The New York Review of Books

# RFK's Record

AUGUST 31, 1972

**Victor S. Navasky, reply by Michael E. Tigar and Madeleine R. Levy**

**IN RESPONSE TO:**

*Reconsidering RFK* from the June 29, 1972 issue

*To the Editors*:

In their zeal to attack RFK's record as Attorney General ["Reconsidering RFK," *NYR*, June 29], Michael E. Tigar and Madeleine R. Levy seem to me to have irresponsibly overstated their case and in the process to have carelessly misrepresented the thesis of my book, *Kennedy Justice*.

I assume that others will come forth to set the record straight on RFK's accomplishments (perhaps John Doar, who is probably as upset as I am amused at your reviewers' confusion of our quite distinct positions). My interest here is simply in setting the record straight on *Kennedy Justice*, though I would note: (1) It is a mistake, especially in an era of Mitchell-Kleindienst, to ignore, as your reviewers go out of their way to do, the importance of Robert Kennedy's civil rights commitment. As Charles Morgan, Southern Regional Director of the ACLU put it, "There was a war on and they [Kennedy, Doar, Marshall, *et al*] were our allies. That's the most important thing." (2) It is silly to make arguments like the one about "David Nissen, the tough-guy prosecutor in the Ellsberg case, who likes to use gratuitously insulting tactics in court," having learned his stuff in the Kennedy Justice Department; one could as easily cite alumni like Henry Ruth, Harry Subin and Ron Goldfarb, who are involved with bail reform, Vera, prison reform, the ACLU, the Committee for Public Justice. (3) It is petty and wrong to say "Even the name of these little bands of lawyers—'Strike Force'—was coined by RFK." Not that it matters, but the name was coined by Ramsey Clark, some years after RFK left the Department.

At the outset your reviewers perversely misconstrue as "apologies" my indictments of RFK (for not confronting the FBI and attempting to control or replace J. Edgar Hoover; for permitting electronic surveillance; for giving white America's tranquility a higher priority than black America's freedom; and for creating the precedent—via a Get Hoffa Squad—for a Get Dissenters or Get Panthers Squad). The result of this misconstruction is a misinformed and misinforming review, which suggests that *Kennedy Justice*, because it

honors Robert Kennedy's achievements, was somehow written in ignorance of, or without reference to the darker side of Robert Kennedy's record, which so obsesses your reviewers. Tigar and Levy invite the reader to "look at the Kennedy record." Let us now look at the Tigar/Levy record.

First, they note that "RFK was largely responsible for the appointment of a number of racist judges to the federal bench in the South" implying that *Kennedy Justice* apologizes for and/or ignores this fact. In fact Chapter five of *Kennedy Justice* is devoted exclusively to these appointments, and concludes that "No aspect of Robert Kennedy's Attorney Generalship is more vulnerable to criticism. For it was a blatant contradiction for the Kennedys to forego civil rights legislation and executive action in favor of litigation and at the same time appoint as lifetime litigation-overseers men dedicated to frustrating that litigation…."

Second, they assert that "Doar and Navasky" say there was a lack of knowledge about the South. John Doar may say this but I certainly don't. Perhaps that is why they resort to such formulations as "It was not as Navasky implies and John Doar has said, a case of it being hard to know what to do." I don't imply any such thing. As a matter of fact, I devote two chapters (three and four) to the legitimate demands of various civil rights organizations and describe how, in the words of Pat Watters and Reese Cleghorn, "Failure to provide federal protection was especially bitter for the voter workers for…they had been led to expect full federal protection of rights and safety." I have no quarrel with Tigar and Levy using the occasion of *Kennedy Justice* to attack a paper John Doar wrote for a Conference at Princeton on the FBI, but it is misleading to refer to "the Doar and Navasky position," especially when Doar and Navasky don't agree. Doar starts from the premise that civil rights was always a number one Kennedy priority; whereas I argue that despite JFK's glittering campaign promises, the Kennedys had no civil rights program in the sense that they had an organized crime program and that at least for the first two years, civil rights was in the rear ranks of Kennedy priorities.

Third, they say "the record shows that Kennedy cared not a damn about federalism" and they suggest that *Kennedy Justice* argues that the "the ivy league code of respect for states rights, a decent balance between the state and federal governments, was behind the Kennedys' diffidence on civil rights." In fact *Kennedy Justice* makes no such neat argument. My point had to do with the interaction of the theory of federalism (which indeed functioned to rationalize federal passivity in the face of local brutality) with the codes of the Kennedys (who gave civil rights the low priority discussed above) and of the FBI (by not challenging the FBI's policy of self-determination, Kennedy deprived himself of the flexible manpower needed to support the civil rights movement's challenge to the status quo).

