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Reconsidering RFK

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Kennedy Justice
by Victor S. Navasky
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Liberal tradition requires neutral justice: prosecution with equal vigor, and by the same means, of gamblers, mayors on the take, racist governors, corrupt union bosses, and violent leftists. Radicals do not expect this kind of neutrality: they try to hold the State to its constitutional promises of free assembly, free expression, and equality. By both liberal and radical criteria, Robert Kennedy failed as Attorney General. The Kennedy Justice Department prosecuted selectively, by un-liberal and illegal means. It paid scant attention to the possibilities of federal power in aid of civil rights, and developed the array of legislative, judicial, and prosecutorial tools now turned against the left with such effect.

In spite of Kennedy's failure, liberals and radicals continue to venerate and excuse him. Regrettably, Victor Navasky excuses most of the Kennedy record and praises much of it. "Regrettably," because Navasky has assembled valuable documents and interviews about the Kennedy years at Justice. His use of this evidence is another thing altogether.

Navasky acknowledges that Robert Kennedy did not always live up to his (and his brother's) promises—no more than his brother did—and at times betrayed constitutional principles. He attributes these failings principally to the FBI's power to frustrate RFK's plans; to RFK's Ivy League bias toward a federalist, go-slow approach to civil rights; and to RFK's combative, deeply moral sense, which (according to Navasky) led him into the crusade against James Hoffa. Throughout the book, there are other, smaller apologies: RFK did not know about the illegal electronic surveillance that went on during his tenure; he faced a hostile Congress; he had no basis for knowing that great federal force would be needed to extend civil rights in the South; his legislation on organized crime and his prosecution tactics were perhaps necessary to combat the threat of the Mafia; his pursuit of Hoffa pitted a moral zealot against a cheap crook. Of Bobby's early service as counsel on the McCarthy committee, Navasky says that it "was nothing to be ashamed of."

The result of all Navasky's apologies and of his "on the other hand" praise is a misinformed and misinforming book. Let us look at the Kennedy record.

In the field of civil rights, RFK was largely responsible for the appointment of a number of racist judges to the federal bench in the South. The 1961 Judiciary bill gave John Kennedy the power to pick seventy-one judges to fill newly created vacancies. As Attorney General, RFK cleared for judicial appointment such prizes as Harold Cox of Mississippi, who, from the bench, referred to black litigants as “niggers” and “chimpanzees.”

Even with a recalcitrant federal district bench in the South, however, RFK had no excuse to take so little action on civil rights. The black movement intensified its direct action tactics in 1961, the first sit-in having taken place just one year before JFK’s inauguration. Patently unconstitutional laws against picketing, leafleting, and disorderly conduct were being used by Southern cops and courts to jail civil rights workers. A series of lawsuits challenging those laws would have been effective, given the make-up of the Court of Appeals for the Fifth Circuit (and would have established precedents for later demonstrations in the North).

This is so because when a suit is filed challenging the constitutionality of a state law and seeking to prevent its enforcement, a special three-judge federal court hears the case, with a direct appeal to the US Supreme Court. One member of the three-judge court must be the district judge with whom the case is filed; the other two are selected by the Chief Judge of the Court of Appeals. The Chief Judge of the Court of Appeals for the Fifth Circuit (which extends from Texas to Florida) was, at that time, Elbert Parr Tuttle, an Eisenhower appointee whose record is one of unwavering support for equality and free expression, combined with a willingness to approve novel legal theories in defense of these principles.

The RFK Justice Department filed no such suits until 1964, leaving underfinanced and understaffed private organizations like the NAACP Legal Defense and Education Fund, the National Lawyers’ Guild, and the ACLU to challenge state anti-parading, anti-picketing, and other harassing laws in the courts. The Civil Rights Division of the Kennedy Justice Department did file a number of voter registration suits, but the lawyers, investigators, and money involved in all of them—at least in the first two years of RFK’s term—probably amounted to no more than those committed to the pursuit of one man, Jimmy Hoffa.

Navasky blames some of Robert Kennedy’s record in civil rights on the FBI’s reluctance to act. John Doar, a civil rights lawyer who was in Kennedy’s Justice Department, has recently come forward to amend even this minor rebuke, claiming that the Bureau conducted many hundreds of interviews for voter registration cases, between 1961 and 1964, and photographed millions of pages of records. Doar explains the Bureau’s hostility to civil rights cases as the result, in part, of its lack of knowledge “about the realities of life in the South,”* a lack which Doar and Navasky say was shared by almost all Americans. These claims deserve some analysis.

