THE MODERATE REHNQUIST

GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON. By William H. Rehnquist.* New York: William Morrow and Co., Inc. 1992. Pp. 9, 303. $23.00.

Reviewed by Vincent R. Johnson**

I. THE EVOLUTION OF A JUSTICE

In 1986, at the time of his nomination for elevation to Chief Justice, William Hubbs Rehnquist was arguably the most controversial jurist in the country.[1] Following his appointment

---

* Chief Justice of the United States Supreme Court.

** Professor of Law and Director of the Institute on World Legal Problems at Innsbruck, Austria, St. Mary's University School of Law, San Antonio, Texas; LL.D. 1991, B.A. 1975, St. Vincent College (Pa.); LL.M. 1979, Yale University; J.D. 1978, University of Notre Dame. Professor Johnson was a Visiting Professor at Vermont Law School during the fall of 1991 and served as Judicial Fellow at the Supreme Court of the United States during 1988-89. The essay benefited from the research assistance of Scott Crutchfield and the encouragement of Barbara Bader Aldave.

1. *See* Stuart Taylor, Jr., *Rehnquist Called Rights 'Extremist,'* N.Y. TIMES, July 29, 1986, at A14 (certain civil rights groups call Rehnquist an extremist who is a reactionary enemy of individual rights); Anthony Lewis, *Abroad at Home; The Court: Rehnquist*, N.Y. TIMES, June 23, 1986, at A15 ("Rehnquist has single-mindedly pursued a vision . . . of judges doing little or nothing to restrain official power or protect individuals . . . . He is an extreme example of what the commentators call 'result-oriented.'"). The *Des Moines Register*, in an editorial on September 15, 1986, opined that Justice Rehnquist was "not only sadly out of touch with contemporary American values but with the values embodied in the Constitution," having five days earlier accused the nominee of harboring a "deep-seated animosity to women's basic rights." DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 7 (1987) (quoting *Just Say No on Rehnquist*, DES MOINES REGISTER, Sept. 15, 1986, and Sept. 10, 1986); *see also* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 589-90 (1987) (accusing Rehnquist of "grave error" in a 1972 recusal case). The 1986 confirmation hearings were not the first time William Rehnquist was the subject of controversy. During the confirmation hearings preceding his move to the Supreme Court bench in 1972, the "American Civil Liberties Union broke a fifty-two-year tradition of never opposing a nominee for public office," calling Rehnquist a "right-wing zealot." BOLES, *supra*, at 11; *see also* Fred P. Graham, *Rights Aides Call Rehnquist Racist*, N.Y. TIMES, Nov. 10, 1971, at 29 (representatives from the ADA and the NAACP called Rehnquist a racist, saying he attempted to prevent Blacks from voting by harassing and intimidating them).

to the U.S. Supreme Court by President Richard Nixon in 1971,[2] Justice Rehnquist had staked out a position at the far right end of the political spectrum.[3] Over the next fifteen years, the Rehnquist name became both a rallying cry for those who sought to bring conservative values to the federal judiciary, as well as a call to arms for others who would preserve the liberal legacy of Earl Warren, William Brennan, and Thurgood Marshall.

Like many other Supreme Court confirmation hearings,[4] the Senate debate over whether William Rehnquist was fit to lead the nation's highest court was partisan and bitter.[5] In the end, it

---

2. On October 21, 1971, then-Assistant Attorney General Rehnquist was nominated by President Nixon to be Associate Justice of the Supreme Court. Justice Rehnquist was sworn in as a member of the Court on January 7, 1972. THE AMERICAN BENCH: JUDGES OF THE NATION 65 (Marie T. Hough ed., 4th ed. 1987).

3. *See* Joe E. Anderson, *The Sixteenth Chief Justice*, 12 OKLA. CITY U. L. REV. 733, 733-34 (1987) (discussing Rehnquist's "conservative position with regard to the Constitution in matters involving tenth amendment reservation of power in the states, fourth amendment unreasonable search and seizure, fifth amendment rights of persons in civil and criminal matters, and fourteenth amendment civil rights cases"); *see also* Russell W. Galloway, *Who's Playing Center?*, A.B.A. J., Feb. 1, 1988, at 42 (describing Rehnquist as "well-anchored on the right" and "one of the most conservative justices of this century").

