



The Partisan: The Life of William Rehnquist

By John A. Jenkins
PublicAffairs, 2012

Review by Carl Stern

On more than one occasion, while I was working as a correspondent for NBC News, I watched William Rehnquist walk around the U.S. Supreme Court building prior to the 10 a.m. session to ease his back pain. Clusters of tourists, with cameras clicking, crowded the majestic front steps and spilled into adjacent streets. Yet I never saw anyone recognize the somewhat gaunt, stooped figure who passed by, the chief justice of the United States.

Such was the shadowy, enigmatic man John A. Jenkins set out to understand and reveal in his highly readable biography of the chief justice—only the 16th—a position that has shaped our lives and destiny, says Jenkins, as much as any president or leader of Congress.

Then why is it that Rehnquist left little imprint in public or legal circles despite 33 years on the Court, nearly 19 of them as chief justice? Jenkins suggests the answer may be in the nature of the man, whose story he tellingly titled *The Partisan*.

Rehnquist was a person of contradictions. He led Court employees in Christmas caroling, was addicted to poker gatherings and office pools, and would throw his head back in a broad, toothy laugh. Yet Jenkins, examining Rehnquist like some Hamlet fingering the skull of Yorick, writes that behind that “public mask of jollity” was a “brooding private man,” a “chameleon,” who never relented in his iconoclastic, partisan’s mission to imbue the Court with a deep conservatism favoring government power over individual rights.

What made Rehnquist tick? Jenkins, who did a remarkable—and rare—interview with the justice in a 1985 profile in *The New York Times Magazine*, provides a tantalizing clue. Among the 13,000 pages of documents he reviewed was a 2003 letter Rehnquist wrote to a grandson in which the chief justice proudly recalled his fifth grade assignment to memorize a poem. His choice: “Horatius at the Bridge.”

In many ways Jenkins, a long-time legal affairs reporter and president of CQ Press, is no less a partisan than his subject. While eschewing a case-by-case examination of Rehnquist’s opinions, he writes that “Precedent and legal argument interested [Rehnquist] barely at all.” He asserts that Rehnquist was motivated by “a sort of inspired legal nihilism.” Says Jenkins, “If you were a homosexual, a racial or religious minority, a woman, an alien, an accused criminal, or someone facing the death penalty, you were not going to get Rehnquist’s vote.”

Rehnquist enlisted “sheer cleverness,” writes Jenkins, “in laboring to turn back the clock.” The claim may not be unwarranted. Case in point: Rehnquist’s jaw-dropping disingenuousness in *General Electric Co. v. Gilbert* (1976), in which he cobbled together six votes for the remarkable proposition that the omission of pregnancy benefits from a company’s employee health care plan was not gender discrimination since men and women alike were denied sick leave for pregnancy.

What accounts for such callousness in a justice who was not otherwise uncaring about the people around him? That is more than Jenkins can explain. Rehnquist had an uneventful childhood in suburban Milwaukee, growing up in a staunchly conservative, anti-New Deal family, like most of the people he knew. One childhood friend recalled that “[their] parents would listen to FDR on the radio, gnash their teeth and turn the dial to [anti-FDR radio priest] Father Coughlin.”

Jenkins attributes Rehnquist’s constitutional development to the influence of Stanford University professor Charles Fairman, “a darling of the political right,” who insisted that the Bill of Rights did not apply to the states and who railed against infringement by the central government. Rehnquist wrote in a master’s thesis at Stanford that minorities had no inherent moral or legal right to be free from discrimination.

That hardening, coupled with Rehnquist’s lifelong reluctance to seek middle ground, was the key to his success—and failure—according to Jenkins.

When Richard Nixon plucked Rehnquist from obscurity in the U.S. Department of Justice at the suggestion of his counsel John Dean, the president is heard on a White House tape recording telling Attorney General John Mitchell, “Be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is.” It was the reason Rehnquist was chosen.

