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Justice Jackson's Persistent Post-Nuremberg Legacy

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BY BRIAN R. GALLINI

JUSTICE JACKSON DELIVERS HIS OPENING STATEMENT DURING THE NUREMBERG TRIALS IN NUREMBERG, GERMANY,
NOV. 21, 1945. PHOTO FROM THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM COLLECTION.

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."¹

JUSTICE ROBERT H. JACKSON,
OPENING STATEMENT BEFORE
THE INTERNATIONAL MILITARY
TRIBUNAL AT THE PALACE
OF JUSTICE IN NUREMBERG,
GERMANY

NOVEMBER 21, 1945

Robert Houghwout Jackson became the 82nd associate justice of the United States Supreme Court in 1941. Four years later, he took a leave of absence to serve as U.S. chief of counsel for the prosecution of Nazi war criminals during the Nuremberg Trials. He returned to the Court in 1946 with a reinvigorated passion for criminal procedure that continues to shape American jurisprudence to this day. Jackson's post-Nuremberg legacy — what I call his "dispassionate approach" to criminal procedure — continues to shape modern Fourth Amendment jurisprudence. That approach, 75 years after the conclusion of the Nuremberg Trials, also continues to shape the evolution of law in the United States.

Jackson's Path to the Court

Jackson was born on Feb. 13, 1892. After receiving his high school diploma from Frewsburg High School in New York, Jackson earned his law degree through a mix of apprenticeship and attendance at Albany Law School. He passed the New York bar exam at the age of 21 and practiced law throughout western New York for the next ten years, during which time he argued seven cases before the New York Court of Appeals.

In 1933, Jackson left for Washington, D.C., to become general counsel for the U.S. Department of the Treasury.

In that role, Jackson's work catapulted him into the national spotlight as a skilled trial lawyer and, in January 1936, earned him a promotion to assistant attorney general in the Tax Division of the U.S. Department of Justice. For nearly a year in that position, Jackson litigated tax cases in trial and appellate courts across the country and argued before the Supreme Court six times.

In 1936, Jackson became the assistant attorney general for the Antitrust Division. He served for a year and a half in that position and argued another eight cases before the Supreme Court. In May 1937, Jackson's rise to prominence prompted *Time Magazine* to recognize him as "one of the nation's ablest trial lawyers."² His trajectory continued with his confirmation to the position of solicitor general in 1938. In that role, he argued an additional 17 cases to the Supreme Court. His advocacy talents before the Court drew considerable praise. Justice Louis Brandeis, for instance, commented that Jackson should be solicitor general for life.

In 1939, President Franklin Roosevelt nominated Jackson to replace Frank Murphy as attorney general, after nominating Murphy to the Supreme Court. Jackson was subsequently confirmed to the position and took his oath of office in January 1940. He argued another three cases to the Supreme Court — all of which he won — during his tenure. ►

In July 1941, Jackson was confirmed to the Supreme Court as its 82nd associate justice. Jackson's time on the Court was interrupted, however, by an absence from the entire October Term in 1945. During this time, he served as U.S. chief of counsel for the International Military Tribunal in Nuremberg, Germany, prosecuting Nazi leaders for their actions during World War II.

Jackson's Nuremberg Experience

Jackson would later refer to his time at Nuremberg as some of "the most important, enduring, and constructive work of [his] life."³ I have previously written about Jackson's life and legacy, particularly his time on the Court following the Nuremberg Trials. My 2014 article, *Nuremberg Lives On*, argued that Jackson's Nuremberg experience spawned his "dispassionate approach" to criminal procedure, an approach rooted in the importance of judicial restraint and providing defendants with a neutral and fair procedural prosecutorial experience.⁴ The evolution and growth of this approach began with Jackson's belief that Nazi war criminals deserved a full and fair trial supported by transparently available evidence. It is perhaps best summarized by Jackson's own words, written to President Harry S. Truman in advance of the trials: The focus "is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and the horrors we deal with will permit, and upon a record that will leave our reasons and our motives clear."⁵

But forging that philosophy was no easy task. Jackson began as chief prosecutor on April 29, 1945, and quickly undertook the difficult work of negotiating with the governments of the

United States, France, Britain, and the Soviet Union to determine the process due to the Nazi defendants. After debating the issue for four months, the Allies produced two documents collectively known as the "London Agreement." The first established an International Military Tribunal, and the second provided "the constitution, jurisdiction, and functions of the Tribunal."⁶ The second document ensured that the accused would have the right to: (1) receive a preliminary hearing; (2) counsel or, in the alternative, self-representation; (3) present evidence; (4) cross-examine any prosecution witnesses; and (5) receive a copy of an indictment specifying in detail the charges against them. Reflecting on the negotiations nearly eight years later, Jackson commented, "Notwithstanding the imperfections of the agreement of London, I think it represents a very important contribution to international law."⁷

