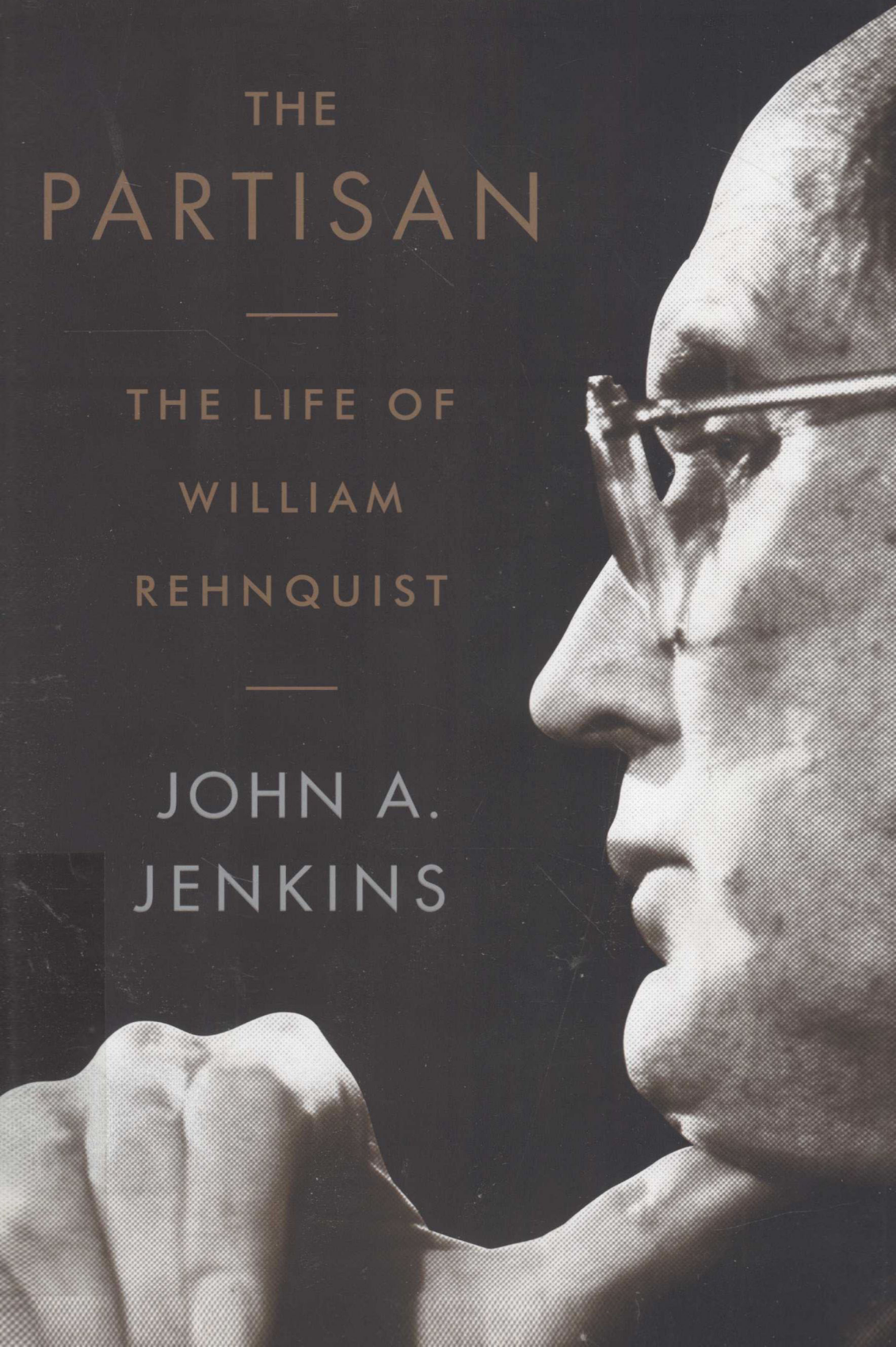


THE PARTISAN

THE LIFE OF
WILLIAM
REHNQUIST

JOHN A.
JENKINS



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ALSO BY
JOHN A. JENKINS

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You believed.*

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INTRODUCTION

IT WAS FRIDAY EVENING, December 10, 1971, and President Nixon was calling.

