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At War with the Constitution: A History Lesson from the Chief Justice*

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Chief Justice William H. Rehnquist invokes the Roman legal maxim "Inter arma silent leges" or "In time of war the laws are silent" in this book about how war powers trump in individual civil liberties.[1] That the powers of the government are greatest during war is but a truism. Certainly, warmaking Presidents have acted upon this belief. The Supreme Court usually has acquiesced to draconian measures by the Executive that would not be permitted during peacetime. The Chief Justice affirms this judgment of history with an important qualification:

> There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors. But even though this be so, there is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[2]

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* Book Reviewed: WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Alfred A. Knopf, New York, NY. (1998); $26; pp. 256).

** Book reviewed by: Thomas E. Baker, Copyright © 1999, James Madison Chair in Constitutional Law and Director of the Constitutional Resource Center, Drake University Law School; B.S. 1974, Florida State University and J.D. 1977 University of Florida. From September 1986 to January 1987, Professor Baker served as the Acting Administrative Assistant to Chief Justice Rehnquist. This review benefited from the author being present for the Dwight D. Opperman Lecture, Drake University School of Law, September 18, 1998, see Honorable William H. Rehnquist, Remarks of the Chief Justice of the United States, 47 DRAKE L. REV. 201 (1999). A shorter, unfootnoted version of this review appeared previously in A.B.A. J., Dec. 1998, at 76, and this version is published here with permission.

1. BLACK'S LAW DICTIONARY 728 (5th ed. 1979) ("It applies as between the state and its external enemies; and also in cases of civil disturbance where extrajudicial force may supersede the ordinary process of law.")

2. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (1998).

Those likely to read into this thesis a right-wing conspiracy or willing to dismiss it as the cant of an overly pragmatic Statist-minded' Reagan-appointed Chief Justice should pause over the company he keeps and the historical brief he files.

"It is vain to oppose constitutional barriers to the impulse of self-preservation," James Madison insisted in Federalist Paper No. 41, "It is worse than vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."[3]

In Federalist Paper No. 23, Alexander Hamilton characteristically went farther than Madison to insist that the textual powers of national defense "ought to exist without limitation" if only to be equal to any and every potential threat or danger.[4]

Thomas Jefferson strictly construed textual powers in the Constitution but recognized a higher duty of government and leaders:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[5]

Abraham Lincoln adhered to Jefferson's sense of higher duty with a vengeance. In the early days of the Civil War, Chief Justice Taney rebuked Lincoln by ruling that only Congress could suspend the writ of habeas corpus, and further directed that the President be delivered a copy of the order requiring the release of a civilian being held in military custody.[6] Lincoln responded with a special message to Congress—from which Chief Justice Rehnquist takes the title for this book—to invoke emergency powers equal to the immediate danger of rebellion: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[7] The military authorities ignored Taney's order but saw fit to release the prisoner later. Con-

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3. THE FEDERALIST NO. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961).

4. THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). ("These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of the means which may be necessary to satisfy them.")

5. Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 606, 606-07 (Adrienne Koch & William Peden, eds. 1944).

6. *See* Ex parte Merryman, 17 Fed. Cases 144 (Cir. Ct. 1861).

7. Message to Congress in Special Session of July 4, 1861, THE COLLECTED WORKS OF ABRAHAM LINCOLN VOL. IV, 421, 430 (Roy P. Basler, ed. 1953).

gress, for its constitutional part, promptly passed a law authorizing the President to suspend the Great Writ.

Indeed, civil liberties were among the greatest casualties of the Civil War. Under martial law, Union Generals ordered summary arrests for draft resisters and conducted widescale warrantless searches and arrests of Southern sympathizers and opponents of the war. They then held military trials—under pain of banishment, indefinite imprisonment, or death—charging whatever they deemed to be "disloyal practices" including making political speeches and writing newspaper editorials against military rule.