The trial of 22 Nazi leaders began on Nov. 20, 1945, and the Tribunal pronounced its judgment on Oct. 1, 1946. Twelve defendants received a death sentence, seven were sentenced to prison terms of varying lengths, and three were acquitted. Jackson submitted his final report to President Truman one week after the verdicts. In it, he recounted some of the impressive procedural statistics from the trials, including that 19 defendants utilized their right to testify in their own respective defenses, 61 witnesses testified on behalf of the defense, and 143 additional witnesses testified for the defense through interrogatories. Characterizing the trials as "gigantic," Jackson pointed to the London Agreement as the root of their success: "The importance of the trial lies

in the principles to which the Four Powers became committed by the Agreement."⁸ That Agreement, Jackson surmised, "set up [a] few simple rules which assured all of the elements of a fair and full hearing, including counsel for the defense."⁹ Jackson, with his work in Nuremberg complete, returned to the Supreme Court at the start of the October 1946 Term.

Jackson's Post-Nuremberg Legacy

My 2014 work concluded that Jackson's "dispassionate approach" to criminal procedure continues to impact modern criminal procedure in the contexts of search and seizure, confessions, and the right to counsel. I now return to that thesis to briefly argue that it remains truer today than ever before, as reflected by the Supreme Court's 2018 landmark decision in *Carpenter v. United States*. Specifically, *Carpenter* is a compelling example of the continued impact of Jackson's post-Nuremberg legacy on the modern Fourth Amendment. At the core of the *Carpenter* Court's holding — limiting the government's ability to conduct warrantless surveillance — is Jackson's 1948 opinion in *United States v. Di Re*. *Carpenter*'s reliance on *Di Re* demonstrates that Jackson's "dispassionate approach" to criminal procedure lives on.

In *Di Re*, the Court considered the constitutionality of a warrantless arrest and search of an automobile passenger following a lawful traffic stop. In holding that the warrantless police action violated the Fourth Amendment, Jackson wrote for the majority: "[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police sur-

The evolution and growth of this approach began with Jackson's belief that Nazi war criminals deserved a full and fair trial supported by transparently available evidence.

veillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.”¹⁰ Jackson’s opinion, in short, showcased his skepticism of law enforcement decision-making without judicial supervision.

Since its issuance, *Di Re* has been cited by courts a whopping 1,328 times.¹¹ It most prominently began impacting modern Fourth Amendment jurisprudence in 1979, when the Supreme Court considered the validity of an Illinois statute authorizing police “to detain and search any person found on [a] premises being searched pursuant to a search warrant.”¹² The Court relied on *Di Re* extensively to hold that the statute violated the Fourth Amendment’s requirement of individualized probable cause.

In 1991, *Di Re* began impacting the evolution of the automobile exception with the Supreme Court’s decision in *California v. Acevedo*, a case of monumental importance to the legality of warrantless car searches. Restructuring decades of doctrine drawing a distinction between searches of cars and searches of containers within cars, a majority of the Court held that the automobile exception justifies a warrantless search of a vehicle and any container found in that vehicle so long as the search is supported by probable cause. Justice Stevens, in his dissent, relied on *Di Re* to highlight the historical importance of warrants and argued that the majority had undermined the role warrants should play in car searches:

Over the years — particularly in the period immediately after World War II and particularly in opinions authored by Justice Jackson after his service as a special prosecu-

tor at the Nuremburg trials — the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.¹³

The proper role of Jackson’s legacy more pointedly arose when Justices Antonin Scalia and John Paul Stevens squared off in *Wyoming v. Houghton*. Decided in 1999, in a case of tremendous significance to everyday Americans, *Houghton* held that when probable cause exists to search a vehicle for contraband, officers may warrantlessly search a passenger’s belongings found inside that vehicle. Writing for the majority, Scalia reasoned that, compared to a full search of a passenger, “the degree of intrusiveness upon personal privacy and indeed even personal dignity” is lower “when the police examine an item of personal property found in a car.”¹⁴ In doing so, he sought to distinguish *Di Re* — relied upon heavily both by the state court below and by Justice Stevens in dissent — by asserting the following:

[The dissent attributes the holding in *Di Re*] to “the settled distinction between drivers and passengers,” rather than to a distinction between search of the person and search of property. . . .