Congratulations were in order. William Rehnquist had survived a messy confirmation battle and soon would take his chair as the newest justice on the Supreme Court. The good wishes were coming from all over, of course, but none was as important as this first and only talk that Rehnquist would ever have with the president. The White House operator already had Rehnquist on the line when Nixon came on. The president was ebullient.

“Well, you must feel like Chief Justice Hughes,” Nixon began. “He had 26 voting against him, too.”

Rehnquist was at a loss for a rejoinder, still getting his feet under him. “Is that the exact number?”

Of course it was. “I just got it in front of me. So, like Hughes, you can go out and say, ‘I had 26 against me.’”

Neither man was much for small talk. Rehnquist listened as the president went on, kidding about an endorsement of Rehnquist’s nomination by the liberal newspaper columnist Joseph Kraft. Treasury Secretary John Connally, a shrewd Texas politico, had shown Kraft’s column to Nixon, “and I said ‘I’ve made a mistake!’”

“Listen,” Rehnquist broke in, “I can’t tell you how much I appreciate your giving me this opportunity.”

“Well, this is a great thing, to be such a young man, to go on the Court.” Nixon exulted when he thought about the young reactionary who now was on the Court. Rehnquist was only forty-seven years old, ten years the junior of any other justice.

“You’ll make a great record, and, you know, the very fact that—.” Nixon halted, then started again. “I’ll give you one last bit of advice because you’re going to be independent, naturally. And that is, don’t let the fact that you were under heat change any of your views.”

“I’ll remember that, Mr. President.”

“I told Warren Burger* that, and he didn’t get much heat, but I told him, ‘Just don’t come down here’—the way I put it to him—‘and let the Washington social set change you.’ So just be as mean and rough as they said you were. OK?”

“Thanks, Mr. President.”

“Good luck. Bye.”



ONLY SEVENTEEN MEN HAVE PRESIDED over the Supreme Court, shaping our lives and our destiny as much as any president or leader of Congress. John Marshall gave voice to the judiciary’s authority in *Marbury v. Madison*. Roger Taney set the nation on the path to civil war in *Dred Scott*. William Howard Taft modernized the judiciary. Charles Evans Hughes led a divided Court through the upheaval of the Great Depression. Earl Warren used the Bill of Rights to craft vital new protections for individual liberties and helped to steer the nation peacefully through the civil rights revolution.

William Rehnquist’s life story is profoundly significant yet largely unknown, which is how he wanted it. Rehnquist’s place on the Court was at once an accident of history and an inevitable result of it—something that Rehnquist had secretly coveted since law school and yet could never have connived to obtain. His nomination in 1971 was one of the modern political era’s most unlikely appointments: a spur-of-the-moment selection, of a candidate bereft of judicial credentials. He is the last of a breed.

Rehnquist was a brilliant loner who used the Court to advance his right-wing agenda. But to call Rehnquist simply a conservative would be to miss the essence of what defined him. Rehnquist’s judicial philosophy was nihilistic at its core, disrespectful of precedent and dismissive of social, economic, and political institutions that did not comport with his black-and-white view of the world. Rehnquist instinctively knew whose side he was on when it came to criminals and law abiders, minorities and the white majority, the poor and the rich, the powerless and the powerful. He set his plan accordingly. Infatuated with his own genius, he spoke his mind, cast his votes, and damned his critics.

*Burger was the chief justice whom Nixon appointed in 1969.

Early on, Rehnquist's iconoclasm made him a darling of the political right. He was perfectly cast as the brash, articulate outsider. But as chief justice, Rehnquist did not—indeed, could not—evolve. Dogma trumped leadership. Thus, despite his intellectual gifts, Rehnquist left no body of law or opinions that define his tenure as chief justice or even seem likely to endure. Instead, Rehnquist bestowed a different legacy, and the story of how it came to be is important in the political canon. Rehnquist made it respectable to be an expedient conservative on the Court.

The Supreme Court now is as deeply divided politically as the executive and legislative branches of our government, and for this Rehnquist must receive the credit or the blame. He provided the clear voice for instinctual decision making that pushed the Court markedly rightward. His successor as chief justice, John Roberts, is his natural heir.

