

Nuremberg Lives On: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure

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The end of Germany's participation in World War II came with its formal surrender on May 8, 1945. After extensive debate over what would come of top Nazi leaders, twenty-two Nazi defendants were tried and ultimately convicted after 216 days of trials held in Nuremberg spread across eleven months between November 1945 and 1946. Associate Supreme Court Justice Robert H. Jackson took a leave of absence from the Court to lead the trial's prosecutorial effort.

Decades of scholarship have considered and evaluated the Nuremberg trials alongside Jackson's role in them. But, no article has evaluated how Justice Jackson's experience as Nuremberg Chief Prosecutor shaped his view of domestic criminal procedure issues when he returned to the Court after the Nazi trials.

This Article makes two arguments. First, that Justice Jackson's experience as Nuremberg Chief Prosecutor transformed his thinking about domestic criminal procedure. Second, that Jackson's transformative Nuremberg experience remarkably continues to impact—even today—the law on search and seizure, confessions, and right to counsel. More than a handful of his post-Nuremberg opinions remain consistently cited by lower courts and the Supreme Court alike.

Accordingly, this Article concludes, Nuremberg did more than affect international criminal law. Given that so many of Jackson's post-Nuremberg opinions continue to impact everyday citizens, the famous war criminal trials that happened more than sixty years ago remain modernly and domestically relevant.

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INTRODUCTION	2
I. JACKSON'S EARLY YEARS	7
A. <i>Life as a Prominent Government Attorney</i>	7
B. <i>Transition to Supreme Court Justice: Jackson's Criminal Procedure Work on the Court from 1941–1945</i>	20
II. JACKSON'S TRANSFORMATION AT NUREMBERG	31
III. NUREMBERG'S EFFECT ON JACKSON'S CRIMINAL PROCEDURE	
JURISPRUDENCE	49
A. <i>Returning to the Court</i>	51
B. <i>Modern Applicability</i>	63
CONCLUSION.....	73

INTRODUCTION

On a pleasant evening in April 1945, Joseph Goebbels, the Nazis' Propaganda Minister, read two horoscopes: one from January 30, 1933 (the day Hitler took office) and the other from November 9, 1918 (the day of the Weimar Republic's birth).¹ The horoscopes, Goebbels concluded, remarkably predicted the outbreak of war in 1939, German victory in 1941, difficulty in the early months of 1945, and a temporary success in the second half of April followed by Germany's rise in 1948.² Fortified by these predictions of the stars, Goebbels on April 6, 1945, sent the following to the remaining Nazi forces:

The Fuehrer has declared that even in this very year a change of fortune shall come The true quality of genius is its consciousness and its sure knowledge of coming change. The Fuehrer knows the exact hour of its arrival. Destiny has sent us this man so that we, in this time of great external and internal stress, shall testify to the miracle³

President Roosevelt was dead nearly a week later—on April 12, 1945—and Goebbels was certain that Roosevelt's death was the "temporary success" the horoscopes predicted.⁴ He boldly brought out the finest champagne, congratulated Hitler and other top officials, and shared his certainty that Roosevelt's death marked a turning point for

1. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 1108–09 (Simon & Schuster 1960).

2. *Id.* at 1109.

3. *Id.*

4. *Id.* at 1110.

Germany in the war.⁵

How wrong he was. As the Nazis toasted Roosevelt's death, Russian troops closed in on Berlin with alarming speed.⁶ The reality was not a turning point that favored the Nazis; rather, by that point, victory in World War II was a near certainty for the Allies.⁷ As if any confirmation of that was necessary, Hitler's celebration of Roosevelt's passing was fleeting; he exchanged congratulations with his top officials on April 12 and was dead by his own hand before the month was over.⁸

The end of Germany's participation in World War II came with its formal surrender on May 8, 1945.⁹ With the Nazi threat removed and wartime concluding, the international community debated what would become of top Nazi leaders responsible for wartime atrocities.¹⁰ Many Allied leaders, including for a time even Roosevelt himself, favored a political resolution for remaining Nazi leaders; that is, summary executions.¹¹ But Robert H. Jackson thought differently.¹² Alone in his thinking, Jackson proposed a full and fair trial for top Nazi leaders.¹³ He believed doing so would set new precedent in transitional international law.¹⁴ Despite understandable temptations to exact retribution on Third Reich leaders, a trial would demonstrate fairness.¹⁵ His logic was persuasive and, in the first international criminal trial in history, Jackson served as Chief Prosecutor for the United States while on leave from his position as Associate Justice of the Supreme Court.¹⁶

5. *Id.*

6. TIME-LIFE BOOKS, *THE ILLUSTRATED HISTORY OF WORLD WAR II* 413–15 (2001).

7. *Id.* at 415.

8. *Id.* at 420.

9. *Id.* at 424.

10. Mark Weisenmiller, *Nazis on Trial*, *AMERICA IN WWII MAG.*, Oct. 2006, <http://www.americainwwii.com/articles/nazis-on-trial/>.

11. 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 7–8 (1954) (discussing the support by Roosevelt's Treasury Secretary, Hans Morgenthau, in favor of summary executions for Nazi leaders and his work to persuade Roosevelt to back up the summary execution concept); JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL 7–8* (1994) (stating Winston Churchill initially proposed summary execution of Nazi leaders).

12. LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 116 (2003); Henry T. King, Jr., Lecture at Chautauqua Institution: Robert Jackson's Place in History: Nuremberg Revisited (June 13, 2003), *available at* <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/robert-jacksons-place-in-history-nuremberg-revisited/>.

13. Judge Norbert Ehrenfreund, Address at the Robert H. Jackson Center: Reflections on Nuremberg Trial (June 13, 2005), *available at* <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/reflections-on-nuremberg-trial/>.

14. FISHER, *supra* note 12, at 116; Ehrenfreund, *supra* note 13.

15. Ehrenfreund, *supra* note 13.

16. Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of a*

He was the first and only Supreme Court Justice to serve as an international prosecutor.¹⁷

Twenty-two Nazi defendants were tried and nineteen were ultimately convicted after 216 days of trials held in Nuremberg that spread across eleven months between November 1945¹⁸ and 1946.¹⁹ Decades of scholarship have considered the incredible effect of the Nuremberg trials on human rights litigation,²⁰ international criminal courts,²¹ and the evolution of international humanitarian law²²—among many other topics.²³ But no article has evaluated how Justice Jackson's experience

Nuremberg Prosecutor, 88 GEO. L.J. 2421, 2423 (2000).

17. Other justices have, however, engaged in extrajudicial service. As the Supreme Court has explained, “[i]n 1877, five Justices served on the Election Commission that resolved the hotly contested Presidential election of 1876.” *Mistretta v. United States*, 488 U.S. 361, 400 (1989). Other justices have “served on various arbitral commissions,” and “Justice [Owen] Roberts was a member of the commission organized to investigate the attack on Pearl Harbor.” *Id.* By way of final example, “Chief Justice Warren presided over the commission investigating the assassination of President Kennedy.” *Id.*

18. Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 503 (1955); Doug Linder, *The Nuremberg Trials*, UNIV. MO. KAN. CITY SCH. LAW (2000), <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.html>.

19. Taylor, *supra* note 18, at 510.

20. See, e.g., NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIAL CHANGED THE COURSE OF HISTORY* 121–29 (2007) (suggesting the greatest influence of the Nuremberg Trials was the extension of international law into the area of human rights through the invention of “crimes against humanity”); John Shattuck, *The Legacy of Nuremberg: Confronting Genocide and Terrorism Through the Rule of Law*, 10 GONZ. J. INT’L L. 6, 7 (2007) (stating “[t]he modern concept of human rights accountability can be traced back to the Nuremberg trials”); Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 326 (2008) (studying the link between the Nuremberg Trials and various aspects of human rights litigation, including subject-matter jurisdiction, violations of customary international law, complicit liability by corporations, and individual liability for violation of human rights).

21. Beth Fain, *The International Criminal Court: An Eminent Impact on a Hesitant United States*, 35 TEX. TECH L. REV. 163, 175 (2004) (discussing the precedent set by Nuremberg for international criminal prosecution and the creation of the International Criminal Court); Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENG. L. REV. 281, 283 (2001) (recognizing the universal jurisdiction approach adopted at Nuremberg); David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER FORUM OF WORLD AFFAIRS, Summer/Fall 2002, at 7, 11 (stating that ad hoc tribunals, beginning with Nuremberg, “laid the foundation for the establishment of a practical and permanent system of international criminal justice”).

22. Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 127, 150–52 (1995) (relating the Nuremberg Trials to the principle that individuals can be subject to international legal rights and obligations); Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 CARDOZO L. REV. 1615, 1627–30 (2006) (exploring how the substantive charges at Nuremberg have helped to define the concepts of injustice and persecution in global politics and continue to shape the rule of law).

23. See, e.g., Christoph Burchard, *The Nuremberg Trial and its Impact on Germany*, 4 J. INT’L

as Nuremberg Chief Prosecutor shaped his view of domestic criminal procedure issues when he returned to the Court after the Nazi trials.²⁴

This Article makes two arguments: first, that Justice Jackson's experience as Chief Prosecutor at Nuremberg transformed his thinking about domestic criminal procedure—specifically his approach to (1) search and seizure, (2) confessions, and (3) right to counsel. This Article contends that, prior to Nuremberg, Jackson had not fully developed his thinking about criminal procedure issues.

After Nuremberg, however, Jackson developed what this Article calls a body of “dispassionate criminal procedure.” Jackson's post-Nuremberg opinions are replete with illustrations of what became his crystalized and consistent approach to key criminal procedure issues—particularly those related to search and seizure, confessions, and right to counsel. This approach was generally rooted in judicial restraint, but, specifically in the context of criminal procedure, he became more vocal on the overarching importance of defendants receiving a neutral and fair procedural prosecutorial trial experience overall.

Second, this Article asserts that Jackson's transformative Nuremberg experience remarkably continues to impact—even today—the law on search and seizure, confessions, and right to counsel. More than a handful of his post-Nuremberg opinions remain consistently cited by lower courts and the Supreme Court alike. Accordingly, this Article concludes that Nuremberg did more than affect international criminal law. Given that so many of Jackson's post-Nuremberg opinions continue to impact everyday citizens, the famous war criminals trial that happened more than fifty years ago remains modernly—and domestically—relevant.

Part I explores Jackson's background to briefly highlight that in his formative professional years he rarely had occasion to become meaningfully involved in search and seizure, confession, and/or right to counsel issues. Rather, his extraordinary pre-Nuremberg career was filled primarily with tax-related issues, antitrust considerations, and Supreme Court appellate advocacy. It is not surprising, as Part I notes, that before his departure for Nuremberg, Jackson penned only one criminal procedure opinion while serving as an Associate Justice to the Supreme Court.

CRIM. JUST. 800 (2006); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094 (2009); From the Library, *Advice from Justice Jackson*, 5 J. APP. PRAC. & PROCESS 215 (2003); Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV. 655 (2000).

24. To be clear, this Article's use of the terms “criminal procedure” will encapsulate only search and seizure, confessions, and right to counsel.

Part II evaluates Jackson's transformation as Nuremberg Chief Prosecutor by looking, in part, into his personal papers—including the diary he kept during the Nazi trials. This assessment makes unmistakably clear how difficult it was for him to navigate procedural issues in what was, and remains, the biggest international criminal trial the world has ever seen.

That experience, Part III argues, changed his thinking about criminal procedure after his return to the Court from Nuremberg. That change is best reflected not only by his productivity—he wrote thirteen opinions on criminal procedure-related issues²⁵—but also by the thoughtfulness and analytical clarity manifested in a handful of illustrative opinions, like *United States v. Di Re* (majority),²⁶ *McDonald v. United States* (concurrency),²⁷ and *Brinegar v. United States* (dissent).²⁸ Courts nationwide have cited those opinions in excess of 3500 times since their respective publications.²⁹ This Article concludes that those opinions'

25. See *infra* note 417 and accompanying citations.

26. *United States v. Di Re*, 332 U.S. 581 (1948). In 2012 alone, courts nationwide cited *Di Re* eighteen times: *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012); *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring); *Booker v. Ray*, No. 3:11-cv-00268, 2012 U.S. Dist. LEXIS 169806, at *41 (M.D. Tenn. Nov. 26, 2012); *Miller v. City of Plymouth*, No. 2:09-CV-205-JVB, 2012 U.S. Dist. LEXIS 152599, at *5 (N.D. Ind. Oct. 24, 2012); *United States v. Hall*, No. 2:11-cr-122, 2012 U.S. Dist. LEXIS 110633, at *17 (D. Vt. Aug. 7, 2012); *United States v. Laughlin*, No. 1:10-CR-113-TWT/AJB, 2012 U.S. Dist. LEXIS 104921, at *90 (N.D. Ga. July 6, 2012); *United States v. Moustrophis*, No. 2:11-cr-141-GZS, 2012 U.S. Dist. LEXIS 113490, at *14 (D. Me. May 30, 2012); *United States v. Mazzetti*, No. 6:11-mj-00090-MJS-1, 2012 U.S. Dist. LEXIS 69922, at *46 (E.D. Cal. May 17, 2012); *United States v. Warrick*, No. 10-CR-0352A(Sr), 2012 U.S. Dist. LEXIS 162985, at *32 (W.D.N.Y. Apr. 13, 2012); *United States v. McDuffie*, No. CR-08-0102-RHW, 2012 U.S. Dist. LEXIS 51003, at *13 (E.D. Wash. Apr. 11, 2012); *United States v. Graham*, 846 F. Supp. 2d 384, 403 (D. Md. 2012); *State v. Washington*, 104 So. 3d 401, 405 (La. 2012); *Ray v. State*, 47 A.3d 1113, 1127 (Md. App. 2012); *State v. Smith*, 729 S.E.2d 120, 124 (N.C. Ct. App. 2012); *State v. Freeman*, 290 P.3d 908, 909 (Or. Ct. App. 2012); *State v. Patino*, No. P1-10-1155A, 2012 R.I. Super. LEXIS 139, at *144 (Sept. 4, 2012); *Commonwealth v. Johnson*, 84 Va. Cir. 518, 523 (Va. 2012); *Commonwealth v. Turner*, 84 Va. Cir. 406, 411 (Va. 2012); *People of the V.I. v. George*, No. ST-10-CR-680, 2012 V.I. LEXIS 13, at *14 (V.I. Super. Ct. Apr. 23, 2012).

27. *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson, J., concurring).

28. *Brinegar v. United States*, 338 U.S. 160 (1949) (Jackson, J., dissenting).

29. Since 1948, courts have cited to Jackson's concurring opinion in *McDonald* 337 times. Jackson's majority opinion in *Di Re* has been cited 1168 times since 1948 and, finally, courts have cited his dissent in *Brinegar* more than 2000 times. Lower courts cited to Jackson's *Brinegar* dissent twenty times just in 2012. See generally *United States v. Sowards*, 690 F.3d 583, 588 (4th Cir. 2012); *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012); *Wommack v. Brown*, No. 4:11CV1487SNLJ, 2012 U.S. Dist. LEXIS 168663, at *23 (E.D. Mo. Nov. 28, 2012); *Church of Universal Love & Music v. Fayette Cnty.*, 892 F. Supp. 2d 736, 744 (W.D. Pa. 2012); *Dunn v. Harrell*, No. 7:11-cv-2440-HMH-JDA, 2012 U.S. Dist. WL 3965043, at *6 (D.S.C. Aug. 20, 2012); *S.L. v. St. Louis Metro. Police Dep't Bd. of Comm'rs*, No. 4:10-CV-2163, 2012 U.S. Dist. LEXIS 116370, at *19 (E.D. Mo. Aug. 17, 2012); *Gleason v. Presto*, No. 11-C-512, 2012 U.S. Dist. LEXIS 112568, at *8 (E.D. Wis. Aug. 9, 2012); *United States v.*

enduring impact is the direct legacy of Jackson's Nuremberg experience.

I. JACKSON'S EARLY YEARS

Robert H. Jackson worked throughout his life to establish “one of the most spectacular legal careers of the twentieth century.”³⁰ But despite his diverse and varied legal career, Jackson, prior to his appointment to the Supreme Court, rarely had occasion to confront issues related to criminal procedure. Subpart A of this Part considers his incredible—and exceptionally rapid—rise to the position of prominent government attorney. Subpart B then evaluates his early experience as an Associate Justice on the Supreme Court from 1941–1945. Collectively, Part I demonstrates that despite Jackson's extraordinary career and tremendously influential judicial philosophy in other substantive areas, he never defined a specific criminal procedure philosophy prior to his experience at Nuremberg.

A. *Life as a Prominent Government Attorney*

Robert Houghwout Jackson (“Jackson”) was born on February 13, 1892, to William and Angelina Jackson, who lived at the time in Northwestern Pennsylvania.³¹ Both William and Angelina worked vigorously on the family farm until Robert was five, when William moved the family to Frewsburg, New York, a village of approximately 500 people.³² In Frewsburg, William worked on a variety of projects, from renovating a hotel (calling it Hotel Jackson), running a livery stable, and investing in real estate.³³ Jackson received a diploma from

Laughlin, No. 1:10-CR-113-TWT/AJB, 2012 U.S. Dist. LEXIS 104921, at *88 (N.D. Ga. July 6, 2012); *Lindsey v. Alabama*, No. 12-0053-CG-M, 2012 U.S. Dist. LEXIS 107400, at *14 (S.D. Ala. July 5, 2012); *United States v. Smith*, No. S1-4:11CR288 RWS, 2012 U.S. Dist. LEXIS 53820, at *35 (E.D. Mo. Mar. 13, 2012); *United States v. Almeida*, No. 2:11-cr-127-DBH, 2012 U.S. Dist. LEXIS 2415, at *25 (D. Me. Jan. 9, 2012); *Watson v. United States*, 43 A.3d 276, 282 (D.C. 2012); *People v. Frier*, No. 1-10-2437, 2012 Ill. App. Unpub. LEXIS 1930, at *10 (Aug. 13, 2012); *People v. Timberlake*, No. 1-10-3290, 2012 Ill. App. Unpub. LEXIS 1571, at *37 (June 28, 2012); *People v. Mosley*, No. 1-10-3642, 2012 Ill. App. LEXIS 1227, at *13 (2012); *State v. Otto*, 726 S.E.2d 824, 828 (N.C. 2012); *State v. Gardner*, 984 N.E.2d 1025, 1030 (Ohio 2012); *City of Mansfield v. Studer*, No. 2011-CA-93, 2012 Ohio App. LEXIS 4242, at *40 (Ohio Ct. App. Oct. 17, 2012); *State v. Echols*, 382 S.W.3d 266, 278 (Tenn. 2012); *State v. Felix*, 811 N.W.2d 775, 804 (Wis. 2012).

30. Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 172 (2001).

31. GAIL JARROW, ROBERT H. JACKSON: NEW DEAL LAWYER, SUPREME COURT JUSTICE, NUREMBERG PROSECUTOR 12 (2008).

32. *Id.* at 14.