In its peroration, however, the dissent quotes extensively from Justice Jackson’s opinion in *Di Re*, which makes it very clear that it is precisely this distinction between search of the person and search of property that the case relied upon:

“The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons

found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car.”

Does the dissent really believe that Justice Jackson was saying that a house-search could not inspect *property* belonging to persons found in the house—say a large standing safe or violin case belonging to the owner’s visiting godfather? Of course that is not what Justice Jackson meant. He was referring *precisely* to that “distinction between property contained in clothing worn by a passenger and property contained in a passenger’s briefcase or purse” that the dissent disparages.¹⁵

In his dissent, Justice Stevens found *Di Re* directly on point as “the only automobile case confronting the search of a passenger defendant[.]”¹⁶ *Di Re*, according to Stevens, established a “settled distinction between drivers and passengers” that made it “quite plain” that the search of a passenger’s belongings involves a serious intrusion of personal privacy.¹⁷ Quoting *Di Re*, Stevens observed: “What Justice Jackson wrote for the Court 50 years ago is just as sound today: . . . ‘We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.’”¹⁸

Then, in its 2008 decision in *Virginia v. Moore*, the Supreme Court considered whether an arrest based on probable cause but in violation of state law violates the Fourth Amendment. In concluding that no Fourth Amendment violation occurs, the Court relied on *Di Re* for the proposition that, “while States are free to regulate such arrests ►

After the Nuremberg Trials, Jackson approached his work on criminal procedure issues with a renewed vigor and focus that produced a number of important Fourth Amendment decisions.

however they desire, state restrictions do not alter the Fourth Amendment's protections."¹⁹ *Moore*, like many other Supreme Court cases influenced by *Di Re*, quickly assumed an important role in Americans' daily lives.

But that's not the end of the story. In 2018, the Supreme Court decided *Carpenter v. United States*, a landmark opinion impacting the Fourth Amendment's third-party doctrine. The *Carpenter* Court considered whether law enforcement's warrantless acquisition of 12,898 location points (so-called cell-site location information or "CSLI") from a defendant's wireless carrier — used to tie the defendant to a string of robberies — constitutes a search under the Fourth Amendment. The Court answered that question in the affirmative, reasoning that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."²⁰

Fundamental to *Carpenter's* holding was the Court's concern about the degree to which the Fourth Amendment serves as a meaningful protection from invasions of privacy made easier by advancements in technology. Indeed, at various points in the majority opinion, the Court acknowledged that a wireless carrier could have unrestricted access to a phone user's database of geographical location information. That, in the Court's view, was a "deeply revealing" invasion of privacy.²¹ The Court further noted that the Government — if left unchecked — could turn wireless carriers into automated collectors of geoinformation.

The *Carpenter* Court twice cited *Di Re* to support the core rationale of its holding. First, in describing the historical purpose of the Fourth Amendment,

the Court quoted *Di Re* to note that a "central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'"²² Second, the Court noted that modern surveillance technology "risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent."²³

Since *Carpenter's* issuance, commentators have rightly described the case as a landmark decision for modern Fourth Amendment jurisprudence. Professor Stephen Vladeck, a national security and constitutional law scholar, has noted that *Carpenter* is "the most important privacy case in a generation."²⁴ It is truly remarkable that such an important case is based in part on an opinion that, in 2018, was 70 years old.

Why was *Di Re* so important to the *Carpenter* Court? According to Professor John R. Kroger, "*Di Re* provides a compelling definition of the purpose of the Fourth Amendment."²⁵ That definition, Kroger notes, is designed "to 'place obstacles in the way of a too permeating police surveillance'"²⁶ Kroger explains that "*Di Re* forces us to ask, in each Fourth Amendment case, a fundamental question: [A]re the government's surveillance practices too permeating, too extensive, and too intrusive for a free society?"²⁷ Professor Orin S. Kerr also believes *Carpenter* relied on *Di Re* "for the view that a 'basic guidepost[]' of interpreting the Fourth Amendment" is to recognize that it places "obstacles in the way of a too permeating police surveillance."²⁸

Considering *Carpenter's* reliance on *Di Re*, it is perhaps no surprise that lower courts have relied on *Di Re* when interpreting *Carpenter*. In *Commonwealth v. McCarthy*, for

example, the Massachusetts Supreme Judicial Court described *Carpenter* as standing for the proposition that "courts analyzing the constitutional implications of new surveillance technologies [] should be guided by the founders' intention 'to place obstacles in the way of a too permeating police surveillance.'"²⁹ The Ninth Circuit, in *United States v. Moalin*, similarly recognized that a core rationale of *Carpenter's* holding is that the Fourth Amendment protects against "a too permeating police surveillance[.]"³⁰ Additional examples abound;³¹ the unmistakable conclusion is clear: Jackson's dispassionate approach to criminal procedure — and in particular, his majority opinion in *Di Re* — has had a far-reaching impact on modern Fourth Amendment jurisprudence that continues to this day.

