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Edward T. Matthews

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JOHN DEAN'S LATEST MEA CULPA

Edward T. Matthews[†]

The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court. By John Dean. *The Free Press*, 2001. 336 pages. \$26.00.

It is not often that one is afforded the chance to read a book about a sitting Chief Justice of the United States written by a convicted felon.¹ I initially had high expectations of this text, as its author, John W. Dean III, was a central player in President Richard Nixon's White House. At first glance, the book appears to be well researched, as Dean relied heavily on 420 hours of President Nixon's White House Tapes, which were released on October 16, 2000.²

The text, however, does little more than dredge up old charges leveled against Chief Justice William Rehnquist. Despite claims to the contrary, the book covers no significant new ground. The book

[†] Executive Editor, *William Mitchell Law Review*, Volume 29.

1. John W. Dean III pled guilty in 1973 to conspiracy to obstruct justice and defraud the United States. JOHN J. SIRICA, *TO SET THE RECORD STRAIGHT* 165-66 (W.W. Norton & Co. 1979). He was sentenced to one to four years imprisonment. His prison sentence was subsequently reduced to time served of four months. According to those who investigated the Watergate scandal, Dean was one of the central actors in the Watergate cover-up. *See, e.g., id.* at 271; SAMUEL DASH, *CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE - THE UNTOLD STORY OF WATERGATE* 97, 122 (Random House 1976) [hereinafter *INSIDE THE ERVIN COMMITTEE*]. Dean himself has admitted his role in the cover-up. JOHN W. DEAN III, *BLIND AMBITION* 121-22, 125, 223 (Simon & Schuster 1976) [hereinafter *BLIND AMBITION*]. He has admitted to (1) blocking congressional investigations into Watergate, *id.* at 143; (2) arranging for hush money to be paid to the Watergate burglars, *id.* at 164; (3) helping Jeb Magruder commit perjury before a grand jury, *id.* at 223, LEN COLODNY & ROBERT GETTLIN, *SILENT COUP: THE REMOVAL OF A PRESIDENT* 220-21 (St. Martin's Press 1991) [hereinafter *SILENT COUP*]; (4) destroying evidence vital to Howard Hunt's defense during the trial of the Watergate defendants, *BLIND AMBITION* 181-82; and (5) using funds from the Committee to Re-elect the President to pay for personal expenses. *INSIDE THE ERVIN COMMITTEE* at 157; *SILENT COUP* at 234.

2. JOHN W. DEAN, *THE REHNQUIST CHOICE* 287 (The Free Press 2001) [hereinafter *THE REHNQUIST CHOICE*].

represents little more than Dean's latest attempt to disassociate himself from the actions of the Nixon administration.³ Dean tells his reader upfront that he has "some regrets" about his role in Rehnquist's selection as a Supreme Court Justice,⁴ but nonetheless simultaneously seeks to take credit for it.⁵

The text is inconsistent, and certain charges are wholly unsupported. On the very first page, Dean states that "William Rehnquist, who would be Nixon's most important appointment, was actively involved in the efforts to create *vacancies* on the Court while serving as an assistant attorney general."⁶ Dean then proceeds to detail only Rehnquist's minor role in the Abe Fortas matter.⁷

While serving as an Associate Justice, Fortas had received a \$20,000 consulting fee from a foundation funded by millionaire industrialist Louis Wolfson. Wolfson subsequently bragged to a friend that Fortas was going to help him dodge a Securities and Exchange Commission (SEC) investigation.⁸ At the height of the SEC investigation, Fortas met with Wolfson in Florida.⁹ The Justice Department, led by Attorney General John Mitchell, investigated the corruption charges. Disgraced, Fortas resigned on May 15, 1969.¹⁰

The story of this investigation has been previously told in *The Brethren*, the inside story of the U.S. Supreme Court told by Bob Woodward and Scott Armstrong,¹¹ and Dean's discussion adds little to the reader's understanding. Contrary to Dean's less-than-subtle

3. See generally BLIND AMBITION, *supra* note 1; JOHN W. DEAN III, LOST HONOR (Strafford Press 1982) [hereinafter LOST HONOR]. Dean's delusional thought processes are best illustrated by passages from his own books. In LOST HONOR, *id.* at 24, for example, Dean attempts to convince his reader that he is certainly "not a criminal," while he previously admitted in BLIND AMBITION to committing various crimes. See *supra* note 1 and accompanying text.