Suspending the writ of habeas corpus in the civilian courts made all this possible without any of the protections afforded by the Bill of Rights. What about the rule of law and the law of the Constitution? Justice Holmes, a thrice-wounded Civil War veteran, would later opine, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."[8]

The four-fifths emphasis of this book is on the lesson of the Civil War described in thirteen chapters. Indeed, as originally conceived, the Chief Justice would have ended his lesson there without dealing with the two declared world wars.[9] The last fifth of the book—the four brief chapters on World War I and World War II—elaborate on his analysis of the past and reinforce his prediction for the future. He is careful to explain that his thesis is limited to what might be described as the constitutional war powers of the government: constitutional powers during constitutionally declared wars.[10]

The reader must understand an important distinction in the constitutional thinking of the Chief Justice. It should not be implied that he is endorsing some notion of a living Constitution that evolves over time under the nurturing of judges to expand government powers when the judges deem it necessary or expedient or appropriate.[11] Rather, he conceives of these war powers to be contained in the text and original con-

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8. Schenck v. United States, 249 U.S. 47, 52 (1919).

9. Justice Rehnquist: At first I thought it would be just a book about civil liberties in the Civil War, but then it turned out that didn't have quite enough material — (laughs) — for an entire book, and I got interested in carrying it forth — you know, carrying it forward into World War I and World War II.

Interview by Brian Lamb with Chief Justice William H. Rehnquist, United States Supreme Court, Book TV on C-SPAN 2 (October 25, 1998) (visited Sept. 6, 1999) <*http://www.booktv.org/rehnquist_transript*.asp>.

10. *See* Rehnquist, supra note 2, at 218.

11. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

ception of the framers but only available to the government at a time of grave threat and serious emergency, during a time of a declared war.[12]

This is a legal realist's account. Civil libertarians and judge-worshippers alike will be chagrined at the role of the Justices to join ranks and march in step with the commander-in-chief. In the infamous but unanimous initial decision upholding the military program to evacuate and relocate Japanese-Americans during World War II—joined in by such civil libertarians as Justices Black and Douglas—Chief Justice Stone quoted his predecessor Charles Evans Hughes but sounded more like Hamilton: "The war power of the national government is 'the power to wage war successfully. . . .' It extends to every matter and activity so related to war as substantially to affect its conduct and progress."[13]

Chief Justice Rehnquist first takes the reader through the major court cases of the Civil War and Reconstruction era—*Ex parte Merryman* (1861),[14] *Ex parte Vallandigham* (1864),[15] *Ex parte Milligan* (1866),[16] Ex parte McCardle (1869)[17]—and goes on to detail the military commission proceedings that condemned the conspirators in the Lincoln assassination—to trace the historical nadir of civil liberties. His

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12. "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . . While emergency does not create power, emergency may furnish the occasion for the exercise of power." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934).

13. Hirabayashi v. United States, 320 U.S. 81 (1943)

> The war power of the national government is 'the power to wage war successfully.' *See* Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 239. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgement and discretion in determining the nature and extent of the threatened injury or danger and I the selection of the means for resisting it. . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Id. at 93 (upholding a criminal conviction for violating a military curfew). *See also* Korematsu v. United States, 323 U.S. 214 (1944) (upholding a criminal conviction for violating an order of exclusion from a declared military area); Ex parte Endo, 323 U.S. 283 (1944) (holding that the statute ratifying the military evacuation and relocation program did not authorize an overly prolonged detention of a citizen whose loyalty was conceded).

14. 17 Fed. Cases 144 (Cir. Ct. Md. 1861).

15. 68 U.S. 243 (1863).

16. 71 U.S. 2 (1866).

17. 74 U.S. 506 (1868).

historical conclusion is that the Civil War experience became "a sort of benchmark for future wartime presidents."[18]

There were important similarities and important differences between the Civil War and World War I, between how Lincoln and how Wilson conducted their presidencies.[19] The Chief Justice points out that the Wilson administration shared the wartime instinct to suppress criticism but could rely on congressional statutes rather than presidential fiats and that the federal courts were more prominent. There were not trials of civilians in military courts and the writ of habeas corpus was not suspended. He seeks to separate his thesis about wartime powers from the notorious "Palmer Raids"—the wholesale arrests, interrogations, and deportations named after the then Attorney General—by emphasizing that they occurred after the war and were more in response to perceived threats of anarchists and criminal syndicalists.