Of course, political conservatism—an imprecise term, often loosely used to identify those who favor fiscal restraint, protection of property, state authority, or limited civil liberties—must be distinguished from judicial conservatism. The hallmarks of the latter are judicial restraint, avoidance of unnecessary rulings, and deference to co-equal branches of government. It has been argued that both Chief Justice Rehnquist and the Rehnquist Court have sought politically conservative results by liberal or activist judicial methods. Robert Glennon, *Will the Real Conservatives Please Stand Up?*, A.B.A. J., Aug. 1990, at 50; *see also* BOLES, *supra* note 1, at 34 ("Rehnquist's judicial voting behavior belies any meaningful application of the term 'judicial conservative'. . . . [H]e is a judicial activist.").

4. *See, e.g.*, WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 125-26 (1987) ("bitter hostility" prevented Roger Taney's nomination to be Associate Justice from ever coming to a vote; later, following changes in the composition of the Senate, Taney was nominated to be Chief Justice and confirmed); *see also* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 250-51 (1985) (discussing the "bitter and lengthy struggle" over nomination of Louis Brandeis); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1216-18 (1988) (describing the controversial hearings in which the nominations of Abe Fortas, to be Chief Justice, and Clement Haynsworth and G. Harrold Carswell, to be Associate Justices, were defeated); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 267-336 (1990) (discussing the failed nomination of Judge Bork); Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill / Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279-1353 (1992) (discussing the controversial confirmation of Justice Thomas).

5. Linda Greenhouse, *Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice*, N.Y. TIMES, Sept. 18, 1986, at A1 [hereinafter *Senate, 65 to 33, Votes to Confirm*] (stating that opponents challenged Rehnquist's judicial ethics, candor, and civil rights record; quoting Sen. Orrin Hatch (R-Utah) as saying: "They've done everything they could

was not surprising that the Republican-dominated Senate endorsed President Ronald Reagan's bold move to make then-Associate Justice Rehnquist the Sixteenth Chief Justice of the United States.[6] However, the nominee received more votes

---

to destroy this man's reputation. The grand inquisitors have turned the Senate chamber into a Star Chamber."); *see also* Linda Greenhouse, *Reporter's Notebook: Senators v. Rehnquist*, N.Y. TIMES, Sept. 19, 1986, at A24 ("Justice Rehnquist's record on the issues, both on and off the bench, was subject to such intense scrutiny from such an array of senators that it is unlikely that the subject of ideology will be regarded as off-limits in future debates."); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 633-34 (1987) (the tone of much of the opposition to Rehnquist was highly political); H. Jefferson Powell, *Letter to the Editor: After Mr. Rehnquist's Elevation*, N.Y. TIMES, Oct. 9, 1986, at A34 ("confirmation of Justice Rehnquist ends a painful episode that did little credit to any of the principal actors"); Al Kamen, *Sen. Bradley Assails Rehnquist Nomination; Republicans Predict Confirmation on Tuesday*, WASH. POST, Sept. 13, 1986, at A3 (quoting Sen. Bill Bradley (D-N.J.) as stating that confirmation of Rehnquist would "signal . . . that a dark cloud has descended over the court").

Among the statements made during the floor debate on confirmation were the following:

> Senator George Mitchell (D-Me.):
> I conclude that Justice Rehnquist is so totally hostile to the rights of women and minorities, that his mind is so closed on the issues of race, that he does not sufficiently share the common recognition of the Supreme Court and the Constitution and their roles in our system to serve as Chief Justice of the United States.

132 CONG. REC. 23,325 (1986).

> Senator Robert Dole (R-Kan.):
> [President Reagan] was not elected in 49 states to pick out the most liberal member [of the judiciary] he could find to be Chief Justice.

Id. at 23,311.