33. *Id.*

Frewsburg High School but then moved to Jamestown to complete an additional year of high school coursework.³⁴ Jamestown High School's principal, Milton Fletcher, persuaded Jackson to consider a career in law although Jackson's father was opposed and refused to pay for law school.³⁵

With no option to attend law school—and having never attended college—Jackson accepted an apprenticeship with lawyer Frank Mott, his mother's cousin and a leader in the Democratic Party.³⁶ Jackson began work with Mott in September 1910 and after a year enrolled in the Albany Law School.³⁷ He obtained a certificate of graduation after a year of coursework at Albany Law and, after another year of apprenticeship, sat for the New York state bar exam.³⁸

Following his time at Albany, Jackson returned to Mott's office to complete his final apprenticeship year.³⁹ During that year, Mott introduced Jackson to a first-term state senator from eastern New York named Franklin Delano Roosevelt.⁴⁰ The pair remained in contact,⁴¹ and Jackson became involved in the Democratic Party,⁴² but Jackson himself declined to run for office.⁴³ He preferred, instead, to practice law.⁴⁴ At the age of twenty-one, following his admission to the New York State Bar on September 22, 1913, Jackson practiced throughout western New York for ten years.⁴⁵ Jackson practiced primarily in Jamestown, New York,⁴⁶ and argued seven cases before the New York Court of Appeals—none of which involved criminal procedure.⁴⁷

34. *Id.* at 23.

35. *Id.* at 25–27.

36. *Id.* at 27.

37. JARROW, *supra* note 31, at 28.

38. *Id.* at 28.

39. *Id.* at 30.

40. *Id.*

41. *Id.* at 31.

42. *Early Life & Career, 1892-1934*, ROBERT H. JACKSON CTR., <http://www.roberthjackson.org/the-man/timeline/early-life-and-career-1892-1934/> (last visited September 22, 2014) [hereinafter *Early Life & Career*, ROBERT H. JACKSON].

43. JARROW, *supra* note 31, at 31.

44. *Early Life & Career*, ROBERT H. JACKSON, *supra* note 42.

45. *Id.*

46. John Q. Barrett, *Robert H. Jackson's Oral Arguments before the New York Court of Appeals*, 1 HIST. SOC'Y CTS. ST. N.Y. 3 (2005).

47. *Helfrick v. Dahlstrom Metallic Door Co.*, 176 N.E. 141 (N.Y. 1931), *aff'd*, 284 U.S. 594 (1932) (per curiam) (resolving dispute under the New York Workmen's Compensation Law); *Westfelt v. Atlas Furn. Co.*, 177 N.E. 147 (N.Y. 1931) (resolving a furniture company's challenge to a civil compensation award to a tort plaintiff); *Minsker v. John Hancock Mut. Life Ins. Co.*, 173 N.E. 4 (N.Y. 1930) (involving insurance dispute); *Caflisch v. Clymer St. Bank*, 169 N.E. 286 (N.Y. 1929) (resolving a land ownership dispute); *Allegheny Coll. v. Nat'l Chautauqua Cnty.*

Rather, Jackson's practice focused on country and business law while he worked in a variety of private firms until his departure for Washington, D.C. in 1933.⁴⁸

Roosevelt was elected President in 1932.⁴⁹ In the Fall of 1933, Jackson accepted a position in Washington, D.C. as General Counsel for the U.S. Department of the Treasury.⁵⁰ It was in this position—trying cases against tax delinquents—that Jackson grew from a prominent figure in Jamestown, New York, to a nationally known trial lawyer.⁵¹ As General Counsel, Jackson litigated a famous tax case against then-Secretary of the Treasury Andrew Mellon⁵² and investigated a case with international reach against Ivar Kreuger.⁵³ His capable handling of

Bank of Jamestown, 159 N.E. 173 (N.Y. 1927) (addressing what consideration is required to bind a contract); *Möller v. Pickard*, 133 N.E. 887 (N.Y. 1922) (dealing with a forcible stock trade); *Bloomquist v. Farson*, 118 N.E. 855 (N.Y. 1918) (arising from a bond trade). Jackson also helped brief an additional case that reached the New York Court of Appeals, although he did not personally argue it. *In re Pa. Gas Co.*, 122 N.E. 260 (N.Y. 1919), *aff'd*, 252 U.S. 23 (1920).

48. See *Early Life & Career*, ROBERT H. JACKSON, *supra* note 42; accord JEFFREY D. HOCKETT, *NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON* 221 (1996) (noting that Jackson focused variously on contract law, trusts and estates, promissory notes, and commercial litigation). Jackson ultimately formed a partnership with Henry S. Manley and Gerald A. Herrick in 1923. EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 37 (1958). The firm's name changed in 1927 to Jackson, Herrick, Durkin & Leet, but Jackson's substantive practice focus did not. *Id.*

49. GERHART, *supra* note 48, at 62.

50. JARROW, *supra* note 31, at 38. He formally started on February 1, 1934. GERHART, *supra* note 48, at 66.

51. See National Affairs, *Judiciary: Round for Mellon*, TIME MAG., May 24, 1937, at 11. By the time Jackson left for Washington, D.C., he was earning a yearly salary of \$30,000 (the modern equivalent of \$500,000) despite the stock market crash in 1929. JARROW, *supra* note 31, at 36. Jackson had established a substantial client list that included small businesses, individuals, and corporations. GERHART, *supra* note 48, at 63.

52. NOAH FELDMAN, *SCORPIONS* 93 (2010) (noting that "Mellon was no ordinary wealthy businessman" and that he "embodied the financial system of the United States").

53. In the 1920s, stocks and bonds in one of Ivar Kreuger's conglomerates, Kreuger & Toll, Inc., were the most widely held securities in America and abroad. Dale L. Flesher & Tonya K. Flesher, *Ivar Kreuger's Contribution to U.S. Financial Reporting*, 61 ACCT. REV. 421 (1986). After Kreuger's suicide in 1932, most of his businesses collapsed financially and declared bankruptcy after it became apparent that the corporations' accounting books were falsified. ROBERT SHAPLEN, *KREUGER: GENIUS AND SWINDLER* 239 (1960). Banks and individual investors suffered when the corporations crashed, with many middle-class investors losing all of their savings in the financial wreckage. *Id.* at 246. In 1935, President Roosevelt assigned Jackson to travel to Europe to investigate the financial circumstances of Kreuger and his companies. John Q. Barrett, "One Good Man": *The Jacksonian Shape of Nuremberg*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 130 (Herbert R. Reginbogin & Christoph J.M. Safferling, eds., 2006). Jackson travelled to Sweden, France, and Germany as he led the U.S. government's investigation into Kreuger's financial fabrications. *Id.* The bankruptcy and investigations resulted in numerous changes to financial reporting requirements in the United States. Flesher & Flesher, *supra*, at 421.

those cases earned Jackson a promotion in January 1936 to Assistant Attorney General in the Tax Division of the U.S. Department of Justice.⁵⁴ For nearly a year in that position, Jackson litigated tax cases in trial and appellate courts across the nation⁵⁵—including six arguments before the Supreme Court.⁵⁶

Shortly after Roosevelt's landslide reelection victory in 1936,⁵⁷ Jackson was transferred to the Antitrust Division, where he led the Division as Assistant Attorney General.⁵⁸ He served for a year and a half in that position—beginning on January 18, 1937⁵⁹—and argued eight cases before the Supreme Court.⁶⁰ His rise to prominence

54. Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court*, 5 WM & MARY BILL RTS J. 527, 528 (1997).

55. GERHART, *supra* note 48, at 85.

56. *United States v. Hudson*, 299 U.S. 498 (1937) (tax issue related to silver futures, argued Nov. 17 & 18, 1936); *Helvering v. Fried*, 299 U.S. 175 (1936) (tax, argued Nov. 17, 1936); *Landis v. N. Am. Co.*, 299 U.S. 248 (1936) (Public Utility Holding Company Act, argued Nov. 9, 1936); *Schafer v. Helvering*, 299 U.S. 171 (1936) (tax, argued Nov. 17, 1936); *Koshland v. Helvering*, 298 U.S. 441 (1936) (tax, argued May 1, 1936); *McCaughn v. Real Estate Land Title & Tr. Co.*, 297 U.S. 606 (1936, tax, argued Mar. 13, 1936).

57. Arthur Krock, *History's Largest Poll: 46 States Won by President, Maine and Vermont by Landon*, N.Y. TIMES, Nov. 5, 1936, at A1.

58. GERHART, *supra* note 48, at 88.

59. *Id.*

60. *Elec. Bond & Share Co. v. S.E.C.*, 303 U.S. 419 (1938) (Public Utility Holding Company Act, argued Feb. 7, 8 & 9, 1938); *Helvering v. Gowran*, 302 U.S. 238 (1937) (tax, argued Oct. 22, 1937); *Aluminum Co. of Am. v. United States*, 302 U.S. 230 (1937) (antitrust, argued Nov. 8 & 9, 1937); *Helvering v. Pfeiffer*, 302 U.S. 247 (1937) (tax, argued Oct. 22, 1937); *F.T.C. v. Standard Educ. Soc'y*, 302 U.S. 112 (1937) (addressing order of the Federal Trade Commission, argued Oct. 18, 1937); *Helvering v. Davis*, 301 U.S. 619 (1937) (constitutionality of the Social Security Act, argued May 5, 1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (constitutionality of the Social Security Act, argued Apr. 8 & 9, 1937); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937) (addressing tax issue, argued Apr. 1 & 2, 1937). One commentator suggests that Jackson argued ten cases before the Supreme Court during his time as Assistant Attorney General in the Antitrust Division. Warner W. Gardner, *Government Attorney*, 55 COLUM. L. REV. 438, 440 (1955) ("In his year and a half in the Antitrust Division, Assistant Attorney General Jackson argued ten cases to the Supreme Court, only one of which related to the responsibilities of the Antitrust Division."). That author, however, does not list cases to support that number. I could uncover only eight cases argued by Jackson during his time as Assistant Attorney General in the Antitrust Division. The error seems harmless, though, because we both agree that Jackson argued a total of thirty-one times while serving as Assistant Attorney General in the Tax Division, Assistant Attorney General in the Antitrust Division, and as Solicitor General. Compare text accompanying *supra* note 56 (collecting the six cases while Jackson worked in the Tax Division), *supra* note 60 (collecting the eight cases while Jackson worked in the Antitrust Division), and *infra* notes 76–79 (collecting the seventeen cases Jackson argued while serving as Solicitor General), with Gardner, *supra*, at 442 (tallying Jackson's win/loss record before the Supreme Court while he served in Tax, Antitrust, and as Solicitor General, and concluding, "[a]gainst these four cases may be tallied some twenty-seven arguments which he won.").

prompted *Time Magazine* in May 1937 to recognize Jackson as “one of the nation’s ablest trial lawyers.”⁶¹

Throughout his impressive rise as a government lawyer, Jackson also remained a prominent figure in Democratic Party politics and an ardent supporter of Roosevelt’s New Deal legislation.⁶² For example, he spoke in favor of Roosevelt’s New Deal at the 1936 Democratic Convention,⁶³ railed against big business during a 1937 address to political scientists in Philadelphia,⁶⁴ and even wrote a book decrying the “judicial nullification of the New Deal.”⁶⁵ He also spoke in favor of Roosevelt’s so-called “Court Packing Plan,”⁶⁶ that ultimately failed,⁶⁷ but sought to expand the number of justices on the Court.⁶⁸

When Jackson considered returning to his law practice in Jamestown in the Fall of 1937,⁶⁹ Roosevelt tried to persuade him to run for Governor of New York.⁷⁰ Roosevelt kept Jackson from returning to Jamestown by prophetically nominating him to the position of Solicitor

61. *Judiciary: Round for Mellon*, *supra* note 51, at 11.

62. *Robert Houghwout Jackson*, CURRENT BIOGRAPHY 428 (H.W. Wilson Co. 1940) (“Jackson has subscribed to the ideals and objectives of the New Deal since long before the New Deal was heard of.”); *Robert H. Jackson*, FORTUNE MAG., Mar. 1938, at 132 [hereinafter FORTUNE MAG.] (describing Jackson’s efforts to promote New Deal legislation). Beginning in 1933, the New Deal had as many as three separate periods within the Roosevelt Administration, each of which “were designed to combat the Great Depression and extend social protections.” Darren M. Springer, *Reimagining the WTO: Applications of the New Deal as a Means of Remediating Emerging Global Issues*, 29 VT. L. REV. 1067, 1077 (2005).

63. Special to *The New York Times*, *Robert H. Jackson’s Attack on Republicans for Fighting New Deal Program*, N.Y. TIMES, Sept. 29, 1936, at 20.

64. Special to *The New York Times*, *Text of the Address of Robert H. Jackson to Political Scientists in Philadelphia*, N.Y. TIMES, Dec. 30, 1937, at 6.

65. Henry Steele Commager, *Robert H. Jackson on the Court “Purge” of 1937*, N.Y. TIMES, Feb. 2, 1941, at BR4 (reviewing Jackson’s book); see ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941) [hereinafter JACKSON, STRUGGLE FOR JUDICIAL SUPREMACY].

66. See ROBERT H. JACKSON, THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT 50 (John Q. Barrett ed., 2003) [hereinafter JACKSON, THAT MAN] (detailing a speech that, according to Jackson, “[came] so close to the President’s message”); Gardner, *supra* note 60, at 440 (noting that Jackson was “an articulate and fearless advocate of the ‘Court Packing Plan’”); National Affairs, *Judiciary: Quiet Crisis*, TIME MAG., Mar. 22, 1937, at 16 (“[H]onest ‘Bob’ Jackson made out a case for the President’s plan which earned the praise of its bitterest foes, delighted its friends as perhaps the most persuasive yet presented.”).

67. See William E. Leuchtenberg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J 673, 673 (1985) (noting that “Roosevelt’s Court-packing plan went down to defeat . . .”).

68. *Id.* Despite the legislation’s failure, Roosevelt was ultimately (and remarkably) able to appoint eight justices during his twelve years in office. *Id.*

69. GERHART, *supra* note 48, at 122.

70. *Id.* at 123.

General on January 27, 1938.⁷¹ Jackson received a sterling vote of confidence from *Fortune Magazine*,⁷² and was easily confirmed by a 62–4 Senate vote on March 4, 1938.⁷³ Jackson took his oath of office the next day.⁷⁴

While serving as Solicitor General, Jackson's talents as an appellate advocate rose to a crescendo before the Supreme Court.⁷⁵ He argued cases on a diverse array of topics including tobacco pricing,⁷⁶ taxation of milk producers,⁷⁷ and bankruptcy,⁷⁸ among many others.⁷⁹ In addition to *successfully* arguing many of those cases,⁸⁰ his talents as an

71. GERHART, *supra* note 48, at 136.

72. FORTUNE MAG., *supra* note 62, at 136 (“However dispassionate his motives, honest, normal Bob is on the right side of the fence in his championship of the little man.”).

73. GERHART, *supra* note 48, at 141.

74. E. Barrett Prettyman, Jr., *Robert H. Jackson: “Solicitor General for Life”*, 1992 J. SUP. CT. HIST. 75, 76 (1992).

75. Victoria A. Graffeo, *Robert H. Jackson: His Years as a Public Servant “Learned in the Law”*, 68 ALB. L. REV. 539, 542 (2005) (“As Solicitor General for the United States, Robert Jackson cemented his reputation as one of the nation’s foremost appellate attorneys.”).

76. *Mulford v. Smith*, 307 U.S. 38, 48–51 (1939) (holding that the Agricultural Adjustment Act of 1938 constitutionally applied to tobacco farms, argued March 8, 1939); *Curran v. Wallace*, 306 U.S. 1, 15–17 (1939) (affirming the validity of the Tobacco Inspection Act of 1935, argued Jan. 4, 1939).

77. *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 603 (1939) (holding that the Agricultural Marketing Act applied to certain milk producers in Boston, argued Apr. 25 & 26, 1939); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 581 (1939) (same, but as applied to New York, argued Apr. 24 & 25, 1939).

78. *United States v. Bekins*, 304 U.S. 27, 51 (1938) (upholding the constitutional validity of Chapter X of the Bankruptcy Act, argued Apr. 7, 1938).

79. *See, e.g.*, *Fly v. Heitmeyer*, 309 U.S. 146 (1940) (addressing the Communications Act of 1934, argued Jan. 11, 1940); *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 136–37 (1940) (construing “the regulation of radio broadcasting in the Communications Act of 1934,” argued Jan. 11, 1940); *Pittman v. Home Owners’ Loan Corp.*, 308 U.S. 21 (1939) (mandamus action requiring petitioner to record a mortgage in favor of respondent, argued Oct. 12 & 13, 1939); *Coleman v. Miller*, 307 U.S. 433 (1939) (proceeding in mandamus to address the Child Labor Amendment, argued Oct. 10, 1938); *Perkins v. Elg*, 307 U.S. 325 (1939) (addressing a citizenship issue, argued Feb. 3, 1939); *O’Malley v. Woodrough*, 307 U.S. 277 (1939) (resolving tax issue that arose pursuant to the Revenue Act of 1932, argued Apr. 28, 1939); *United States v. Morgan*, 307 U.S. 183, 185 (1939) (determining “the proper disposition to be made of a fund paid into the court below pending a suit instituted in that court to set aside an order of the Secretary of Agriculture,” argued Oct. 20 & 21, 1938); *Graves v. N.Y. ex rel. O’Keefe*, 306 U.S. 466 (1939) (resolving a tax issue arising pursuant to the Home Owners Loan Act of 1933, argued March 6, 1939); *Utah Fuel Co. v. Nat’l Bituminous Coal Comm’n*, 306 U.S. 56 (1939) (considering an issue arising under Bituminous Coal Act of 1937, argued January 3, 1939); *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177 (1938) (construing definition of “interurban electric railway,” argued Oct. 19, 1938); *Interstate Circuit, Inc. v. United States*, 304 U.S. 55 (1938) (addressing requirement of findings in equity, argued Apr. 5, 1938); *Morgan v. United States*, 304 U.S. 1 (1938) (resolving the validity of maximum rates fixed by the Secretary of Agriculture, argued March 10 & 11, 1938).

80. *Compare* Gardner, *supra* note 60, at 442 (estimating that Jackson won “some twenty-seven arguments” before the Court), *with* Graffeo, *supra* note 75, at 545 n.17 (“Scholars and

advocate drew substantial praise and even endeared members of the Court to him;⁸¹ Justice Brandeis went so far as to say that Jackson should be Solicitor General for life.⁸²

Like his prior legal work, Jackson's work as Solicitor General did not include criminal procedure issues.⁸³ But unlike his prior attorney positions with the government, there was an element of discretion that Jackson could exercise as Solicitor General to select cases for possible argument to the Supreme Court.⁸⁴ By all accounts, Jackson took advantage of this discretion to select cases that focused on the New Deal.⁸⁵ In 1938, as Solicitor General, Jackson argued six cases before the Court, none of which included a criminal procedure issue.⁸⁶ Similarly, in 1939, Jackson argued nine cases, seven of which he argued in ten days,⁸⁷ and none of which implicated criminal procedure.⁸⁸ In the first month of 1940, his final month as Solicitor General, Jackson argued two more cases, and again, the range of issues omitted criminal procedure.⁸⁹ In total, Jackson argued seventeen cases to the Supreme

Jackson's Assistant Solicitors General disagree on the number of cases that Robert Jackson argued successfully before the U.S. Supreme Court, primarily due to their differing methods of accounting for rearguments.”).

81. Warner Gardner, who served as First Assistant to the Solicitor General during Jackson's tenure, remarked, “I have . . . seen none who could so surely and so naturally cut to the heart of a case.” Gardner, *supra* note 60, at 441.

82. Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955).

83. Prettyman, *supra* note 74, at 76 (“None of his cases involved criminal law; the subject matter, instead, ranged from antitrust, federal procedure, immigration and tax to bankruptcy and communications.”).

84. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324 (2010) (“The U.S. Solicitor General, as the U.S. Supreme Court's premier advocate, has long exerted significant influence over both the Court's case selection decisions and its substantive decisions on the merits.”); Graffeo, *supra* note 75, at 544 (“[T]he Solicitor's authority to choose cases for appeal serves a critical gatekeeping function for the Supreme Court.”).

85. Graffeo, *supra* note 75, at 544; *see* JACKSON, THAT MAN, *supra* note 66, at xvi.

86. *Coleman v. Miller*, 307 U.S. 433 (1939); *United States v. Morgan*, 307 U.S. 183, 185 (1939); *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177 (1938); *Interstate Circuit, Inc. v. United States*, 304 U.S. 55 (1938); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Bekins*, 304 U.S. 27 (1938).

87. Prettyman, *supra* note 74, at 75.

88. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939); *Perkins v. Elg*, 307 U.S. 325 (1939); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Mulford v. Smith*, 307 U.S. 38 (1939); *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939); *Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n*, 306 U.S. 56 (1939).

89. *Fly v. Heitmeyer*, 309 U.S. 146 (1940); *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 136–37 (1940).

Court during his time as Solicitor General,⁹⁰ none of which included a criminal procedure issue.

After Supreme Court Justice Pierce Butler died on November 16, 1939,⁹¹ President Roosevelt on January 4, 1940 submitted the names of then Attorney General Frank Murphy to fill the Supreme Court vacancy and of Robert Jackson to become Attorney General.⁹² Jackson was subsequently confirmed as Attorney General and took his oath of office on January 18, 1940.⁹³ He argued only three cases to the Supreme Court while serving as Attorney General: all of which he won,⁹⁴ but none of which involved criminal procedure.⁹⁵

Consistent with the description of his new position (to only appear before the Supreme Court in rare circumstances), Jackson's focus was not on Supreme Court litigation.⁹⁶ By the Spring of 1940, Adolf Hitler had amassed an extraordinary German military force that had already occupied Denmark, Poland, France, Norway, Holland, and Belgium.⁹⁷ When the Nazi force turned its attention to Britain, Prime Minister

90. Another commentator suggests that Jackson argued twenty-four times to the Supreme Court while serving as Solicitor General, but that commentator does not cite cases to support the higher figure. Prettyman, *supra* note 74, at 76 (asserting that there were twenty-four arguments in twenty-one total cases; three were rearguments). A June 1939 issue of *Time Magazine* also reports that Jackson made twenty-four arguments, losing two, but does not provide a list. National Affairs, *Judiciary: Jackson's Term*, TIME MAG., June 12, 1939, at 17; cf. CURRENT BIOGRAPHY, *supra* note 62, at 428 (indicating that Jackson made twenty-four arguments, without listing them, and suggesting he lost three). Jackson's otherwise extraordinarily comprehensive biography does not provide a list of Jackson's argued cases, choosing instead to simply note that they are "matters of record which need not be repeated here." GERHART, *supra* note 48, at 191.

91. GERHART, *supra* note 48, at 182.

92. *Id.* at 187. Francis Biddle was appointed to replace Jackson as Solicitor General. *Id.*

93. GERHART, *supra* note 48, at 190.

94. Prettyman, *supra* note 74, at 76. Jackson's predecessor, Frank Murphy, never appeared before the Supreme Court. *Id.*

95. *United States v. Morgan*, 313 U.S. 409 (1941) (addressing decision by the Secretary of Agriculture to set maximum rates charged by market agencies for services at Kansas City Stockyards, argued Apr. 10, 1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (resolving action to enjoin the collection of taxes under the Bituminous Coal Act of 1937, argued Apr. 29, 1940); *Okla. ex rel. Williamson v. Woodring*, 309 U.S. 623 (1940) (addressing motion for leave to file a bill of complaint, argued Jan. 29 & 30, 1940).

96. *Office of the Attorney General: About the Office*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/ag/about-oag.html> (last visited September 22, 2014) ("In matters of exceptional gravity or importance the Attorney General appears in person before the Supreme Court.").

97. IVOR MATANLE, *WORLD WAR II*, at 31–42 (1989) (discussing, in separate chapters, the Nazi invasions of Norway, Holland, and Belgium); SHIRER, *supra* note 1, at 694–700 (discussing invasions of Denmark and Norway); C.M.A. McCauliff, *Union in Europe: Constitutional Philosophy and the Schuman Declaration, May 9, 1950*, 18 COLUM. J. EUR. L. 441, 446 (2012) (noting "France fell to the Nazis in June 1940"); Elissa S. Myerowitz, *Protecting Cultural Property During a Time of War: Why Should Russia Return Nazi-Looted Art*, 20 FORDHAM INT'L L.J. 1961, 1987 n.163 (1997) (documenting Hitler's invasion of Poland in 1939).

Winston Churchill relayed his first official message to President Roosevelt requesting “the loan of forty or fifty of your older destroyers to bridge the gap between what we have now and the large new construction we put in hand at the beginning of the war.”⁹⁸ By the conclusion of two of Jackson’s three arguments as Attorney General to the Supreme Court that Spring,⁹⁹ he—and Roosevelt—had shifted their attention to wartime.¹⁰⁰

Roosevelt sought the counsel of his Attorney General about Churchill’s request. Jackson told Roosevelt that “old World War I 75’s, machine guns and Lee-Enfield rifles could legally be made available to the Allies if declared obsolescent by the United States armed services.”¹⁰¹ That, however, did not sufficiently appease Churchill, who again requested destroyers from Roosevelt via telegram on July 31, 1940.¹⁰² Despite complex legal limitations restricting the legality of the transaction,¹⁰³ Jackson helped facilitate the transfer of fifty destroyers to Britain¹⁰⁴—a transaction one commentator later termed “a milestone in the development of American foreign policy.”¹⁰⁵ Labeled the “Lend-Lease Act of March 11, 1941,” the legislation “authorized the president to implement when necessary immediate transfer—to a value of \$1.3 billion—of war supplies . . . to any countries whose defense he considered critical to the safety of the United States.”¹⁰⁶

Even as Jackson focused on complex wartime legal issues as Attorney General,¹⁰⁷ he faced the first (and arguably only) major criminal procedure issue in his pre-Nuremberg career. Nearly three thousand complaints arrived daily at the Federal Bureau of Investigation

98. GERHART, *supra* note 48, at 213.

99. *Adkins*, 310 U.S. at 381; *Woodring*, 309 U.S. at 623.

100. See generally DAVID REYNOLDS, THE CREATION OF THE ANGLO-AMERICAN ALLIANCE, 1937–41: A STUDY IN COMPETITIVE CO-OPERATION 119–20 n.7 (1982) (referring to Roosevelt’s private writings in June 1940 about his long-term fears of the possibilities of the destroyers falling into German hands); William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-for-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 41 (2012) (discussing Jackson’s involvement in and Roosevelt’s response to Great Britain’s request for destroyers beginning May 15, 1940).

101. GERHART, *supra* note 48, at 213.

102. *Id.* at 215.

103. *Id.* at 219–21.

104. 1 THE AMERICAN ECONOMY: A HISTORICAL ENCYCLOPEDIA 267 (Cynthia Clark Northrup ed., 2011).

105. GERHART, *supra* note 48, at 221.

106. THE AMERICAN ECONOMY, *supra* note 104, at 267.

107. Robert H. Jackson, *The Exchange of Destroyers for Atlantic Bases* (Dec. 3, 1952) (unpublished manuscript), in JACKSON, THAT MAN, *supra* note 66, at 82–110; see Casto, *supra* note 100, at 40.

from Americans concerned about possible spies.¹⁰⁸ Consistent with his now long-standing concern with the rise of Nazi Germany and the Soviet Union,¹⁰⁹ Roosevelt sought to implement a program of domestic wiretapping.¹¹⁰ His aim, however, was, complicated by Jackson's announcement on March 18, 1940—allegedly spurred on by FBI Director J. Edgar Hoover¹¹¹—that “[w]ire tapping as a means of procuring evidence will not be used in the future by the Department of Justice, nor will it handle the cases of other government departments when any of the evidence is procured through wire tapping.”¹¹² That position seemed to correspond directly with two Supreme Court holdings—one issued in 1937, and the other in 1939—making clear that the Communications Act of 1934 prohibited domestic wiretapping.¹¹³

In May 1940, two months after Jackson's announcement, Roosevelt confidentially wrote to Jackson his belief that the Supreme Court's two holdings, alongside the Communications Act of 1934, were never intended “to apply to grave matters involving the defense of the nation.”¹¹⁴ Accordingly, Roosevelt “authorized and directed” Jackson to wiretap “persons suspected of subversive activities against the

108. JARROW, *supra* note 31, at 55.

109. Neal K. Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1037 (2008).

110. See JACKSON, THAT MAN, *supra* note 66, at 68.

111. Special to *The New York Times*, *Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation*, N.Y. TIMES, Mar. 18, 1940, at A1 (noting that Jackson's announcement originated “[o]n the recommendation of J. Edgar Hoover, Director of the Federal Bureau of Investigation”). There are numerous documented instances where Hoover sought to persuade Jackson that wiretaps were “essential” and, moreover, that a failure to wiretap would expose the Department of Justice to “public indignation” should there occur a “national catastrophe.” Katyal & Caplan, *supra* note 109, at 1049.

112. *Justice Department Bans Wire Tapping*, *supra* note 111.

113. *Nardone v. United States*, 308 U.S. 338, 340 (1939) (holding that evidence obtained via illicit wiretapping may not be used directly or indirectly); *Nardone v. United States*, 302 U.S. 379, 380 (1937) (construing the Communications Act of 1934 to prohibit the introduction of “procured by a federal officer's tapping telephone wires and intercepting messages”). Certain members of the Justice Department were apparently not persuaded that *Nardone I* was particularly far-reaching; as *The New York Times* reported, “[e]ven in the face of the absolute barrier against use of wire-tapping evidence in the courts, there was a question in the minds of some Department of Justice officials whether listening in on telephone conversations was still not permissible.” Special to *The New York Times*, *High Court Bars Testimony Based on Wire-Tapping*, N.Y. TIMES, Dec. 21, 1937, at A1. Whatever *Nardone I* left unclear, though, seemed clarified by *Nardone II*—or at least that's what the media thought. Special to *The New York Times*, *High Court Widens Wiretapping Ban; Bars Indirect Use*, N.Y. TIMES, Dec. 12, 1939, at A1 (observing that *Nardone II* served to “preclude[] the use of wire-tapping evidence, in what seems every form”).

114. *United States v. U.S. Dist. Court*, 444 F.2d 651, 669–70 (6th Cir. 1971) (reproducing the full text of Roosevelt's confidential May 21, 1940 memorandum to Jackson in Appendix A).

Government of the United States, including suspected spies.”¹¹⁵ Roosevelt asked that Jackson “limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.”¹¹⁶

Roosevelt’s confidential memorandum to Jackson seemingly changed everything about the remainder of Jackson’s tenure as Attorney General. From May 1940 until Jackson’s July 1941 confirmation to the Supreme Court as its eighty-seventh Associate Justice, Jackson was consumed by evaluating the legality of wiretapping.¹¹⁷ At first, in response to the President’s directive, Jackson seemed conflicted; despite (or perhaps because of) *his* personal position against wiretapping,¹¹⁸ Jackson nevertheless delegated wiretapping responsibility to Hoover in compliance with Roosevelt’s directive.¹¹⁹

As Hoover, with Jackson’s knowledge,¹²⁰ implemented the imprecise boundaries of the President’s confidential wiretapping directive,¹²¹ Jackson worked tirelessly toward legislation favorable to wiretapping in an effort to safeguard what he perceived to be a threat to individual civil liberties.¹²² He was particularly concerned with Hoover’s desire to expand the FBI’s wiretapping efforts beyond criminal investigations,¹²³

115. *Id.* at 670.

116. *Id.*

117. Katyal & Caplan, *supra* note 109, at 1047–52 (examining Jackson’s work on wiretapping beginning in March 1940 through May 1941).

118. JACKSON, THAT MAN, *supra* note 66, at 68–69 (noting in part Jackson’s belief that “wire tapping was a source of real danger if it was not adequately supervised . . .”).

119. Whether Jackson expressly delegated to Hoover on this issue is less than clear. Rather, shortly after Roosevelt’s confidential memorandum, Jackson wrote to Hoover that he would not keep a “detailed record” about “the cases in which wire-tapping would be utilized.” Katyal & Caplan, *supra* note 109, at 1051–52 (internal citation and quotation marks omitted). Interestingly, Jackson’s personal memoirs suggest the opposite: “But I had regular reports and was pretty closely in touch with [wiretapping] to make sure that it was not abused.” JACKSON, THAT MAN, *supra* note 66, at 69. Two commentators suggest that Jackson’s inclusion of such language in his memoirs is “historical revisionism.” Katyal & Caplan, *supra* note 109, at 1052.

120. See Katyal & Caplan, *supra* note 109, at 1053 (noting that, in his letter to Congress, “Jackson did not fess up about the fact that the government was already wiretapping”); see Athan Theoharis, *FBI Wiretapping: A Case Study of Bureaucratic Autonomy*, 107 POL. SCI. Q. 101, 105–06 (1992) (“In effect, Jackson’s decision not to maintain written records of approved wiretaps or require a written justification whenever the FBI director sought approval to wiretap effectively negated the intended restrictions of Roosevelt’s directive: that such uses be exceptional and limited to aliens and that the attorney general authorize each wiretap after first assessing each request of the FBI director.”).

121. Katyal & Caplan, *supra* note 109, at 1058 (noting that Hoover wiretapped organizations and businesses including the NAACP, Kyffhaeuser Bund, and the Revolutionary Workers League).

122. See JACKSON, THAT MAN, *supra* note 66, at 68 (“After the decision in *Nardone v. United States* came down in late 1939, I as Attorney General quickly issued an order to discontinue all use of the interception of wire communications.”).

123. See *id.* at 69. Jackson’s opposed a House resolution that “sought generally to authorize

and the prospect that wiretapping could extend into wartime abuses.¹²⁴ Notwithstanding Jackson's efforts, Congress responsively declined to amend the Communications Act of 1934 (or enact other legislation), and the Supreme Court did not reconsider or otherwise amend its approach to domestic wiretapping.¹²⁵ To worsen matters from Jackson's standpoint, Roosevelt also later gave his "general approval" to a broadened FBI wiretapping effort.¹²⁶

But Jackson's time as Attorney General was drawing to a close, and thankfully so he seemed to think. At the time of his nomination to the Supreme Court on June 12, 1941,¹²⁷ "Jackson 'held a certain interest,' in becoming attorney general," but the administration's approach to domestic spying was taking its toll.¹²⁸ Apart from his inability to successfully pursue Congressional action favorable to his view of wiretapping,¹²⁹ Jackson had fallen so ill at one point in January 1941 that he was unable to attend ceremonies commemorating Roosevelt's third inauguration.¹³⁰ And, from a substantive law standpoint, Jackson

FBI wiretapping 'in the interests of national defense.'" *Id.* Moreover, he "filed a letter with Congressman Emanuel Celler, who was heading the house investigation, pointing out the need for specific authorization with safeguards." *Id.*

124. Jackson went so far as to note that "wire tapping was a source of real danger if it was not adequately supervised, and that the secret of the proper use of wire tapping was a highly responsible use in a limited number of cases, defined by law . . ." *Id.* at 68–69. Jackson relives his exchanges with military leaders regarding espionage in his memoirs. *Id.* at 72–73.

125. See Katyal & Caplan, *supra* note 109, at 1059 ("Jackson unsuccessfully sought to convince Congress to enact legislation that would authorize the Attorney General to do what the President was already confidentially requiring him to do."). Congress and the Supreme Court would of course ultimately amend their respective approaches to wiretapping. *Compare* Katz v. United States, 389 U.S. 347, 356–57 (1967) (holding that the Fourth Amendment applied to the government's use of an electronic eavesdropping device, attached to a phone booth, to listen to a suspect's phone conversations), with Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(2)(e) (2012) ("Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance . . . as authorized by [the Foreign Intelligence Surveillance Act of 1978].").

126. Katyal & Caplan, *supra* note 109, at 1059–60 (noting that the Secretary of War and the Secretary of the Navy supported expanding FBI wiretapping).

127. GERHART, *supra* note 48, at 231. Jackson had actually hoped for nomination to the position of Chief Justice, *id.* at 230–31, which Harlan Fiske Stone received. Frank L. Kluckhohn, *Stone Chosen Chief Justice; Jackson and Byrnes Named*, N.Y. TIMES, June 13, 1941, at A1.

128. HOCKETT, *supra* note 48, at 236.

129. See Katyal & Caplan, *supra* note 109, at 1060 ("However, Jackson's efforts to secure legislation abruptly failed just as his time as Attorney General came to an end."); see also David M. Helfeld, *A Study of Justice Department Policies on Wire Tapping*, 9 LAW. GUILD REV. 57, 63 (1949) (noting that "Congress rejected all proposed amendments" to the Communications Act and "after 1942 the Justice Department ceased asking" for them).

130. Associated Press, *Jackson Ill, Son Represents Him*, N.Y. TIMES, Jan. 21, 1941, at 6; John Q. Barrett, *On the Eve of an Unprecedented Inauguration (1941)*, JACKSON LIST (Jan. 16, 2009), <http://thejacksonlist.com/wp-content/uploads/2014/02/20090116-Jackson-List-Inauguration.pdf>.

also preferred antitrust matters and specifically “found foreign affairs less stimulating than domestic governance.”¹³¹

Jackson took his official oath of office on July 11, 1941, to become an Associate Justice of the United States Supreme Court.¹³² He did so after having completed an extraordinary rise,¹³³ one that—as discussed—included an impressively deep background in politics,¹³⁴ tax,¹³⁵ and antitrust.¹³⁶ But Jackson, prior to his time on the Supreme Court, still seemingly had no meaningful opportunity to develop his approach to domestic criminal procedure issues, at least not in the same way he did with Roosevelt’s New Deal policies.¹³⁷

Jackson seemed to inadvertently solidify this conclusion by penning *The Struggle for Judicial Supremacy* at the end of his government attorney career.¹³⁸ Published in 1941, the book originated from speeches he gave in favor of Roosevelt’s court-packing plan,¹³⁹ which grew into a more polished product following Roosevelt’s suggestion that Jackson document his administration’s conflict with the Supreme Court over New Deal legislation.¹⁴⁰ The book was¹⁴¹ (and to some extent still is)¹⁴² cited both by the Supreme Court and scholars alike.¹⁴³

131. HOCKETT, *supra* note 48, at 236.

132. GERHART, *supra* note 48, at 233. Jackson was earlier confirmed by voice vote on July 8, 1941. Special to *The New York Times*, *Senate Voice Vote Confirms Jackson*, N.Y. TIMES, July 8, 1941, at 15.