The book the fastforwards through the criminalization of dissident speech during World War I, the World War II internment of Japanese-Americans on the West Coast, and the imposition of total martial law in Hawaii from 1941 to 1944 to reinforce the author's conclusion. Attorney General Francis Biddle's observation about FDR is representative of presidential attitudes: "Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war."[20] Thus the Chief Justice's history lesson is that the Executive Branch will prosecute the war abroad and have its way with civil liberties at home, while the Supreme Court merely stands by, for the most part, perhaps disapproving the most grievous and least justified domestic transgressions, but even then usually only after-the-fact.[21]

He writes his chapter on World War II with the perspective of a veteran who lived through those years.[22] It is interesting to watch the Chief Justice behave like any other Court-watcher, going down the line-up on the bench and then analyzing the Supreme Court's judicial handiwork in a line of cases. Perhaps by design, the Chief Justice tries to analyze the infamous Japanese internment cases from the standpoint

18. *See* Rehnquist, *supra* note 2, at 171.

19. *See Id.* at 182-83.

20. *Id.* at 191-92.

21. *See* CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918 (1989); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951).

22. *See* Rehnquist, *supra* note 2, at 184-202.

of the majority on the Court at the time, based on the records and the briefs, and taking into account the state of constitutional law back when those decisions came down. He almost begrudgingly admits to "a certain disingenuousness in this sequence of three opinions"[23] in the *Hirabayashi*,[24] *Korematsu*[25] and *Endo*[26] decisions—conceding that all three individuals were similarly situated: the petitioners were three equally loyal Americans who alleged they were being unjustifiably denied their civil rights and civil liberties. But he concludes that the Court's performance illustrates his thesis because the Court was willing to rule against the government and in favor of the individual only in the last case in the series, when the country was near winning the war.

The Chief Justice's explication of these cases is troubling. He makes a move here that is as positivistic and formalistic as it is unnecessary and unsubstantiated, an outdated move that is peculiarly ahistorical in a book about history. He attempts to distinguish between the Issei—immigrants from Japan who were not naturalized citizens—and the Nisei—American-born children of those immigrants who enjoyed all the rights of citizens. He tries to defend the military for erring on the side of military security in an uncertain emergency. He maintains that constitutional law was undeveloped and unclear. In addition, he seems to imply that hind-sighted critics are somehow being unfair to the military and to the Court by condemning what was done under a wartime constitutional dispensation.[27] Most ironic is the Chief Justice's invocation of the tradition of the Alien and Sedition Act of 1798. He also seems to quarrel with the way generations of law professors and law students have come to understand these cases: that the government's classification was at once so overinclusive and so underinclusive as to be invidious and unconstitutional.[28]

It is no small fact that the Supreme Court cases involved individuals

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23. *Id.* at 202.

24. Hirabayashi v. United States, 320 U.S. 81 (1943).

25. Korematsu v. United States, 323 U.S. 214 (1944).

26. Ex parte Endo, 323 U.S. 283 (1944).

27. C-SPAN: What do you think you would have done back then, if you had been in a leadership position?

Justice Rehnquist: Oh, I think one of the most difficult things in the world to do, is to second-guess people who were in leadership positions at that time. You know, it's very easy, in the atmosphere of the late 1990s, to say something was a very bad thing to have done. That doesn't mean that it was not a very bad thing to have done.

But so far as criticizing people who were in leadership positions at that time, you've got to realize they operated under the ethos and the standards of the times in which they lived. . . .

See Interview, *supra* note 9, at 14.

28. *See* Tussman & Tenbroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

of Japanese descent who were American citizens, but more importantly the Chief Justice inexplicably ignores how the history of this episode has been totally and completely revised. The consensus is that these decisions have been overruled in the court of history, except for the important background principle in the opinions that governmental racial classifications should be reviewed with the highest and strictest judicial scrutiny. The actual convictions in the lead cases have been vacated and set aside in extraordinary judicial proceedings. Congress has enacted a formal governmental apology and a reparations program for survivors. The contemporary historical understanding of the episode is well-established and equally well-accepted that the government officials gave in to popular ignorance and racist sentiments and affirmatively exaggerated the threats to security to mislead the courts willfully and materially. Finally, the Supreme Court's performance has gone down in history as one of its most craven moments. With all due respect, the Chief Justice's otiose chapter dissenting from this revised history is idiosyncratic and unpersuasive.[29]