> Senator Edward Kennedy (D-Mass.):
> If we confirm Justice Rehnquist to be Chief Justice, we will elevate to the pinnacle of our American Judicial system a man who by word and deed throughout his career has shown disdain for the fundamental values embodied in our Constitution, . . . someone who would roll back the hard won progress of women and minorities to achieve full equality . . . .

Id. at 23,327.

> Senator John D. Rockefeller, IV (D-W. Va.):
> Mr. Rehnquist is not a fair-minded conservative. He is a closed-minded ideologue.

Id. at 23,331.

> Senator Orrin Hatch (R-Utah):
> The debate continues only because some Senators and special interests disagree with Justice Rehnquist's legal views. . . . [T]hey proceed to call him insensitive on civil rights solely because he differs with their views.

Id. at 23,328.

6. "Forty-nine Republicans and 16 Democrats voted for Justice Rehnquist, with 31 Democrats and 2 Republicans voting against him." *Senate, 65 to 33, Votes to Confirm*, *supra* note 5, at A1.

against his confirmation than any person previously confirmed to the Court.[7] It is easy to wonder whether the outcome would have been different if the vote had been taken just a few months later, after the Democratic Party had recaptured the Senate, which the Democrats had held for forty-four of the prior fifty-three years,[8] in the November 1986 elections.[9]

Some court observers have argued that since accepting the Supreme Court mantle of *primus inter pares*,[10] Chief Justice Rehnquist has moved closer to the center of the political spectrum.[11] According to this view, which seems to surface periodi-

---

Historians have debated the question of the number of Chief Justices because early in the nation's history John Rutledge served as Chief Justice under a recess appointment, but later was not confirmed, and Justice William Cushing was confirmed as Chief Justice by the Senate, but declined to serve in that position. The consensus appears to be that, including the present occupant of the office, there have been sixteen Chief Justices, for sixteen persons actually have presided over the Supreme Court in that role. Anderson, *supra* note 3, at 733 n.1.

7. *Senate, 65 to 33, Votes to Confirm*, *supra* note 5, at A1.

> Justice Rehnquist received more negative votes than any other Justice who has been confirmed to the High Court. The previous high number of negative votes, 26, was shared by three Justices: Mahlon Pitney, confirmed as an Associate Justice in 1912 by a vote of 50 to 26; Charles Evans Hughes, confirmed as Chief Justice in 1930 by a vote of 52 to 26; and Mr. Rehnquist himself, confirmed as an Associate Justice in 1971 by a vote of 68 to 26.

Id.

8. 7 CONGRESS AND THE NATION 1123 (Colleen McGuiness ed., 1990).

9. Six of the Republican Senators who voted to confirm Chief Justice Rehnquist (James Abdor (R-S.D.); Mark Andrews (R-N.D.); James Broyhill (R-N.C.); Slade Gordon (R-Wash.); Paula Hawkins (R-Fla.); and Mack Mattingly (R-Ga.)) were defeated by Democrats in the 1986 general election, and another Republican who voted for Rehnquist (Paul Laxalt (R-Nev.)) was replaced by a Democrat. *Id.* at 1127-34. While this shift alone would not have been sufficient to have defeated the Rehnquist nomination, together with the change in the chairmanship of the Senate Judiciary Committee, the shift might have generated the momentum necessary to derail confirmation. In the first Supreme Court confirmation hearings following the 1986 general election, the nomination of Robert Bork was defeated. 133 CONG. REC. 29,121 (1987).

10. The term is one which Rehnquist himself has used to describe the position of Chief Justice. William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637 (1976) (The Chief Justice is "generally considered, as the prime minister of Great Britain once was, to be primus inter pares—first among equals—taking precedence only because any group must have a nominal leader.").

11. David O. Stewart, *Reconsidering Rehnquist*, A.B.A. J., Apr. 1, 1988, at 40. Stewart states:

> In three decisions announced in late February [1988], Chief Justice Rehnquist challenged his public image as a reflexive conservative who votes for the government in criminal cases, against individual rights, and in favor of property rights.

cally, the Chief Justice increasingly is more interested in forging majorities than in defining the conservative viewpoint.[12] Occasionally, this means that conservative principles must be sacrificed for the greater good of enabling the Court to speak with a clear voice.[13] Adherents of this view argue that the Chief Justice now recognizes that it is his responsibility to lead the Court.[14]

> With the announcement of these rulings, some speculated that Rehnquist might be moving toward the center of the Court to exert more leadership as chief justice.