Fourth, they say that "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…." I, of course, make no such suggestion. On page 78 I state that "because of (RFK's) active interest in the affairs of the IRS…he should have known about the February 24, 1961, IRS order which called for saturation treatment of racketeers' files and 'full use' of 'available electronic equipment.' "

Fifth, they quote William Hundley, "who 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." Since they invoke Mr. Hundley as an authority when they believe he buttresses their case, how can your reviewers so dogmatically assert—without producing any direct evidence—that RFK personally knew about the FBI's illegal bugging practices, when Hundley, who was there and talked with Kennedy about it long after RFK had left the Justice Department, is one of the many former top Justice officials who asserts unequivocally that RFK didn't know?

Sixth, they write that "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." In fact, I made it clear that my discussion of the New York telephone case had nothing to do with what Robert Kennedy did or didn't know but rather with whether the New York telephone company or the FBI required the Attorney General's signature on an authorizing document for the leasing of telephone lines. I concluded that it was the FBI and that "the FBI's purpose in having the Attorney General sign the August 17, 1961 'authorization' was apparently not to lease a telephone line but to get the Attorney General's participation on the record."

I could go on, but the point is clear. Tigar and Levy may or may not be correct in their one-sided analysis of RFK's contribution to Justice, but one finds it difficult to take instruction from them on RFK's contribution when they have been so careless and dogmatic in their treatment of this one attempt to explore the dimensions of that contribution.

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**Michael Tigar and Madeleine Levy replies:**

Navasky crowds into his letter almost as many errors as one finds in his book. We follow, in this reply, his enumeration:

1) We did not ignore RFK's civil rights commitment; we think it demonstrable that it was

far too feeble, and a long time too late. Navasky cites no evidence in opposition. Every civil rights lawyer who thought of RFK as an "ally" also knew that when the heat was on the Justice Department could not be counted upon.

2) Our mention of Nissen was intentional and part of our thesis that RFK believed in and supported the reckless, unprincipled use of prosecutorial power to achieve ends he thought right. A Department of self-styled "Justice" which trains prosecutors in this theory is a danger to civil liberty, regardless of the number of thoughtful and polite prosecutors it may also hire. See Paul Jacobs' article in the March 1963 *California Law Review*.

3) "Strike Force" began to appear on Justice Department legal documents after RFK left the Department, but the term was in use in the Department long before.

Now to Nevasky's major attack: First, while *Kennedy Justice* does not ignore the racist judges appointed by the Kennedys, apologize it certainly does. The chapter on this subject begins (and does not "conclude," as Navasky states) with the words quoted (p. 244), but goes on to wash away this tentative judgment, explaining that intractable political realities, and some excusable political inexperience, were responsible for RFK's failure. Then, Navasky rejects as a cliché (p. 269) the view that the Eisenhower administration appointed more good judges in the South than the Kennedys did, despite evidence to the contrary.

Second, Navasky should re-read his own book; he and John Doar have their differences, but Navasky takes pains to show that RFK did not know about the civil rights problem and that therefore his inaction is excusable. These apologies appear, for example, at pp. 99, 107-108, 118 ("underestimated the prospective need"), 192 (RFK "cannot be blamed"), and 271. Navasky's treatment is fuller than Doar's but both take fundamentally the same position; more could have been done, but it was hard to know just what to do.

Third, Navasky egregiously misstates our summary of his analysis of the RFK civil rights record, in which we enumerate the three elements he mentions. We underscored Navasky's treatment of federalism because his chapter on that subject is by far the longest in his book (more than eighty pages—nearly 20 percent of the text), and because the chapter is far too gentle with those who, like RFK and his associates, let theories about states' rights interfere with preventing the murder of civil rights workers.

Fourth, Navasky's paragraph about the IRS, with its meager citation of a single ambiguous memorandum, utterly fails to mention the extent of proven IRS bugging and tapping during the RFK years, as revealed by the Long Committee, for example. We scored Navasky's failure to prove IRS bugging and tapping, a failure reflected on p. 95 (at the end of his chapter on organized crime), where he refers to "the FBI's own electronic war," passing any reference to the IRS. Had Navasky concentrated more on the IRS, he would have seen a trail of illegal taps leading right to the heart of the Organized Crime Division, RFK's pet

project in the Justice Department.

Fifth, William Hundley does not "assert unequivocally" that RFK did not know about bugging. The Navasky reference to this point is at p. 69, where Hundley is quoted as believing a denial of knowledge by RFK, on the sole basis that RFK *seemed to Hundley* to be telling the truth. Unlike Navasky, we invoke Hundley as authority only when he admits something against his interest, not when he is patting his former boss on the back.

Sixth, Navasky does indeed use the telephone company's denial to underscore the sinister character of the FBI's effort to discredit RFK. Pp. 90-91 of his book make that clear.

We "could go on, but the point is clear." Ruthless and unprincipled prosecution tactics, destroying what little protection of privacy and procedural fairness exists in the American system of justice, ought to be exposed and condemned. We believe our judgment of RFK's record to be warranted by the evidence.