4. THE REHNQUIST CHOICE, *supra* note 2, at xv.

5. Dean, by his own admission, enjoyed being a "power broker." See LOST HONOR, *supra* note 3, at 58. He has frequently capitalized on his Watergate notoriety to land jobs for himself. See, e.g., *id.* at 135 (hired by *Rolling Stone* magazine to cover the 1976 Republican Convention).

6. THE REHNQUIST CHOICE, *supra* note 2, at 1 (emphasis added).

7. See *id.* at 5-8.

8. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 18 (Simon & Schuster 1979) [hereinafter THE BRETHREN].

9. ROBERT SHOGAN, A QUESTION OF JUDGMENT 210-11 (The Bobbs-Merill Co. 1972) [hereinafter A QUESTION OF JUDGMENT].

10. *Id.* at 258-60.

11. THE BRETHREN, *supra* note 8, at 18-20.

suggestions, the investigation was not only lawful, but required to maintain confidence in the nation's highest court.¹² Rehnquist's involvement in the Fortas matter consisted solely of innocuous legal research that concluded that Fortas could be prosecuted while he remained on the Court.¹³ So minor and tangential was Rehnquist's involvement that other texts that have examined the Fortas affair do not mention Rehnquist's involvement at all.¹⁴

It is preposterous to contend that this activity by Rehnquist, relating solely to a single sitting justice, somehow demonstrates that he was involved in efforts, plural, to create more than one vacancy on the Court. Dean later details then-minority leader Gerald Ford's drive to impeach Justice William Douglas.¹⁵ But Rehnquist's name is not even mentioned on these pages. I find it ironic that Dean, who has consistently tried to distance himself from the actions of the Nixon administration, attempts to employ guilt by association to taint Rehnquist's reputation.

Some of Dean's statements are just plain laughable. For example, Dean summarily concludes "that without Rehnquist's guidance and blessings, Mitchell's hardball and dubious tactics vis-à-vis the Court would never have been undertaken."¹⁶ It is difficult to imagine the strong-willed John Mitchell seeking approval from anyone except the President.

Dean saved his most egregious charges for presentation in his Chapter 13 "Afterword." There he repeats the previously disproven allegations that Rehnquist challenged black voters at the polls during the 1960s. Rehnquist has consistently denied these inflammatory assertions.¹⁷ But this did not stop Dean from stating that "[t]he evidence is *clear and convincing* that Rehnquist was not

12. Attorney General John Mitchell, President Nixon's closest confidant, was concerned with the prestige of the Court, not with any political agenda. *See, e.g.*, A QUESTION OF JUDGMENT, *supra* note 9, at 21. During the troubled period of the late 1960s, the public's confidence in the nation's government institutions was seriously eroding. *Id.* at 25-26. Richard Nixon was elected President largely on his pledge to restore law and order. His administration therefore could not look the other way when a member of the nation's highest Court was implicated in a scandal.

13. THE BRETHREN, *supra* note 8, at 19.

14. *See, e.g.*, JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 4-16 (University Press of Virginia 1991).

15. THE REHNQUIST CHOICE, *supra* note 2, at 24-26.

16. *Id.* at 28.

17. *Id.* at 270-71; TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 42 (John Wiley & Sons 1992) [hereinafter TURNING RIGHT].

truthful about his activities in challenging voters, an activity that was legal and accepted at the time he did it."¹⁸ But Dean himself admits, as he must, that eight witnesses have testified that Rehnquist engaged in no such activity.¹⁹ It appears that Dean has forgotten the definition of clear and convincing in the time since he was disbarred in 1975.²⁰

Dean also accuses Rehnquist of lying about the circumstances surrounding a memo Rehnquist wrote to Justice Robert Jackson in 1952 while clerking for him.²¹ At the time the memo was written, the Supreme Court was preparing to consider *Brown v. Board of Education*.²² The memo urged that *Plessy v. Ferguson*²³ be reaffirmed, because separate but equal facilities were all that was constitutionally required.²⁴ Rehnquist has steadfastly maintained that the memo was intended to express Jackson's views, not his own.²⁵ Both Rehnquist and fellow law clerk Donald Croson have stated that the memo was prepared at Justice Jackson's request and that the two of them worked on it together.²⁶ Justice William Douglas, who in 1971 was the only remaining member of the Court that had decided *Brown*, also supported Rehnquist's version of events.²⁷