True, the Bureau did some record gathering. But its agents also stood by, hands at their sides, while civil rights workers were beaten by police. It is said the FBI only investigates

and is not a police force. Would FBI agents on duty and armed try to arrest gunmen shooting up a national bank? Of course. But no arrests were made when Southern cops clubbed people to prevent them from exercising their rights—a federal crime. The FBI's Southern agents were all white and mostly native Southerners; they shared the views of Southern police about the "outside agitator" civil rights workers. Agents could not regard criminal action by these police as comparable to bank robbery. Blacks knew of this FBI hostility and did not regard the FBI as an ally. The FBI could, and did, conduct routine interviews for voting cases; until 1964, however, it neither took nor was asked to take any role in protecting the lives of civil rights workers.

Under these circumstances, RFK ought to have reshuffled the Bureau and forced it to perform in the South. But no significant change in Bureau practices took place until the murder of three civil rights workers in Mississippi in June, 1964. Indeed, Doar's acknowledgment that resident FBI agents were "too close to local Mississippi officials" is difficult to square with his conclusion that the Bureau failed to perform in Mississippi because it "knew little about the realities of life in the South." The FBI not only knew about but was one of those "realities."

Doar's citation of the FBI's field work in document copying and interviewing is unimpressive; a single antitrust case may involve as much document copying as all that done by the FBI in 1961 voter registration cases. Eight hundred and sixteen witnesses were interviewed by the FBI for RFK's first thirty-four voter registration investigations, which seems impressive until one realizes that a greater number of people were interviewed just to get 114 trial witnesses for one case—the Chicago prosecution of Jimmy Hoffa.

Both Doar and Navasky miss a more important point. John Kennedy was elected with a large black vote, and had the support of important black organizations. RFK's Justice Department could, from January, 1961, have turned to those organizations to ask some basic questions: What legal theories are there to protect and extend civil rights? How can we defend the emerging black political organizations from terror? Existing legislation and court decisions like *Brewer* v. *Hoxie School District* gave the government ample weapons to seek injunctions against racist violence—even private violence—violations that could have been prosecuted. Patterns of racist terror could have been broken by invoking Reconstruction laws and moving in with US marshals or other federal force. RFK could, even more conventionally, have listened to such people as Arthur Kinoy of the Law Center for Constitutional Rights who pleaded for help in Danville, Virginia, New Orleans, and elsewhere. RFK's Justice Department could have worked alongside the litigation-oriented black organizations.

Instead, Robert Moses of the Student Non-violent Co-ordinating Committee was driven in despair to file suit against RFK in order to force him to use federal power to protect the

lives of SNCC workers. The Justice Department successfully opposed the suit. John Lewis of SNCC wrote in his speech for the 1963 March on Washington, "Which side is the federal government on?" RFK's assistants prevailed on Lewis to take the sentence out.

Both Kennedys, in short, refused to take very seriously the claims of blacks and youth, two groups that had hailed their electoral victory. It was not at all, as Navasky implies and John Doar has said, a case of it being hard to know what to do. The demands of these groups were clear, and lawyers in the movement had begun to translate them into strategies for litigation. The RFK Justice Department simply would not listen.

RFK made his most arrogant statement on civil rights in June, 1964, as he left for Berlin, when he said Berlin) that the federal government lacked power to deal with violations of civil rights in Mississippi. Nineteen sixty-four was Freedom Summer in Mississippi, the summer of the Goodman-Schwerner-Chaney murders, of bombings and burnings and shootings. As RFK was reminded by law professors on that occasion, the federal government had plenty of power, under existing law, to put a federal presence in Mississippi to stop the carnage. But RFK's Justice Department made only inadequate gestures.

Navasky's claim that Kennedy did not learn until late in his tenure that extensive force was necessary to combat racist-sponsored official and unofficial violence is unconvincing. In addition to the demands of youth and blacks, many liberals had widely and loudly denounced President Eisenhower's refusal to enforce federal court orders desegregating Southern schools. The use of troops in Little Rock in 1957 was the sole exception to the Eisenhower policy, which permitted armed state police, unopposed by federal presence and in defiance of federal court orders, to prevent black children from entering, white schools. The Southern rhetoric of "interposition' and "nullification" was already in the air. RFK knew that federal power would be needed. And the lengthy and scholarly memorandum drafted for Attorney General Brownell in 1957 to justify the Little Rock intervention was on the books as an official Attorney General's opinion; it contained ample legal grounds for any number of plans to prevent the murders, beatings, and burnings.

