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William Rehnquist, Sept. 3, 2005: The Chief at LSU Law

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An avalanche of snow shut down the United States Capitol. Across First Street, at the Rehnquist Court, it was business as usual.

Katrina knocked us down hard, but the day after Labor Day LSU Law was back on its feet. Such is our strength. Our stomachs were in knots, truth to tell. Chief Justice Rehnquist died the preceding Saturday. Sadly, Jim Bowers and I paid our respects in the Law Review Seminar. Rehnquist's former law clerk John Roberts may succeed him as Chief Justice of the United States. Thus life gives our law reviewers and our courageous students another season—we have witnessed it ourselves—of hurricane, Court, and Constitution. "We are very quiet there, but it is the quiet of a storm centre, as we all know," said Holmes from the Court's eye (*Law and the Court* (1913), in *Collected Legal Papers* 292 (1920)).

After the seminar, Jason Doré asked if I could render a salute to Chief Justice Rehnquist for *The Civilian*. As it happens, William H. Rehnquist was a great friend of LSU Law Center, visiting us twice a decade apart—first his Edward Douglass White Lectures in 1983, next his Alvin and Janice Rubin Lectures in 1993. For a Rehnquist tribute, nothing flowery will do. The Chief Justice was not a flowery guy. One remembers well a few gold stripes on the Chief's black robe—a Rehnquist touch of *Gilbert and Sullivan*. As an Associate Justice, he let himself go. I remember seeing him in a loud orange tie and long sideburns during oral argument in what I call the *Policeman's Long Hair Case*. The Chief Justice voted with the Chief of Police, our students know.

For my little prayer, I will let The Chief at LSU Law do the talking. I will only set the stage.

William Rehnquist's courage held on to the very end. The *New York Times* photograph of a weakened Chief Justice of the United States swearing in President Bush in January 2004 sticks in memory. The news is very sad to those who knew him personally. All of his colleagues loved him. I have this from Justice Brennan.

Justice O'Connor's tears on seeing the casket draped in the American Flag being carried up the front steps of the Court touched hearts. Mama Dot, up from Gretna, saw O'Connor's anguish in the *Advocate's* photograph.

Katrina wreaked havoc upon us and upon the Nation. But we at LSU Law know that the death of the sixteenth Chief Justice of the United States is worthy of note. "An institution takes its tone from the top." This was Charles Evans Hughes's admonition to those who would lead. I can say from personal observation that William H. Rehnquist set Hughes's tone when he presided as Chief Justice of the United States during oral argument. On the public side of the curtain, William Rehnquist was all Hughes—strictly business. On the private side, like Charles Evans Hughes, he was about as delightful as they come. His droll wit was part of the man. He loved poker. He loved singing Christmas carols to Ron Martinson's piano in the West Conference Room. Justice Antonin Scalia is a nice foil. *Il Guidice Sapiente* likes the rough and tumble of the law on Mt. Olympus. William Rehnquist would rather just get on with it. He was a jobbist.

Our Chief once skipped a State of the Union address to go to his painting lesson. He sat as a trial judge in Richmond, Va., for a change of pace. (His ruling was reversed by the Fourth Circuit Court of Appeals, say it softly.) He finished first at Stanford Law School, two notches above Sandra Day O'Connor. Justice Robert Jackson hired him as his law clerk.

Looking back over thirty-three years, it is clear to me that Rehnquist's record reflects the wisdom of Robert Jackson: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

Chief Justice Rehnquist could surprise even Yale Kamisar. He could bow to the past, even to those precedents he condemned. He could say to Congress: "Thou Shalt Not Overrule *Miranda*." This is *Dickerson v. United States*, as we all know.

Cynics say that *Bush v. Gore* is a rotten egg begotten by Rehnquist & Co. That is not how I teach it. "Cynicism is the worst sin," according to Justice Frankfurter, whose constitutional sensibilities are part and parcel of *Bush v. Gore* and Chief Justice Rehnquist's *Flag Burning* dissent in *Texas v. Johnson*.

I remember seeing Justice Rehnquist walking briskly on the sidewalks of the Court when I was privileged to work inside the Court as a Judicial Fellow, a program Chief Justice Rehnquist strongly supported. This was exactly thirty years ago. I have grown up, so to speak, with William Rehnquist on the Court. He wore Hush Puppies, size 14D. He was a tall figure.

The Chief at LSU Law



Painting by Thomas Loepf, Collection of the Supreme Court of the United States

Later I urged him to deliver an Edward Douglass White Lecture at LSU. He added life to our learning. At a faculty luncheon, I thanked him very much on behalf of those of us who teach Constitutional Law for his majority opinion in *United States v. Lopez*. I could tell from his laughter that he knew exactly what I meant. The Court's work is arduous, and we have all the fun teaching its decisions term after term, seeing the Court whole over time.

Chief Justice Rehnquist's last opinion is a triumph of brains, conviction, and time: "The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does." *Van Orden v. Perry*, June 27, 2005. Thus a stricture of the Constitution is tempered with common sense. I am sure my precious friend and colleague Professor John Baker, who lost *Wallace v. Jaffree* but won Rehnquist's vote, is pleased and justly proud.

William H. Rehnquist wound up his E. D. White Lectures in LSU's Union Theater with three quotations and timeless insight. He quoted Thomas McCauley, the English historian of the nineteenth century, who observed to one of his American friends,

"Sir, your Constitution is all sail and no anchor." What was William Rehnquist's reaction?

The stage is set. Here is The Chief at LSU Law:—

I think that a judge's disposition should be about evenly balanced between sail and anchor. He cannot be anchored to the past mechanically by a line of precedents, but by the same token he ought not to be moved by each puff of novel doctrine which may be generated by one group of litigants or another.

Perhaps Polonius put it as well as anyone when he told Laertes, "To thine own self be true . . . , [and] thou canst not then be to any man false."

Finally, whether it be denominated "common sense," some patchwork of knowledge of the human condition gained from experience, or put some other way, the best judges undoubtedly have some sort of understanding of human nature and how the world works.

(Lions Under the Throne: The Supreme Court in the Mirror of Chief Justices 105 (1995)).

And what of Louisiana's Great Chief Justice Edward Douglass White, who was regarded by his contemporaries as having "an indefinable 'plus' which is very difficult to articulate":—

Perhaps Edward Douglass White, whom these lectures honor, possessed that more general important quality of being a good judge—equally important for the effective discharge of many other positions of public responsibility—the quality epitomized by Matthew Arnold's description of Sophocles that he "saw life steadily, and saw it whole."

William H. Rehnquist saw life steadily, and saw it whole. Supremely, he was true to himself. *Requiescat in pace*.