



Provocative, Human, Eclectic

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nel and how his military service helped him to mature as a person. Judge Glasser spoke about entering German homes where everyone denied being a Nazi sympathizer but there were swastikas on the wall. Judge Spatt was on his way to invade Japan and was only a thousand yards away from the USS Missouri when the Japanese surrendered.

Next, Judge Raggi asked questions about the panelists' adjustment to the bench and what had been the most difficult part of the transition. All of the judges spoke about the satisfaction and privilege of being a federal judge although they discussed the difficulty of criminal sentencing.

Finally, she asked them what advice they had for current and future judges. Judge Weinstein reminded the younger judges that they are free to dispense justice. He also got a big laugh when he described his court as adhering to something that "resembles" the Federal Rules of Civil Procedure. Judge Glasser said that the most important thing for a younger judge to remember is to talk less and listen more.

An Extraordinary Evening

This was an extraordinary evening in every respect. The wealth of experience of these jurists is astounding and the fact that they are still active on the bench in their 90s is inspiring. All four judges expressed special pleasure both as to the "great job" they occupy, and the outstanding quality of the recent judicial appointees.

Legal History

What LBJ Did Not Know and Why He Did Not Know It?

By C. Evan Stewart



The Cuban Missile Crisis in October 1962 was surely John F. Kennedy's finest hour. Although he undoubtedly played a role in encouraging Nikita Khrushchev's reckless gamble to place nuclear missiles in Cuba (e.g., the Bay of Pigs fiasco, his quite unsuccessful summit meeting with the Soviet Premier, Operation Mongoose – his administration's covert operation to topple (and even kill) Castro), President Kennedy's cool hand led to the ultimate resolution of that potential nuclear Armageddon.

The lesson supposedly learned by the crisis (and that was first detailed in a contemporaneous article by Stewart Alsop and Charles Bartlett in the *Saturday Evening Post* ("In Time of Crisis") (December 8, 1962); John and Robert Kennedy were clearly the sources for much of this inside-the-crisis piece) was

that President Kennedy had gone "eyeball to eyeball" with the Soviet Union and had prevailed by showing "resoluteness, restraint, and controlled escalation of force," which caused Moscow "to capitulate."

Lyndon Johnson, once he became President, believed that that was indeed the lesson of the Cuban Missile Crisis. And aided by the same advisors who helped President Kennedy in the Missile Crisis, President Johnson sought to apply that lesson to the Vietnam imbroglio he inherited on November 22, 1963, one month after the overthrow and assassination of South Vietnam's President Ngo Dinh Diem (which had been aided and abetted by the Kennedy Administration). In December 1964, for example, powerful Washington columnist Joseph Alsop wrote in the *Washington Post*: "For Lyndon B. Johnson, Vietnam is what the Cuban missile crisis was for John F. Kennedy. If Mr. Johnson ducks the challenge, we shall learn by experience about what [it] would have been like if Kennedy ducked the challenge in October, 1962." According to one of President Johnson's key aides, the just-elected President hit the roof when he read those words; as he later told one of his biographers (Doris Kearns), if he "lost" South Vietnam to communism the person most vociferous in attacking him would be Robert F. Kennedy, claiming that President Johnson had "betrayed John Kennedy's commitment to South Vietnam.... That I was a coward.

An unmanly man.”

The *Saturday Evening Post* article later became even more enmeshed in history by Robert F. Kennedy's *Thirteen Days: A Memoir of the Cuban Missile Crisis* (W.W. Norton, 1969). That book, based upon Robert Kennedy's diary and written and published posthumously by Theodore Sorensen, is (in the words of the leading historian of the Missile Crisis) “undoubtedly... the most influential book on the missile crisis.” Unfortunately, it is materially wrong on a multitude of fronts. The only error this article will focus on is what did President Johnson not know about the Missile Crisis and why he did not know it.

The Trollope Ploy

Anthony Trollope was a nineteenth-century British novelist. He employed a plot device in which a woman overly eager to be wed accepts a casual remark by a man to be a marriage proposal.

At the height of the crisis, on Friday, October 26, Khrushchev sent President Kennedy a letter that was very emotional and appeared to have been penned by the Soviet leader himself; in the letter, Khrushchev offered to remove the missiles from Cuba if America publicly pledged not to invade the island. The following day, a letter much more formal (and thus likely to have been the product of many hands in the Kremlin) arrived demanding an additional term: that the U.S. withdraw its Jupiter (nuclear)

The Cuban Missile Crisis in October 1962 was surely John F. Kennedy's finest hour.

missiles from Turkey.

