

## Two Books Offer View of High Court

### The Partisan

#### The Life of William Rehnquist

By John A. Jenkins  
PublicAffairs (2012)

Reviewed by John Wesley Hall

### The Oath

#### The Obama White House and the Supreme Court

By Jeffrey Toobin  
Doubleday (2012)

Reviewed by John Wesley Hall

Two books about the Supreme Court came out this fall, and both of them were a slap in the face. When finished with each, I was sad. In each, the revelations were profound: The Supreme Court is just another political institution, except we can't reject those politicians at the polls.

I came to law school, packing my rose colored glasses, thinking of the Supreme Court as this venerable, untouchable, incorruptible institution. It is, after all, the ultimate arbiter of constitutional questions in our democracy. It was an example to me, a mere uninformed citizen, of the "shining city on a hill,"<sup>1</sup> an institution of intellectual and political purity. So my civics teachers led me to believe in high school and college.

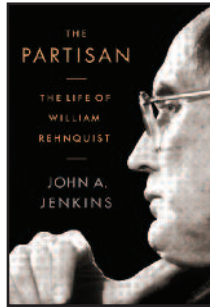
But what did they know? Had they ever studied any Supreme Court cases? Apparently not. As we all do in law school, I started reading and digesting its opinions. How could some of these opinions be written with a straight face? *Plessy v. Ferguson*<sup>2</sup> (separate but equal just fine under the Fourteenth Amendment), *Dred Scott v. Stanford*<sup>3</sup> (slaves not citizens; helping cause the Civil War; the worst SCOTUS decision ever<sup>4</sup>), and *Wickard v. Filburn*<sup>5</sup> (wheat grown on a family farm and consumed there affects interstate commerce because it's not in interstate commerce; recognizing an effective Catch-22). The shame of it all.

Then there is politics in SCOTUS's decisionmaking process, nothing as raw as *Korematsu v. United States*<sup>6</sup> (Japanese-Americans could be presumed to be spies and imprisoned during WWII) or 2000's *Bush v. Gore*.<sup>7</sup> But don't forget *McCleskey v. Kemp*,<sup>8</sup> holding that an obvious pattern of racial discrimination in the death penalty with white victims and African-American defendants was not proved because it couldn't be proved

it happened in McCleskey's own case.<sup>9</sup> We all have our Top Ten list.

How can books about a closed institution like the Supreme Court be written in the first place? Woodward had Justice Potter Stewart as his source for *The Brethren*.<sup>10</sup> The work involved is tedious and the revelations are extraordinary.<sup>11</sup> It takes devotion to the subject matter and a great amount of time.

### The Partisan



was such a private man he granted one interview in his life in 1984, to Jenkins. More interesting to me was the fact Jenkins also went through Nixon White House tapes and found Nixon's machinations in filling the four SCOTUS vacancies that occurred in 1969–71.

The chapters leading to the nomination of Rehnquist to the Supreme Court also tell us of the Nixon administration's engineering the resignation of hated liberal Abe Fortas.<sup>12</sup> Nixon was bound and determined to remake the Supreme Court in his own image and reverse the civil liberties and civil rights "excesses" of the Warren Court. He needed Fortas gone so he could fill that seat.<sup>13</sup>

The Nixon White House was stung by Senate rejection of two nominees in 1969–70 that they didn't properly vet.<sup>14</sup> Rehnquist was seemingly part of that failure because he was in on the vetting as DOJ's Office of Legal Counsel. Still, Nixon noted Rehnquist because of his pink shirts, paisley ties, Hush Puppies, and goofy 1970s sideburns, referring to him, as reported a few years later when the tapes became public (as I recall hearing it), as "that clown Rehnchburg."<sup>15</sup>

After getting Justice Blackmun nominated and easily confirmed to Fortas's seat, they had two more vacancies in short order with resignations of Hugo Black and John Harlan because of grave illnesses. Finally, after getting Lewis Powell to agree to take a seat, Attorney General John Mitchell decided that they should at least look at Rehnquist. Nixon nominated Rehnquist without ever talking to him about it.<sup>16</sup> But Rehnquist had the requisite qualifications for Nixon's

image: A reactionary who thought little of civil rights or the rights of the criminally accused,<sup>17</sup> especially the "sacred cows" of *Gideon* and *Miranda*.<sup>18</sup> Better yet, Rehnquist even wrote a memo when clerking for Justice Jackson during *Brown v. Board of Education*<sup>19</sup> that *Plessey* was rightly decided, and separate but equal was constitutional under the Fourteenth Amendment. "Rehnquist's 1952 memos put him squarely on the record as an ardent segregationist."<sup>20</sup> They would threaten his nomination to Associate Justice and Chief Justice but never derail them. In retrospect, I see that Nixon was just a mean spirited, evil little man, and he wanted somebody like him on the Court. Rehnquist fit the bill perfectly.