133. Jackson, *Trusted Roosevelt Aide, Rose Rapidly Under the New Deal*, N.Y. TIMES, June 13, 1941, at 3.

134. See GERHART, *supra* note 48, at 166–202 (discussing generally Jackson’s positions as Solicitor General, Assistant U.S. Attorney, and U.S. Attorney General); Graffeo, *supra* note 75, at 540 (noting Jackson’s work with the Democratic Party).

135. Stark, *supra* note 30, at 173 (characterizing Jackson’s government tax lawyer experience as “varied and high profile, offering him a brief but intense exposure to the government side of the practice of tax law”).

136. CURRENT BIOGRAPHY, *supra* note 62, at 428 (discussing Jackson’s background in antitrust).

137. Cf. Bruce A. Green, *Of Laws and Men: An Essay on Justice Marshall’s View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 371 (1994) (noting the opposite for Justice Marshall who, because of his experiences as Solicitor General, may have acquired “an even greater appreciation of law enforcement interests in criminal cases”).

138. JACKSON, STRUGGLE FOR JUDICIAL SUPREMACY, *supra* note 65.

139. DOROTHY BUCKTON JAMES, JUDICIAL PHILOSOPHY AND ACCESSION TO THE COURT: THE CASES OF JUSTICE JACKSON AND DOUGLAS 77–78 (1966).

140. Graeme A. Barry, “*The Gifted Judge*”: *An Analysis of the Judicial Career of Robert H. Jackson*, 38 ALBERTA L. REV. 880, 889 (2000).

141. See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111, 117 n.10 (1965); *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 16 (1955) (Clark, J., dissenting); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 433 n.42 (1946).

142. See, e.g., *United States v. Morrison*, 529 U.S. 598, 654 (2000); *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 674 (1980) (Rehnquist, J., concurring); *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971).

The text, in short, provided a window into Jackson's overarching judicial philosophy—a philosophy that emphasized judicial restraint¹⁴⁴—and led one commentator to conclude that Jackson's text laid the foundation for the scholarly field of constitutional history.¹⁴⁵

The point is hopefully clear: after confronting a wide range of domestic governance issues in the context of an extraordinarily important time in our nation's domestic history—the New Deal—Jackson's response—to write a book—affected and continues to impact how we conceptualize judicial philosophies.¹⁴⁶ As we shall see, his transformative service to the law would soon be extended beyond substantive civil legal issues and repeated in the criminal procedure context.

But his confrontation with criminal procedure was still to come.

B. Transition to Supreme Court Justice: Jackson's Criminal Procedure Work on the Court from 1941–1945

Following his confirmation in July 1941, Jackson served on the Supreme Court until his death in 1954.¹⁴⁷ His time on the Court was interrupted, however, by an absence from the entire October Term in 1945. During this time, he served as United States Chief Prosecutor for the International Military Tribunal at Nuremberg, prosecuting Nazi leaders for their actions during World War II.¹⁴⁸ Before his absence, the first part of Jackson's tenure on the Court—from 1941–1945—saw Jackson remarkably decline to assert himself in the Court's work on

143. See, e.g., Laura A. Cisneros, *Youngstown Sheet to Boumediene: A Story of Judicial Ethos and the (Un)Fastidious Use of Language*, 115 W. VA. L. REV. 577, 599 n.92 (2012); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1206 n.34 (2009); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 395–96 (2008).

144. E.g., Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 TEMP. L. REV. 51, 59 (1999) (noting that Jackson's book “expounded a view of judicial restraint within the federalism context”).

145. Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 TEX. L. REV. 1707, 1709 (1994).

146. E.g., J. Peter Byrne, *Regulatory Takings and “Judicial Supremacy”*, 51 ALA. L. REV. 949, 950 (2000) (characterizing Jackson's book as “[o]ne of the most eloquent critiques of excessive judicial lawmaking”); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1000 (2000) (discussing the “shift in attitudes toward judicial review from the Populist/Progressive era to the New Deal era”); Dwight J. Simpson, *Robert H. Jackson and the Doctrine of Judicial Restraint*, 3 UCLA L. REV. 325, 326 (1956) (discussing Jackson's “forthright espousal of the doctrine of judicial restraint”).

147. Wilson Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1, 9 (2007).

148. Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 ALB. L. REV. 55 (2004).

search and seizure, confessions, and right to counsel issues. Accordingly, and consistent with Jackson's prior legal work, this Subpart concludes, that he did not develop a meaningful and coherent philosophy related to criminal procedure issues during his early time on the Supreme Court. Although intermittent evidence of what would become his post-Nuremberg approach exists, it is limited; Jackson's pre-Nuremberg approach to criminal procedure was therefore underdeveloped.

To demonstrate these conclusions, this Subpart considers Jackson's participation on the Court's criminal procedure work from 1941–1945 and focuses, consistent with this Article's thesis, on search and seizure, confessions, and right to counsel issues. During that four-year span, the Court heard a total of 639 cases,¹⁴⁹ 16 of which were focused on criminal procedure issues,¹⁵⁰ though Jackson did not participate in 4 of them.¹⁵¹ Although Jackson wrote *fourteen* opinions related to criminal law issues,¹⁵² by comparison, he wrote just *one* opinion on a case that

149. *U.S. Supreme Court Center*, JUSTIA, <http://supreme.justia.com/cases/federal/us> (last visited September 22, 2014).

150. By topic, Jackson participated in the following search and seizure, confession, and right to counsel cases:

- Search and Seizure: *United States v. White*, 322 U.S. 694 (1944).
- Confessions: *Malinski v. New York*, 324 U.S. 401 (1945); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Ward v. Texas*, 316 U.S. 547 (1942); *Lisenba v. California*, 314 U.S. 219 (1941).
- Right to Counsel: *Rice v. Olson*, 324 U.S. 786 (1945); *White v. Ragen*, 324 U.S. 760 (1945); *House v. Mayo*, 324 U.S. 42 (1945), *overruled by* *Hohn v. United States*, 542 U.S. 236 (1998); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Betts v. Brady*, 316 U.S. 455 (1942).

Not included in the confession cases are *McNabb v. United States*, 318 U.S. 332 (1943), *superseded by statute*, 18 U.S.C. § 3501, *as recognized in* *Corley v. United States*, 556 U.S. 303 (2009), and *United States v. Mitchell*, 322 U.S. 65 (1944). Although the defendants in both cases confessed, the Supreme Court in its *McNabb* and *Mitchell* opinions focused on federal procedures required for when an interrogated defendant must appear before a magistrate.

151. *Feldman v. United States*, 322 U.S. 487 (1944); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Goldman v. United States*, 316 U.S. 129 (1942); *Goldstein v. United States*, 316 U.S. 114 (1942).

152. In chronological order, Jackson's criminal law–related opinions from 1941–1945 are as follows: *Edwards v. California*, 314 U.S. 160 (1941) (Jackson, J., concurring) (addressing constitutional challenge to a statute that criminalized bringing an indigent person across state lines); *Duckworth v. Arkansas*, 314 U.S. 390 (1941) (Jackson, J., concurring) (addressing challenge to an Arkansas statute requiring a permit to transport liquor through the state); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (Jackson, J., concurring) (considering challenge by convicted felon who faced sterilization); *Williams v. North Carolina*, 317 U.S. 287 (1942) (Jackson, J., dissenting) (considering challenge to convictions for bigamy); *Pendergast v. United States*, 317 U.S. 412 (1943) (Jackson, J., dissenting) (considering whether criminal contempt charge was barred by the statute of limitations); *Spies v. United States*, 317 U.S. 492 (1943) (holding that the crime of income tax evasion required a “willful” attempt to disregard taxes); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (Jackson, J., dissenting) (addressing whether collusive

sought resolution of a substantive state criminal procedure issue.¹⁵³

Admittedly, domestic criminal procedure during Jackson's early tenure on the Court was, at best, undeveloped. Remember that, for search and seizure issues, the Supreme Court had not yet held that the Fourth Amendment applied to the states.¹⁵⁴ The same was true for the Fifth Amendment.¹⁵⁵ And, for purposes of the right to counsel, indigent defendants were still temporally a long way away from the promise of appointed counsel under *Gideon v. Wainwright*.¹⁵⁶ Accordingly, any limitation imposed by the Supreme Court on a state's administration of criminal procedure would have to come from the Fourteenth Amendment's Due Process Clause.¹⁵⁷ And, given that Jackson joined the Court after having just published a book on the importance of judicial restraint,¹⁵⁸ it seemed unlikely that he would favor relying on the Due Process Clause to limit states' approach to criminal procedure.

Such was the state of the law, and perhaps the state of Jackson's thought process, when the Court began the 1941 term—Jackson's first on the Court. That year, the Court decided a single, but important, confession case—*Lisenba v. California*¹⁵⁹—wherein Jackson joined the majority that concluded an uneducated defendant's confession was

bidding occurred); *Bowles v. United States*, 319 U.S. 33 (1943) (Jackson, J., dissenting) (considering whether convicted defendant should have been able to access a certain file related to his defense at trial); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Jackson, J., dissenting) (addressing First Amendment implications of a conviction for violating child labor laws); *Pollock v. Williams*, 322 U.S. 4 (1944) (addressing defendant's conviction who was arrested under a Florida statute that criminalized receiving cash advances for future work); *United States v. Ballard*, 322 U.S. 78 (1944) (Jackson, J., dissenting) (considering religious group's prosecution for mail fraud); *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., dissenting) (addressing legality of Japanese internment); *Oriolo v. United States*, 324 U.S. 824 (1945) (Jackson, J., dissenting) (considering interstate prostitution); *Cramer v. United States*, 325 U.S. 1 (1945) (addressing treason conviction).

153. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (Jackson, J., dissenting).

154. *See, e.g., Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment without the exclusionary rule). It was not until later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the Court held that the Fourth Amendment's exclusionary rule applied to the states through Fourteenth Amendment.

155. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (holding that the Due Process Clause of the Fourteenth Amendment "incorporate[d]" the Self-Incrimination Clause of the Fifth Amendment).

156. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (interpreting the Sixth Amendment to require that states provide counsel to indigent criminal defendants).

157. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 304 (2001); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 150 (2001).

158. JACKSON, *supra* note 65, at 315 (characterizing the Supreme Court as having a "plain duty to enforce explicit constitutional provisions even in opposition to the majority").

159. *Lisenba v. California*, 314 U.S. 219 (1941).

voluntary despite police interrogation that involved physical contact, sleep deprivation, prolonged interrogation sessions, and the denial of counsel.¹⁶⁰

Six months later, the Court reached the opposite conclusion in *Ward v. Texas*,¹⁶¹ wherein a defendant argued that his confession was involuntary where he was “arrested without a warrant, taken from his home town, driven for three days from county to county, placed in a jail more than 100 miles from his home, questioned continuously, and beaten, whipped, and burned by the officer to whom the confession was finally made.”¹⁶² Despite the differing result, Jackson joined the majority, but did not write.¹⁶³ Jackson would write just one criminal procedure opinion between 1941 and 1945: a dissent in *Ashcraft v. Tennessee*.¹⁶⁴

By the time the Court heard arguments on February 28, 1944, in *Ashcraft*, the United States had been attacked¹⁶⁵ and had gone to war.¹⁶⁶ Thinking his work on the Court was comparatively unimportant, Jackson sought to leave the bench.¹⁶⁷ But Roosevelt asked that he remain on the Court, and he did.¹⁶⁸

Jackson’s continued presence on the Court paid dividends. Despite his absence of traditional legal educational training, and despite his extraordinary peer group on the bench, Jackson stood out early in his judicial tenure.¹⁶⁹ By the time of the *Ashcraft* oral arguments, Jackson

160. *Id.* at 241–42 (Black, J., dissenting).

161. *Ward v. Texas*, 316 U.S. 547 (1942).

162. *Id.* at 549.

163. One scholar, in seeking to explain the differing results in *Ward* and *Lisenba*, suggests that the Court was driven by its belief in the defendants’ respective guilt—it thus arguably believed that the defendant in *Lisenba* was guilty but was not persuaded of the *Ward* defendant’s guilt. Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 341 n.183 (1998).

164. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (Jackson, J., dissenting).

165. United Press, *Tokyo Bombers Strike Hard at Our Main Bases on Oahu*, N.Y. TIMES, Dec. 8, 1941, at 1.

166. See Chesly Manly, *Congress Declares War on Japan in Speedy Session*, CHI. DAILY TRIB., Dec. 9, 1941, at 7 (“[C]ongress today adopted a resolution declaring the existence of a state of war with Japan.”).

167. JACKSON, THAT MAN, *supra* note 66, at 107. Indeed, following Japan’s December 7, 1941 attack on Pearl Harbor, Jackson discussed leaving the Court with Roosevelt and specifically told him that he felt like he “was not doing anything that promoted the war effort and not much that seemed to be very important in contrast with the great issues at stake in the world.” *Id.* Jackson was the Court’s junior member at the time of Pearl Harbor. He had at that point filed only two opinions: *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941) (Jackson, J., dissenting) and *Edwards v. California*, 314 U.S. 160 (1941) (Jackson, J., concurring).

168. JACKSON, THAT MAN, *supra* note 66, at 107.

169. HOCKETT, *supra* note 48, at 241.

had already penned well-received opinions in *West Virginia State Board of Education v. Barnette* (writing a majority opinion rejecting a flag-salute requirement in 1943),¹⁷⁰ *Korematsu v. United States* (writing a dissenting opinion rejecting Japanese American internment camps in 1944),¹⁷¹ and *Wickard v. Filburn* (writing a majority opinion clarifying Commerce Clause powers).¹⁷² Specifically regarding the *Barnette* case, the *New York Times* went so far as to call Jackson's opinion "one of the most notable writings in the [C]ourt's history."¹⁷³ Jackson had moreover established himself as a "'moderate liberal' toward civil liberty claims, and a 'moderate conservative' in business regulation and labor cases."¹⁷⁴ Consequently, Justice Frankfurter would later characterize Jackson's opinions as being "as lively as the liveliness of his talk."¹⁷⁵

Jackson received tremendous praise for many of his opinions, but that praise rarely extended to criminal procedure.¹⁷⁶ Perhaps that's why,

170. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 140–41 (1990) (discussing *Barnette* and noting that Jackson's opinion in that case "soared above Cardozo in eloquence"); GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 34 (1969) (suggesting that Jackson's opinion in *Barnette* "includes passages that rank among the great paeans to human liberty and freedom of the mind").

171. *Korematsu v. United States*, 323 U.S. 214 (1944); see John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 *LAW & CONTEMP. PROBS.* 57, 59 (2005) ("Justice Jackson's dissent in *Korematsu v. United States* merits its very high place in both the American legal and the human canons."); Jeff Bleich et al., *Dissenting from the Bench the Origins and Impact of A Modern Trend*, 69 *OR. ST. B. BULL.* 26, 28 (2008) (including Jackson's *Korematsu* dissent among "a veritable greatest-hits list of constitutional law"); David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women"*, 76 *MO. L. REV.* 1, 8 (2011) (observing that, according to Lawrence Tribe, "the dissenting opinion of Justice Jackson, not the majority opinion of Justice Black, has 'carried the day in the court of history.'" (quoting 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 237 n.118 (3d ed. 2000))).

172. *Wickard v. Filburn*, 317 U.S. 111 (1942); see Jim Chen, *Filburn's Legacy*, 52 *EMORY L.J.* 1719, 1747 (2003) ("*Filburn* is regarded today as the high-water mark of the New Deal's constitutional revolution."); Charles Fairman, *Associate Justice of the Supreme Court*, 55 *COLUM. L. REV.* 445, 464–65 (1955) (suggesting that, because of his opinion in *Wickard*, Jackson "takes his place in history as one who was pre-eminent in his day . . .").

173. Arthur Krock, *In the Nation: The Supreme Court at its Peak*, *N.Y. TIMES*, June 15, 1943, at 20.

174. JAMES, *supra* note 139, at 80.

175. Frankfurter, *supra* note 82, at 938.

176. One source praised Jackson's work on criminal procedure, focusing exclusively on his post-Nuremberg opinions. Fairman, *supra* note 172, at 469. Otherwise, the great weight of authority focuses on assessing the impact of his opinions in other substantive areas. See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 94–96 (Oxford Univ. Press 2d ed. 1996) (stating that Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* "has become a starting point for constitutional discussion of concurrent powers"); Barry, *supra* note 140, at 881 (highlighting "Jackson's specific jurisprudence relating to

when Jackson wrote his dissent in *Ashcraft*, his approach was different. In *Ashcraft*, the Court considered the admissibility, pursuant to the Fourteenth Amendment, of Ashcraft's confession, given after an interrogation that remarkably lasted thirty-six hours.¹⁷⁷ Suspected of killing his wife on June 5, 1941, officers took Ashcraft into custody on June 14, 1941, after talking to him about the circumstances of his wife's death on several occasions.¹⁷⁸ Law enforcement took Ashcraft to "an office or room" on the fifth floor of the Shelby County, Tennessee jail early that evening and "questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock."¹⁷⁹

During that time, Ashcraft never left the room and officers were forced to question him "in relays" because "they became so tired they were compelled to rest."¹⁸⁰ For his part, Ashcraft received "a single five minutes respite."¹⁸¹ Ashcraft ultimately said he gave officers the name of another man "who occasionally had ridden with him to work,"¹⁸² although officers recounted that Ashcraft told them that this other man—petitioner Ware—"overpowered him at his home and abducted the deceased, and was probably the killer."¹⁸³ At the time of his statement, Ashcraft said he was "blinded by a powerful electric light, his body became weary, and the strain on his nerves became unbearable."¹⁸⁴

The investigators collectively contended that Ashcraft was "'cool,' 'calm,' 'collected,' 'normal'"; "his vision was unimpaired and his eyes not bloodshot"; and, finally, "he showed no outward signs of being tired or sleepy."¹⁸⁵ Regardless of who was correct,¹⁸⁶ law enforcement

economic regulation, procedural due process, civil liberties, and the separation of powers doctrine"); Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 652–53 (2009) (discussing the impact of Jackson's opinion in *Cramer*, which focused on a treason issue); Mary L. Dudziak, *Law Power, and "Rumors of War": Robert Jackson Confronts Law and Security After Nuremberg*, 60 BUFF. L. REV. 367 (2012) (reviewing some of Jackson's more famous post-Nuremberg opinions, a review that does not include criminal procedure opinions); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 564 (1996) (praising Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which focused on Truman's seizure of the nation's steel mills).

177. *Ashcraft v. Tennessee*, 322 U.S. 143, 145, 149 (1944).

178. *Id.* at 147–49 (describing the circumstances of the victim's death and Ashcraft's interactions with officers "on several occasions").

179. *Id.* at 149.

180. *Id.*

181. *Id.*

182. *Id.* at 151.

183. *Id.*

184. *Id.* at 150.

185. *Id.* at 151.

detained Ware, who confessed after a nearly six-hour interrogation and told officers that Ashcraft hired him to kill his wife.¹⁸⁷ Ashcraft verbally admitted the truth of Ware's statement, but declined to sign the transcription of Ware's confession.¹⁸⁸ Premised on their statements, and apparently their statements alone,¹⁸⁹ both Ashcraft and Ware were convicted of murder in state court and sentenced to ninety-nine years in prison.¹⁹⁰ The Supreme Court of Tennessee affirmed.¹⁹¹

Relying on the Fourteenth Amendment, the Supreme Court reversed Ashcraft's conviction.¹⁹² In an opinion by Justice Black, the majority held that Ashcraft's confession was unconstitutionally "compelled."¹⁹³ The Court reasoned, "a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."¹⁹⁴ In stirring language, the majority added the following:

There have been, and are now, *certain foreign nations* with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.¹⁹⁵

Black's highlighting of the interrogation tactics of other nations was likely no temporal accident. By the time *Ashcraft* was published on May 1, 1944, Nazi Gestapo interrogation tactics¹⁹⁶—alongside the

186. The opinion's majority author, Justice Black, characterized factual disputes as the typical result of third-degree interrogation practices: "As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict." *Id.* at 149–50.