The Rehnquist Court (1986–2005) thus was molded in his image, and the change endures. In thirty-three years on the Supreme Court (nineteen as chief justice), from 1972 until his death at age eighty in 2005, Rehnquist was at the center of the Court's dramatic political transformation. He was on a partisan's mission, waging a quiet, constant battle to imbue the Court with a deep conservatism favoring government power over individual rights.

Disciples like Roberts carry on.* Under Roberts, who clerked for Rehnquist, the Court remains unrecognizable as an agent of social balance even after its 5–4 decision upholding the Affordable Care Act. Gone are the majorities that rejuvenated the Bill of Rights, enfranchised black citizens, dismantled southern segregation, protected people from police abuse, removed religion from public schools, forced a president from office, and safeguarded a woman's right to abortion.

The story of how and why Rehnquist rose to power is as compelling as it is improbable. Rehnquist left behind no memoir,** and the fact that there has never been a serious biography of him is understandable: Rehnquist was an uncooperative subject, and during his lifetime he made an effort to ensure that journalists would have scant material to work with.

*“John Roberts is proving to be an absolutely first-rate law clerk, and I hope that if you have any more like him you will not hesitate to let me know if they have an interest in clerking for me,” Rehnquist wrote in 1981 to US Court of Appeals Judge Henry J. Friendly, for whom Roberts previously clerked.

**In 2001, he offered this explanation: “[For a memoir] to be interesting, you know, you have to say that ‘This is a good person,’ ‘That’s a bad person,’ ‘That’s a medium person,’ ‘He really let me down here.’ And I just don’t want to do that.”

When, in December 1984, then—Associate Justice Rehnquist sat for two hour-long interviews with me in his chambers,* his answers revealed much about his personality and philosophy, but they were also reflective of a cagey lawyer's literalism and shrewdness. Replies were confined to the specific question; information was seldom volunteered. Sometimes he feigned with a plea that he simply didn't understand the question. The justice was particularly reticent about matters he considered personal—names of the judges he played poker with, details about his family. "I'm not going to write your story for you," he said.

His participation was "under duress," he asserted at the time. More than a decade later he hadn't changed his mind. He wrote to the editors at the *New York Times Magazine*: "You are correct that I did give an interview to John Jenkins for the article which appeared in your magazine; it may have been in part the impression that article made on me that led me to decide not to grant any such interviews in the future."

To be William Rehnquist was to consider one's self misunderstood—and with good reason. Rehnquist often appeared to be living in a private world of his own invention, and probing strangers were not welcome. Nixon, though, knew what he was getting. Right after his surprise announcement of Rehnquist's nomination,** on the night of Thursday, October 21, 1971, Nixon telephoned his attorney general and gleefully spoke about the "four good men"† he had named to the Court so early in his administration. "And Rehnquist is the smartest of the whole goddamn bunch! And he's on our side, isn't he?"

"I think you did a great thing for the Court," John Mitchell replied.

"I really built them up," Nixon went on. "You know, and I talked about respect [for] the law, whether you agree and obey the law, and all

*These were Rehnquist's first and, for most of his tenure, only on-the-record interviews about his role on the High Court. Toward the end of his career, as he authored historical works about the Court, Rehnquist gave an occasional interview. Invariably, the subject matter focused on his books, the interviewer was friendly, and the format was forgiving.

**Rehnquist's was one of two nominations Nixon made that day. Also nominated was Lewis F. Powell, Jr., a Richmond lawyer and former president of the American Bar Association. Powell, sixty-four at the time, succeeded to what was considered the "southern seat" left vacant by the retirement (and death a week later) of Hugh Black. Rehnquist took the seat vacated by John M. Harlan.

†Nixon had previously named Chief Justice Warren E. Burger, in 1969, and Associate Justice Harry A. Blackmun in 1970.

that. And they oughta appreciate it, the bastards! . . . Be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is.”

Even as a young man in the 1950s, Rehnquist boldly preached an uncompromising brand of conservatism, and he espoused—and acted on—views that were racist even by the standards of that era. Confronted later in the Senate, he took a disingenuous approach with his critics, lying his way out of trouble. Having taken his knocks in two brutal confirmation hearings, he deeply mistrusted the press, and he did his best to frustrate coverage or, failing that, to keep the stories about him one-dimensional.