In researching this book review, I found four other reviews worth sharing:

On Salon.com, Dahlia Lithwick wrote "Injustice: Did William Rehnquist's practical jokes and bonhomie disguise a vicious, racist ideologue?":

William Hubbs Rehnquist was an enigma wrapped in a riddle, according to John A. Jenkins' new biography, *The Partisan*. An enigma wrapped in a riddle, wrapped in an orange tie, wrapped in a drug-induced stupor, then wrapped yet again in a hard racist shell. And, as Jenkins tells it, beneath all that packaging there lay a pulsing heart of pure, ends-driven evil.<sup>21</sup>

In the *Los Angeles Times*, Jim Newton wrote "'The Partisan' an opinionated biography of William Rehnquist."

One sample of his paradox: Rehnquist was a respected leader of the Court, appreciated even by those whose politics he abhorred, and yet he secured his position in part by perjuring himself at his confirmation hearing.

From before he came to the Court, Rehnquist was a provocative, pugilistic conservative. As a young man, he relished challenging seemingly settled ideas: He defended a hanging judge and the vigilance committees that substituted for conventional police in Gold Rush San Francisco. He followed the misguided scholarship of his Stanford mentor, Charles Fairman,

who postulated that the 14th Amendment, which promises all Americans the equal protection of the law, meant something other than what it said. Rehnquist fired off self-satisfied letters to the editor, did his best to keep Latinos from voting in Arizona, annoyed Justice Robert Jackson, for whom he clerked, and argued for the preservation of school segregation when *Brown v. Board of Education* came before the court.<sup>22</sup>

In the *New York Times*, Adam Cohen wrote his review entitled “The Justice Dissents,” which also discussed how Rehnquist hated habeas corpus and anything that interfered with execution of judgment in a criminal case:

When Jimmy Lee Gray was sent to the Mississippi gas chamber in 1983 the procedure went horribly wrong. He gasped for breath and convulsed wildly, slamming his head against a metal pole hard enough to shake the room. The episode caused widespread revulsion,



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and Mississippi eventually switched from gas to lethal injection.

Weeks after the botched execution, Justice William Rehnquist lamented the Gray case in a speech at the University of Arkansas. Rehnquist was not troubled by the gruesomeness. He was disturbed by the number of times the condemned man had been allowed to challenge his sentence in federal and state court.<sup>23</sup>

Better yet is the *Wall Street Journal's* review by Richard W. Garnett, “The Conscience of a Judicial Conservative: William Rehnquist was a Nixon appointee and a Republican, but above all he was a lawyer’s lawyer with a clear-eyed appreciation of the duties of his position.”

Rehnquist believed that the Supreme Court is charged with a crucial but limited task and that a justice’s job isn’t to design public policy but to preserve the Constitution’s careful system of checks and balances. He succeeded in moving the court’s doctrines in a number of important areas, and — as the drama surrounding the decision last summer in the Obamacare case illustrated — he changed the conversation about our nation’s public law, reminding lawyers and citizens alike of the first principles that inspired the American founding.

Such a figure’s life and work deserve a careful, close biographical study. John Jenkins’s *The Partisan* isn’t such a book. It is a tediously partisan, relentlessly tendentious and superficial expansion of a similarly flawed *New York Times Magazine* profile published more than 25 years ago.<sup>24</sup>

The WSJ really has to tell us that Rehnquist had a conservative judicial philosophy? “[D]uties of his position”? They conveniently fail to note he had utterly no regard for stare decisis. He was the quintessential judicial activist, but he was “their” “judicial activist,” so the WSJ finds solace in calling his racism and mean spiritedness “The Conscience of a Judicial Conservative” or the “duties

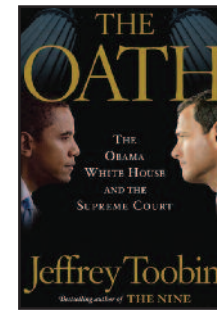
of his position.”

Rehnquist would write his own lone dissents so he could cite them later at a more convenient time when it could become law. He would plant dicta so he could later make it law. Every dissenting opinion was a lurking judicial time bomb waiting for its time.