Id.

12. Paul M. Barrett, *Thomas Emerges as Bold New Justice With Strong Dissents in Criminal Cases*, WALL ST. J., May 28, 1992, at B6 ("Since he has ascended to the chief's position, Mr. Rehnquist has shown increased interest in forming majorities."); *see also* Lincoln Caplan, *Rehnquist: New and Improved?*, A.B.A. J., Jan. 1989, at 40. Caplan states:

> The [1987-88] term saw Rehnquist strongly repudiating arguments presented by the Reagan Justice Department[,] . . . moving firmly from his former position as a dissenter to one as a coalition-builder who wrote or assigned all of the term's key opinions, and otherwise appearing to assume the mantle of a chief justice committed to unifying the Court.

Id.

13. *See* Barrett, *supra* note 12, at B6. Barrett states that since ascending to the Chief Justice's position, "Mr. Rehnquist . . . has been willing to compromise more often," and cites as an example Justice Rehnquist joining the majority in Hudson v. McMillian, 112 S. Ct. 995 (1992), in which the Court held that excessive physical force against a prisoner may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury. Barrett quotes one of Justice Rehnquist's former law clerks as saying that it is "not where you once would have expected him to be." *Id.*

There is reason to conclude that the Chief Justice may not always have been so concerned with court unanimity. Joe Anderson, my colleague at St. Mary's University, has interpreted a 1980 speech by then-Justice Rehnquist as asserting that "[w]hether such unanimity is even desirable is questionable." Anderson, *supra* note 3, at 745. In that speech, Justice Rehnquist had argued that "it is surely best that [the Supreme Court] be a collegiate court which no Chief Justice seeks to, or is capable of, 'dominating' or even of 'harmonizing.'" *Id.*

14. David O. Stewart and Scott Nelson, *Separation of Powers, Cont.*, A.B.A. J., Sept. 1, 1988, at 40, 50. In discussing Morrison v. Olson, 487 U.S. 654 (1988), in which the Court, in a 7-1 majority opinion by Chief Justice Rehnquist, held that the Special Prosecutor law did not violate constitutional separation of powers, Stewart and Nelson state:

> Some observers speculated that Rehnquist's presence in the majority might be due less to his own convictions than to the view that the chief justice, regardless of his personal inclinations, ought to be the leader and spokesman for the Court on an issue of this magnitude.
>
> . . . .
>
> Whatever Rehnquist's feelings, his opinion shows no sign of having been written for "damage control" purposes by one who would have preferred the contrary result. Rather, . . . the opinion appears to reflect a "genuine attempt to find common ground and write a moderate opinion that reflects the justices' views fairly."

This thesis concerning what some perceive, and others dispute,[15] as the professional evolution of a member of the High Court is interesting, and it has respectable antecedents. Supreme Court buffs love to recount the stories demonstrating the unpredictability of Presidential appointments.[16] Felix Frankfurter and Byron White, nominees of liberal Democratic Presidents (Franklin Roosevelt and John Kennedy, respectively), matured into dependable conservative votes.[17] Harry Blackmun, appointed as a "law-and-order conservative" by President Nixon, metamorphosed into a leading liberal,[18] following in the tradition of Chief Justice Warren and Justice Brennan, both of whom were appointed by conservative Dwight Eisenhower.[19]

Id. (quoting Larry Kramer); *see also* Al Kamen, *Rehnquist, Moving to Center, Gains More Control of Court: Scalia May Be Successor as Conservatives' Chief Advocate*, WASH. POST, July 3, 1988, at A4. Kamen states that:

> Rehnquist's move to the center, at least in certain areas, was unmistakable. . . .
>
> . . . .
>
> Several court observers said Rehnquist, after 15 years on the court as an associate justice often alone in dissent, feels that it is important as chief justice to exert leadership, something he cannot do from the right wing.

