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CHARACTER, CONSCIENCE, AND DESTINY

G. Gordon Liddy*

ARCHIBALD COX: CONSCIENCE OF A NATION. By Ken Gormley. Foreword by Elliot L. Richardson. Reading, Mass.: Addison-Wesley. 1997. Pp. xxii, 585. \$30.

In authoring the definitive biography of Archibald Cox, Professor Ken Gormley¹ has also favored us with a study of character, its formation, and its effect upon history. What is more, he has demonstrated once again that while events may present men with opportunity, men make history and not vice versa. Into the bargain, Mr. Gormley offers yet more proof of the correctness of Heraclitus's dictum, "character is destiny."²

As the author is human, the book has its faults. They range from the mere erroneous use of language (misusing "smells" for "odors" (pp. 59, 307), misusing "anxious" for "eager" (p. 46), and using the redundant "ink pen" (p. 42)) to the careless (referring to the original Watergate prosecutors as "assistant attorneys general" (p. 256) rather than "Assistant United States Attorneys" and an inapt reference to the biblical Ruth, implying that her "Whither thou goest" vow referred to her husband rather than to her mother-in-law) (p. 326); to unscholarly prejudice (referring to those Justices of the Supreme Court of the United States who voted against some of President Roosevelt's New Deal congressional legislation as "mutinous" (p. 36) and to the events of the war in Southeast Asia as "travesties" (p. 219)). There also are significant missed opportunities in the author's research. He includes John Dean's *Blind Ambition*³ and Len Colodny and Robert Gettlin's *Silent Coup*⁴ in his list of books read in preparing to write his biography of Mr. Cox, and also lists among his sources an interview of Mr. Dean as recent as June 22, 1996. Surely Mr. Dean must have made Mr. Gormley aware of his suit for defamation against, *inter alia*, Messrs. Colodny and Gettlin and their publisher, St. Martin's Press. Surely also Professor Gormley's scholarly instincts must have told him that the rec-

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1. Ken Gormley is a professor of law at Duquesne University.

2. HERACLITUS, ON THE UNIVERSE fragment 1, 121 (W.H.S. Jones trans., Loeb Classical Library). See also RUSSELL W. GOUGH, CHARACTER IS DESTINY: THE VALUE OF PERSONAL ETHICS IN EVERYDAY LIFE (1998).

3. JOHN W. DEAN III, BLIND AMBITION (1976).

4. LEN COLODNY & ROBERT GETTLIN, SILENT COUP: THE REMOVAL OF A PRESIDENT (1991).

ord of that case, on file in the United States District Court for the District of Columbia,⁵ would provide a rich vein of information on Watergate in general and Mr. Dean's involvement in particular.

Had he availed himself of that record, Mr. Gormley would have discovered that Mr. Dean — who wrote that he prepared for writing *Blind Ambition* “the same way I prepared to testify before the Ervin Committee, before the special prosecutors, and in the cover-up trial” by reviewing “an enormous number of documents as well as my own testimony” and who was prepared to take a “lie detector test” to prove it⁶ — admitted when deposed that not only did he not write *Blind Ambition*,⁷ he did not even fully read it.⁸ Moreover, Mr. Colodny's Second Amended Response to Plaintiffs' Interrogatories lists thirty-seven separate alleged Dean perjuries and the sources supporting the falsity of Dean's sworn statements.⁹

CHARACTER, PERSONALITY, AND DESTINY

In his book, *Character Is Destiny*,¹⁰ Russell W. Gough, a professor of ethics and philosophy at Pepperdine University, makes the crucial point that one's character is separate and apart from one's personality.¹¹ Were it otherwise, and personality destiny, Archibald Cox would not have fared well. He is depicted throughout by the author as shy and retiring, stiff and distant with other than family and friends, and something of a snob.¹² Nevertheless, if good character may be defined as the habit of taking moral decisions,¹³ Mr. Cox had it, in spades.

5. See *Dean v. St. Martin's Press, Inc.*, C.A. No. 92-1807 (D.D.C. filed Aug. 3, 1992) (to which the author of this review is one of the more than one hundred parties defendant).

6. See DEAN, *supra* note 3, at 5.

7. 1 Deposition of John Wesley Dean III, Sept. 12, 1995, at 204-09, *Dean v. St. Martin's Press, Inc.*, C.A. No. 92-1807 (D.D.C. filed Aug. 3, 1992).