Further, the Kennedy record is tainted by the prosecution, in Albany, Georgia, in 1963, of civil rights workers on a flimsy charge of trying to influence a federal juror. Navasky documents what everybody knows: RFK himself approved the decision to prosecute. He forgets to mention that the convictions were later reversed because the grand jury that indicted and the trial jury that convicted were found to have been selected by racially discriminatory methods. A phony charge, a racist judge, and two biased juries are not the hallmarks of liberal principle.

Navasky hazards the opinion that the Ivy League code of respect for states' rights, a decent balance between the state and federal governments, was behind Kennedy's diffidence on

civil rights. There were, of course, Kennedy advisers who held such views. But the record shows that RFK himself cared not a damn for federalism. Within months after taking office, he had secured passage of a package of anticrime bills that invaded to an unprecedented degree the province of state and local cops and courts and enhanced the FBI's power. A catalogue of new federal offenses was created, by adding to state offenses a new element: a connection, however slight and incidental, with interstate travel of people, money, or goods. A gambler in Las Vegas who phoned a bet to Los Angeles was now guilty of a federal felony. Two people who bet the horses in New York City were guilty of a federal felony if one of them paid off with a check on a New Jersey bank. With federal power to prosecute came enlarged FBI jurisdiction, federal grand jury investigations, and federal electronic surveillance.

No, Bobby did not care for federalism much. Senator Eastland did, though, and to get these laws through the Senate, Bobby apparently had to agree to see that Harold Cox went on the federal bench.

The new legislative package spear-headed the Kennedy crime-busting drive, a systematic assault upon due process and the right of privacy. Consider, first, illegal electronic surveillance. This can include both wire-tapping, which is interception of a telephone conversation, and "bugging," placing a hidden microphone in a room or on the person of an agent. Wire-tapping was a federal crime in the Kennedy years, and bugging was illegal if it involved a trespass.

There is no dispute that within the first year after RFK became Attorney General, an unprecedented number—hundreds, in fact—of unquestionably illegal bugs and taps were installed. Navasky's conclusion, based largely upon denials by RFK and his assistants, is that RFK did not know about these. He does say that RFK should have known; and bears "moral" responsibility.

We think it can be shown that Robert Kennedy knew and approved of the tapping and bugging. Electronic surveillance was not, contrary to Navasky's suggestion, done solely by FBI agents working for Hoover and only tentatively subject to control by RFK. The Internal Revenue Service was actively engaged in illegal bugging and tapping. So were organized crime investigators and lawyers who reported directly to Kennedy and his immediate subordinates. Indeed, almost all of the bugging and tapping was directed at targets of Kennedy's personal organized crime drive, over which he kept the closest control, including attending meetings to read case files and discuss tactics on an almost weekly basis.

Other taps and bugs disclosed in subsequent years had, by uncanny coincidence, picked up the conversations of Kennedy political enemies and their associates, including cronies of LBJ. William Hundley, a top Kennedy crime-busting aide whom Navasky interviewed for

his book, once said in conversation (but not, we guess, to Navasky) that the IRS Special Agent schools during this period were teaching the techniques of trespassory bugging and wiretapping in formal classes. Where did they get the authority to do that?

In Las Vegas, the FBI had an entire floor of tape machines and listening clerks. It is incredible that Justice Department organized-crime lawyers on the scene did not know about the bugging. These lawyers worked out of Washington, subject to constant scrutiny by Bobby and his immediate underlings.

In reading case files, or in being told about them, RFK could hardly have avoided some inkling that the information was coming from electronic over-hearing. Navasky misses this point entirely, since his familiarity with FBI materials seems to consist solely of having read Bureau interdepartmental memoranda couched not in J. Edgar Hoover's unique argot but in bureaucratese. FBI Form 302, by contrast, is the one used by Special Agents to report the results of interviews and observations, and to transmit information gained from electronic surveillance (there are other means, too, but Form 302 is used to record information that goes directly into the file of the person under investigation). To take one example, if a Form 302 records that a subject who is in jail called up his lawyer and talked about bail and the status of his case, and the lawyer replied that bail money was on its way, it does not require great perception to know that a telephone conversation has been intercepted. This sort of semiverbatim reporting appears in many FBI files, and is a fairly sure tipoff to electronic surveillance.

When illegal bugs were discovered in Las Vegas and a suit was filed, the RFK Justice Department did everything possible to stall the case and prevent the plaintiffs from finding out who had authorized the installation. Navasky notes that the New York telephone company denies ever having leased telephone lines for illegal bugs, and then uses this denial to help exonerate RFK from knowledge that bugs were installed. Navasky's choice to believe this denial, when both the company and Navasky know that the Las Vegas phone company lost a lawsuit after admitting cooperation with the FBI, is difficult to understand.