Conclusion

Justice Jackson was an enormously important legal figure, but not for the reasons we might traditionally think. Following his return to the Supreme Court after the Nuremberg Trials, Jackson approached his work on criminal procedure issues with a renewed vigor and focus that produced a number of important Fourth Amendment decisions, including his 1947 majority opinion in *United States v. Di Re*. That opinion continues to impact the development of modern Fourth Amendment jurisprudence across the judiciary.



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- ¹ Opening Statement Before the International Military Tribunal, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> (last visited Sept. 1, 2021) (statement of Robert H. Jackson).
- ² *Judiciary: Round for Mellon*, TIME, May 24, 1937, at 11.
- ³ Robert H. Jackson, *Introduction to* WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946* at xxxviii (1954).
- ⁴ Brian R. Gallini, *Nuremberg Lives On: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure*, 46 LOY. U. CHI. L.J. 1 (2014). The law review gave its permission to re-use portions of that work here.
- ⁵ Robert H. Jackson, *Justice Jackson's Report to President Truman on the Legal Basis for Trial of War Criminals*, 19 TEMP. L.Q. 144, 148 (1945).
- ⁶ HARRIS, *supra* note 3, at 22.
- ⁷ Robert H. Jackson, *Oral History Memoir at 1648* (1955) (unpublished manuscript) (on file with Columbia Center for Oral History).
- ⁸ Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nuremberg War Crimes Trial*, 20 TEMP. L.Q. 337, 342 (1946).
- ⁹ *Id.*
- ¹⁰ *United States v. Di Re*, 332 U.S. 581, 595 (1948).
- ¹¹ Westlaw Citing References (last accessed Sept. 1, 2021).
- ¹² *Ybarra v. Illinois*, 444 U.S. 85, 87 (1979).
- ¹³ *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (citing as an example *Di Re*, 332 U.S. at 595).
- ¹⁴ *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999).
- ¹⁵ *Id.* at 303 n.1.
- ¹⁶ *Id.* at 309 (Stevens, J., dissenting).
- ¹⁷ *Id.* at 309-10.
- ¹⁸ *Id.* at 312 (quoting *Di Re*, 332 U.S. at 587).
- ¹⁹ *Virginia v. Moore*, 553 U.S. 164, 176 (2008).
- ²⁰ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).
- ²¹ *Id.* at 2223.
- ²² *Id.* at 2214 (quoting *Di Re*, 332 U.S. at 595).
- ²³ *Id.* (quoting *Di Re*, 332 U.S. at 595).
- ²⁴ Stephen Vladeck, *The Supreme Court Phone Location Case Will Decide the Future of Privacy*, VICE: MOTHERBOARD (June 16, 2017), <https://www.vice.com/en/article/59zq5x/scotus-cell-location-privacy-op-ed>.
- ²⁵ John. R. Kroger, *The Fourth Amendment in the Age of Trump and Roberts*, 55 GONZ. L. REV. 1, 11 (2020).
- ²⁶ *Id.* (alteration in original) (quoting *Di Re*, 332 U.S. at 595).
- ²⁷ *Id.*
- ²⁸ Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 535 n.342 (2018) (alteration in original) (quoting *Carpenter*, 138 S. Ct. at 2214).
- ²⁹ *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1099 (Mass. 2020) (quoting *Carpenter*, 138 S. Ct. at 2214).
- ³⁰ *United States v. Moalin*, 973 F.3d 977, 990 (9th Cir. 2020) (quoting *Carpenter*, 138 S. Ct. at 2214).
- ³¹ See, e.g., *United States v. Rubin*, Case No. 18-cr 00568-CRB-1, 2021 WL 3773609, at *3 (N.D. Cal. Aug. 25, 2021) (explaining that, post-*Carpenter*, courts analyzing the constitutionality of modern surveillance technologies must be mindful in part of the Framers' intent "to place obstacles in the way of a too permeating police surveillance" (quoting *Carpenter*, 138 S. Ct. at 2214)); *United States v. Howard*, 426 F. Supp. 3d 1247, 1253 (M.D. Ala. 2019) (same), *aff'd*, No. 20-10877, 2021 WL 2155414 (11th Cir. May 27, 2021); *United States v. Chavez*, 423 F. Supp. 3d 194, 202 (W.D.N.C. 2019) (same).



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