187. *Id.* at 151.

188. *Id.*

189. *Id.*; see *id.* at 149 (noting that "none" of law enforcement's investigative efforts prior to interrogating Ashcraft "produced tangible evidence pointing to the identity of the murderer").

190. *Id.* at 144.

191. *Id.* at 145.

192. *Id.* at 155–56.

193. *Id.* at 153.

194. *Id.* at 154.

195. *Id.* at 155 (emphasis added).

196. Threats of being sent to the Gestapo were used frequently in initial Nazi interrogation sessions. ARTHUR A. DURAND, *STALAG LUFT III*, at 64 (1999). For example, British and American airmen were held in solitary confinement while awaiting interrogation, with temperatures inside their cells hot enough to make the bed scorch bare flesh. *Id.* Their diets were also woefully inadequate. *Id.* at 66. In special cases, the Gestapo also advocated forceful

Stalin regime's troubling questioning techniques¹⁹⁷—were firmly established and routinely used in territories under German or Soviet control.¹⁹⁸

But Jackson was not persuaded. In a dissent, joined by Justices Roberts and Frankfurter, Jackson proffered a distinct federalism concern, noting that “[w]e have no power to discipline the police or law-enforcement officers of the State of Tennessee nor to reverse its convictions in retribution for conduct which we may personally disapprove.”¹⁹⁹

Apart from his concern over states' rights,²⁰⁰ Jackson seemed to expressly approve of the techniques used by law enforcement to interrogate Ashcraft.²⁰¹ He was unconcerned by the length of the interrogation, and accused the majority of invalidating the confession “because of the time taken in getting it.”²⁰² But, if interrogation duration is a problem, Jackson argued, then “it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1?”²⁰³ The duration of interrogation should be particularly unproblematic, when as Jackson asserted happened in Ashcraft's case, a witness is not credible,²⁰⁴ experienced no physical abuse during the interrogation,²⁰⁵ and received

interrogation. GEORGE C. BROWDER, FOUNDATIONS OF THE NAZI POLICE STATE 234 (1990). Klaus Barbie, known as the “Butcher of Lyon” and S.S. and Gestapo member, tortured women and children during his interrogations in Lyon, France. *3 Women Testify of Torture at Hands of Klaus Barbie*, PHILA. INQUIRER, May 23, 1987, at A01.

197. See, e.g., ALAN WOOD, STALIN AND STALINISM 40 (2d ed. 2005) (“Sophisticated interrogation techniques, physical and mental torture, deprivation of sleep, threats to close relatives and the administration of narcotic drugs were used with deadly finesse to weed out and destroy the ‘enemies of the people.’”).

198. WOOD, *supra* note 197, at 40 (referring to Stalinist interrogation tactics used in 1938); *The Triumph of Hitler: The Gestapo is Born*, HISTORY PLACE (2001), <http://www.historyplace.com/worldwar2/triumph/tr-gestapo.htm> (noting reliance on the Gestapo as early as February 10, 1936).

199. *Ashcraft*, 322 U.S. at 158 (Jackson, J., dissenting).

200. Jackson reiterates this concern throughout the opinion. E.g., *id.* at 160 (“[W]e cannot read an indiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.”).

201. Jackson's personal case notes in *Ashcraft* do not reflect that he was concerned about the police interrogation techniques. To the contrary, Jackson notes simply “Longer examined greater suspicion. Finally told them negro did it. Of course proper hold him as [unintelligible] then.” Robert H. Jackson, Draft Opinion in *Ashcraft v. Tennessee*, No. 391 (on file with Library of Congress, Robert H. Jackson Papers, Box 131).

202. *Ashcraft*, 322 U.S. at 161 (Jackson, J., dissenting).

203. *Id.* at 162.

204. *Id.* at 172.

205. *Id.* at 171–72.

regular food and bathroom breaks.²⁰⁶ Rather, as a white, male property owner, “[t]he real issue is strength of character,” and Ashcraft was not the “victim of prejudice.”²⁰⁷ Accordingly, said Jackson, “[n]o conclusion that this confession was actually coerced can be reached on this record except by reliance upon the utterly uncorroborated statements of defendant Ashcraft.”²⁰⁸

Jackson’s position is to some extent difficult to understand. By May 1944, the Supreme Court was already well on its way to condemning state law enforcement’s use of “third degree” interrogation tactics (i.e., using physical or mental pain to extract a statement from a suspect).²⁰⁹ In 1940, shortly before Jackson’s arrival, the Supreme Court in *Chambers v. Florida*²¹⁰ invalidated state confessions taken from four defendants on facts remarkably similar to *Ashcraft*. Consider that, in *Chambers*, officers questioned the four suspects in the presence of multiple investigators and, at one point, relied on an “all night vigil” interrogation session.²¹¹ Like the interrogation sessions in *Ashcraft*, the interrogation sessions in *Chambers* became so long that the supervising sheriff was unable to interrogate the suspects at night because he was too tired.²¹² Moreover, like the sessions in *Ashcraft*, the *Chambers* suspects were denied sleep, questioned extensively, and could not confer either with counsel or a friend.²¹³

Justice Black even authored *Chambers*.²¹⁴ Relying on the Fourteenth Amendment, he powerfully warned states that, “[t]o permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.”²¹⁵ The Court thereafter relied on *Chambers* to invalidate two additional state confessions in 1940,²¹⁶ and two more in 1941.²¹⁷

206. *Id.* at 166–67.

207. *Id.* at 171, 173.

208. *Ashcraft*, 322 U.S. at 172 (Jackson, J., dissenting).

209. 1 NAT’L COMM. ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 19 (1931).

210. *Chambers v. Florida*, 309 U.S. 227, 238–42 (1940).

211. *Id.* at 230.

212. *Id.*

213. *Id.* at 233–35.

214. As is documented extensively elsewhere, Jackson and Black had a well-known feud while the two served on the Supreme Court together. Associated Press, *Jackson Attacks Black for Judging Ex-Partner’s Case*, N.Y. TIMES, June 11, 1946, at A1. It is perhaps unsurprising to find them at opposite ends of an issue. See generally FELDMAN, *supra* note 52, at 268–74 (discussing the circumstances that gave rise to their feud); GERHART, *supra* note 48, at 235–77 (dedicating an entire chapter to explore in depth the feud between Jackson and Black).

215. *Chambers*, 309 U.S. at 240.

216. *White v. Texas*, 310 U.S. 530, 532–33 (1940); *Canty v. Alabama*, 309 U.S. 629, 629

Although Jackson was not on the Court for those decisions, he was likely aware of them. And, although the Court would temporarily reverse course in October 1941—after Jackson joined the Court—by admitting a state confession obtained following overnight relay interrogation sessions,²¹⁸ Jackson was at least minimally on notice by *Ashcraft* of the Court’s general disapproval of even non-physically abusive interrogation techniques.

Following *Ashcraft*, but before Jackson’s departure for Nuremberg,²¹⁹ Jackson’s voting pattern in confession cases favored opinions that were deferential to the states.²²⁰ But he never explained why. For example, in June 1944, Jackson joined the majority in upholding a defendant’s written confession despite the confession having been obtained, in part, after a ten-hour interrogation where “a pan of the victims’ bones was placed in [defendant’s] lap by his interrogators.”²²¹

In March 1945, Jackson joined a partial dissent,²²² disagreeing with the majority’s decision to invalidate a state confession, despite law enforcement’s reliance on several lengthy interrogations that involved stripping the defendant and possibly beating him.²²³ In part, the dissent wrote that:

The rightful independence of the states in the administration of their own criminal laws in their own courts requires that in such cases we scrupulously avoid retrying the facts which have been submitted to the jury, except on a clear showing of error substantially affecting the constitutional rights of the accused.²²⁴

Although discerning Jackson’s judicial philosophy regarding confessions is challenging, that challenge is even greater when examining the Court’s 1941–1945 right to counsel and search and

(1940) (mem.).

217. *Vernon v. Alabama*, 313 U.S. 547 (1941) (mem.); *Lomax v. Texas*, 313 U.S. 544 (1941) (mem.).

218. *Lisenba v. California*, 314 U.S. 219, 229–33 (1941).

219. JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 272 (2007).

220. See *HOCKETT*, *supra* note 48, at 256 (explaining that *Ashcraft* reflects “Jackson’s advocacy of judicial deference”).

221. *Lyons v. Oklahoma*, 322 U.S. 596, 599–600 (1944). The suspect orally confessed following law enforcement’s reliance on this dramatic interrogation technique, and his confession was not offered into evidence. *Id.* at 600. Rather, the issue in *Lyons* was the admissibility of suspect’s subsequent written confession. *Id.*

222. *Malinski v. New York*, 324 U.S. 401, 434–39 (1945) (Stone, J., dissenting).

223. *Id.* at 403–04 (reviewing conflicting factual evidence of whether defendant was beaten, how long the interrogations lasted, and whether defendant was forcibly disrobed during one of the sessions).

224. *Id.* at 438.

seizure opinions, none of which were authored by Jackson. The Court decided five search and seizure cases during that period, but Jackson did not participate in four of them.²²⁵ The remaining case, *United States v. White*, provides no insight into Jackson's Fourth Amendment judicial philosophy.²²⁶ Although the respondent in *White* argued that the Fourth Amendment's Search and Seizure Clause provides a constitutional right for an officer of an unincorporated labor union to refuse to produce records of the union responsive to a subpoena, the Supreme Court relied almost exclusively on the Fifth Amendment to reject respondent's argument.²²⁷

The Court's six right to counsel cases during Jackson's pre-Nuremberg tenure are only slightly more revealing. Jackson's voting pattern foreshadows his ultimate view that counsel is exceptionally important, but the right to counsel is not unlimited—a view he would express post-Nuremberg.²²⁸ That view seems rooted in *Betts v. Brady*,²²⁹ the first right to counsel case Jackson heard, wherein the Court held that due process requires the state to—in unspecified “certain circumstances” (although not the circumstances at issue)—provide indigent defendants with counsel.²³⁰ The Court thereafter held five times in 1945 that certain denials of counsel unconstitutionally violated Due Process.²³¹

The point is hopefully clear: prior to his departure for Nuremberg, Jackson, in the limited number of opinions he joined or authored related to confessions, right to counsel, and/or search and seizure, established

225. *Feldman v. United States*, 322 U.S. 487 (1944); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Goldman v. United States*, 316 U.S. 129 (1942); *Goldstein v. United States*, 316 U.S. 114 (1942).

226. *United States v. White*, 322 U.S. 694 (1944).

227. *Id.* at 698.

228. *Compare Gryger v. Burke*, 334 U.S. 728, 729 (1948) (holding no denial of due process where defendant “was sentenced as a life offender without counsel or offer of counsel”), with *Townsend v. Burke*, 334 U.S. 736, 739–41 (1948) (holding a denial of due process existed where a defendant was interrogated and pleaded guilty without counsel).

229. *Betts v. Brady*, 316 U.S. 455 (1942).

230. *Id.* at 462 (declining constitutionally to require the provision of counsel to an indigent defendant indicted for robbery in state court).

231. *Rice v. Olsen*, 324 U.S. 786, 788 (1945) (“A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.”); *White v. Ragen*, 324 U.S. 760, 763–64, 766–67 (1945) (dismissing federal habeas petition but condemning state practice of declining to appoint counsel for petitioners in state habeas proceedings); *House v. Mayo*, 324 U.S. 42, 45–46, 48 (1945) (per curiam) (granting motion for leave to file petition for certiorari where counsel was absent during sentencing proceedings); *Tomkins v. Missouri*, 323 U.S. 485, 486–88 (1945) (no counsel provided in capital case); *Williams v. Kaiser*, 323 U.S. 471, 472 (1945) (no counsel provided during guilty plea and sentencing phases despite indigent defendant's request).

himself—with allowance made for certain circumstances in right to counsel cases²³²—as generally deferential to state-based criminal procedure. But why? Perhaps the pro-judicial restraint philosophy he advocated in the context of the New Deal guided his voting to some extent. But the dearth of Jackson-authored criminal procedure opinions leaves unclear why that rationale should apply to confessions, right to counsel, and/or search and seizure issues.

II. JACKSON’S TRANSFORMATION AT NUREMBERG

“*[T]he hard months at Nuremberg were well spent in the most important, enduring, and constructive work of my life.*”²³³

This Part describes Jackson’s first meaningful encounter with criminal procedure. It took place in London, where during the Summer of 1945, Allied delegates debated the merits of, and procedure for, a war criminals trial. During those lengthy and sometimes heated post-war negotiations, Jackson worked to assure that a trial of the Nazis would occur. During that time, he was forced to think through the merit of varied and competing international legal systems, each of which required that he develop a criminal procedure philosophy. The detailed minutes of the London Negotiations, as discussed in this Part, reflect that Jackson felt strongly that the accused should receive a *fair* trial, one that ensured the accused had due process and evidentiary trial protections. Accordingly, this Part does not focus on the evidence against the Nazis and the corresponding applicable law;²³⁴ rather, it

232. Jackson’s reserving the right to counsel as a special category of due process concerns—particularly for indigent defendants—was in hindsight likely foreseeable given his longtime view of the attorney as exceptionally important. For example, in a speech to the National Conference of Bar Association Delegates in 1934, Jackson said, “[i]t is a matter of self-preservation, as well as of social duty, that the bar assumes leadership in overhauling our procedure to put the processes of the courts in the reach of the people, and to make justice available to disadvantaged men.” Robert H. Jackson, *The Lawyer; Leader or Mouthpiece?*, 18 J. AM. JUD. SOC’Y 70, 74 (1934).

233. Robert H. Jackson, *Introduction* to HARRIS, *supra* note 11, at xxxvii.

234. See, e.g., M. Cherif Bassiouni, *The Nuremberg Legacy*, in PERSPECTIVES ON THE NUREMBERG TRIAL 577, 587–90 (Guenael Mettraux ed., 2008) (discussing the lack of precedent for the substantive criminal charges against defendants at Nuremberg and the problem of *ex post facto* involved in creating new substantive charges); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 564–65 (2006) (stating that “[e]ach of the legal grounds set forth in the London Charter was controversial” and noting the novelty of the concept of substantive law at Nuremberg); Henry T. King, Jr., *Lecture at Chautauqua Institution: Robert Jackson’s Place in History: Nuremberg Revisited* (June 13, 2003), available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/robert-jacksons-place-in-history-nuremberg-revisited/> (noting the three types of substantive crimes proposed by Jackson in the London Negotiations and the opposition he

addresses Jackson's first major encounter with criminal procedure: the London Negotiations.

Roosevelt condemned the Nazi concept of "total war" as early as October 25, 1941, when, in response to the Nazi execution of hostages in France, he said that such acts would "only sow the seeds of hatred which will one day bring fearful retribution."²³⁵ Roosevelt would not live to witness the accuracy of his prediction or the punishment of those adjudged responsible for wartime atrocities.²³⁶ While an artist sketched a portrait of Roosevelt at his vacation home in Warm Springs, Georgia, on April 12, 1945, the President complained of a "terrific headache."²³⁷ That pain turned out to be a stroke; Roosevelt died at 4:35 P.M. that day.²³⁸

Jackson was stunned.²³⁹ That same day, Chief Justice Stone administered the Presidential oath to Vice President Harry S. Truman.²⁴⁰ Speaking in Washington, D.C., at Roosevelt's funeral, an emotional Jackson said, "[w]e are glad that he lived the high moments when he could see that his efforts have led our country to the very threshold of victory both in Europe and the Orient."²⁴¹ But this was not the only speech Jackson gave that day.

Later, in an address to the American Society of International Law, also in Washington, D.C., Jackson referred, in part, to the prospect of trying war criminals:

I have no purpose to enter into any controversy as to what shall be done with war criminals, either high or humble. . . . [But,] I am not so troubled as some seem to be over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. . . . You must put no man on trial before anything that is called a court, if you are not prepared to establish his personal guilt. *I do not, of course, mean that every step must be taken in accordance with technical common-law rules of*

encountered in implementing his draft of the substantive laws).

235. HARRIS, *supra* note 11, at 3.

236. Roosevelt died "less than three months into his fourth term." FELDMAN, *supra* note 52, at 265.

237. Associated Press, *Last Words: 'I Have Terrific Headache'*, N.Y. TIMES, Apr. 13, 1945, at A1.

238. Arthur Krock, *End Comes Suddenly at Warm Springs*, N.Y. TIMES, Apr. 13, 1945, at A1.

239. JACKSON, THAT MAN, *supra* note 66, at 165; see FELDMAN, *supra* note 52, at 265 (noting that Roosevelt's death "particularly affected" Jackson).

240. C.P. Trussel, *Truman is Sworn in the White House*, N.Y. TIMES, Apr. 13, 1945, at A1.

241. JACKSON, THAT MAN, *supra* note 66, at 169; see FELDMAN, *supra* note 52, at 265-66 (recounting Jackson's speech and noting that, by the end, Jackson had "broken down").

proof. The evidence to be received depends upon what the circumstances make available.²⁴²

The speech, which Truman noticed,²⁴³ nicely represents a crude but emerging form of what became Jackson's post-Nuremberg criminal procedure judicial philosophy. By the time of Jackson's April 13 speech, the Allies were already consistently defeating Nazi forces,²⁴⁴ and it seemed clear that the war would end soon.²⁴⁵ The question would shift to punishment and responsibility,²⁴⁶ a question already debated internationally.²⁴⁷ President Truman, perhaps having heard or read Jackson's speech,²⁴⁸ and impressed by Jackson's credentials as a trial lawyer,²⁴⁹ had one of his top advisors, Judge Samuel Rosenman, contact Jackson on April 26, 1945,²⁵⁰ to ask whether Jackson would consider leaving the Court to prosecute Nazi war criminals.²⁵¹

242. Robert H. Jackson, *The Rule of Law Among Nations*, 19 TEMP. L.Q. 135, 140 (1945) (emphasis added); see *Speeches by Robert H. Jackson*, ROBERT H. JACKSON CTR., <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/> (last visited September 22, 2014) (noting the date and location of his address to the American Society of International Law).

243. See FELDMAN, *supra* note 52, at 275–76 (“Jackson’s speech was too directly focused on the war crimes issue to be a coincidence, and it suggested he hoped to position himself to serve in some capacity on the new tribunal.”); Taylor, *supra* note 18, at 495 n.37 (“President Truman’s attention had been called to Jackson’s address . . .”).

244. MATANLE, *supra* note 97, at 356–58 (detailing a handful of the Allied conquests in April 1945).

245. *Id.* at 359 (reproducing a letter from Hitler’s secretary, Martin Bormann, to Grand-Admiral Doenitz, which noted that “on account of the non-appearance of all the divisions, our position seems hopeless”).