RFK had a celebrated row with J. Edgar Hoover over bugging and tapping. When RFK publicly denied he knew either was taking place, Hoover produced a copy of a memo from RFK authorizing the leasing of telephone lines to conduct bugging. Privately at the time, in at least one of the penned postscripts which Navasky describes as appearing at the foot of many RFK letters, Kennedy virtually acknowledged that Hoover had caught him out in his denial.

Thus an advance was made in the widespread use of bugging and tapping, of which some small portion is admitted each month by the government.

The RFK Justice Department also made great use of the federal grand jury. Bobby and his

minions perfected the blanket subpoena to appear before slam-the-witnesses-around, lock-a-few-up-in-jail-for-contempt, try-your-case-in-the-press grand juries. They did this in gambling and other "organized crime" cases almost routinely. There isn't space here to pull apart the Kennedy record in "organized crime" cases; it bears nothing that if you subtract the gambling cases, there is not much to it. Maybe the reader can get more excited about the gamblers than we can: mostly they were bookies, runners, and handicappers who derived their income from large-scale betting operations with bettors who could afford big wagers—in the $5,000 per game range.

But it is certain that the federal laws Kennedy sponsored—including the provisions of Section 1952 of the Criminal Code that make it a crime to travel interstate or use interstate facilities in the commission of any of a long list of state offenses—were the model for the Rap Brown Act and its anti-constitutional cousins. The 1968 wiretapping bill which Senator McClellan shoved through the Congress and which is used to harass radicals is modeled on legislation introduced by RFK in 1961 and 1962, but not passed because of liberal opposition. The new federal grand jury, with its devastating attacks on the left, was pioneered by Bobby and only put into statute when some federal courts found there was no authority for Bobby's agents to conduct themselves in the freewheeling way that was their wont. There is no question that the "hit list" technique, seeking to drag up any charge at all against preselected target figures, was developed by Bobby at the Justice Department.

The new breed of Justice Department lawyer, sent out from Washington with a warrant to convene a grand jury and use any tactics at all, subject only to control from the Attorney General's office, was another Kennedy speciality. Even the name of these little bands of lawyers—"Strike Force"—was coined by RFK. David Nissen, the tough-guy prosecutor in the Ellsberg case, who likes to use gratuitously insulting tactics in court, learned his stuff in the Kennedy Justice Department; he practiced on gambling cases before moving up to the big time.

Well, one might say, these tactics were used against bad people and so were excusable. Nonsense. We live, in the United States of North America, subject to a judicial system which pretends to see all criminal cases as pretty much alike, except that leftists tend to get the short end of almost every stick. Bobby's tactics were challenged by his victims, and his staff of lawyers managed in most cases to win judicial approval in the form of "precedents" that are with us today; for example, the precedent for relaxed rules of evidence and prosecutorial misconduct in conspiracy cases. Such precedents won by RFK's people are now used to great effect by John Mitchell's and Richard Kleindeinst's people as they wage war against the left.

Judges are political creatures, and few of them had the courage to denounce RFK's tactics in the holy war against crime and Jimmy Hoffa. It was disgusting and dangerous that the

FBI would plant an informer in the defense camp in a political prosecution, robbing the defendants of any little chance they had to get a fair trial. Bobby Kennedy did just that to Hoffa, and the Supreme Court in *Hoffa* v. *US* and *Osborne* v. *US* lacked the courage to condemn it. This precedent still lives and RFK's belated conversion to liberalism did not cancel half a line or wash out a word of it. The precedent is freely used by the FBI and Justice Department today.

Navasky's book is more than disappointing; it lacks judgment. There is, it seems, awe in the presence of death, almost any death. When political figures die, they go to literary heaven. As J. Edgar Hoover's recent death reminds us, the evil men do seems to die with them. The good is interred in books like this one.

But we no longer have time for these amenities. When men and women of power die—or (like Lyndon Johnson) retire—their records must be examined by the most stringent critical standards. Of what use will J. Edgar Hoover's retirement be if it is not used to demand that never again must a being with such views be permitted to hold power? While the platitudes and politeness are being passed around, some other lunatic is being sworn in to take his place.

J. Edgar Hoover never claimed, of course, to bear the liberal standard, nor did he claim to have much regard for constitutional rights. RFK claimed both, and the critical examination of this claim is as important now as it was in 1964, or 1968, to one's own attitude toward the political process and toward those who say they are his successors.

LETTERS

RFK's Record August 31, 1972

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In a copyrighted paper, written with Dorothy Landsberg, that was distributed to the press at the FBI conference at Princeton sponsored by the Committee for Public Justice and Princeton University in October, 1971. ↩