Rehnquist privately grumbled about the liberal media—“they have a particular point of view. If they want to be a house organ for the ACLU, that’s their privilege.” He muttered about all of the other usual liberal suspects. Upon his death, he made sure his papers would be far from Washington, at the conservative Hoover Institution at Stanford University, and he put significant restrictions on their availability.

Yet, oddly for someone so attuned to public criticism, Rehnquist also professed not to care what others thought. “If you’re bothered by what the press says about you,” he told me, “you’re not cut out for this job.” Rehnquist endured the liberals’ rebukes in the service of a higher mission.

Rehnquist presents a fascinating study in political character. To a casual observer he appeared diffident, almost invisible, yet he possessed huge reservoirs of intellect and self-confidence. He had an outsized ego, yet none of the egoist’s outward swagger. He was authoritarian yet rebellious. He was an inveterate gambler, yet he almost never took a chance.

Rehnquist was driven by an outsized desire to *win*. Winning is an end in itself for the average politician, but for Rehnquist it was different. For him, winning provided affirmation: of his skill, intelligence, viewpoint, principles, superiority. He wanted to be right, and he wanted that acknowledged. The subject did not particularly matter—it could be a constitutional crisis or the most trivial of arguments. Nor, interestingly, did the stakes. In fact, small stakes were obligatory in his wagers, because although Rehnquist was a gambler he was not a risk taker. The ego-validation Rehnquist received from winning (and from standing by his principles in defeat) really mattered to him, and it defined his life on and off the Court.

In the academic discipline of political psychology, Rehnquist serves as a unique case study: flash frozen from the day he arrived. Rehnquist’s views

never changed, and that remained true even after he made the move from associate justice to chief justice. “Justices fall into three types,” said Dr. Margaret Hermann, a psychologist and Syracuse University professor who has studied the behavior of Supreme Court justices. “With the first two types, either *law* (‘the Constitution says . . .’) or *ideology* controls.” When a case comes in, it’s usually easy to predict which way those justices will vote; it’s preordained. But the third type is much different. “Prior life experience interacts with the cases, and the justice just deals with each case almost as a cost-benefit equation: ‘This is my experience; this is how I see it, let’s move on.’” In that world, results and efficiency are what matter. “And that’s Rehnquist.”

Rehnquist, the son of a paper salesman, grew up in a Republican household where the dominant figure was his well-educated mother. She was a University of Wisconsin English literature major who spoke five languages.* The family’s hometown of Shorewood, Wisconsin, near Milwaukee, was a homogeneous idyll of lakefront mansions and well-tended bungalows, but in the midst of the Depression the Rehnquist family’s fortunes soured. In 1939, his parents defaulted on their mortgage, and the sheriff sold the only home Bill Rehnquist had ever known in a foreclosure sale for the outstanding debt, \$7,000. A succession of humiliating rentals followed. The Rehnquists’ old-fashioned verities had taken a serious hit. And although young Bill Rehnquist clung to those values, he was determined not to end up like his father. When it came to money he would obsess over even the smallest amounts, to the point of pettiness.

On August 23, 1947, Rehnquist began making entries in the first of several journals that together constitute a highly selective account of his years as a student at Stanford University. Here he scrawled his poker partners’ names and winnings, his records of bets, what he earned (mowing lawns) and what he spent (down to the penny), and sums of money that others owed him. The notebooks document the miscellany of a young man’s life, but the writings are also fascinating for the picture they paint of a twenty-three-year-old who already had his mind set.

“Finished *Supreme Court and the National Will*, by Dean Alfange,” Rehnquist wrote in his first entry. Alfange, a liberal legal commentator of

*French, German, Italian, Portuguese, and Italian.

the day, advocated judicial activism, which Rehnquist curtly dismissed. "Not overly impressed. Mostly a rehash of what I already knew."

Two pages later, Rehnquist was brooding about money due him from someone named Herman: "He wants me to go back to work for him. Tomorrow I will deliver him an ultimatum." The debt gnawed at Rehnquist for days: "Went over to Herman's but no one was there. I'm getting quite discouraged about the whole thing. I would hate to think I was just 'out' that money. It will weigh on my mind until I finally collect it. I should be happy now that my days of manual labor are finally over, but that is always in the back of my mind." Finally, Herman paid him \$10. "Things look a little brighter for collecting the remainder."