246. President Roosevelt had begun considering in detail how to deal with the trial and punishment of Nazi War Criminals. In a secret memorandum to the President dated January 22, 1945, Roosevelt’s top advisors proposed who should be punished, where the trials should take place, and also crudely outlines what crimes the proposed defendants committed. Memorandum for the President, Jan. 22, 1945, in *Diary Kept by Jackson While Preparing for Trial*, Confidential Memorandum for the President, at 5–8 [hereinafter Jackson Nuremberg Diary] (on file with Library of Congress, Robert H. Jackson Papers, Box 95, Reel 1).

247. See Taylor, *supra* note 18, at 492 (footnote omitted) (noting that the United Nations War Crimes Commission, established in 1944, “gave intense and continuing study to such questions as the tribunals—national or international, military or civilian—by which those accused of war crimes would be tried and the scope and nature of the international penal law that would be invoked and applied.”).

248. *Id.* at 495 n.37.

249. Robert H. Jackson Diary Entry, Apr. 27, 1945, in *Jackson Nuremberg Diary*, *supra* note 246, at 22.

250. Taylor, *supra* note 18, at 495 n.38; see JACKSON, THAT MAN, *supra* note 66, at 109 (noting that Judge Rosenman was White House counsel at that time).

251. GERHART, *supra* note 48, at 308. Oddly, Jackson’s biography reports that he received Truman’s offer through Rosenman by phone, *id.*, but Jackson’s own diary says he met with Rosenman face-to-face. Robert H. Jackson Diary Entry, Apr. 27, 1945, in *Jackson Nuremberg Diary*, *supra* note 246, at 23.

Although he was “immensely pleased at the offer,” Jackson asked for, and received, the opportunity to evaluate whether he would accept.²⁵² At the time, Jackson was concerned about whether prosecuting the Nazis would be inconsistent with his responsibilities on the Supreme Court.²⁵³ Given that at least two of his colleagues would later oppose Jackson’s endeavors at Nuremberg,²⁵⁴ his concerns were hardly unfounded. He closed an April 27, 1945 entry in his diary with this passage: “Of course if I undertake it and find that the Court is embarrassed, I shall resign.”²⁵⁵ Jackson ultimately accepted the President’s offer on April 29.²⁵⁶ Remarkably, despite having no meaningful substantive background in criminal law or procedure either as a practitioner or Associate Justice, Jackson was tapped to devise criminal procedure in the first—and critically important—international criminal trial.²⁵⁷ Despite his meager background on the topic, a witness to the trials would say reflectively, “Jackson turned out to be the principal architect of the entire proceeding.”²⁵⁸ His road to doing so was hardly an easy one.

From the outset, Jackson knew he had to deal with proposals that the Nazi war criminals should be “allocated to penal labor”²⁵⁹ or shot in a series of summary executions—a position particularly advocated by the British.²⁶⁰ Against the zealotry of the other Allied nations to

252. Robert H. Jackson Diary Entry, Apr. 27, 1945, *supra* note 251, at 23.

253. *Id.*

254. Chief Justice Stone was opposed to Jackson’s appointment. Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 209 (1953) (noting Chief Justice Stone was “deeply disturbed” by Jackson’s appointment as Nuremberg prosecutor). So too were Justices Black and Douglas. WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG 134 (1970) (listing Justice Black as “another justice to whom personal considerations may well have been important” in Jackson’s decision to take a leave of absence for Nuremberg); WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 28–29 (1980) (stating that Justice Douglas agreed with Chief Justice Stone’s objections to Jackson’s leave of absence); GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 241 (1977) (describing Justice Black as “irate” about Jackson’s absence and Black’s dissatisfaction with the additional opinions he and the other justices had to write in Jackson’s absence); GEORGE MARTIN, CCB: THE LIFE AND CENTURY OF CHARLES C. BURLINGHAM, NEW YORK’S FIRST CITIZEN, 1858-1959, at 501 (2005) (referring to a later quote by Justice Douglas expressing Douglas’s disagreement with Jackson’s departure).

255. Robert H. Jackson Diary Entry, Apr. 27, 1945, *supra* note 251, at 23.

256. *Id.* at 24 (Memorandum from Jackson to the President).

257. See EHRENFREUND, *supra* note 20, at 10–11 (describing Jackson’s appointment as “remarkable” for a number of reasons, including his educational background and experience).

258. *Id.* at xiv.

259. Taylor, *supra* note 18, at 496.

260. EHRENFREUND, *supra* note 20, at 7–8. Roosevelt and Churchill had previously even signed an agreement on September 15, 1944, indicating that the Nazi leaders would, following capture, be “taken out in the yard and shot by a firing squad.” *Id.* at 7.

dispense hastily with the Nazi war criminals, Jackson was alone in his desire for them to receive a full and fair trial.²⁶¹ To advance his principled position, Jackson had to work quickly, even before his announcement as Chief Prosecutor was made public. Indeed, President Truman had indicated in his initial offer to Jackson that Judge Rosenman would leave in just a few days to present a proposal to the Allies,²⁶² which left little time for Jackson to prepare. Fortunately, as he considered the President's offer, he had already been furnished with a copy of a January 22, 1945 confidential memorandum prepared by Henry Stimson (Secretary of War), Edward Stettinius (Secretary of State), and Francis Biddle (Attorney General) to assist Roosevelt when he attended the Yalta Conference.²⁶³ That early memorandum proposed a trial of the Nazi war criminals by the United Nations War Crimes Commission, but noted that "[t]he labors of the Commission have not resulted in any governmental agreement as to the tribunals to try *or the procedures for trying war criminals.*"²⁶⁴

In his formal acceptance of Truman's offer, Jackson noted that the January 1945 memorandum "need[ed] a good deal of maturing in details," but that it "seem[ed] to afford a practicable and sound general basis for a summary but fair procedure."²⁶⁵ He suggested that "[w]e . . . start at once preparation of a short code of procedure, for submission to and adoption by the Commission."²⁶⁶ In doing so, Jackson cautioned, "we must try to outline a flexible but efficient procedure that will be both summary and in keeping with our traditional fairness towards those accused of crime."²⁶⁷ Truman's response, according to Jackson's personal diary, reflects Truman's confidence in Jackson's ability to complete a task that both men acknowledged to be an inordinate undertaking.²⁶⁸

261. EHRENFREUND, *supra* note 20, at 12.

262. Robert H. Jackson Diary Entry, Apr. 27, 1945, *supra* note 251, at 22 (emphasis added).

263. *Id.* at 2–3; see Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945, at 3 (U.S. Gov't Printing Office 1949) [hereinafter JACKSON REPORT], available at http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf. Yalta is a Ukrainian city on the Black Sea where, in February 1945, Roosevelt, Stalin, and Churchill met to discuss how to punish the Nazis. EHRENFREUND, *supra* note 20, at 9.

264. Memorandum for the President, Jan. 22, 1945, *supra* note 246, at 3 (emphasis added).

265. Memorandum for the President, Apr. 29, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 24.

266. *Id.* at 25.

267. *Id.*

268. Robert H. Jackson Diary Entry, Apr. 30, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 29.

On April 30, the same day that Hitler committed suicide,²⁶⁹ Jackson was provided with “a draft of the document which it was hoped the United Nations would sign setting up the tribunal and procedure.”²⁷⁰ The next day, Jackson authored a memorandum indicating that he thought the proposed trial procedures were “too impassioned,” included too much legalese, and were too inflexible.²⁷¹ He therefore hastily worked with representatives of the State, War, and Justice Departments to construct a different document that Judge Rosenman took with him to San Francisco for presentation to the Allies at the United Nations Conference on International Organization.²⁷²

The document, titled “American Draft of Definitive Proposal,” included considerably more detail than its predecessor. Of particular interest to this Article are the sections entitled “Due Process For Defendants” and “Evidence And Procedure.”²⁷³ Under the Due Process heading, the April 1945 Draft included the guarantee that the accused would receive “reasonable notice” of the charges against them, would receive a copy of the statement of those charges, and had the right to “be heard in their defense personally and by counsel.”²⁷⁴ The evidence heading was thinner and indicated both that the Tribunals should “adopt and apply . . . expeditious and non-technical procedures” and would “disallow action by defendants the effect of which will be to cause unreasonable delay.”²⁷⁵ Procedure, it seemed, was very much on Jackson’s mind, well before his appointment to Chief Prosecutor

269. IAN KERSHAW, *THE END: THE DEFIANCE AND DESTRUCTION OF HITLER’S GERMANY, 1944–1945*, at 346 (2011).

270. Robert H. Jackson Diary Entry, Apr. 30, 1945, *supra* note 268, at 29 (noting that Herbert Wechsler dropped the document off to Jackson, along with Colonel Bernays and Colonel Cutter).

271. Memorandum Re Document Entitled “Punishment of War Criminals”, dated 26 April, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 30–31.

272. American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, in JACKSON REPORT, *supra* note 263, at 22. Although the Draft is labeled “April,” the discussions in San Francisco took place between May 2–10. *Id.*

273. *Id.* at 24–25.

274. *Id.* at 25.

275. The full “Evidence And Procedure” heading provides as follows: 13. Tribunals established pursuant to this Agreement shall adopt and apply, to the greatest extent possible expeditious and non-technical procedures. 14. Such tribunals shall (a) admit any evidence which in their opinion has probative value, (b) confine trials strictly to an expeditious hearing of the issues raised by the charges, (c) disallow action by defendants the effect of which will be to cause unreasonable delay or the introduction of irrelevant issues or evidence, and (d) employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make proffers of proof; taking judicial notice of facts of common knowledge; and utilizing reasonable presumptions.

became public.

On May 2, Jackson was officially designated Chief Prosecutor at Nuremberg via Executive Order.²⁷⁶ By then, Judge Rosenman had introduced the American Draft of Definitive Proposal to the Allied Nations, a process that would extend to May 10.²⁷⁷ Although the four Allied nations ultimately took no action on the Definitive Proposal,²⁷⁸ they did agree that an international military tribunal would decide the Nazi leaders' fate²⁷⁹—despite lingering opposition from Russia and from many in the United States.²⁸⁰ Amidst the San Francisco negotiations, Germany surrendered on May 8, 1945.²⁸¹

Jackson flew to Europe for “his initial survey”²⁸² on May 22 and met with British representatives on May 29.²⁸³ In a top secret file documenting the meeting, “[t]he British indicated a strong inclination to go along with the US wherever we should provide an actual clear lead.”²⁸⁴ By way of illustrative example, the British pointed to Jackson’s drafted protocol presented to them in San Francisco.²⁸⁵ Shortly after his return, and indicative of Jackson’s success abroad, the British on June 3 issued a statement indicating that it “now accepted in principle the United States draft for a discussion by the representatives appointed by the Allied Governments to prepare for the prosecution of

276. President’s Executive Order, May 2, 1945 in Jackson Nuremberg Diary, *supra* note 246, at 35–36 (providing the President’s Executive Order). Jackson remarkably also managed to find time to wind up his Court business. He delivered his dissenting opinion in *Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945) on May 7. Robert H. Jackson Diary Entry, May 7, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 56. He thereafter worked for two days straight on opinion-related work. *Id.* at 59. On May 21, he completed his work on the Court and left for London the next day, *id.* at 88, although he would return briefly for the announcement of opinions on June 4, *id.* at 136, and a June 9 conference. *Id.* at 142.

277. American Draft of Definitive Proposal, *supra* note 272, at 22

278. *Id.*

279. Robert H. Jackson Diary Entry, May 10, 1945 in Jackson Nuremberg Diary, *supra* note 246, at 59.

280. See Robert H. Jackson Diary Entry, May 18, 1945 in Jackson Nuremberg Diary, *supra* note 246, at 82–83 (describing a range of experiences Jackson had with those who opposed trials and describing the Russian plan “to take both men and women in very large numbers and to sterilize the men and to breed the German women to Russians . . .”); see also Drew Pearson, *The Washington Merry-Go-Round*, WASH. POST, May 23, 1945, at 12 (noting, against strong opposition, Jackson’s position that pretrial compulsory labor for members of the Nazi party was inappropriate).

281. R.W. Kostal, *The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945–1946*, 29 LAW & HIST. REV. 1, 2 (2011).

282. GERHART, *supra* note 48, at 318.

283. Meeting at House of Lords, May 29, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 93.

284. *Id.*

285. *Id.*

war criminals.”²⁸⁶

Jackson wrote to Truman with a progress update three days later.²⁸⁷ In it, Jackson outlined his overall plan and in doing so foreshadowed what became his post-Nuremberg criminal procedure judicial philosophy. In stirring language, Jackson wrote that “[t]he American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry . . . into the culpability of those whom there is probable cause to accuse of atrocities and other crimes.”²⁸⁸ But he also added, “the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.”²⁸⁹ The key, Jackson said, “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.”²⁹⁰

Jackson outlined his conceptualization of how the trials should look at negotiations held in London from June 26–August 8, 1945 among the governments of the United States, France, Britain, and the Soviet Union.²⁹¹ In advance of the meetings, Jackson prepared and submitted a “Revision of American Draft of Proposed Agreement,” dated June 14, 1945.²⁹² The June 14 Draft included only a few changes—in response to the Soviet Union’s request²⁹³—to the “Due Process For Defendants” (called “fair trial for defendants” in the latter draft) and “Evidence And Procedure” sections of the April 1945 Draft.²⁹⁴

Of more interest is the planning memorandum that accompanied the June 1945 Proposed Agreement, which Jackson distributed to all of the

286. 1 DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT* 41 (1999).

287. Robert H. Jackson, *Justice Jackson’s Report to President Truman on the Legal Basis for Trial of War Criminals*, 19 TEMP. L.Q. 144 (1945).

288. *Id.* at 147–48.

289. *Id.* at 148.

290. *Id.* (emphasis added).

291. SPRECHER, *supra* note 286, at 43.

292. Revision of American Draft of Proposed Agreement, June 14, 1945, in JACKSON REPORT, *supra* note 263, at 55.

293. *E.g.*, Aide-Mémoire from the Soviet Government, June 14, 1945, in JACKSON REPORT, *supra* note 263, at 62 (requesting the deletion of Article 12(c) from the April 1945 Draft, which required the tribunal to “make written findings and enter written judgment” (quoting Revision of American Draft of Proposed Agreement, *supra* note 292, at 59)).

294. Compare American Draft of Definitive Proposal § 12(d), *supra* note 272, at 25 (including the requirement of written judicial findings post-guilt), with Revision of American Draft of Proposed Agreement, *supra* note 292 (omitting the requirement of written judicial findings post-guilt).

delegations at the beginning of the London Negotiations.²⁹⁵ That document was designed both to aid in the understanding of Jackson's June 1945 proposal and to outline the possible practical problems with trying the Nazis.²⁹⁶ It included fairly robust sections outlining, in relevant part, Jackson's expectations on (1) the necessary scope of what to prove, (2) the admissibility of evidence, and (3) outlines of how to prove guilt.²⁹⁷ Those expectations included requiring the Allies to prove minimally for each defendant "[t]heir identity,"²⁹⁸ "[t]heir participation in the criminal plan or enterprise,"²⁹⁹ and "[t]heir responsibility for the specific atrocities and other crimes charged."³⁰⁰

The Soviet delegation found the level of procedural detail unnerving, and, in doing so, quickly established itself as Jackson's most aggressive adversary.³⁰¹ In the course of the coming weeks and months, Jackson became so frustrated with the Soviets that he threatened to quit, threatened to walk out, and even recommended that each country try its own prisoners individually.³⁰² What ultimately unnerved him more than anything else was the Soviet conception of a trial.³⁰³ Although they had accepted the *idea* of a trial, they believed that a trial's purpose was not to determine guilt, which they believed was already established, but rather only "to determine the *measure* of guilt."³⁰⁴

In addition to the precise purpose of the trial, the U.S. and Soviet delegations also had substantial differences on how the trial would operate from a procedural standpoint.³⁰⁵ For its part, the Soviet Union, along with the French, advocated in favor of the inquisitorial system,

295. Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945, in JACKSON REPORT, *supra* note 263, at 64.

296. *Id.*

297. *Id.* §§ II–IV, at 65–68.

298. *Id.* § II(2)(f)(1), at 65.

299. *Id.* § II(2)(f)(2), at 65.

300. *Id.* § II(2)(f)(3), at 65.

301. Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 814–16 (1949).

302. ROBERT E. CONOT, JUSTICE AT NUREMBERG 88 (1983); John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH U. GLOB. STUD. L. REV. 511, 520 (2007).

303. Michael J. Bazylar, *The Role of the Soviet Union in the International Military Tribunal at Nuremberg*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, at 45 (Herbert R. Reginbogin & Christoph J. M. Safferling eds., 2006) (noting that the Soviet vision of trials likely consisted of "show trials").

304. EHRENFREUND, *supra* note 20, at 13 (emphasis added) (quoting the position advocated by the Soviet delegate, Major General Ion T. Nikitchenko) (internal citation and quotation marks omitted).

305. See generally Minutes of Conference Session of June 26, 1945, in JACKSON REPORT, *supra* note 263, at 71–85 (documenting exchanges between the Soviet Union delegate and Jackson on a variety of procedural matters).

whereby the prosecution presents the major points of evidentiary emphasis to the trial judges who then question the defendants on those points.³⁰⁶ Further, in this system, the defendants were not permitted to testify and the prosecution and defense counsel played minor roles.³⁰⁷ In contrast, Jackson and the British pushed for the accusatorial (or adversary) system, which even then favored receiving evidence during trial (rather than before as in the inquisitorial system) and providing defendants with robust trial rights such as the rights to present and cross-examine witnesses and testify under oath.³⁰⁸ Thus was born the first—and arguably only—major substantive problem at the London Negotiations: criminal procedure.³⁰⁹

Consider how Jackson handled some illustrative problems of criminal procedure during the London Negotiations. At a formal meeting among the delegations on June 29, 1945, the Soviet Union expressed its consistent (and persistent) view about the nature of the trial: “[w]e are dealing here with the chief war criminals *who have already been convicted* and whose conviction has [sic] been already announced by both the Moscow and Crimea declarations by the heads of the governments”³¹⁰ Accordingly, said the Soviets, “the procedure that we want to work out should be such as to insure the speediest possible execution of the decisions of the United Nations”³¹¹ That procedure, thought the Soviets, should include a judge who was aware of the evidence prior to trial and a prosecutor who should be relegated to “merely a role of assisting the court in the actual cases.”³¹² The Soviet Union believed the best way to proceed required two documents: one outlining the agreement between nations and another defining the scope of procedure and the tribunal’s jurisdiction.³¹³

Although Jackson agreed to the idea of two separate documents,³¹⁴

306. HARRIS, *supra* note 11, at 15; SPRECHER, *supra* note 286, at 43.

307. HARRIS, *supra* note 11, at 15; SPRECHER, *supra* note 286, at 43.

308. HARRIS, *supra* note 11, at 15.

309. *Id.* (“The first problems in negotiating the London Agreement and the Charter of the Tribunal arose out of basic differences in Anglo-American and Continental criminal procedure.”).

310. Minutes of Conference Session of June 29, 1945, in JACKSON REPORT, *supra* note 263, at 104–05 (emphasis added); see 9 Robert H. Jackson, Oral History Memoir 1266–67 (1955) (unpublished manuscript) (on file with Columbia Center for Oral History) [hereinafter Oral History] (“The Soviet delegation early indicated a belief that the court was merely to apprise the differences in degree of guilt between various individuals and fix their penalties, but that the finding of guilt against all and sundry had already been made by Churchill, Roosevelt, and Stalin in their statements accusing the Germans.”).

