Raw Judicial Power

by MICHAEL O'DONNELL

The Partisan
The Life of William Rehnquist.
By John Jenkins.
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William Rehnquist was not an odds-on favorite for a seat on the Supreme Court. The man who put him there, Richard Nixon, was unimpressed after their first meeting, asking an aide in July 1971: "Who the hell is that clown?" At the time, Rehnquist was a Justice Department lawyer known for wearing loud psychedelic neckties with clashing shirts, Hush Puppies and mutton-chop sideburns. A few weeks later, Nixon asked again after the clown, whose name he butchered as "Rehnchburg." But mere months after that—in the wake of the American Bar Association's vocal disapproval of several of his potential Supreme Court nominees—Nixon nominated Rehnquist to the Court as a dark horse. Rehnquist was in the right place at the right time: the man Nixon had planned to nominate, Senator Howard Baker, hesitated over accepting an appointment. As head of the Justice Department's Office of Legal Counsel, Rehnquist had helped vet Nixon's previous nominees; as a former editor in chief of the *Stanford Law Review* and law clerk to Justice Robert Jackson, he had a pedigree that dazzled the president. After making his last-minute decision, Nixon instructed the attorney general to "be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is."

He was. The nomination that almost didn't happen proved to be one of Nixon's most consequential acts as president. Rehnquist, who was born in 1924 and died in 2005, ended up serving on the Court for thirty-three years, far longer than any other Nixon appointee; he spent nineteen of those years as chief justice. When Rehnquist joined the Court, he was easily its most conservative member; by the time of his death in office, there were two justices to the right of him (Antonin Scalia and Clarence Thomas), and two more fitting out their robes (John Roberts and Samuel Alito). Rehnquist therefore serves at the very least as a valuable point of reference—a conservative stalwart who nevertheless migrated through attrition from the far right to the middle right of the Supreme Court, a journey that demonstrates just how extreme the Court's conservative wing has become. Yet it would be a grave mistake to view Rehnquist as nothing more than a vote, a dogma and a pair of chunky glasses. He was enormously influential and, like his former boss Barry Goldwater, changed the parameters of public conversation about the role of government in the United States. Through tenacity, patience and at times guile, he channeled fringe positions into mainstream judicial conservatism.

John Jenkins, a journalist who in 1985 wrote a major profile of Rehnquist for *The New York Times Magazine*, has published what purports to be "the first full biography" of the late chief justice, *The Partisan*. The book doesn't even try to live up to its billing. Any biography of a judge must confront not only the life but also the work. Jenkins writes here and there about Rehnquist's jurisprudence, but never at any length or with much analysis; mainly, he snipes in one-off lines that Rehnquist reached politically conservative—and therefore incorrect—results. The vast majority of *The Partisan* covers other facets of Rehnquist's life. Many of Jenkins's explorations are fascinating and break new ground; they fill out the profile of an enormously powerful and significant man. But a complete scholarly biography that pinpoints Rehnquist's legacy as chief justice must await another day.

The Partisan is a polemic rather than a disinterested study. Jenkins is consistently hostile to Rehnquist, calling him a judicial nihilist and writing hardly a civil word in his favor. Many of his criticisms seem justified, although they feel less trustworthy for their predictability. Rehnquist was, after all, a results-driven justice with unapologetically far-right views; his life's work was to turn the Bill of Rights into a thinner, flimsier document. He was a man of petty bigotries, calling immigrant children "wetbacks" among his brethren and fighting integration at every turn. Rehnquist aggressively pushed to scale back what he perceived to be the excesses of the Warren Court, in the process undermining the rights of the criminally accused, immigrants, women, blacks, gays and the disabled. He was one of the most consistent votes in favor of capital punishment on a Court not known for its sympathy toward criminals. As Professor Geoffrey Stone demonstrated in an empirical analysis in 2006, Rehnquist was, "by an impressive margin, the member of the Supreme Court *least* likely to invalidate a law as violating 'the freedom of speech, or of the press.'" And, of course, Rehnquist led the Court in the "federalism revolution" by protecting the states from lawsuits and by reducing the national government's power—often when it was trying to do something progressive.

It is nevertheless remarkable for Jenkins to say that in "the totality of his career, not one of Rehnquist's majority opinions stood out as distinguished." Rehnquist's opinions were not dramatic or rhetorically dazzling, but regardless of their positions, they had the rare benefit of being short and clear, providing straightforward guidance to attorneys and to lower courts. His opinions in *United States v. Lopez* (1995), striking down portions of the Gun-Free School Zones Act, and *Nevada Department of Human Resources v. Hibbs* (2003), upholding the Family and Medical Leave Act, to take just two examples, are extraordinary judicial documents that belie Jenkins's overbroad assertion. Rehnquist's decisions were reasoned and to the point, avoiding the apocalyptic invective of Scalia or the mystical ponderousness of Anthony Kennedy. Even the great liberal William Brennan, Rehnquist's ideological foe, conceded the effectiveness of Rehnquist in dissent, saying appreciatively after the release of one decision over which they had sparred, "Wasn't Rehnquist good!"