According to Alsop, Bartlett, and *Thirteen Days*, Robert Kennedy supposedly suggested accepting the terms of the first letter and ignoring the terms of the second; the inspired strategy became known as the Trollope Ploy. And according to Robert Kennedy (and agreed to and promoted by numerous Kennedy men over the years: McNamara, Schlesinger, Rusk, Bundy, Sorensen, etc.), this strategy worked. It saved the world from a nuclear holocaust and underlined the “lesson” to be learned from the Missile Crisis. But that is not what really happened, and so the “lesson” learned was not in fact the right one.

It is true that almost to a man the famous ExComm (the group of advisers President Kennedy assembled to assist him in the crisis) did not want to agree to the October 27 letter's additional demand. But the most important person in the room – President Kennedy – thought differently. On tape recordings the President made of ExComm meetings, he said: “most people will regard this [trade] as not an unreasonable proposal.” The President added that those same “people” would not think the U.S. would be justified in attacking Cuba af-

ter Khrushchev had said: “‘If you get yours out of Turkey, we'll get ours out of Cuba.’ I think you've got a very tough one here.” He went on to say: “Let's not kid ourselves. They've got a very good proposal....” As a result, the President directed the ExComm to be “thinking about what our position's gonna be on this one [the October 27 letter], because this is the one that's before us and before the world.” The man with the ultimate responsibility had already reminded his colleagues (and the Joint Chiefs) that “You're talkin' about the destruction of a country” (if the Cuban missiles were fired at the United States and an all-out war began).

In the face of the opposition of virtually all of his advisers (except for Adlai Stevenson, who had earlier suggested a missile swap and later was accused of advocating another “Munich” in the Alsop & Bartlett article), President Kennedy convened a rump session of the ExComm at 8 p.m. on October 27 in the Oval Office. Present were President Kennedy, Robert Kennedy, Dean Rusk (Secretary of State), Robert McNamara (Secretary of Defense), Sorensen (White House Counsel), McGeorge Bundy (National Security Adviser), George Ball (Undersecretary of State), Llewellyn Thompson (former Ambassador to the U.S.S.R.), and Roswell Gilpatric (Undersecretary of Defense); excluded from the rump session were General Maxwell Taylor (Chairman of the Joint Chiefs of Staff), C. Douglas



At 7:00 p.m. on October 22, 1962, President John F. Kennedy, seated at his desk in the Oval Office, delivers a radio and television address to the nation regarding the Soviet Union's military presence in Cuba. Photo by Robert Knudsen. White House Photographs. John F. Kennedy Presidential Library and Museum, Boston.

Dillon (Secretary of the Treasury), John McCone (Director of Central Intelligence), and Lyndon Johnson. President Kennedy informed the group that he was about to send Robert Kennedy to meet with Soviet Ambassador Anatoly Dobrynin. President Kennedy continued to see a missile swap as the way out, even though *all* of his advisers in attendance (including Robert Kennedy) were against it. Finally, Dean Rusk suggested that Robert Kennedy tell Dobrynin that a *public quid pro quo* for a missile swap was unacceptable, but that the Jupiter missiles would be removed at some future point *if* the Cuban missiles were removed. McGeorge Bundy later wrote that Rusk's proposal was quickly supported by those in attendance and Robert Kennedy was authorized to convey those terms to the Russian Am-

bassador. Bundy also later wrote: "It was also agreed that knowledge of this assurance would be held among those present and no one else." The secrecy held until 1989.

Robert Kennedy, even though he still wanted "to take Cuba back," dutifully delivered his brother's message that evening. The deal was quickly agreed to by Khrushchev, who announced to the world on October 28 that

the U.S.S.R. would remove its missiles from Cuba. The next day, Dobrynin delivered to Robert Kennedy a letter from the Soviet Premier detailing the terms of the two countries' agreement; included was reference to the U.S.'s "secret commitment" to remove the Jupiter missiles. Robert Kennedy, after consulting with his brother, returned the letter to Dobrynin.

According to the Russian

ambassador, Robert Kennedy told him that "some day – who knows? – [I] might run for president"; as such, he could not "risk getting involved in the transmission of this sort of letter, since who knows where and when such letters can surface or be somehow published – not now, but in the future – and any changes in the course of events are possible. The appearance of such a document would cause irreparable



Noon meeting, July 22, 1965, on Vietnam. From left: Gen. Wallace Greene, Gen. Harold K. Johnson, Sec. Stanley Resor, McGeorge Bundy (standing), President Johnson, Sec. Robert McNamara. Photo courtesy President Johnson Library.

harm to my political career in the future.”