The chapter on Hawaii under martial law draws attention to a little known part of American history.[30] In the aftermath of the attack on Pearl Harbor, the government declared a level of martial law that resembled the Civil War invocations. The Chief Justice points to the Supreme Court's 1946 ruling against the government as the exception that proves the rule of his book: only the most extreme measures against civil rights and civil liberties—suspension of the writ of habeas corpus and military prosecutions of civilians for common crimes—will be deemed to have exceeded war powers when judicially reviewed after the war.[31]

Although the martial law imposed in Hawaii approached that of the Civil War the Chief Justice notes important differences between the war between the states and the declared world wars that qualify the comparison.[32] President Lincoln had depended on executive powers but the presidents during the world wars followed congressional authorizations. Therefore, the powers of Presidents Wilson and Roosevelt were maximized.[33] The role of the federal courts, especially the Supreme Court, has greatly expanded in jurisdiction and influence during the 20th cen-

29. *See generally* PETER IRONS, ED., JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989); PETER IRONS, JUSTICES AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983).

30. *See* Rehnquist, *supra* note 2, at 212-17.

31. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

32. *See* Rehnquist, *supra* note 2, at 219-21.

33. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-37 (1952) (Jackson, J., concurring).

tury. This coincided with developments in the theory and precedents of civil rights and civil liberties so that there was more tolerance for dissent and for dissenters in the courts and in the popular culture during the modern era.

Having made the historical case for the maxim "Inter arma silent leges" as a description of how the Constitution operates and functions during wartime, the Chief Justice concludes his book with the inevitable question of philosophy: "Is this reluctance a necessary evil—necessary because judges, like other citizens, do not wish to hinder a nation's 'war effort' or is it actually a desirable phenomenon?"[34] His own answer is based on the proper context of a civil liberty being a freedom of a citizen, an individual living in society:

> In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.[35]

To conclude his historical exegesis, the Chief Justice brings us back one last time to Lincoln's dilemma to ask and answer rhetorically, "Should he, to paraphrase his own words, have risked losing the Union that gave life to the Constitution because that charter denied him the necessary authority to preserve the Union? Cast in these terms, it is difficult to quarrel with his decision."[36]

Throughout the book the Chief Justice is revealed to be an accomplished amateur historian, a most able stylist, and a first rate storyteller. One cannot help but surmise that his hobby of history is something he enjoys and finds satisfaction doing, if for no other reason than that a person usually enjoys something he or she is good at doing.[37]

He dedicates his book to his daughter Nancy, his "editor of last re-

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34. *See* Rehnquist, *supra* note 2, at 221. He goes on further to ask "If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?" *Id.* at 222.

35. *Id.* at 222-23.

36. *Id.* at 223.

37. C-SPAN: What do you think of this business of writing books?

Justice Rehnquist: Well, I enjoy it. It's very nice to be able to write something you don't have to get four other people to agree with you, before it can become authoritative.

See Interview, *supra* note 9, at 8.

sort" who helped him sound "less like a lawyer."[38] Reading this book is like sitting next to him at dinner or meeting him for drinks before an evening of interesting conversation. This is not his opinion-writing style.[39] His book-writing style is informal, relaxed and entertaining, even colorful; for example, he takes the liberty of describing one member of Lincoln's cabinet as being "brightly plumaged" in contrast to another who was a "sparrow."[40] The account of Lincoln's train trip to take the oath as President which opens the book and the chapter that chronicles the day of his assassination read like a well-written screenplay.[41] The book also pays attention to geography and place, offering Michner-like digressions which will interest and educate the reader all at once. For example, Rehnquist's explanation about how Maryland was settled in the 1600s helps illuminate its politics in the 1860s,[42] and he also spends some time describing the early history of Indiana and its environs.[43]

The Chief Justice's history is full of personalities and characters to whom he pays quite a bit of attention. He repeats the familiar story of Lincoln taking time to visit Grace Bedell, the little girl who wrote him the letter suggesting that he grow his famous chin whiskers.[44] His writing animates people by describing what they looked like, what they sounded like, and their personal mannerisms.[45] He pays attention also to the milieus of history, the rooms and furnishings or the surroundings and weather, in which the scenes took place to help to set the mood and recapture the moment.[46]

The book demonstrates a fascinating and remarkable facility with time and relation. Historical figures are situated by relationships and

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38. *See* Rehnquist, *supra* note 2, at xiii.