More remarkable still, Jenkins contends that "Rehnquist left no body of law or opinions that define his tenure as chief justice or even seem likely to endure." The first half of this statement is manifestly incorrect and the second half is wishful thinking. Rehnquist left a major—and destructive—body of law in the federalism context, along the way asserting a doctrine that might be called Raw Judicial Power. Even if Jenkins has forgotten the federalism decisions, the Court made clear in June, when it upheld the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius*, that the conservative justices have not. While upholding the act's "individual mandate" provision as a permissible exercise of Congress's taxing power, a majority of the Court under Chief Justice Roberts found that the law exceeded Congress's power to regulate interstate commerce. Like a baton pass on a very long track, this ruling may prolong Rehnquist's defining philosophy for several generations. Roberts clerked for Rehnquist from 1980 to 1981, and his old boss taught him how to play the long game.

Michael O'Donnell is a lawyer in Chicago whose writing on legal affairs has appeared in Bookforum, Washington Monthly *and the* Los Angeles Times.

Although Rehnquist joined the Court as a young man, he brought with him more baggage than most junior associate justices. While clerking for Justice Jackson during the 1952–53 term, Rehnquist drafted what the *Boston College Law Review* recently called "the most notorious Supreme Court law clerk memorandum ever written." The memo concerned the batch of cases up for argument that would eventually lead to the Court's 1954 decision in *Brown v. Board of Education*. In the memo, Rehnquist wrote, "I think that *Plessy v. Ferguson* was right and should be reaffirmed." This shocking assertion in support of the separate-but-equal doctrine raised hackles during Rehnquist's Senate confirmation hearings both as an associate justice in 1971 and as chief justice in 1986, and has sparked extensive scholarly debate. Jenkins—whose 1985 *Times Magazine* profile revealed other Rehnquist clerkship memos hostile to civil rights plaintiffs—concludes that Rehnquist baldly lied when he told the Senate Judiciary Committee that he was not stating his own views in the memo, but rather preparing a summary of Jackson's views for use at the justices' conference.

There is no longer any real doubt—nor was there ever much—that Rehnquist misled the Senate. The very title of his memorandum, "A Random Thought on the Segregation Cases," suggests that it contained Rehnquist's own views. Similarly, the sentiments were not couched in terms that a justice would likely use with his colleagues, but rather sound consistent with Rehnquist's other brash writing from the time ("I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but…"). Tellingly, Jackson's biographer, Dennis Hutchinson, found no evidence after an exhaustive search through Jackson's papers of the justice ever requesting any clerk to prepare a summary of his views for use at conference. Hutchinson called Rehnquist's explanation "absurd." And, of course, Jackson demonstrated that he thought *Plessy* was wrong by voting with the unanimous Court to overturn it in *Brown*.

Rehnquist carried his position on *Brown* and *Plessy* into the work he performed for the Republican Party after his clerkship. He served as a strategist and speechwriter for Goldwater during the 1964 presidential campaign, helping, along with Robert Bork, to persuade the senator to vote against the Civil Rights Act of 1964. Becoming active in Arizona politics, Rehnquist testified before the Phoenix City Council against a proposed public accommodations law on libertarian grounds and served as head of "ballot security" for the Arizona Republicans from 1958 to 1964, challenging the literacy of minority voters. Through a serendipitous friendship with Deputy Attorney General Richard Kleindienst, he joined the Nixon administration, where he served as the administration's quirky legal intellectual, lambasting the excesses of the Warren Court and acting as an aggressive bulldog on issues of criminal justice reform. In an extraordinary memo to White House counsel John Dean, Rehnquist even recommended amending the Constitution to limit criminal procedure protections—a proposal that Dean wisely ignored. Around that time, Rehnquist noted in his journal that "Conservatives are those who worship dead radicals."