Id.; *cf.* Tony Mauro, *Could Election Spell the End of the Rehnquist Era?*, TEX. LAW., June 15, 1992, at 18 (referring to Rehnquist's "efforts to keep the trains running on time with a steady flow of succinct and near-unanimous conservative opinions").

15. Stewart, *supra* note 11, at 45 ("reports of a 'new' Rehnquist may be exaggerated"); *see also* Caplan, *supra* note 12, at 40 (arguing that "the chief's shuffle toward the center was more pragmatic than ideological" and that the "'new' Rehnquist . . . [merely] voted with the liberals in order to retain the opinion assignment power and lessen the impact of decisions he really disagreed with but lacked the votes to block"). *But see id.* ("If Rehnquist was pursuing a wily strategy of 'damage control,' however, his rhetoric often seemed to exceed tactical requirements. *Falwell* [Hustler Magazine v. Falwell, 485 U.S. 46 (1988)] in particular, appeared to mark a change for Rehnquist, a move toward clarity and consensus and away from the pressing of old views.").

16. *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 81-84 (1986) (discussing evidence of "betrayal").

17. *See* CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 15 (1961) ("Justice Frankfurter's reputation for conservatism derives primarily from his opinions in civil-liberties cases, while his reputation as a liberal, acquired before his elevation to the bench, was . . . indebted to his championship of libertarian causes."); Galloway, *supra* note 3, at 44-45 (White "was expected to be a liberal justice," but "in the early 1970s . . . veered sharply to the right" and is "especially conservative on social issues.").

18. *See* Galloway, *supra* note 3, at 42 ("Blackmun has been drifting steadily to the left since he was appointed . . . and since the 1978-79 term has voted left of center statistically.").

19. *See* Joel M. Gora, *Justice William J. Brennan, Jr.: A Justice for All Seasons*, A.B.A. J., June 1986, at 18 (stating that in his appointment of Brennan, Eisenhower was adhering to a policy of appointing "distinguished and moderate" appellate court judges); *see also* David O. Stewart, *Justice Brennan at 80*, A.B.A. J., Jan. 1987, at 61 (discussing Brennan's

The Rehnquist transformation thesis is difficult to test. For every *Hustler Magazine v. Falwell*,[20] where the Chief Justice surprisingly led a majority of the Court in extending Justice Brennan's defamation doctrine of constitutional privilege to actions for tortious infliction of mental distress, there is a *Deshaney v. Winnebago*,[21] where the Chief Justice wrote a highly controversial six to three opinion denying federal relief to a victim of child abuse.[22] Moreover, the idea that there has been a substantial Rehnquistian transformation tends to be negated by the fact that there is no significant dissatisfaction in conservative quarters with the Chief Justice's leadership of the Court during the last half-dozen years. The apparent "moderation" of the Chief Justice may have less to do with his willingness occasionally to compromise conservative principles than with the increasing number of conservatives—some probably to the political right of the Chief Justice—who now sit upon the Supreme Court. When Justice Rehnquist was appointed to that tribunal two decades ago, it was clear that if he did not voice a strict conservative viewpoint, such views would not be heard. Now, with Antonin Scalia and Clarence Thomas on the bench, there is less need for William Rehnquist to undertake that task.[23] The Rehnquist moderation thesis may be little more than wishful thinking by those of a different political stripe.

Still, there is evidence of a more politically restrained or astute, if not more moderate, William Rehnquist. Consider, for example, the Chief Justice's proposal for reforming diversity

---

"liberalism"); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 26 (1979) (discussing Warren's liberalism and his conversion from being "right-wing").

20. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

21. DeShaney v. Winnebago, 489 U.S. 189 (1989) (Justices Brennan, Marshall, and Blackmun dissented).

22. The controversial nature of *DeShaney* is suggested by more than two dozen law journal casenotes or comments written about the case. Search of WESTLAW, JLR library, May 1, 1992.

