn't be taken into account, but he does care about the broader perception of the public about the court's non-partisan legitimacy. And the Stevens papers suggest the court used to talk about this all the time. They talked about it in Casey, and Justice Kennedy and the liberals would openly discuss legitimacy. Is the current majority concerned about the court's legitimacy or not?

**[00:46:35] Joan Biskupic:** I think absolutely. And I do want to say that I'm always careful of how I refer to individual justices who I talked to. You know, there's only nine of them, so the field is really [laughs]... It's hard, you don't want to describe any of these sources, but when one of the more recent justices, and I'll say over the past five years, went on the court, that individual said to me later privately that there was this, they were sort of surprised at how much colleagues talk about public perceptions and how they might be perceived. So I think the kinds of strands that we're seeing in the Stevens papers from late '90s and early 2000s still go on. That yes, indeed, they talk upfront about how they might be perceived. Not to say this is how we should rule, because, obviously, nobody would want to say, "Hey, I think we should uphold this case because if we don't, there goes our Gallup rating again," you know, that kind of thing.

**[00:47:38] Joan Biskupic:** But it's more that they, I think, they wisely understand enough of them wisely understand that that's what they run on is public confidence. And, you know, it's an old cliché that they have no power of the sword or the purse, they have their institutional integrity and the notion of impartiality. And that's why these stories about their partisan inclinations and their running with political benefactors hurt the court. I do think that hurts the court. The rejection of precedent in Dobbs and the expansion of the notion of the Second Amendment, I think both of those struck the public as not just rulings that were on the law. I think people, even people who support the decisions, also saw those decisions as representing something a little bit more. That, and I only say that because that's what public opinion polls have shown, is that it's not just Democrats and progressives who think that the justices might be more political, it's Republicans and people in the center. You know, and they're obviously gratified by some of these rulings, but they see much more of a political cast to the court.

**[00:48:59] Joan Biskupic:** And I think some of these ethics instances that raise questions about who the justices are associating with, who are they taking fancy trips from and gifts and travel, and all of it, things that have come up recently particularly with Justice Thomas and the ProPublica piece about his connection to Harlan Crow. They reinforce this notion that these justices only align with an answer to certain people. And I think that no one would want that look.

**[00:49:32] Jeffrey Rosen:** No one, indeed. Well, in these polarized times, it's so important to have neutral, fair-minded reporting of the kind that you've been doing for decades, and of course the National Constitution Center's mission to continue to convene people who disagree for thoughtful discussions about the court. You end the book with competing quotations from Justices Roberts and Kagan about the sources of the court's legitimacy. You say that Justice Kagan said the court "earns its legitimacy by what it does, by the way it behaves." And "if over time the court loses all connection with the public and with public sentiment, that's a dangerous thing for [a] democracy[.]" while Chief Justice Roberts said, "I don't understand the connection between opinions that people disagree with and the legitimacy of the court." how do you see this debate playing out in the years to come?

**[00:50:27] Joan Biskupic:** Yeah, wasn't that... That's a great pairing. And, you know, those two get along I would say. Those two have mutual respect, but they really do see the situation now very differently. And Justice Kagan thinks, you know, if people are gonna judge us by our opinions, we want to make sure our opinions convey the idea that we are neutral arbiters of the law. And the chief says, well our opinions are our opinions, and when people disagree with them, that's when they're going to think that we're illegitimate. But as I said earlier, I don't think that's quite right because I know people who are very happy with this court who do see it as politically motivated, but in a good way. They're happy with this court, and they want, they were, they're very happy that the Federalist Society and Donald Trump have had such an imprint on this court. They think it was important to roll back the Warren era, even the Burger era, even the lingering Rehnquist era. And who would ever think the Rehnquist era was, you know, had any liberalism, but certainly Chief Justice William Rehnquist did not, but he presided over a court that did in some ways.

**[00:51:42] Joan Biskupic:** So it's, so much of it is in the eye of the beholder, but I think at this time, we do have a broader understanding that some of these rulings and some of the off-bench behavior have indeed shaken the confidence in the nation's highest court.

**[00:52:00] Jeffrey Rosen:** Joan Biskupic, such a pleasure to catch up, to learn from you. Thank you so much for this wide-ranging discussion about the court. And congratulations on your new book, *Nine Black Robes: Inside the Supreme Court's Drive to the Right and its Historic Consequences*. Thank you.

**[00:52:16] Joan Biskupic:** It's been a pleasure, Jeff. Thank you and your audience.

**[00:52:21] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock, and Sam Desai. Research was provided by Sam Desai. It was engineered by Greg Scheckler. Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Do check out Joan Biskupic's new book, *Nine Black Robes*, and sign up for our newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). Always remember, whether you wake or sleep, that the National Constitution Center's a private non-profit. So meaningful when folks sign online and give \$5 or \$10 or more just to signal your support for our great community of lifelong learners. You can do that by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount to support our work at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.