In his early years on the Supreme Court, Rehnquist gained a reputation as a frequent—and sole—dissenter, earning the nickname "the Lone Ranger." His dissents were usually short, clear and wrongheaded. Representative of the period is Rehnquist's dissent in *Roe v. Wade* (1973), which began, "The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement." Rehnquist then went on, in eleven paragraphs, to outline critiques of *Roe* that, while ultimately unpersuasive, have continued to trouble even liberal legal scholars over the ensuing decades: the Court's decision was theoretically confusing, usurped voters' preferences and, in its unorthodox announcement of judicial rules tethered to the three trimesters of pregnancy, amounted to "judicial legislation." Rehnquist remained hostile to abortion rights for the rest of his career. Nineteen years after *Roe*, he drafted and circulated a decision in *Planned Parenthood v. Casey* (1992) that would have overruled *Roe* outright, but he lost his majority.

By writing respectfully and opening his *Roe* dissent with a gracious nod to the majority opinion's sensitive author, Harry Blackmun, Rehnquist demonstrated one of the traits that later allowed him to succeed as chief justice: his warm and amiable relations with colleagues of all persuasions. Jenkins thinks otherwise, emphasizing Rehnquist's isolated spats with Justices John Paul Stevens and Thurgood Marshall. But most sources reveal Rehnquist as a beloved figure on the Court: a goofy iconoclast who liked gambling on small stakes, tried repeatedly to enlarge social opportunities among Court staff and never took himself too seriously (even taking a cue from Gilbert and Sullivan and adding gold stripes to his robe). It is striking the extent to which colleagues with differing judicial philosophies, like Brennan, Blackmun, Lewis Powell and William Douglas, genuinely enjoyed Rehnquist, liked working with him and counted him as a friend. Although Rehnquist did not go out of his way to cultivate allies, he rarely alienated his brethren with overheated rhetoric like Scalia or Brennan. To his credit, Jenkins does an excellent job of sketching the improbable friendship between Rehnquist and Douglas, who overlapped on the Court for fewer than four years. The two men were ideological opposites: the right-wing conservative and the radical leftist. But both were loners from the West who liked doing things their own way and refused to make work the center of their lives.

Another of Rehnquist's early dissents set in motion a judicial agenda that would not be fulfilled for decades. In *Fry v. United States* (1975), the Court upheld the Economic Stabilization Act of 1970, which allowed the president to address rising inflation by fixing wages and salaries across the country—including the salaries of state employees. Two Ohio public employees sued, contending that the federal law unjustly prevented the state from giving them a raise. Rehnquist filed a solitary dissent to the majority's brief, workmanlike opinion, protesting the federal government's intrusion into state sovereignty and contending that Congress had exceeded its power to legislate under the commerce clause. He warned that such laws posed a "danger to our federal system" and wrote that Congress was "not free to deal with a State as if it were just another individual or business enterprise subject to regulation." The following year, in *National League of Cities v. Usery*, Rehnquist commanded a bare majority of the Court in invalidating the Fair Labor Standards Act as applied to state governments. That decision was overruled in 1985, but the Rehnquist revolution had quietly begun.

Its zenith came in a string of federalism decisions in the 1990s and 2000s, when the Rehnquist Court struck down a record forty-one federal laws. Under Rehnquist's leadership, the Court invalidated laws as exceeding Congress's broad commerce power; limited the ability of federal programs to "commandeer" state agencies or resources (by, for instance, enlisting state police to help build a federal handgun registry); and insulated states from suit. Rehnquist wrote the most important of these decisions himself: *Lopez* and *United States v. Morrison* (2000) on the commerce clause issue, and *Seminole Tribe of Florida v. Florida* (1996) on protecting states from plaintiffs. In *Morrison*, the Court by a

5–4 vote invalidated a portion of the Violence Against Women Act that granted victims a right to sue in federal court. Rehnquist had actually lobbied against the VAWA during Congress's consideration of the bill, warning that it would flood the federal courts with suits dealing with traditionally state matters like domestic violence. In *Seminole Tribe*, the Court essentially constitutionalized the doctrine of sovereign immunity, which at common law prevented individuals from suing state governments. The decision sharply limited the ability of private plaintiffs to sue states for violations of federal law. In his 2011 memoir, Justice Stevens called *Seminole Tribe* the most important decision Rehnquist wrote as chief justice—and one of the worst decisions handed down by the Court in decades.

Jenkins derides the "so-called" federalism revolution as "less than world-shaking," suggesting that it is over and done with. It is true that the federalism decisions tapered off in the 2000s, and that even the landmark ones did not invalidate major federal programs, as the Court had done in the 1930s, leading to the constitutional crisis in which Franklin Roosevelt threatened to pack the Court with liberal judges. I hope Jenkins is right—although, tellingly, in his 1985 *Times Magazine* profile, he described the 1976 *Usery* decision as the "high-water mark" of Rehnquist's federalism jurisprudence, when in fact the worst was yet to come. But the genius of the federalism revolution may well be its insidious nature. By invalidating symbolic laws like the Gun-Free School Zones Act and the VAWA, Rehnquist and his allies created and nourished a movement that startled legal scholars but attracted little attention among the general public. Rather than risk a backlash by undertaking an all-out assault on progressive policies, the Rehnquist Court launched a stealth war. Consequently, the conservative bloc on the current Court has a series of potent doctrines to draw on. It's doubtful that the federalism revolution is the stuff of history.