23. Caplan, *supra* note 12, at 42 ("[I]t is now commonly observed that Scalia has replaced Rehnquist as the Court's tribune of conservatism—although Scalia speaks for the New Right and Rehnquist did not."); Barrett, *supra* note 12, at B6 ("Justice Thomas may be trying out a role that Mr. Rehnquist assumed upon joining the court in 1972—that of the strident dissenter on the right."); Kamen, *supra* note 14, at A4 ("Rehnquist's former role as the principal conservative advocate . . . now may be fulfilled by Scalia, who was often joined in dissent this term by O'Connor.").

jurisdiction. Before taking the center seat at the Court, then-Justice Rehnquist had advanced a favorite conservative proposal for curtailing the size and activity of the federal courts, the total abolition of diversity jurisdiction.[24] As Chief Justice, he has trimmed his proposal to the politically more reachable goal of eliminating only the in-state plaintiff form of diversity jurisdiction.[25]

A critical analysis of whether, in fact, there has been a moderation of the views of the Chief Justice over the last half-dozen years is beyond the scope of this essay. The purpose here is merely to observe that those inclined to endorse that thesis may find strong evidence of a centrist Rehnquist in the two books he has published during his tenure as Chief Justice: *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992) ("*Grand Inquests*"), and *The Supreme Court: How It Was, How It Is* (1987). Both works—the only books ever published by a sitting Chief Justice[26]—are examples of exceptionally even-handed scholarship. This is particularly true of his more recent effort, *Grand Inquests*, the focus of this review. Devoid of ideological overtones, or any effort to proselytize a viewpoint, *Grand Inquests* is a balanced, scholarly account of two major events in American history. Except for a few personal references contained in the work, one would never guess that *Grand Inquests* was written by a man who just a few years earlier

---

24. Justice William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 8 (1984) ("To insist at this late date on retaining 'diversity jurisdiction' when the underlying reason for it has disappeared is inconsistent with the best interests of the federal judiciary and of the legal profession.").

25. *See* Chief Justice William H. Rehnquist, Reforming Diversity Jurisdiction and Civil RICO, Address at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute (Apr. 7, 1989) *in* 21 ST. MARY'S L.J. 5 (1989). In that address, Chief Justice Rehnquist stated:

> [T]here is one part of diversity jurisdiction as it now stands that I think is very difficult to justify . . . . Whatever may be the arguments for maintaining diversity jurisdiction with respect to an out-of-state plaintiff who sues an in-state defendant . . . few would seem to support the idea that there will be local prejudice against an in-state plaintiff . . . . [T]here is no reason for letting the [in-state] plaintiff start out in federal court.

Id. at 7.

26. Telephone conversation with spokesperson, Public Information Office, Supreme Court of the United States (Aug. 27, 1992).

was widely regarded as the most controversial jurist in the country.

II. IMPEACHMENT AND POLITICS

As the book's subtitle suggests, *Grand Inquests* deals with the unsuccessful impeachment trials of a Supreme Court Justice in 1805 and an American President in 1868. In focusing on those events, the Chief Justice has chosen a subject which is both interesting and important. Interesting, because the impeachment and trial of a high official is the stuff of great drama; important, because the Chase and Johnson impeachments contributed as much to the American doctrine of separation of powers as any court decision.

In voting to impeach Justice Samuel Chase in 1804, the House of Representatives was motivated in large measure by political considerations. Chase was an unrepentant Federalist whose judicial actions and political statements understandably antagonized members of the Republican-dominated House. Ridiculed as "Old Bacon Face" because of his brownish-red complexion,[27] and given to impetuous conduct and sarcastic remarks,[28] Chase had publicly criticized Republican policies, including at least one act of Congress.[29] Chase also had made a number of questionable rulings as a judge in criminal trials while riding circuit in Philadelphia and in Richmond. Chase was impeached by the House for alleged misconduct involving those trials and for politically intemperate statements made in connection with a charge he delivered to a grand jury in Baltimore, Maryland.