39. As an aside, my own sense is that when he was an Associate Justice and new to the High Court his opinions were more individual and finely literary. He found interesting quotations to make his points and he seemed more intent to turn his own quotable phrase. He was more of an essayist in the genre of the Justice Jackson, for whom he clerked. These days his opinions are more institutional, bordering on the bureaucratic, perhaps because he is Chief Justice and feels some hydraulic pressure to write for the Court as a corporate institution.

40. *See* Rehnquist, *supra* note 2, at 44. The Chief Justice applies the same colorful label to Justice Frankfurter. *Id.* at 194.

> C-SPAN: Now, that language, "a brightly plumaged bird." Is that something you enjoyed doing when you wrote this book, of using language?
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> Justice Rehnquist: Well, I thought that was an apt description of him. You know, I don't know that I want to be terribly florid all the time.

See Interview, *supra* note 9, at 5.

41. *See* Rehnquist, *supra* note 2, at 3-11 & 138-43.

42. *Id.* at 19.

43. *Id.* at 78.

44. *Id.* at 5.

45. *Id.* at 7-8 & 43.

46. *Id.* at 118-19.

personal connections; for example, Chief Justice Taney married the sister of Francis Scott Key.[47] For the principal figures, the Chief Justice traces their family background to help explain the person they were at their point in history.[48] He traces relationships and friendships.[49] In addition, when someone enters the picture who at the time was less important than he would be later—like James A. Garfield arguing a case in the Supreme Court long before he became president—the Chief Justice fastforwards ahead in his life to tell the reader what the future had in store for him.[50] All this is accomplished while maintaining the book's rhythm and flow.

The book likewise has a sense of audience and purpose.[51] The Chief Justice plays the part of a patient teacher who must stop to explain, for example, the writ of habeas corpus[52] or the notion of common law crimes[53] or the law of conspiracy.[54] When he explains martial law, the Chief Justice takes the reader through the history of the War of 1812 and Dorr's Rebellion to provide background for his own analysis of the critical time.[55] He is also a teacher who is interested in knowing and explaining the origins of terms like doughface[56] or copperheads.[57] Furthermore, he spells out constitutional theory with the same care and attention to detail. For example, his explanation of the 5th and 14th amendments and the counter-intuitive idea of reverse incorporation of the equal protection component into the due process clause is both simple and instructive.[58]

When it is appropriate to his subject, the Chief Justice reverts to his craft as an appellate judge. His account of Lambdin P. Milligan's trial is drawn from the Q & A transcript of the drama of the trial court-

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47. *Id.* at 27.

48. *Id.* at 42, 54 & 105.

49. "Stanton would come first to respect, then to admire, and finally to worship Lincoln." *Id.* at 58.

50. *Id.* at 122-23.

51. C-SPAN: When you wrote it, who did you envision reading it? And what do you want them to get out of it?

Justice Rehnquist: Kind of the intelligent lay people, and interested people in the legal profession. And just kind of get out of it that when you are dealing with civil liberties in time of war, you're not dealing with, you know straight rectangles, or straight lines necessarily. There's fuzziness involved, and there always will be.

See Interview, *supra* note 9, at 21.

52. *See* Rehnquist, *supra* note 2, at 36.

53. *Id.* at 85.

54. *Id.* at 101.

55. *Id.* at 70-71.

56. *Id.* at 114.

57. *Id.* at 102.

58. *Id.* at 207-08.

room.[59] He does the same for the arguments in the Supreme Court[60] to prepare for his dissection of the Supreme Court opinions on decision.[61] He stops to evaluate the performance of the advocates and their arguments.[62] In one of the most interesting parts of the book, the Chief Justice applies this appellate judge perspective to the military proceedings against the defendants charged with conspiring to assassinate President Lincoln. Over two chapters, he reviews the proceedings trial-by-trial and defendant-by-defendant.[63] It is fascinating to watch his judicial mind struggle with doubts about the government's proof and the sufficiency of the evidence against Mary Suratt and Samuel Mudd.[64] In the end, his history affirms the military commission but is partly based on the legalistic notion of deference towards trial determinations of credibility.