By the time of the decisions in *Lopez* and *Morrison*, Rehnquist had been promoted to chief justice. His confirmation for that position in 1986 was an even closer affair than his initial confirmation to the Court in 1971. The Senate votes were 68–26 in 1971 and 65–33 in 1986; ironically, on the same day in 1986, Scalia slid by 98–0 because the Democrats had focused all their opposition on Rehnquist. Jenkins is typically harsh on Rehnquist's administration of the Court as chief justice, chiding him for "rigid deadlines," "nit-picking caveats" and "imposing his pace" on his colleagues. But these characterizations are at odds with the tone of most commentary on Rehnquist's tenure in the position. Rehnquist's predecessor as chief justice was Warren Burger, a man almost universally derided for his pomposity and chaotic management of the Court. Burger presided over endless, unwieldy conferences where he withheld his vote in order to retain the right to stay in the majority and assign the opinion. Sometimes he failed to make an assignment at all, baffling his colleagues and delaying the Court's judgment. Burger wrote opinions that were often confusing and failed to command a majority, and he would blatantly change his vote once opinion-writing was under way in order to retain control. He played favorites in assigning opinions and engaged in petty spats with his colleagues.

Rehnquist was the opposite: an efficient administrator who ran a tight ship but used a light touch, saw that the Court did its work on time, and earned the respect and gratitude of his colleagues. Brennan called him the "ideal" chief justice, and there were no more headlines about dysfunction at the Supreme Court. Rehnquist presided over a brisk conference and ended Burger's practice of rearguing difficult cases, which often extended a case's gestation to two terms. He assigned opinions impartially, based on which justices were current with their work. It is true that he gained a reputation among the bar for grouchiness because of his terseness with lawyers at oral argument, insisting that they call him by his proper title and cutting them off once their time expired. But here a comment from Stevens's memoir is enlightening: he writes that Rehnquist was tough, but impartially tough, which is the hallmark of a good judge. When Republican Senator Arlen Specter argued a case and sought to keep talking after his time was up, Rehnquist cut him off just like everybody else.

One area where *The Partisan* does add to our understanding of Rehnquist is his life outside the law. Some of Jenkins's observations on this front are questionable and even petty, as when he chides Rehnquist for excluding a disliked cousin from a family wedding (who hasn't!) or quotes anonymous sources attesting to his racist comments and behavior. Other passages are more illuminating. Rehnquist found Court life isolating and strongly considered retiring in the 1980s. In a fascinating chapter, Jenkins discusses the justice's literary ambitions. He wrote several novels in his spare time and parlayed his friendship with Douglas into a relationship with a superstar literary agent, who tried but failed to sell them. Jenkins writes: "What was interesting about Rehnquist's literary ambitions was how willing the justice was to keep his own ego in check. Rehnquist was cut-and-dried when he edited the work of his clerks, and he could be didactic in the extreme. But with [Robert] Lantz, this agent he had not yet met, he adopted an almost apprentice-like relationship." Rehnquist eventually found his niche, publishing four books of history about the Supreme Court.

These revelations humanize the late chief justice, and his ability to preside over the Court distinguishes him. Yet for all that, his solidly conservative jurisprudence was terrible for the country. He voted against every affirmative action program that came before the Court in his lifetime, as well as every major case on gay rights. He was a persistent roadblock to desegregation in the 1970s, and found teeth in the First Amendment only in cases where laws limited commercial speech, imposed campaign finance restrictions or limited religious expression. At times his decisions demonstrated a striking lack of empathy—almost a heartlessness. Few justices did more to undermine important criminal procedure protections like those provided by *Miranda v. Arizona*, the landmark decision affording Fifth Amendment rights to criminal suspects—though, in 2000, Rehnquist surprised the legal world by writing an opinion reaffirming *Miranda*, thus demonstrating his statesmanship and revealing that his conservatism was not as obstinate as Scalia's or Thomas's. He was willing to compromise and forge coalitions in other cases as well, especially later in his career. But he was hard right and obstreperous enough. A liberal chief justice has not presided over the Supreme Court since Earl Warren retired in 1969. And John Roberts, Rehnquist's protégé and heir, is only seven years into his tenure. The chief is dead. Long live the chief. ■

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