311. Minutes of Conference Session of June 29, 1945, *supra* note 310, at 105.

312. *Id.* at 105–06.

313. HARRIS, *supra* note 11, at 15.

314. Minutes of Conference Session of June 29, 1945, *supra* note 310, at 117.

he was otherwise unimpressed and not persuaded by the Soviet position. By this point, Jackson had already privately noted that the head of the Soviet Union's delegation, Major General Ion T. Nikitchenko, "proves to be an inscrutable person."³¹⁵ Perhaps unsurprisingly, Jackson responded by saying to him at the June 29 meeting that, "in the matter of procedure we are quite wide apart because of the fact that our legal traditions are so far apart."³¹⁶ To begin with, Jackson did not assume the Nazis' guilt and, moreover, emphasized to the delegates that "the accusation made carries no weight in an American trial what[so]ever."³¹⁷ He added in closing: "[w]e will reconcile these differences only with difficulty. While they appear to be merely matters of procedure, they are matters of procedure so deeply ingrained in the thought of the American people that some of the theories of procedure mentioned here could not be supported by us."³¹⁸ The June 29 meeting adjourned with Jackson agreeing to edit the American proposal and submit a revised draft to the delegates.³¹⁹ The Soviets, meanwhile, began drafting the overarching agreement between nations.³²⁰

Jackson submitted his draft and an accompanying memorandum the next day.³²¹ On July 2, the Soviet Union submitted a draft agreement formally establishing the Allies' agreement to try the Nazi war criminals.³²² Most relevant to this Article is Jackson's drafting decision in the June 30 Draft to dilute the provisions restricting the Tribunal's ability to receive evidence.³²³ In that Draft, Jackson did not back down

315. Robert H. Jackson Diary Entry, June 26, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 159.

316. Minutes of Conference Session of June 29, 1945, *supra* note 310, at 113.

317. *Id.* at 115.

318. *Id.* at 113. At the conclusion of the June 29 meeting, the impact of the Soviet position was seemingly still on Jackson's mind. Robert H. Jackson Diary Entry, June 29, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 161. At a dinner meeting with John Winant, the U.S. Ambassador to Great Britain, Jackson discussed with him the "problems of the Russians as posed by their objections." *Id.*

319. Minutes of Conference Session of June 29, 1945, *supra* note 310, at 118.

320. Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 988-89 (2004).

321. Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, in JACKSON REPORT, *supra* note 263, at 119.

322. Draft of Agreement Presented by Soviet Delegation, July 2, 1945, in JACKSON REPORT, *supra* note 263, at 128.

323. Compared to the June 14 Draft, the June 30 document provides more examples of when the Tribunal should freely receive evidence. Compare Revised Draft of Agreement and Memorandum Submitted by American Delegation § 18, *supra* note 321, at 124 ("It shall employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make written proffers of proof; making extensive use of judicial notice; receiving sworn or unsworn statements of witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other

from his provision of counsel to the accused,³²⁴ or eliminate either the defendant's right to testify in his own defense³²⁵ or the requirement of an indictment published to the accused before trial.³²⁶ Finally, in direct contravention to the Soviet hopes, Jackson expressly clarified that "[n]o proof shall be lodged with the Court except at the trial."³²⁷

The delegates spent the next three days discussing the American and Soviet submissions. Predictably, Jackson was at odds with the Soviets and they with him. The Soviets, for example, sought to obtain a declaration that certain organizations, like the Gestapo and S.S., were criminal; thus, the trial would serve only to prove whether the defendants belonged to a criminal organization.³²⁸ The Soviets also sought "a decision of the court which establishes the criminal responsibility of the heads or the leaders of any organization of that kind [that] automatically establishes the criminal responsibility of the various subordinate members of the organization."³²⁹ Jackson, however, did not presume the criminal nature of the Nazi organizations; rather, he believed that the trial was designed to prove that point, in addition to proving the individual defendants' involvement.³³⁰ Calling the Soviet plan too "drastic," Jackson emphasized the importance of allowing each defendant "to defend what he has done."³³¹ He tried to make clear that "you cannot, under our system, attribute guilt to a person who has not had an opportunity to appear and defend on the main issues."³³²

This was hardly the totality of their procedural disputes. Rather, Jackson disagreed with the Soviets on the purpose and function of witnesses,³³³ the purpose and timing of the indictment,³³⁴ and the

evidentiary materials and all such other evidence as is customarily received by international tribunals."), with Revision of American Draft of Proposed Agreement § 18(d), *supra* note 292, at 59 ("[The Tribunal shall] employ with all possible liberality simplifications of proof, such as but not limited to: requiring defendants to make proffers of proof; taking judicial notice of facts of common knowledge; and utilizing reasonable presumptions.").

324. Revised Draft of Agreement and Memorandum Submitted by American Delegation § 14(b)(2), *supra* note 321, at 123.

325. *Id.*

326. *Id.* § 11, at 123.

327. *Id.*

328. Minutes of Conference Session of July 2, 1945, in JACKSON REPORT, *supra* note 263, at 129.

329. *Id.* at 135.

330. *Id.* at 137.

331. *Id.* at 139. Jackson described the Soviet plan as a "more drastic application of the principle than we would be familiar with." *Id.*

332. *Id.*

333. Minutes of Conference Session of July 3, 1945, in JACKSON REPORT, *supra* note 263, at

timing for collection and presentation of evidence.³³⁵ In an effort to resolve their procedural disagreements, the delegates agreed to name a separate subcommittee relegated exclusively to drafting.³³⁶ Despite the drafting subcommittee's diligent work—it submitted a proposed draft agreement on July 11³³⁷—Jackson was starting to get anxious by the time the delegates conferenced on the draft on July 13.³³⁸ Emphasizing his work on the Supreme Court to the delegates, Jackson said, “I personally must either abandon this project or get it concluded certainly by the first of the year.”³³⁹

Despite these expediency concerns, Jackson and the Soviets appeared no closer to resolving their procedural controversies; extending their previous position, the Soviets again advocated trying “chief criminals only, and in the course of that trial the court may give a verdict that the organization to which those criminals were parties is a criminal organization.”³⁴⁰ From there, the Soviets believed all members of that organization—even if not present—would contemporaneously be adjudged guilty.³⁴¹ Jackson disagreed, noting that such a procedure “will affect the acceptance of the result of these trials as fair in the United States.”³⁴² The delegates' differences also extended into whether to provide the accused with double jeopardy protections and a right against self-incrimination during the trial.³⁴³

Procedural differences between Jackson and the Soviets persisted throughout the London Negotiations. Indeed, conflicts about witnesses,³⁴⁴ the role of cross-examination,³⁴⁵ testimony from the

153–54; Minutes of Conference Session of July 4, 1945, in JACKSON REPORT, *supra* note 263, at 155–56.

334. Minutes of Conference Session of July 3, 1945, *supra* note 333, at 153–54.

335. *Id.*

336. Minutes of Conference Session of July 4, 1945, *supra* note 333, at 155.

337. Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945, in JACKSON REPORT, *supra* note 263, at 194.

338. Minutes of Conference Session of July 13, 1945, in JACKSON REPORT, *supra* note 263, at 211–12.

339. *Id.* at 212.

340. *Id.* at 236.

341. *Id.*

342. *Id.* at 237.

343. *See generally* Minutes of Conference Session of July 17, 1945, in JACKSON REPORT, *supra* note 263, at 262; Minutes of Conference Session of July 16, 1945, in JACKSON REPORT, *supra* note 263, at 246.

344. Compare John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOB. STUD. L. REV. 511, 523 (2007) (indicating Jackson's preference to build the prosecution's case primarily on captured German documents rather than by making deals with cooperating witnesses), with GEORGE GINSBURGS, *MOSCOW'S ROAD TO NUREMBERG: THE SOVIET BACKGROUND TO THE TRIAL* 112 (Martinus Nijhoff Publs. 1996) (depicting Soviet

accused,³⁴⁶ the role of counsel,³⁴⁷ the role of indictments,³⁴⁸ and the method of presenting evidence³⁴⁹ carried on throughout the London conference and, to varying extents, were never perfectly resolved.³⁵⁰ Most frustratingly for Jackson, the Soviets again asserted on July 19, despite weeks of discussing the issue, that “[t]he fact that the Nazi leaders are criminals has already been established.”³⁵¹ That same day, the Soviets announced, to Jackson’s surprise,³⁵² that they would not be attending a previously scheduled visit to Nuremberg to assess its viability as a trial location.³⁵³

Although the other delegates successfully visited Nuremberg without a representative from the Soviet Union,³⁵⁴ Jackson’s frustration boiled over following his return from the trip. Amidst continuing controversy, Jackson observed on July 20 that “[f]rom the very beginning it has been apparent that our greatest problem is how to reconcile two very different systems of procedure”³⁵⁵ The inability to reconcile those systems led Jackson to suggest abandoning the concept of an international war crimes trial altogether.³⁵⁶ On July 23, having privately characterized the prior week’s negotiations as “futile” and “sterile,”³⁵⁷ a dejected

Prosecutor Rudenko pushing the Allied prosecution to present more witnesses, including German witnesses).

345. Oral History, *supra* note 310, at 1265.

346. *See id.* at 1270–71 (“We were in a position, however, where it would not be regarded as a fair trial in the western common law countries if the defendant was denied his right to testify in his own behalf.”).

347. *Id.* at 1267–68.

348. Minutes of Conference Session of July 17, 1945, *supra* note 343, at 266; Oral History, *supra* note 310, at 1268–69.

349. *See* Minutes of Conference Session of July 18, 1945, in JACKSON REPORT, *supra* note 263, at 289 (noting, per Jackson’s comment, that evidentiary questions existed about “what should go into the indictment and what should go in at the trial”); Oral History, *supra* note 310, at 1268–69.

350. HARRIS, *supra* note 11, at 16.

351. Minutes of Conference Session of July 19, 1945, in JACKSON REPORT, *supra* note 263, at 303.

352. *See* Robert H. Jackson Diary Entry, July 20, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 169 (noting Jackson’s “surprise” when the Soviets pulled out of the trip).

353. *See* Minutes of Conference Session of July 18, 1945, *supra* note 349, at 280 (providing Jackson’s formal invitation to the delegates and the Soviet Union’s acceptance); *see also* Minutes of Conference Session of July 19, 1945, *supra* note 351, at 309 (noting that the Soviet Union withdrew from the Nuremberg trip).

354. Robert H. Jackson Diary Entry, July 21, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 169–70.

355. Minutes of Conference Session of July 20, 1945, in JACKSON REPORT, *supra* note 263, at 319.

356. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 72 (Knopf Doubleday Publ’g Grp. 1992).

357. Robert H. Jackson Diary Entry, July 26, 1945, in Jackson Nuremberg Diary, *supra* note

Jackson told the delegates, “[i]t seems to me our difference in viewpoint is too great to work without so much difficulty and delay that it is going to be impractical to try these people within the length of time I can commit the United States to this venture.”³⁵⁸ He reiterated a similar sentiment during their continued negotiations on July 25 before leaving for Potsdam, Germany.³⁵⁹

During his visit to Potsdam from July 26–29,³⁶⁰ Jackson spoke at some length with Secretary of State Byrnes about the lack of progress at the London Negotiations.³⁶¹ During an evening meeting on July 26, Jackson expressed his frustrations to Byrnes, who responsively said not to reach an agreement “at the price of a compromise on fair trial or other things that we as Americans thought essential.”³⁶² During that same meeting, the pair seemingly agreed that the best solution would be to have the Allies agree on a definition of what crimes the Nazis violated but then have each country “try his own criminals by his own procedure.”³⁶³ But Jackson also reported directly to President Truman, who himself was at Potsdam discussing a post-war peace settlement with the heads of state from Britain (Prime Minister Attlee) and the Soviet Union (Premier Stalin).³⁶⁴

Jackson’s exchange with Truman paid off—eventually. The Potsdam Conference convened July 17 and continued until August 2.³⁶⁵ On July 26, the Potsdam Conference produced a document titled the “Potsdam Declaration,” which most famously dictated the terms for Japan’s

246, at 171.

358. Minutes of Conference Session of July 23, 1945, in JACKSON REPORT, *supra* note 263, at 343.

359. Minutes of Conference Session of July 25, 1945, in JACKSON REPORT, *supra* note 263, at 379–80.

360. See Robert H. Jackson Diary Entries, July 21–31, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 171–74 (detailing Jackson’s visit to Potsdam).

361. HARRIS, *supra* note 11, at 21.

362. Robert H. Jackson Diary Entry, July 26, 1945, *supra* note 357, at 172. Fascinatingly, Jackson visited Berlin the next day and specifically viewed Hitler’s office. Robert H. Jackson Diary Entry, July 27, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 172. In the office he saw “letters addressed to Goering,” “typewritten documents,” and “motion picture films.” *Id.* They were “strewn with wreckage,” which prompted Jackson to write, “[i]f the Russians had done no better job than this in collecting evidence we will not get much from that source.” *Id.* Jackson did ultimately uncover an index to Hitler’s files, though he never found the files themselves. Oral History, *supra* note 310, at 1287–88.

363. Robert H. Jackson Diary Entry, July 26, 1945, *supra* note 357, at 172.

364. SPRECHER, *supra* note 286, at 45.

365. Michael J. O’Neal, *Overview, Potsdam Conference Protocols*, MILESTONE DOCUMENTS, <http://www.milestonedocuments.com/documents/view/potsdam-conference-protocols> (last visited September 22, 2014).

surrender.³⁶⁶ However, that was not the only document of importance produced during the Conference.

During his time in Potsdam, Jackson seemingly sensed the weight of the procedural impasse that existed back in London. The question of whether a singular tribunal could try the Nazis loomed larger. Upon his return to London, he let the next few days pass without pressing for additional negotiations. Indeed, a July 30 entry in his diary reflects that he “made no move toward the holding of further conferences.”³⁶⁷ A memorandum submitted by the United States to the delegates on July 31 reinforced the idea of each country trying its own prisoners pursuant to its own procedures.³⁶⁸ It is in hindsight remarkable to think how close the Nuremberg trials came to never happening.

Meanwhile, back in Potsdam, Truman’s work aided in the production of the “protocol of the proceedings.”³⁶⁹ Released on August 1,³⁷⁰ Truman suggested including³⁷¹ the following language in Article VI:

The three Governments have taken note of the discussions which have been proceeding in recent weeks in London between British, United States, Soviet and French representatives with a view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October, 1943, have no particular geographical localization. The three Governments reaffirm their intention to bring those criminals to swift and sure justice. They hope that the negotiations in London will result in speedy agreement being reached for this purpose, and they regard it as a matter of great importance that the trial of those major criminals should begin at the earliest possible date.³⁷²

That Protocol language, alongside a change in British leadership,³⁷³

366. *Potsdam Conference*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/472799/Potsdam-Conference> (last updated May 15, 2014). The official “Potsdam Declaration” was published July 26, 1945. See *Potsdam Declaration*, July 26, 1945, available at <http://www.atomicarchive.com/Docs/Hiroshima/Potsdam.shtml> (noting date of publication).

367. Robert H. Jackson Diary Entry, July 30, 1945, in *Jackson Nuremberg Diary*, *supra* note 246, at 174.

368. Memorandum on Changes in Subcommittee Draft Desired by American Delegation, July 31, 1945, in *JACKSON REPORT*, *supra* note 263, at 396–97.

369. Berlin (Potsdam) Conference, July 17–Aug. 2, 1945: Protocol of the Proceedings, August 1, 1945, available at http://avalon.law.yale.edu/20th_century/decade17.asp.

370. See *Potsdam Conference Protocols*, *supra* note 365 (noting the date of the Protocols issuance).

371. SPRECHER, *supra* note 286, at 45.

372. The language was included in Article VI. Berlin (Potsdam) Conference, *supra* note 369.

373. Churchill was voted out of office while Jackson was in Potsdam. HARRIS, *supra* note 11, at 22. Churchill’s departure meant a change in representation back in London for the balance of negotiations. *Id.*; see *Oral History*, *supra* note 310, at 1279 (discussing the importance of the

dramatically changed the character of the London Negotiations. Jackson sat down on August 1 with the new British delegate, Lord Chancellor Sir William Jowitt, to discuss his negotiating difficulties with the Soviet Union.³⁷⁴ Jackson expressed to him that “if we stood together, we could get what we wanted.”³⁷⁵

When negotiations resumed on August 2, Jowitt guided the meeting with a firm hand.³⁷⁶ This remarkably led the Soviet Union *not* to object to providing the accused with a right of cross-examination, a right to testify at trial, and a right to testify at any preliminary examination³⁷⁷—an examination that did not exist in prior drafts. Soviet representatives made several procedural concessions favorable to Jackson in other critical areas too, like the nature and character of the indictment³⁷⁸ and the organization and timing of evidence presentation.³⁷⁹ Reflecting on the incredible turn of events, Jackson wrote that the Soviet Union “swallowed our program ‘hook, line[,] and sinker.’”³⁸⁰ The Nuremberg trials were now a reality.³⁸¹

The London Agreement, as it was called, ultimately produced two documents: first, an agreement reflecting the establishment of an International Military Tribunal, and second, a Charter that provided “the constitution, jurisdiction, and functions of the Tribunal.”³⁸² The text of

British change in leadership).

374. HARRIS, *supra* note 11, at 22 (“For the new Labor government Lord Chancellor Sir William Jowitt assumed the responsibilities formerly assigned to Sir David Maxwell Fyfe.”); Robert H. Jackson Diary Entry, Aug. 1, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 175 (noting also that the pair agreed on all major points except one that is unrelated to this thesis); Summary Record of Conference Between the Lord Chancellor and Mr. Justice Jackson, August 1, 1945, in JACKSON REPORT, *supra* note 263, at 398 (same).

375. Robert H. Jackson Diary Entry, Aug. 1, 1945, *supra* note 374, at 175.

376. *Id.*

377. Minutes of Conference Session of August 2, 1945, in JACKSON REPORT, *supra* note 263, at 403–04.

378. The Soviets wanted the indictment to include a “certain amount of evidence.” *Id.* at 413.

379. The Soviets asked that:

[I]n the opening statement the prosecution would outline the main charges against defendants; then . . . the prosecution would state to the Tribunal what new evidence they had, evidence not lodged with the indictment, or any witnesses; and the Tribunal would pass judgment on that, whether that evidence was considered necessary and whether it was relevant to the case.

Id. at 413.

380. Robert H. Jackson Diary Entry, Aug. 2, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 175.

381. FRANCIS BIDDLE, IN BRIEF AUTHORITY 385 (1962) (“Robert Jackson’s tireless energy and skill had finally brought the four nations together—a really extraordinary feat.”); HARRIS, *supra* note 11, at 24 (“With the signing of the London Agreement the legal basis for the trial was laid.”).