One final note: That Plessey memo? The confirmation “fight” for Rehnquist as Chief Justice<sup>25</sup> when nominated by Ronald Reagan so exhausted the Senate with a 65–33 vote that Antonin Scalia skated through right after without examination with a 98–0 vote. Regarding Scalia, even Sen. Biden said, “This nominee has demonstrated through his career that he as an intellectual flexibility. He is not a rigid man.”<sup>26</sup> Reagan had Rehnquist run interference for Scalia. The rest is history.

Rehnquist’s 2005 death led to Chief Justice Roberts, which takes us to *The Oath*.

## The Oath



Jeffrey Toobin’s *The Oath: The Obama White House and the Supreme Court* is an intense follow-up to Toobin’s 2008 *The Nine: Inside the Secret World of the Supreme Court*. It

seemed surprising that only four years in the life of the Supreme Court could justify another book. Usually these take decades before enough has happened to justify another book.

Not so with *The Oath*. Between the two: Justices David Souter and John Paul Stevens retired and President Obama appointed Justices Sonia Sotomayor and Elena Kagan, and *Citizens United*<sup>27</sup> and the constitutionality of Obamacare<sup>28</sup> were decided. In addition, Rehnquist was a mentor of Chief Justice John Roberts.<sup>29</sup>

I confess: About halfway through *The Oath* I had a visceral reaction from it: Civil libertarians must feel profoundly sad for the Court as an institution and the Constitution as a whole because of Toobin’s revelations about the people and the politics of the Court. Roberts was clearly appointed to be another Rehnquist, except a more genteel one, maybe a little less evil, but still another Rehnquist. If so, that means the Court will remain bogged down in politics and remain in the forefront of keeping the conservative “agenda” before the federal

courts for another generation.

I've read John Paul Stevens's biographies, but Toobin's observation on Stevens's retirement after *Citizens United* is notable: "After thirty-five years on the Supreme Court, it was clear that John Paul Stevens was about to walk away from a place he no longer recognized."<sup>30</sup> It was not a matter of Stevens getting more liberal, as all have observed, it was a matter of the Supreme Court getting more conservative.

From my friend Garrett Epps's review in the *New York Times*, "Potus v. Scotus: 'The Oath: The Obama White House and the Supreme Court,'" "Toobin calls Roberts an 'apostle of change,' seeking to move the law dramatically to the right, and Obama a 'conservative' who wants the courts to leave politics alone."<sup>31</sup> As to the healthcare case:

... the rest of the book is devoted to drama inside the court, which is harder to report. When oral arguments ended on March 28, most observers (including, as he gamely admits, Toobin himself)

predicted that the act would be savaged. By the end of June, however, Roberts had apparently left his four conservative allies in the lurch. "The Oath" adds little to what is already known of these events, nor does Toobin tell us who was responsible for the surprising wave of leaks, mostly critical of Roberts, coming from the Court before and after the decision (which could be traced, he speculates, to "petulant law clerks," not disappointed justices).<sup>32</sup>

Remember Roberts's claim that it was only his job to "call balls and strikes" as a Chief Justice? If that's what President Bush wanted, Roberts never would have gotten the nomination. Bush, too, wanted to keep the Court leaning right, as far right as possible. President Obama had to make two "liberal" appointees, if that's what you want to call them, just to keep the balance from the loss of Souter and Stevens, two moderate Republicans.

Toobin's telling comments about

former Justice O'Connor, already gone from the Court, but still living a public life:

In private, O'Connor had a disparaging word for what she saw in Roberts — *an agenda*. Rehnquist was different, she said. He had taken each case one at a time; he had not tried to force his vision of the Constitution on the Court. This was actually revisionist history on O'Connor's part. Rehnquist was just about as conservative as Roberts was, but Rehnquist just didn't have the votes to enact his agenda. Roberts, in most cases did.<sup>34</sup>

Except that Rehnquist was not different.

Still, even under Roberts, stare decisis is the exception rather than the rule. It was ignored in *Citizens United*, but embraced in the healthcare case. Go figure. Because for once Roberts wanted to come out as somebody who actually followed stare decisis rather than blithely ignoring it?

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Because Roberts didn't want to be seen as so crassly partisan, as he obviously is?

Admit it: Every time the Supreme Court grants cert in a case, we cringe. What's going to happen? How will they change the law again? Where is stare decisis when you need it?

