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A RECOLLECTION OF ROBERT KENNEDY
AS A LAWYER

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Robert Kennedy had become, by the time of his death, the wisest and most passionately dedicated political leader of his generation, at the same time both pragmatic and idealistic, deeply educated by experience and curiosity on the critical domestic and international crises of our time, with an unmatched understanding and acceptance of the weaknesses and virtues of people, whether important or unknown, and thus of the political process.

Lawyers and law students should remember, however, that part of what made the man was his training and experience as a lawyer. It is altogether fitting that the *Law Journal* should dedicate a volume to Robert Kennedy, for he was, among many other things, a very good lawyer.

Most lawyers who know much about the Department of Justice know that Kennedy was an exceptionally effective and productive Attorney General. Those who know most about it would say that he was the best, or without argument, among the best, in our history. Yet there is a tendency to attribute his achievements as Attorney General solely to his extraordinary administrative capabilities, to his staff, and to his close relationship with the White House. This ignores the fact that the Attorney General is called upon to decide extremely difficult, complex, and important legal issues, and to do so himself. Robert Kennedy did so often.

His technique of self-education on the issues he had to decide was the one used by most lawyers I know. He was not a scholar in the law, and had not had the time or experience to learn through practice. So as any busy lawyer should in dealing with a significant new problem, he steeped himself with information through reading what was suggested to

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him, and through briefings, and then tested whatever tentative conclusions he reached against the best minds available to him.

I do not know how many full-scale meetings Kennedy called on basically legal problems in the years 1961 to 1964, but there were probably more than a score. If that sounds like few, consider the magnitude of the questions to be examined, from a lawyer's point of view.

In the civil rights area, in May 1961, when we were all still very new at our jobs in the Department of Justice, Kennedy had to find a constitutionally acceptable basis for the deployment of federal physical power to protect the Freedom Riders and other citizens in Montgomery, Alabama. The use of specially deputized marshals for this purpose (actually primarily from the border patrol, prison guards, and elements of Treasury Department law enforcement agencies) was unprecedented as matters stood, and required a prior federal court order in a government lawsuit involving many novel features.¹ The timing was very tight, the situation extremely dangerous, indeed almost catastrophic when a church in which Dr. King was holding a meeting came under siege from a mob, and the potential political costs to both Robert Kennedy and the President were very high. The legal issues to be decided involved the most basic and difficult of the relationships between the states and the federal government—the administration of justice and the preservation of law and order—and were the object of disagreement and debate among the most experienced lawyers in the Department. Robert Kennedy moved through this maze as surely as the best of trial lawyers at a critical moment in court; his telegram to Governor Patterson, dictated by him in the midst of crisis, is a model of a concise brief of the essential points of the government's position.

It was on Kennedy's direction that the Department followed up with an imaginative petition asking the ICC to eliminate in one stroke racial discrimination in bus and rail terminals throughout the South. He did not have the background or experience in administrative law (nor did I or any of the Assistant Attorneys General) to know precisely what form of action the ICC should take, but he had the wit and legal intuition to insist that the authority and will to act must be there, as it turned out to be, unanimously, despite negative predictions and advice from almost all the expert ICC watchers who were consulted.

This is but one example in a field where there are several. Robert Kennedy had the responsibility for deciding among several options at

¹See *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961).

every step of the proceedings against Governor Barnett and the State of Mississippi in connection with the admission of James Meredith to the University at Oxford in 1962, and those against Governor Wallace and others at the admission of Vivian Malone and James Hood to the University of Alabama in June 1963, as well as, for that matter, on several other occasions when the Governor chose to interfere with the orderly conduct of desegregation steps in a number of local school districts. He had also to penetrate and reconcile deep divisions of thought and approach within the Department of Justice on the most difficult constitutional questions presented by the sit-in cases, and to do so in a way that permitted Solicitor General Cox, a great legal scholar, to support comfortably and with conviction before the Supreme Court the position that the massive arrests for trespass, disturbance of the peace, and similar charges arising out of the protest movement could not constitutionally stand. Similarly, Kennedy finally had to decide on what constitutional theory we should ground title II of the civil rights bill submitted to the Congress by President Kennedy in June 1963, and then spend hour upon hour running through the pages of *Corpus Juris*, *American Jurisprudence*, and other works of semi-scholarship with Senator Ervin of North Carolina, in public hearings, defending the administration's position that the commerce clause permitted Congress to forbid racial discrimination in all places of public accommodation.

The advancement of the civil rights struggle through law occupied a central place in Kennedy's law practice in those years, but there were many other issues. He dealt, for example, with the reapportionment cases, insisting against many advisors that the rule of one man, one vote was demanded by the Constitution. He prepared himself and argued that position in the leading case,² writing out his argument with great care, reducing it to notes for presentation to the Court, and then testing it against questions from other lawyers, in the manner followed by all of the best appellate advocates that I know.

His interest in the fight against crime is well known, and I recall participating in several strategy sessions with him to determine the best method of dealing with difficult evidentiary and related questions in the midst of important trials. But he spent much more time in sifting advice on what form of legislation could most effectively bring wiretapping and eavesdropping under control; the bill introduced in 1962 still represents to my mind the most responsible combination of balanced considerations. Kennedy was also personally the driving force for the most creative program of prison reform, bail reform, and new methods

²Gray v. Sanders, 372 U.S. 368 (1963).

of providing counsel for indigents ever to come out of the Department of Justice.

It is not my purpose in listing these items—and there are many more—simply to recount the accomplishments of Robert Kennedy's service as Attorney General. Obviously each matter I have referred to is worth at least a law review article in itself, or a full volume if the political and human factors are also to be told.

Rather, I want to focus attention on the manner in which Kennedy ran his law office because it to some degree reveals at least part of the reason for the great lasting affection and respect he inspired in those who worked for him. I think this affection was due to the sheer delight, the gaiety, the intellectual thrust of the meetings he held in the process of his self-education on these issues, and the conviction he gave to everyone participating—whatever views they argued for during the meetings—that at the end he had weighed matters properly, understood the legal points thoroughly, and reached a wise conclusion.

It must be remembered that all of the principal participants in such meetings came to the Department with established careers of their own in the law—Byron White, while he was there, Archibald Cox, Nick Katzenbach, Louis Oberdorfer, Bill Orrick, Jack Miller, Ramsey Clark, John Douglas, Harold Reis, Norbert Schlei, and, from time to time, others having particular knowledge of the problem at hand. They were none of them, men to accept direction on legal matters they did not agree with, nor to enjoy superficial discussions. Yet they all came on occasion to accept his judgment over their own, on what were essentially problems in law within the area of their responsibilities. In large part this was because of the conduct of those legal debates chaired by the Attorney General, that were so full of his self-deprecating wit and ego-puncturing humor that pomposity and pedantry could not survive.

Robert Kennedy was a man of many parts, who was loved for many reasons by all who knew him well. He used to scoff at his training as a lawyer, and his capacity to practice law. But he was wrong about that; it was by no means the least of many abilities.