The impeachment of President Andrew Johnson more than half a century later was also, in part, politically inspired. Johnson, a border-state Democrat who believed that the Union must be preserved, was nominated Lincoln's vice-presidential running mate in 1864 as part of an effort to cultivate broader

---

27. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 20 (1992) [hereinafter GRAND INQUESTS].

28. *Id.*

29. *Id.* at 22.

support for Lincoln's mid-Civil War re-election effort.[30] The ticket was called the National Union ticket rather than the Republican ticket.[31] Johnson succeeded to the Presidency following Lincoln's assassination and, in short order, infuriated Republicans in Congress by repeatedly blocking their efforts to reconstruct the South in the manner they deemed appropriate. When Johnson arguably failed to comply with provisions of the Tenure of Office Act by removing the Secretary of War from office without Senate consent, the House of Representatives seized upon that violation as a basis for impeachment.[32]

In both the Chase and Johnson cases, it was questionable whether, from a legal standpoint, the accused were guilty of "high Crimes or Misdemeanors"[33] sufficient to justify conviction. Yet both officials were highly unpopular and, on each occasion, the Senate was heavily dominated by members of the opposing political party. A party-line vote would have been sufficient to convict either Chase or Johnson by the two-thirds majority constitutionally required for removal from office.[34]

Chief Justice Rehnquist rightly concludes that the failure of the Chase and Johnson impeachment efforts under such politically favorable circumstances "was of extraordinary importance to the American system of government."[35] Those trials stand for the proposition that political differences alone are an insufficient predicate for removing a high official from office. Today it is widely recognized that one may be stripped of office only upon proof of a serious violation of the law or other specific instances of improper conduct.[36] This simple point, now largely taken for

---

30. *Id.* at 195.

31. *Id.*

32. *Id.* at 210-18.

33. U.S. CONST. art. II, § 4.

34. GRAND INQUESTS, *supra* note 27, at 108. Of the 34 Senators who voted at the Chase trial, 9 were Federalist and 25 were Republican. *Id.* At the time of the Johnson trial, there were 54 Senators, 42 Republicans and 12 Democrats. *Id.* at 231.

35. *Id.* at 10.

36. *Cf.* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 34 (1974) (indicating that most misdeeds of a seriousness sufficient to warrant impeachment are likely to be ordinary crimes as well, although extreme examples of non-indictable, yet impeachable, conduct may be posited).

granted, was not always clear.[37] At the time of the Chase impeachment, it was plausibly argued that:

> [I]mpeachment was nothing more than a declaration by Congress to this effect: [y]ou hold dangerous opinions, and if you are suffered to carry them into effect[,] you will work the destruction of the [Union]. *We want your offices*[] for the purpose of giving them to men who will fill them better.[38]

Rehnquist states, from a separation of powers perspective, that the significance of the Chase and Johnson impeachments "can hardly be overstated."[39] For members of the federal judiciary, who, under the Constitution, hold office during "good Behavior"[40] and may be removed only by impeachment, those precedents effectively guarantee life tenure, absent commission of serious unlawful conduct. Life tenure, in turn, plays an important role in ensuring equal treatment before the law, for judges and justices insulated from political retribution by other branches of government are more likely to be vigilant guardians of the rights of those accused, disadvantaged, or oppressed.[41] Discussing the "profound effect"[42] of the acquittal of Samuel Chase on the American judiciary, Chief Justice Rehnquist writes:

---

37. GRAND INQUESTS, *supra* note 27, at 127-28 (discussing the removal of Judge John Pickering of New Hampshire shortly before the Chase impeachment).

38. *Id.* at 27 (alterations in original) (quoting THE MEMOIRS OF JOHN QUINCY ADAMS 322 (Charles F. Adams, ed.) (Philadelphia, J.B. Lippincott, Vol. 1, 1874) in which John Quincy Adams describes the views of William Branch Giles, a leader of the Chase impeachment effort, as stated to Adams by Giles in a conversation).

39. *Id.* at 271, 278.