Only in the U.S. Supreme Court would Strike 3 be called a home run. One would think the game is rigged to come out 5-4 on everything. Almost everything.

The Points to Remember:

The Rehnquist Court:

Government > Individuals

The Roberts Court:

Corporations > Government

## Notes

1. See Matthew 5:14, formalized by Puritan John Winthrop's sermon "A Model of Christian Charity" given in 1630, but attributed by those with no sense of history only to Ronald Reagan. It was used first in modern times by John F. Kennedy in a January 9, 1961, speech.

2. 163 U.S. 537 (1896).

3. 60 U.S. 393 (1857).

4. ETHAN GREENBERG, *DRED SCOTT AND THE DANGERS OF A POLITICAL COURT* (2010).

5. 317 U.S. 111 (1942).

6. 323 U.S. 214 (1944).

7. 531 U.S. 98 (2000).

8. 481 U.S. 279 (1987).

9. Discussed in *THE PARTISAN* at 55 n.† (Justice Powell regretted his vote in *McCleskey*, and he wrote the opinion).

10. It was disclosed by Woodward that Justice Potter Stewart was his primary source after Stewart's death in 1985. David J. Garrow, Book Review: *The Brethren: Inside the Supreme Court*, Constitutional Commentary (June 22, 2001).

11. Consider also JEFFREY L. TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008), mentioned *infra*.

12. *THE PARTISAN* at 91-95.

13. Fortas was already damaged by Nixon's "plumbers" in the failed bid to be Chief Justice, *id.* at 90-91, so it wasn't that hard to bluff him into just resigning.

14. Some of us remember the fiasco nominations of Clement Haynesworth and Harold Carswell to fill the "Southern Seat" with a potential racist. Carswell was on the Northern District of Florida and had just been appointed by Nixon to the Fifth Circuit when his SCOTUS nomination came. Sen. Roman Hruska accidentally and famously destroyed the nomination by his comment outside the Judiciary Committee that Carswell was mediocre, and "there are a lot of mediocre judges and people and lawyers. They are entitled

to a little representation, aren't they, and a little chance?" *Id.* at 100.

15. *THE PARTISAN* at 109. Rehnquist was working on a project for DOJ and Nixon and Nixon said: "You remember the meeting we had when I told that group of clowns we had around there? Rehnchburg and that group."

16. An interesting side note: The first choice was Sen. Howard Baker, but Baker was ambivalent and didn't really want it. *Id.* at 120-27. Baker became really famous as the Ranking Minority member of the Senate Watergate Committee who repeatedly asked: "What did the president know and when did he know it?"

17. *Id.* at 117.

18. *Id.* at 81 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

19. 347 U.S. 483 (1954).

20. *THE PARTISAN* at 37.

21. [http://www.slate.com/articles/news\\_and\\_politics/books/2012/11/william\\_rehnquist\\_biography\\_the\\_partisan\\_by\\_john\\_jenkins\\_reviewed.html](http://www.slate.com/articles/news_and_politics/books/2012/11/william_rehnquist_biography_the_partisan_by_john_jenkins_reviewed.html) (Nov. 2, 2012).

22. <http://articles.latimes.com/2012/oct/27/entertainment/la-ca-jc-john-jenkins-20121028> (Oct. 27, 2012).

23. <http://www.nytimes.com/2012/11/18/books/review/the-partisan-the-life->

[of-william-rehnquist-by-john-a-jenkins.html?pagewanted=all&r=0](http://www.nytimes.com/2012/11/18/books/review/the-partisan-the-life-of-william-rehnquist-by-john-a-jenkins.html?pagewanted=all&r=0) (Nov. 18, 2012).

24. <http://online.wsj.com/article/SB10000872396390443749204578050494036122014.html> (Oct. 23, 2012).

25. An aside: I learned here that Justice O'Connor was seriously considered for Chief Justice in 1986. *THE PARTISAN* at 211.

26. *Id.* at 221.

27. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

28. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

29. *THE OATH* at 38-39.

30. *Id.* at 191.

31. Garrett Epps, "Potus v. Scotus: 'The Oath: The Obama White House and the Supreme Court'" by Jeffrey Toobin, N.Y. TIMES (Sept. 30 2012), <http://www.nytimes.com/2012/09/30/books/review/the-obama-white-house-and-the-supreme-court-by-jeffrey-toobin.html>.

32. *Id.*

33. *THE OATH* at 216-17.

34. *Id.* at 215. ■

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