8. Q: “Have you read *Blind Ambition*?”

Mr. Dean: “From cover to cover?”

Q: “Yes.”

Mr. Dean: “No.”

Id. at 212.

9. See Colodny's Second Amended Response, Oct. 4, 1994, *Dean v. St. Martin's Press, Inc.*, C.A. No. 92-1807 (D.D.C. filed Aug. 3, 1992). Colodny's Second Amended Response was originally served on 4 October 1994 as St. Martin's Press, Inc.'s and Len Colodny's First Amended Response to Plaintiffs' Interrogatories 1-4, and subsequently amended by order dated 22 November 1995. Colodny's Second Amended Response incorporates his First Amended Response.

10. *Supra* note 2.

11. See *id.* at 3-11.

12. The author quotes Cox on the personal appearance of a messenger delivering a letter to him from the White House: “Couldn't they have sent a chap with a proper necktie?” P. 358.

13. See GOUGH, *supra* note 2, at 69.

Both as a professor of law at Harvard and in public service, he worked long and hard, never seeking to escape the most difficult tasks. Cox thus had compiled a formidable reputation for diligent scholarship, judgment, and prudence in such demanding positions as, *inter alia*, chairman of the Wage Stabilization Board under President Truman (from which he resigned on principle); Solicitor General of the United States under Presidents Kennedy and Johnson (in which office he resisted great pressure to argue for positions he believed would do violence to the Constitution and disclose the weakness of the law when opposed by raw political power); and as an important leader at Harvard and Columbia in dealing with the student antiwar riots. Finally, he was to prove equal to the greatest challenge of his public career: his role as Watergate Special Prosecutor.

As distinguished from the sociopath, who has no conscience, a person of good character has the ability to feel guilt and a sense of shame. Archibald Cox was capable of feeling both. According to Professor Gormley, he displayed them on at least three occasions. The first followed the World War II combat death of his younger brother Robert, who had joined the British King's Royal Rifle Corps prior to the United States' entry into the war. Robert Cox was killed fighting the famed *Afrika Korps* of *Feldmarschall* Erwin Rommel in Tunisia in 1943.¹⁴ When the United States entered the war, following the Japanese attack on Pearl Harbor of December 7, 1941, Archibald Cox was an athletic twenty-nine-year-old who could have volunteered. He did not, and his shame is deserved.

The second instance of shame that the author recorded occurred on June 15, 1964. As Solicitor General, Cox had argued and won the Tennessee reapportionment case, *Baker v. Carr*.¹⁵ Although he had misgivings about the constitutionality of the Supreme Court's asserting power over state apportionment, Cox justified the Court's interference by arguing that districts with populations so numerically divergent were irrational under the Fourteenth Amendment. When the brothers Kennedy then pushed for a "one man one vote" standard, Cox believed their position was going too far. Nevertheless, he tortured logic to assuage his conscience and won exactly

14. Not by a German "sniper," as the author characterizes a machine gunner who "sprayed him in the arm and upper shoulder." P. 54. Snipers do not "spray" (their motto is "one shot, one kill") and in neither World War did German *Scharfschützen* (sharpshooters) employ the *Maschinengewehre* (machine gun), certainly not in 1943. Some *Selbstladegewehren* (semi-automatic rifles) were fitted with optical sights for sniping but it was not until 1944 that *Reichsführer SS* Heinrich Himmler suggested to Minister of Armaments and War Production Albert Speer, by letter dated Dec. 18, 1944, that "perhaps also machine carbines with telescopic sights [should be produced] as soon as possible." Letter from Himmler to Speer (Dec. 18, 1944), in PETER SENICH, *THE GERMAN SNIPER 1914-1945*, at 281-84 (1982).

15. 369 U.S. 186 (1962).

that standard when the Supreme Court consolidated six cases into one in *Reynolds v. Sims*.¹⁶ A reporter slid him a note that read, "How does it feel to be present at the second American Constitutional Convention?" Cox wrote back, "It feels awful" (p. 176).

The third occasion precipitating Mr. Cox's sense of guilt took place after his dismissal as Watergate Special Prosecutor in the "Saturday Night Massacre." Cox revealed to two Democratic Senators, Kennedy and Hart, information he had received in strict confidence from the lawyer for former Attorney General Richard Kleindienst. When the information was revealed in the press, Cox felt disgraced (pp. 381-82).