The Chief Justice as author demonstrates an astuteness for politics and a fascination with the Executive Branch that is suggested in his own professional background as having served as Assistant Attorney General in the Office of Legal Counsel. He provides an insider's account of the Republican Party convention of 1860 that helps explain the appointment of David Davis to the Supreme Court.[65] Indeed, the Chief Justice carefully assesses all of Lincoln's nominations to the Supreme Court like he was back in the Department of Justice.[66]

He likewise demonstrates a keen sense of history for the office of Chief Justice and for the institution of the Supreme Court down to the present day.[67] He is understanding of how Chief Justice Stone might feel obliged to draft an opinion to mass the Court and then be willing to revise it to keep a majority.[68] He praises Chief Justice Taney for his legal acumen and judicial skills but criticizes him when he acted precipitously and injudiciously.[69] You can see him shaking his head while he was writing about the self-inflicted wound of the Dred Scott decision.[70] In the strongest terms, the Chief Justice disapproves of improper influ-

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59. *Id.* at 89-104.
60. *Id.* at 118-27.
61. *Id.* at 128-43.
62. *Id.* at 121 & 124.
63. *Id.* at 144-69.
64. *Id.* at 162, 165, 167-69.
65. *Id.* at 105-12.
66. *Id.* at 110-15.
67. *See also* William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637 (1976).
68. *See* Rehnquist, *supra* note 2, at 198.
69. *Id.* at 41.
70. *Id.* at 32; Dred Scott v. Sandford, 60 U.S. 393 (1857).

ences between the White House and the Court.[71] He comments about the quality of opinions for their logic and rhetoric and he evaluates decisions for their political timing.[72] He makes connections between historic decisions and modern doctrine.[73]

This is a secondary, popular work of history that does not purport to be an original historical investigation. Frequently, when the Chief Justice does quote from an original source, it is being quoted from some other secondary source. But he demonstrates a preference for eyewitness accounts[74] and a penchant for the verisimilitude of contemporary newspaper articles about the events he is reporting.[75] There are enough obscure references sprinkled through his sources that demonstrate the thoroughness and care of the research that went into this book,[76] and he has an obvious preference for more literary history over the banal, for example his primary reliance on Carl Sandburg's studies of Lincoln.[77] But the endnotes are minimalist and do not intrude on the reader. There is a comprehensive but helpful bibliography — what you might expect from someone who works next door to the Library of Congress. Overall, the Chief Justice demonstrates an intellectual forte for synthesizing the previous scholarship of professional historians, a skill not unlike fashioning an opinion from the briefs of advocates.

My Ph.D. friends would label this book "law office history,"[78] but it is good law office history, perhaps due partly to the fact that the Chief Justice did graduate work in history and holds a Masters Degree. He hews to the accepted versions of history and does not set out to become his own revisionist[79] though he is careful to note relevant disagreements among historians.[80]

If his opinions were not enough, the Chief Justice's three books— on the Supreme Court,[81] impeachments,[82] and this latest book on civil

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71. *See* Rehnquist, *supra* note 2, at 30.

72. *Id.* at 129.

73. *Id.* at 136-37 & 178 n.11.

74. *Id.* at 22.

75. *Id.* at 21 & 34-35.

76. *Id.* at 46 n.2 & 62 n.3.

77. *Id.* at 227 (endnotes to Chapters 1 & 2).

78. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988).

79. *But see supra* text accompanying note 29.

80. *See* Rehnquist, *supra* note 2, at 82.

81. WILLIAM H. REHNQUIST, THE SUPREME COURT — HOW IT WAS, HOW IT IS (1987).

82. WILLIAM H. REHNQUIST, GRAND INQUESTS — THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

liberties during wartime—establish him as a remarkably literate constitutional scholar. They reveal the habits of a thoughtful constitutionalist and restrained jurist: one who is attendant on the facts, well-versed in the law, steeped in political philosophy, and savvy about practical politics, but somewhat skeptical towards grand theories and judicial designs. He knows his own mind and he is confident in his independent conclusions.[83]

The Chief Justice, remindful of Holmes, is above all a pragmatist who understands that "a page of history is worth a volume of logic."[84] And this is a most worthy volume of history.

83. C-SPAN: What do you think of what Abraham Lincoln did with the writ of habeas corpus during the war?

Justice Rehnquist: I think, if I'd been president, I would have done exactly the same thing.

See Interview, *supra* note 16, at 3.

84. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).