Rehnquist was proud of his principled tenacity, and he acknowledged its origins. On September 24, 1986, he wrote to his mother two days before he was to be sworn in as chief justice:

Next week I will be 62 years old, and as I look back I have had a remarkably fortunate life. I am sure that much of the success I have had is due to the fine bringing up that you and Dad gave me. I still remember some of the long discussions that you and I had about many different things, and I also think that one of the things that both you and Dad taught me was to stand up for what I believed. I will be thinking of you this next Friday. * Love, Bill.

Like many public figures, Rehnquist presented a face to the public that often was at odds with the private man. My purpose here is to unmask that private face, using wherever possible Rehnquist's own words and the trove of materials deposited at Stanford, and in so doing to set the record straight about one of the most ambitious, brilliant, and partisan jurists ever to occupy the chief justice's chair.

Because any investigative biography is necessarily selective, it is important that readers understand what this book is, and what it is not. This book spans the arc of Rehnquist's life and seeks to separate man from myth. I am particularly interested in the origins of Rehnquist's conservatism and how that motivated him on the Court. Anyone looking for a comprehensive

*Friday, September 26, 1986, the day of his swearing in.

survey of Rehnquist's jurisprudence, however, will not find it here. Although I shall not stint in offering my own opinion of things, I also acknowledge that there are scores of other books and law review articles that seek to explain or make sense of Rehnquist's judicial philosophy, many listed in the bibliography.

Toward the end of his career, Rehnquist played a part in two historic events, presiding at the Senate impeachment trial of President Bill Clinton in 1999 and voting with the Court's 5–4 majority to end the Florida presidential-election recount—and thus give George W. Bush the victory—in the cliffhanger election of 2000. Both events have been the subject of extensive exposés in their own right and I don't intend to exhaustively retrace that terrain.* Likewise, readers will not find paeans here from Rehnquist's friends and relations. Although I do not doubt that family was important to Rehnquist, those relationships are best explained by Rehnquist's extensive and revealing correspondence with the people close to him, and that documentary evidence is what I have relied upon in this work.

On the mid-December day of Rehnquist's Senate confirmation in 1971, Harry Blackmun picked up a pen and wrote to the young justice who was soon to be seated beside him.

I have refrained from writing heretofore because I did not wish to embarrass you or upset the delicate balance of these days that have been so critical for you. But now that the ordeal—of having one's entire life bared by those who, it seems, seek to destroy more than they seek to be informed—is behind you, I extend my congratulations and warm welcome.

You will have many years here, and successful ones, and your influence on the Court as an institution will be great and enduring.

Blackmun's encouraging welcome was probably more a politeness than a serious attempt at prediction. He was right about Rehnquist's durability,

*In any event, although both the Clinton impeachment and the Court's decision in *Bush v. Gore* were of epic national importance, Rehnquist's role in each was relatively minor. As the constitutionally prescribed presiding officer in the impeachment proceeding, Rehnquist mostly was an observer. Coining a phrase from Gilbert and Sullivan's *Iolanthe*, he later said: "I did nothing in particular, and I did it very well." Rehnquist voted with the majority in *Bush v. Gore*, but the opinion was unsigned. Author Jeffrey Toobin, in his book *The Nine*, attributes authorship of the majority opinion to Justice Anthony Kennedy.

but he could not have guessed at the kind of Court that Rehnquist would inhabit or the iconoclasm that would be his hallmark long after his patrons Richard Nixon and Ronald Reagan vanished. Assessing his own significance, Rehnquist quixotically would compare himself not to Antonin Scalia, Lewis Powell, Warren Burger, or other Court conservatives but to an ideological opposite, one who shared his essentially solitary temperament, a fellow loner.

Change would come to the Court, not to Rehnquist. When he reflected on his judicial philosophy many years later, he declared: "I can remember arguments we would get into as law clerks in the early '50s. And I don't know that my views have changed much from that time."

Asked to assess his own growth as a justice, he was genuinely taken aback: "You equate *change* with *growth*?" Rehnquist didn't.

It did not matter whether, or how far, he and his Court of reliable conservatives fell out of step with the times. There was a certain natural order to Rehnquist's world, and it had been established a long time ago.

John A. Jenkins

Washington, DC

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