The Aftermath of the Horse Trade

President Kennedy publicly cautioned those in his administration not to gloat over the Soviet’s “capitulation.” At the same time, he sanctioned the *Saturday Evening Post* article and bragged to his close friends that he had “cut [Khrushchev’s] balls off.” He also went to great lengths to cover up any suggestion that he had traded the Jupiter missiles in Turkey for the Soviet missiles in Cuba. Furthermore, Bundy publicly denied any trade had taken place; the State Department officially confirmed to the Turkish government that the Jupiter missiles had not been swapped in order to resolve the crisis; and, most tellingly, Rusk and McNamara both lied under oath before the Senate Foreign Affairs Committee (Rusk – in response to a question that he affirm that a “deal” or “trade” had in “no way, shape or form, directly or indirectly been connected with the settlement... or had been agreed to – testified: “That is correct, sir.”) (McNamara – in response to a similar question – testified: “Absolutely not ... the Soviet Government did raise the issue... [but the] President absolutely refused even to discuss it. He wouldn’t even reply other than that he would not discuss the issue at all.”) Notwithstanding, and on McNamara’s October 29 order, the Jupiter missiles

were directed to be destroyed (the Defense Department’s General Counsel John McNaughton, implementing the order, barked: “Those missiles are going to be out of there by April 1 if we have to shoot them out!”); the process was quietly completed within six months.

In January 1989, at a conference in Moscow on the Cuban Missile Crisis (which the Soviets called the Caribbean Crisis), Dobrynin publicly dismissed the notion that Robert Kennedy had resolved the crisis by giving him an ultimatum on October 27 (the *Thirteen Days* account), and challenged the U.S. officials who knew better to fess up. Apparently shamed, Theodore Sorensen stood up and said he had “a confession to make to my colleagues on the American side, as well as to others who are present”:

I was the editor of Robert Kennedy’s book. It was, in fact, a diary of those thirteen days. And his diary was very explicit that this [the missile swap] was part of the deal; but at the time it was still a secret even on the American side, except for the six [sic] of us who had been present at the meeting. So I took it upon myself to edit that out of his diaries.

Are We Sure President Johnson Did Not Know?

The answer to the captioned question is: yes. Of course, it is not unusual for Presidents and

their aides not to share information with vice presidents (e.g., Franklin D. Roosevelt and Harry Truman). But what about when the vice president succeeds to the presidency by death and the secret information relates to national security? In April 1945, for example, the first thing Secretary of War Henry Stimson did was to tell President Truman about the top-secret nuclear bomb.

Robert Kennedy, of course, loathed and detested Lyndon Johnson, even before he became President; and the fact that he succeeded his slain brother only made matters worse for that “relationship.” So it is hardly a surprise that Robert Kennedy did not tell President Johnson. But what about the men at the center of American foreign policy – Rusk, McNamara, Ball, and Bundy – all of whom stayed on in the Johnson Administration and (with the exception of Ball) were enthusiastic advocates of escalating the Vietnam conflict into what became known as “McNamara’s War”?

After Sorensen’s 1989 disclosure, Professor Barton Bernstein interviewed each of those men and asked whether any of them had told President Johnson. Each said “no.” And Bundy went even further, telling Bernstein that President Johnson did not know. Why was Bundy so sure? Because there are two White House tape recordings of President Johnson and Bundy discussing the Cuban Missile Crisis in the context of the escalating Vietnam conflict. As President Johnson was openly musing about President Kenne-

dy's tough brinksmanship in opposition to Khrushchev's gamble, Bundy (after a few "uh-huh[s]") said: "I've always thought that the prospect of invasion had more to do with the solution than any other one thing. I couldn't prove it, but I just think that it looked awful imminent...."

So why did these men (and the others privy to the secret deal) not tell President Johnson? There would appear to be two reasons: first, loyalty to President Kennedy and the assassinated leader's Camelot image in history; and second, loyalty to Robert Kennedy's political ambitions (and certain run for the presidency). That such notions of loyalty trumped our national security interests is (at a minimum) very troubling.

Would It Have Made A Difference?

Counterfactual history is just that. But it is clear President Johnson was concerned about Robert Kennedy coming at him over Vietnam from the right (as opposed to the left). And in fact, before Robert Kennedy reversed his position on Vietnam (from strong hawk to passionate dove), he invoked the Missile Crisis's "lesson" when he said, on February 17, 1966, that North Vietnam "must be given to understand ... that their present public demands are in fact for us to surrender a vital national interest – but that, as a far larger and more powerful nation learned in October of 1962, surrender of a vital interest of the United States is an objec-

tive which cannot be achieved."

After the secret deal was outed in 1989, Robert McNamara – as part of his desperate public attempts at saying he was "sorry" for his role in the Vietnam War – contended that it was "highly probable" that President Kennedy would not have escalated Vietnam into a full-scale war, citing his willingness to trade the Jupiter missiles in 1962. Easy to say, in retrospect (but if President Kennedy "would have," why would President Johnson (the consummate horse-trader) also not have done so? – If he had known?). What was Sorensen's (one of President Kennedy's principal hagiographers until the day he died) view?: "Very possibly ... an earlier disclosure of JFK's assurance to Khrushchev regarding the missiles in Turkey would have slowed down LBJ's ... plunge in Vietnam, but I doubt it." Of course, we will never know.