40. U.S. CONST. art. III, § 1.

41. Vincent Johnson, *Adequate Compensation Necessary for Quality*, SAN ANTONIO LIGHT, Nov. 19, 1989, at L-1.

> The hallmark of the federal judiciary has always been the independence of its judges. In its finest moments, such as the school desegregation cases, the federal courts have fearlessly championed the rights of the disadvantaged, the oppressed and the weak. The ability of federal judges to stand strong against the winds of majority sentiment has been attributable to provisions in the Constitution guaranteeing federal judges life tenure and non-reducible compensation.

Id.; *cf.* Vincent R. Johnson, *The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 17-19 (1990) (discussing how abolition of the principle of judicial irremovability contributed to the French Reign of Terror by silencing jurists who might otherwise have championed cases where civil rights clashed with the prevailing majoritarian will).

42. GRAND INQUESTS, *supra* note 27, at 114.

> First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body.[43]

Despite the Supreme Court's increasingly prominent role in deciding politically sensitive questions, no Supreme Court Justice has been impeached during the nearly two hundred years since the Chase trial. "[T]he Chase acquittal has come to stand for the proposition that impeachment is not a proper weapon for Congress (abetted, perhaps, by the executive as in the case of Chase) to employ in . . . confrontations [with the Supreme Court]."[44]

The lesson of the Chase and Johnson impeachments is equally significant for the Executive Branch. Only once since the Johnson trial has there been a serious effort to remove a President. In that case—involving Richard Nixon—it was clear that a policy disagreement would not suffice and that Congress would require clear proof of a specific instance of wrongful conduct before removing a president from office.[45] The high standard for impeachment applied during the Watergate inquiry was undoubtedly influenced by the precedent established by the Chase and Johnson proceedings.

III. THE SWEEP OF AMERICAN HISTORY

Grand Inquests does an excellent job reporting the color and analyzing the charges which formed the basis for the Chase and Johnson impeachment trials. The book also offers plausible interpretations of senatorial voting in the cases, as well as fair appraisals of the long-term importance of the acquittals.

However, the book does more than recount two signal political events: it covers much of the full sweep of American history. In the guise of explaining the political background of the two impeachment trials, the Chief Justice walks the reader, step by

---

43. *Id.*
44. *Id.* at 134.
45. *Id.* at 274.

step, from the early colonial settlement to more recent times, focusing principally on the 100-year period between the Revolution and post-Civil War reconstruction. The historical account is clear, colorful, and richly detailed. Written for the "interested and informed nonlawyer,"[46] *Grand Inquests* brings to life the otherwise moribund disputes of earlier eras, such as Alexander Hamilton's plan for discharging the Revolutionary War debt,[47] Andrew Jackson's war on the Second National Bank,[48] and the efforts by Henry Clay, John Calhoun, and Daniel Webster to reconcile the political demands of Western expansion with divergent views on slavery.[49] Occasionally, a vignette seems somewhat far afield from the Chase and Johnson trials—such as the intriguing and pathetic account of a noted federal judge who resigned in the late 1930s in the face of bribery charges, contending, curiously, that the bribes had not diminished the quality of justice in his court because "he had never sought any of the bribes until he had already made up his mind on the merits of the case; he then [only] sought bribes from the party in whose favor he had already decided to rule on the basis of the law."[50] But the author has chosen well, and when there is a detour from the main road, the path generally is worth taking.

CONCLUSION

In our Nation's history, there have been dozens of Presidents, hundreds of Senators, thousands of Congressmen, but only sixteen Chief Justices. *Grand Inquests* provides not only a good lesson in American history, but a glimpse into the mind of one of the few occupants of the highest judicial office. Although the author does not readily reveal his personal views, the work makes clear that the current Chief Justice has a deep appreciation and commanding knowledge of America's past, and an abiding commitment to see that it is not forgotten. Objective and balanced, and subtlely laced with humor, *Grand Inquests* is hardly the type of work one would expect from a man who so often has been at the center of controversy.

---

46. GRAND INQUESTS, *supra* note 27, at 11.
47. *Id.* at 33-41.
48. *Id.* at 161.
49. *Id.* at 164-65.
50. *Id.* at 120-24.