Nonetheless, the “Lone Ranger,” as his clerks dubbed him, was marginalized by his unyielding conservatism, in Jenkins’ view. It negated Rehnquist’s ability to influence the outcome of cases. During his tenure Court watchers described a “Brennan Court,” and later an “O’Connor and Kennedy Court,” but seldom a “Rehnquist Court.” True, nine federal statutes were invalidated in whole or in part on federalism grounds between 1995 and 2001, the few years some might call a “Rehnquist revolution.” But Jenkins notes that no major federal program got the ax, and the result was “decidedly less than world-shaking.”

If there is any moral to the story of Rehnquist’s astonishing (at least to Jenkins) rise, it is to affirm the importance of being in the right place at the right time. Rehnquist obtained a clerkship with Supreme Court Justice Robert Jackson, in no small part because he became available at midterm when Jackson feared his one and only clerk was falling behind. Thereafter, he gravitated to Phoenix in search of warm weather. He fell in with the Barry Goldwater crowd. When Goldwater’s surrogate to the Nixon presidential campaign, Richard Kleindienst, came to Washington to be the number two man at the Justice Department, he brought Rehnquist with him.

It culminated with an almost comical, *The Perils of Pauline* dash by the White House in 1971 to find a High Court nominee in time for a promised TV announcement. When two seats opened on the Supreme Court and Senator Howard Baker vacillated at the last moment to being nominated for one of them, President Nixon turned to a man he had only met once, the man he had famously referred to as “Rehnchburg” in an Oval Office tape recording. In Jenkin’s words: “Right place. Right time. Luck. Pluck. Fate.”

That afternoon rumors reached the Justice Department press room that the president would name former ABA president Lewis Powell Jr. to one of the two seats, and perhaps Rehnquist to the other. A Powell nomination seemed plausible. The mention of Rehnquist, an assistant attorney general for the Office of Legal Counsel, seemed more likely to be humorous buzz generated by his staff.

Rehnquist was in the kitchen of his Virginia home when I reached him by phone. "You're not going to believe this," I said, with a laugh in my voice. "Now they are even mentioning *your* name for the Supreme Court." I thought Rehnquist would get a kick out of knowing he figured in the pre-announcement chatter.

"I can't talk about it," Rehnquist replied.

"Oh, no," I groaned, still believing it was unlikely (and, if it wasn't, I had just committed a monumental *faux pas*). Rehnquist said he had to go. Three hours later, I watched him standing at the president's side on television.

At his confirmation hearing, I recall thinking that, at age 47, this man would be on the Court for the rest of the century. He surpassed it. He remained on the Court until 2005. Jenkins implies Rehnquist hung on, even through his terrible decline from cancer, because there was nothing else that interested him after the death of his wife in 1991. And, of course, to pursue his partisan's mission.

I hope there was more to it than that. Jenkins says little about the institutional tug that occasionally draws the justices out of character. In Rehnquist's case, it was his 2000 opinion upholding the constitutionality of *Miranda* after years of trying to undo it.

Jenkins suggests that Rehnquist had only the workaday objective of preventing the chaos that might have followed from abandoning procedures to which the police and public had become accustomed. He says it "actually comported with Rehnquist's law-and-order credo in some way."

But is that all there was? After decades of belittling *stare decisis*, Rehnquist wrote that the principles of *stare decisis* "weigh[] heavily against overruling [*Miranda*] now." He said "the warnings have become part of our national culture."

The *result* was to put the Court above partisanship. Any other decision would have made all of the Court's pronouncements seem transitory.

That is why I am unconvinced by the book's concluding assertion that Rehnquist will live on in the chief justice who succeeded him, and who was once his clerk, John Roberts. "The Roberts Court is Rehnquist's true legacy," says Jenkins, "doctrinaire, predictable, road tested." In his view, Roberts' momentous vote upholding President Obama's health care law was little more than a vehicle to eviscerate Congress's commerce clause power while tolerating the law as a humdrum exercise of its taxing authority.

If that is so, then Roberts will surely shrink in stature by Jenkins' own yardstick.

I prefer to think that Roberts wanted to avoid the kind of unconciliatory path that diminished Chief Justice Rehnquist's influence, and that Roberts already had learned the lesson of Jenkins' cautionary tale about the consequences of excessive partisanship.

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