Postscripts

- After Sorensen's 1989 admission, Bundy acknowledged that "[s]ecrecy of this sort has its costs. By keeping to ourselves the assurance on the Jupiters, we misled our colleagues, our countrymen, our successors, and our allies. We allowed them all to believe that nothing responsive had been offered...." Bundy's biographer (Kai Bird) thus concluded: "[P]eople were allowed to think the great lesson of the missile crisis was that 'un-

wavering firmness' had carried the day. The appearance of uncompromising toughness in facing down a Soviet threat may have aided Kennedy politically, but it also sent a message to the American people that a confrontational policy against communists was necessary at all times. This, in turn, would make it harder for Kennedy and his successors to have any flexibility in dealing with the Soviets, or for that matter, such other communist adversaries as the North Vietnamese."

- Had the non-public *quid pro quo* not worked, according to Dean Rusk (but unbeknownst to the others), President Kennedy had authorized him to utilize Andrew Cordier (a dean at Columbia University and former U.N. official) to approach U Thant (the U.N. Secretary General) and have the *quid pro quo* be a U.N. proposal that would allow the Soviets to save face. Although *all* of his advisers had opposed a public swap of the missiles, President Kennedy wanted to do everything he could to avoid nuclear war.
- Many historians have hailed the ExComm meetings as the quintessential exemplar of crisis management; but the White House tapes of the meetings show them to be (in the words of Professor Bernstein) "desultory, spastic, and often inchoate." President Kennedy, in fact, later told John Kenneth Galbraith: "You have no

idea how much bad advice I received in those days.”

- The best sources for those who wish to pursue this subject further are: Sheldon M. Stern, *The Cuban Missile Crisis in American History: Myths Versus Reality* (Stanford 2012); Max Holland & Tara Marie Egan, *What Did LBJ Know About the Cuban Missile Crisis? And When Did He Know It?* (Washington Decoded October 19, 2007); Eric Alterman, *When Presidents Lie: A History of Official Deception and Its Consequences* (Viking 2004).

Second Circuit Decisions

What Is A “Whistleblower”?

By Charles C. Platt



The Second Circuit’s recent decision in *Berman v. Neo@olgilvy LLC* addresses whether the

Dodd-Frank Act’s definition of a “whistleblower” limits the retaliation remedies available under that Act. In a 2-1 decision, the court held that it must defer to the interpretation of the statute offered by the Securities and Exchange Commission, which does *not* so limit the remedies. The decision creates a circuit split, as the Fifth Circuit concluded that the “whistleblower” definition in Dodd-Frank *does* restrict the retaliation protections available.

By way of background, Dodd-Frank protects “whistleblowers” from retaliation. “Whistleblowers” are defined as individuals who provide to the S.E.C. information relating to violations of the securities laws. A whistleblower’s protection against retaliation is provided in a separate provision of Dodd-Frank. That separate provision prohibits any retaliation *not only* for providing information to the S.E.C. (as contemplated in the definitional section) *but also* for making disclosures required or protected under the Sarbanes-Oxley Act. Sarbanes-Oxley in turn protects employees who blow the whistle either internally or to regulators such as the S.E.C.

Berman’s Suit

In the case at hand, plaintiff Berman sued his employer under Dodd-Frank, alleging that he was wrongfully discharged for whistleblowing. His whistleblowing occurred when he reported internally that there were fraudulent accounting practices occurring at

the company. He did not report these practices to the S.E.C. until after he was fired.

Berman’s employer moved to dismiss, arguing that he had not stated a claim for relief under Dodd-Frank. Specifically, the company relied on the definitional section in Dodd-Frank and argued that Berman was not a “whistleblower” because his whistleblowing was internal; he did not provide information *to the S.E.C.* Berman responded by relying on the separate provision of Dodd-Frank that protects against retaliation. He argued that, under this section, he could not be terminated for making disclosures under Sarbanes-Oxley, which in turn protects employees like him who provide information *internally at the Company*.

The Circuit’s Decision

The district court granted the motion to dismiss the Dodd-Frank claims. The Second Circuit reversed and remanded, in a decision by Judge Jon O. Newman, joined by Judge Guido Calabresi. The court noted that there was no “absolute conflict” in Dodd-Frank between its definition of a whistleblower (i.e., those who report to the S.E.C.) and the separate section prohibiting retaliation against whistleblowing (i.e., any reporting to the S.E.C. or internally at the company). An employee who suffers retaliation after simultaneously reporting wrongdoing both to the S.E.C. and within the company internally has remedies under both Dodd-