Dean's critique of Rehnquist's actions as a lawyer could not be more hypocritical. From the beginning of his legal career, continuing through his disbarment, John Dean was a corrupt attorney. He was fired from his first legal position when it was discovered that he "was secretly working on a television station

18. THE REHNQUIST CHOICE, *supra* note 2, at 273 (emphasis added).

19. *Id.*

20. *See In re Dean*, 421 U.S. 984 (1975).

21. THE REHNQUIST CHOICE, *supra* note 2, at 284.

22. 347 U.S. 483 (1954).

23. 163 U.S. 537 (1896).

24. THE BRETHERN, *supra* note 8, at 163.

25. TURNING RIGHT, *supra* note 17, at 36-37.

26. THE REHNQUIST CHOICE, *supra* note 2, at 276-77; *See also* DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST 100-01 (Iowa State Univ. Press 1987) (noting the memo was prepared at Justice Jackson's request, and both clerks contributed to it).

27. THE BRETHERN, *supra* note 8, at 163. In 1986, when the Senate Judiciary committee voted 13 to 5 to recommend that Justice Rehnquist's nomination as Chief Justice be confirmed, "[t]he majority dismissed the 'Jackson Memo' as 'totally irrelevant and without merit.'" SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 197-98 n.11 (Princeton Univ. Press 1989) [hereinafter REHNQUIST AND THE CONSTITUTION].

license application for a competitor of one of his firm's clients."²⁸ While serving as White House Counsel, Dean admittedly used the Internal Revenue Service and other government agencies to harass opponents of the Nixon administration.²⁹ Dean also participated in meetings where illegal wiretapping plans were discussed.³⁰ He lied under oath to the congressional committees investigating Watergate.³¹ According to some accounts, Dean was the mastermind behind the Watergate break-in.³² At a minimum, he was the central figure in the subsequent cover-up.³³

Not content with falsely accusing Rehnquist of unethical behavior, Dean also attempts to portray Chief Justice Rehnquist as a right-wing maverick, one outside the political mainstream.³⁴ But such a portrayal is inaccurate. Rehnquist has frequently proven to be flexible in his thinking and often seeks common ground with his colleagues on the Court.³⁵ Even early in his tenure he was often able to persuade his colleagues to follow his line of reasoning.³⁶ In the four terms prior to his appointment and confirmation as Chief Justice, Rehnquist wrote more opinions of the Court than any other justice.³⁷

Since pleading guilty to obstruction of justice, Dean's strategy appears to be one of attempting to tarnish other members of the Nixon administration in order to increase his own relative public standing.³⁸ The informed reader, however, will undoubtedly see through such tactics. It takes much more than innuendo and the rehashing of decades-old charges to tarnish the reputation of one of the most distinguished and accomplished Chief Justices in the history of our nation.

28. SILENT COUP, *supra* note 1, at 97.

29. BLIND AMBITION, *supra* note 1, at 32-35; 47-48. *See also* SILENT COUP, *supra* note 1, at 104. Dean admitted during his congressional testimony to writing a memo suggesting use of federal agencies to "screw" political enemies. SILENT COUP, *supra* note 1, at 104.

30. BLIND AMBITION, *supra* note 1, at 79-86. It was these meetings that ultimately led to the Watergate break-in. *See id.* at 224.

31. SILENT COUP, *supra* note 1, at 119, 172, 406.

32. *See id.* at 124, 131, 133-34.

33. *See supra* note 1 and accompanying text. *See also* SILENT COUP, *supra* note 1, at 175-85, 193-94, 216-223.

34. THE REHNQUIST CHOICE, *supra* note 2, at 265.

35. THE BRETHERN, *supra* note 8, at 365, 383, 411.

36. *Id.* at 410.

37. REHNQUIST AND THE CONSTITUTION, *supra* note 27, at 198 n.12.

38. *See* BLIND AMBITION, *supra* note 1.