HISTORY PAYS PRICE OF COX DISMISSAL

Because of Archibald Cox's brief tenure as Watergate Special Prosecutor,¹⁷ we can only speculate how matters would have turned out had he not been fired. Because he pursued the White House tapes so relentlessly that it led to his dismissal from that post, however, it is reasonable to argue that Cox — already concerned that Dean might be lying (p. 306), knowing that Dean pleaded guilty to one count of conspiracy to obstruct justice and to defraud the United States in the Watergate affair (p. 335), and aware that fraud is the *deliberate* practice of deceit¹⁸ — would not have accepted uncritically Dean's accusations of others. Instead, Cox might have gotten to the bottom of what Watergate was all about — something none of his successors accomplished.

Had Mr. Cox remained in office, and eventually sought tapes of conversations other than the nine we can suppose were suggested by Dean, he would have had the recording of President Nixon's telephone call to Mr. Dean at his home on the evening of March 16, 1973. In it, Mr. Nixon asked Dean for a report that would support "my reiterated statements from time to time that, 'Well, no one in the White House staff is involved,' [will] have some basis, you see?"

16. 374 U.S. 802 (1963) (taking the name of the Alabama case Cox had also argued). Cox should have seen *Baker* and *Reynolds* coming:

The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination. . . . The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators.

Dyer v. Abe, 138 F. Supp. 220, 236 (D. Haw. 1956), *revd. as moot*, 256 F.2d 728 (9th Cir. 1958) (although not reaching the question of whether or not the Fourteenth Amendment was violated as the Fifth Amendment applied to the plaintiff as a citizen of a territory). See also Case Note, *Elections — Redistricting — Failure of Territorial Legislature to Reapportion — Right to Enjoin Compliance*, 25 FORDHAM L. REV. 343 (1956).

17. May — October 1973.

18. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 863 (1986).

Dean (who had been telling the President just that for some time) replied:

A lot of my conclusions were based on the fact that there was not a scintilla of evidence in the investigation that led anywhere in the White house There's nothing in the FBI files that indicates (sic) anybody in the White House was involved. Nothing in what's been presented to the grand jury indicating White House involvement.¹⁹

That conversation took place just five days before Dean entered the Oval Office on March 21 to deliver his now famous "Cancer on the Presidency" speech, which alleged, in effect, that nearly everybody who was anybody in the White House was involved.²⁰ That, when I was a Special Agent of the FBI, was called a clue. It would have been hard for a man of Mr. Cox's ability to miss it.

The bulk of the information contained in *Silent Coup*, developed by investigation, and placed in the record by the defendants in the Deans' lawsuit for defamation²¹ was fresher and even more available during and after the tenure of Mr. Cox as Watergate Special Prosecutor. Therein lies the real tragedy to our country of the "Saturday Night Massacre" — we had in Cox a man who could, in the early 1970s, have discovered the truth that is only now emerging in the 1990s. Mr. Cox has demonstrated, over a long and productive lifetime, that he is a man of conscience and good character. One can, of course, have a bad character and the conscience to recognize it. Mr. Dean has amply demonstrated that he has the former, but not the latter. But Archibald Cox was fired to plaudits and John Dean forced to abandon his book to derision. Ironically, Heraclitus was right about them both — character *is* destiny.

In the interests of full disclosure I feel obliged to note that I am grateful to Mr. Cox for, as Solicitor General, moving my admission to the Bar of the Supreme Court of the United States — from which, of course, I was subsequently disbarred upon my Watergate convictions (in which Mr. Cox had no part).

19. *Conversation 37-134, Portion of Telephone Conversation Between Richard Nixon and John W. Dean at 8:14 pm lasting until 8:23 pm.* National Archives.

20. Including, *inter alios*, Messrs. Haldeman, Ehrlichman, Mitchell, Colson, Dean, Krogh, Chapin, and Strachan. See Meeting: The President, Dean, and Haldeman, Oval Office, Mar. 21, 1973 (10:12-11:55 a.m.), *transcribed in* SUBMISSION OF RECORDED PRESIDENTIAL CONVERSATIONS TO THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES BY PRESIDENT RICHARD NIXON: APRIL 30, 1974, App. 6, 170-249 (1974).

21. Much of it is also contained in the Watergate holdings of the library of the University of South Florida in Tampa.