382. HARRIS, *supra* note 11, at 22.

the Charter reflected that Jackson got his way on all procedural matters previously opposed by the Soviets.³⁸³ Of particular note are the rights provided by the Charter for the accused to: (1) receive a preliminary hearing;³⁸⁴ (2) have a right to counsel (or to represent themselves);³⁸⁵ (3) present evidence;³⁸⁶ (4) cross-examine any prosecution witnesses;³⁸⁷ and (5) receive a copy of an indictment specifying in detail the charges against them.³⁸⁸ The delegates met on August 8 to sign the Charter “in a highly photographed ceremony.”³⁸⁹

The event was widely reported,³⁹⁰ and a trial based on the London Agreement was scheduled.³⁹¹ Reflecting on the London Negotiations nearly eight years later, Jackson said the following: “Notwithstanding the imperfections of the agreement of London, I think it represents a very important contribution to international law.”³⁹² The trial of twenty-two Nazi leaders began on November 20, 1945, and the Tribunal pronounced its judgment on October 1, 1946.³⁹³ Twelve defendants received a death sentence, seven were sentenced to prison terms of varying lengths, and three were—remarkably—acquitted.³⁹⁴

383. See SPRECHER, *supra* note 286, at 48 (noting that the “Fair Trial for Defendants” article “generally followed the adversarial system of Anglo-American practice”).

384. Agreement and Charter art. 16(b), Aug. 8, 1945, in JACKSON REPORT, *supra* note 263, at 426

385. *Id.* art. 16(d), at 426.

386. *Id.* art. 16(e), at 426.

387. *Id.*

388. *Id.* art. 16(a), at 426. It ultimately took one entire trial day for the Tribunal to read the indictment, which one participant would later say “probably could have been avoided if the signatories of the London Agreement had foreseen how long the Indictment would be and how little purpose would be served by its reading.” SPRECHER, *supra* note 286, at 148.

389. Robert H. Jackson Diary Entry, Aug. 8, 1945, in Jackson Nuremberg Diary, *supra* note 246, at 178.

390. See, e.g., *Allies Accept Code for Trials*, MILWAUKEE J., Aug. 9, 1945, at 8; Associated Press, *Allies Agreed On Trial Plan: Tribunal Machinery Set Up in Signed Agreement*, TEL. HERALD, Aug. 8, 1945, at 3; United Press, *Court Setup for War Trials*, PITTSBURGH PRESS, Aug. 9, 1945, at 4; *Mass Trial Planned*, WINDSOR DAILY STAR, Aug. 9, 1945, at 23; Canadian Press, *Powers Agree on War Trials*, CALGARY HERALD, Aug. 8, 1945, at 3; Associated Press, *The Texts of the War Crimes Committee Report and the Jackson Statement*, N.Y. TIMES, Aug. 9, 1945, at 10.

391. Order of the Tribunal Regarding Notice to Members of Groups and Organizations, International Military Tribunal, in INTERNATIONAL MILITARY TRIBUNAL, THE TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 97 (1947), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

392. 11 Oral History, *supra* note 310, at 1648.

393. See Taylor, *supra* note 18, at 503, 510 (providing the first trial date followed by the Tribunal’s judgment date).

394. *Id.* at 510; see 2 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT 1415 (1999) (providing a tabulation of the Tribunal’s sentencing decisions for each defendant).

Jackson submitted his final report to President Truman one week after the Nuremberg verdicts.³⁹⁵ In it, he recounted for Truman some of the impressive statistics about the trial, including those of procedural relevance; most notably, he shared that 19 of the defendants utilized their right to testify in their own defense, 61 witnesses testified on behalf of the defense, and 143 additional witnesses “gave testimony by interrogatories for the defense.”³⁹⁶ Characterizing the trial as “gigantic,”³⁹⁷ Jackson pointed to the London Agreement as the root of the trial’s success³⁹⁸: “[t]he importance of the trial lies in the principles to which the Four Powers became committed by the Agreement.”³⁹⁹ 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.”⁴⁰⁰

With Jackson’s report complete, he resigned his commission as Chief Prosecutor.⁴⁰¹ When all was said and done, the length of Jackson’s service to the Nuremberg effort far exceeded what he anticipated; although he believed he would be done in time for the 1945 term,⁴⁰² he did not rejoin his Supreme Court colleagues until the start of the October 1946 Term.⁴⁰³

III. NUREMBERG’S EFFECT ON JACKSON’S CRIMINAL PROCEDURE JURISPRUDENCE

Jackson described his Nuremberg experience as, “without qualification, as the most satisfying and gratifying experience of my

395. Taylor, *supra* note 18, at 510.

396. Robert H. Jackson, *Justice Jackson’s Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L.Q. 337, 338 (1946) [hereinafter Jackson, *Final Report*].

397. *Id.* at 340.

398. Not everything about Nuremberg was a success. Jackson struggled mightily with his cross-examination of Hermann Göring, the second-highest-ranking Nazi official on trial (behind only Reich President Karl Dönitz). See FELDMAN, *supra* note 52, at 286–93 (describing Jackson’s courtroom performance in detail); see also HILLARY GASKIN, EYEWITNESS AT NUREMBERG 87 (1990) (providing a witness account who noted that Jackson’s cross-examination was a “flat failure”). In fact, he struggled *so* mightily with his poor performance during this cross-examination that, when Truman passed over Jackson for the position of Chief Justice following Stone’s death, Jackson sent a memorandum to Truman, threatening to—among other troubling assertions—resign his position as Associate Justice. FELDMAN, *supra* note 52, at 298.

399. Jackson, *Final Report*, *supra* note 396, at 342.

400. *Id.*

401. *Id.* at 344.

402. *October Term 1945*, ROBERT H. JACKSON CTR., <http://www.roberthjackson.org/the-man/supreme-court/october-term-1945/> (last visited September 22, 2014).

403. John Q. Barrett, *Bringing Nuremberg Home: Justice Jackson’s Path Back to Buffalo, October, 4 1946*, 60 BUFF. L. REV. 295, 313 (2012).

life.”⁴⁰⁴ This Article is not the first to examine whether, and to what extent, that experience impacted his post-Nuremberg time on the Supreme Court.⁴⁰⁵ But prior efforts have generally focused broadly on his overall judicial philosophy,⁴⁰⁶ rather than more narrowly on the extent to which Nuremberg altered Jackson’s approach to specific individual criminal procedure rights. Upon his return to the Supreme Court, Jackson’s opinions in the search and seizure, confessions, and right to counsel realms place primary importance on the criminal justice system engaging in a dispassionate search for the truth.⁴⁰⁷ According to Jackson’s post-Nuremberg philosophy, it is possible—and permissible—for a suspect to endure or experience what might be an undesirable law enforcement tactic, so long as the overall procedural experience was itself detached, objective, and exposed objectionable police tactics to neutral judicial review.

The extent of Jackson’s philosophical shift in criminal procedure issues is subtle, but real, and this Part argues that it has maintained an important life of its own in the realm of modern domestic criminal procedure. Subpart A analyzes a handful of Jackson’s post-Nuremberg opinions and argues that, taken together, Jackson’s opinions and votes accompanying those decisions best exemplify his altered approach to select criminal procedure issues. Subpart B then contends that Jackson’s post-Nuremberg criminal procedure philosophy has shaped modern criminal procedure doctrines in the specific areas of search and seizure, confessions, and right to counsel. Subpart B highlights specific areas where lower courts, in reliance on Jackson’s approach, have altered or devised key doctrinal areas of criminal procedure for their jurisdictions.

404. 11 Oral History, *supra* note 310, at 1648.

405. Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 982 (1955) (“His year in Nuremberg (on leave from the Court) as chief prosecutor of the German war criminals added a dimension to his experience which influenced his views on ‘civil liberties.’”).

406. *See, e.g.*, HOCKETT, *supra* note 48, at 267–80 (examining several substantive areas of Jackson’s opinions and concluding that “[a] careful examination of Jackson’s opinions . . . reveals that, apart from influencing him to change the tone of his free speech opinions and to modify his approach to incorporation and seditious speech, Nuremberg did not serve as a determinant in his constitutional jurisprudence”); Jaffe, *supra* note 405, at 977–78 (seeking to harmonize Jackson’s criminal procedure opinions in their totality).

407. Although not discussed in this Piece, Jackson’s post-Nuremberg emphasis on providing the accused with an overall dispassionate procedural experience pervades in other areas of the law too, like immigration. *E.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting) (“Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused.”).

A. Returning to the Court

Jackson returned to the Court on October 3, 1946 in time to hear cases docketed for the October 1946 Term.⁴⁰⁸ To say the least, he returned to a combative court. Indeed, in his absence, two of his colleagues—Justices Douglas and Black—had threatened to resign if Truman named Jackson as Chief Justice to replace Stone following Stone’s death.⁴⁰⁹ Despite facing that considerable adversity, Jackson rejoined the Court with a renewed sense of purpose—a purpose that helped him develop a more impactful judicial philosophy related to criminal procedure issues.⁴¹⁰

Termed by this Article his “dispassionate criminal procedure,” Jackson’s post-Nuremberg approach sought to provide the accused with a procedurally fair experience without focusing too much on specific rules or doctrines. As illustrated below, Jackson’s post-Nuremberg approach reflects his belief in the importance of overall procedure—just as he believed in the importance of holding a complete war crimes trial while at Nuremberg. Thus, at Nuremberg, Jackson sought procedure in the sense that he did not want the Nazis to be summarily executed without counsel, but he did not seek an equivalent to the Bill of Rights.⁴¹¹

Consistent with his approach during the London Negotiations, he did not seek an expanded Bill of Rights once home. But also consistent with his London positions, Jackson’s “dispassionate” approach sought to strengthen the accused’s right to counsel and simultaneously impose *some* limitations on law enforcement, dictated largely by his perception of fairness rather than his reliance on precedent.⁴¹²

408. Barrett, *supra* note 403, at 313.

409. FELDMAN, *supra* note 52, at 294–95.

410. Barry, *supra* note 140, at 885 (arguing that Justice Jackson gained a greater appreciation of procedural due process after Nuremberg); Alfred S. Konefsky & Tara J. Melish, *Justice Jackson’s 1946 Nuremberg Reflections at Buffalo: An Introduction*, 60 BUFF. L. REV. 255, 262 (2012) (noting that, to Jackson, Nuremberg represented the “hope that ‘men of good will’ could establish ‘fairly workable legal controls’” (quoting Robert H. Jackson, Address at the University of Buffalo Centennial Convocation (October 4, 1946))).

411. Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT’L L. 335, 336 (2002) (noting Jackson’s approach was “totally divergent from the summary execution approach” but did not include all of the traditional rights guaranteed to defendants in the United States).

412. As part of his formulating that philosophy, it is possible that Jackson incorporated public perception. Indeed, as his private papers reflect, he kept assorted newspaper clippings assessing his opinions, both positive and negative, alongside communications received from the public. Justice Jackson’s Personal Papers, No. 61, U.S. v. Di Re (on file with Library of Congress, Robert H. Jackson Papers, Box 142, Folder 7) (including five letters from the public and two relevant newspaper articles submitted by the public in his personal *Di Re* file); Justice Jackson’s Personal Papers, No. 391, *Ashcraft v. Tennessee* (on file with Library of Congress, Robert H.

To demonstrate these conclusions and showcase Jackson's post-Nuremberg criminal procedure philosophy, this Subpart considers his participation in the Court's criminal procedure work from 1946 until his sudden death on October 9, 1954.⁴¹³ During that eight-year period, the Court heard a total of 921 cases,⁴¹⁴ 39 of which focused on criminal procedure issues pertaining to the focus of this Article.⁴¹⁵ Within that period, in dramatic contrast to the single pre-Nuremberg criminal procedure opinion he wrote,⁴¹⁶ Jackson penned thirteen post-Nuremberg opinions on search and seizure, confession, and right to counsel cases.⁴¹⁷

Jackson Papers, Box 131, Folder 1) (including two letters from the public in his personal *Ashcraft* file).

413. Barry, *supra* note 140, at 881.

414. *U.S. Supreme Court Center*, *supra* note 149 (providing total number of cases for the 1946, 1947, 1948, 1949, 1950, 1951, 1952, and 1953 terms).

415. By topic and in chronological order, Jackson after Nuremberg participated in the following search and seizure, confession, and right to counsel cases:

- Search and Seizure: *Harris v. United States*, 331 U.S. 145 (1947); *McDonald v. United States*, 335 U.S. 451 (1948); *United States v. Di Re*, 332 U.S. 581 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *Trupiano v. United States*, 334 U.S. 699 (1948); *Brinegar v. United States*, 338 U.S. 160 (1949); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Lustig v. United States*, 338 U.S. 74 (1946); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. Jeffers*, 342 U.S. 48 (1951); *Rochin v. California*, 342 U.S. 165 (1952); *On Lee v. United States*, 343 U.S. 747 (1952); *Schwartz v. Texas*, 344 U.S. 199 (1952); *Irvine v. California*, 347 U.S. 128 (1954).
- Confession: *Upshaw v. United States*, 335 U.S. 410 (1948); *Haley v. Ohio*, 332 U.S. 596 (1948); *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Stroble v. California*, 343 U.S. 181 (1952); *Brown v. Allen*, 344 U.S. 443 (1953); *Stein v. New York*, 346 U.S. 156 (1953).
- Right to Counsel: *Carter v. Illinois*, 329 U.S. 173 (1946); *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Foster v. Illinois*, 332 U.S. 134 (1947); *Gayes v. New York*, 332 U.S. 145 (1947); *Marino v. Ragen*, 332 U.S. 561 (1947); *Bute v. Illinois*, 333 U.S. 640 (1948); *Wade v. Mayo*, 334 U.S. 672 (1948); *Gryger v. Burke*, 334 U.S. 728 (1948); *Townsend v. Burke*, 334 U.S. 736 (1948); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Gibbs v. Burke*, 337 U.S. 773 (1948); *Quicksall v. Michigan*, 339 U.S. 660 (1950); *Palmer v. Ashe*, 342 U.S. 134 (1951); *Stroble v. California*, 343 U.S. 181 (1952); *Chandler v. Fretag*, 348 U.S. 3 (1954); *Massey v. Moore*, 348 U.S. 105 (1954).

416. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (Jackson, J., dissenting).

417. In chronological order, Jackson wrote the following opinions following his Nuremberg service: *Harris v. United States*, 331 U.S. 145 (1947) (Jackson, J., dissenting); *Gryger v. Burke*, 334 U.S. 728 (1948); *Townsend v. Burke*, 334 U.S. 736 (1948); *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson, J., concurring); *United States v. Di Re*, 332 U.S. 581 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *Brinegar v. United States*, 338 U.S. 160 (1949) (Jackson, J., dissenting); *Watts v. Indiana*, 338 U.S. 49 (1949) (Jackson, J., concurring); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (Jackson, J., dissenting); *Harris v. South Carolina*, 338 U.S. 68 (1949) (Jackson, J., dissenting); *Gallegos v. Nebraska*, 342 U.S. 55 (1951) (Jackson, J.,

When Jackson rejoined the Court in 1946, domestic criminal procedure remained—compared to its modern counterpart—undeveloped.⁴¹⁸ And, consistent with his pre-Nuremberg Supreme Court experience, the Due Process Clause persisted as the primary, if not exclusive, tool for restricting state action.⁴¹⁹ Entering his second stint with the Court, Jackson’s view of due process remained largely constrained by his still strongly held view of judicial restraint.⁴²⁰ To Jackson, the Due Process Clause of the Fourteenth Amendment was, as a general rule, an inappropriate vehicle, both before and after Nuremberg, to invade states’ rights.⁴²¹ But even against that backdrop, there are hints that Jackson’s views post-Nuremberg had changed.

Apart from his views on due process, it is difficult at first blush to find consistency in Jackson’s post-Nuremberg criminal procedure opinions. Consider first his two right to counsel opinions, both originating from consolidated cases argued and decided on the same day.⁴²² In *Townsend v. Burke*,⁴²³ decided on June 14, 1948, petitioner Townsend was indicted in Pennsylvania state court for burglary and armed robbery on June 1, 1945.⁴²⁴ Things thereafter moved quickly: the petitioner was arrested on the indictment on June 3, confessed on June 4, pleaded guilty on June 5, and was sentenced that same day.⁴²⁵ Premised in part on incorrect information about the petitioner’s criminal history,⁴²⁶ the trial court sentenced him to two indeterminate sentences that were not to exceed ten to twenty years.⁴²⁷ At no point was the petitioner represented by counsel.⁴²⁸

The petitioner argued to the Supreme Court, in part, that during his plea hearing, among other procedural phases, “he was not represented by counsel, offered assignment of counsel, advised of his right to

concurring); *On Lee v. United States*, 343 U.S. 747 (1952); *Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., concurring); *Stein v. New York*, 346 U.S. 156 (1953).

418. See *supra* text accompanying notes 154–56.

419. *Rochin v. California*, 342 U.S. 165 (1952); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

420. See *HOCKETT*, *supra* note 48, at 280 (arguing that Jackson was “fundamentally the same justice” following his return from Nuremberg).

421. See *id.*

422. *Gryger v. Burke*, 334 U.S. 728 (1948) (argued Apr. 26 & 27, 1948 and decided June 14, 1948); *Townsend v. Burke*, 334 U.S. 736 (1948) (argued Apr. 27, 1948 and decided June 14, 1948).

423. *Townsend*, 334 U.S. 736 (1948).

424. *Id.* at 737.

425. *Id.*

426. *Id.* at 739–40 (noting that the trial court incorrectly relied on charges for which petitioner was found not guilty as a basis for imposing sentence).

427. *Id.* at 737.

428. *Id.* at 739.

counsel or instructed with particularity as to the nature of the crimes with which he was charged.”⁴²⁹ Those circumstances, according to the petitioner, “deprived his conviction and sentence of constitutional validity by reason of the Due Process Clause of the Fourteenth Amendment.”⁴³⁰

Writing for a majority of the Court, Jackson agreed. In doing so, the Court held that the combination of Pennsylvania’s failure to provide the petitioner with counsel and the sentencing court’s reliance on incorrect information about the petitioner’s criminal history violated due process.⁴³¹ In his opinion, Jackson reasoned “that this uncounseled defendant was either overreached by the prosecution’s submission of misinformation to the court or was prejudiced by the court’s own misreading of the record.”⁴³² Jackson thought that had counsel been present, counsel “would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted.”⁴³³

The Court reached seemingly the opposite conclusion in *Gryger v. Burke*, decided the same day as *Townsend*, and also authored by Jackson.⁴³⁴ Following the receipt of a life sentence as an eight-time habitual offender in Pennsylvania, petitioner Gryger argued to the Supreme Court that his sentence violated due process in part because he was sentenced without counsel and one of his convictions occurred prior to Pennsylvania’s enactment of its habitual offender statute.⁴³⁵ In rejecting petitioner’s right to counsel claim, Jackson wrote, “it rather overstrains our credulity” to believe that petitioner—an eight-time offender—“did not know of his right to engage counsel.”⁴³⁶ And, although petitioner argued that the sentencing judge erroneously applied the Pennsylvania Habitual Criminal Act, Jackson disagreed: “[N]othing [in the record] indicate[s] that he felt constrained to impose the penalty except as the facts before him warranted it.”⁴³⁷ Accordingly, a majority of the Court affirmed the sentence petitioner received, despite the absence of counsel.

The four-member dissent was baffled. Justice Rutledge, writing for

429. *Id.* at 738.

430. *Id.* at 738–39.

431. *Id.* at 740.

432. *Id.*

433. *Id.* at 740–41.

434. *Gryger v. Burke*, 334 U.S. 728 (1948).

435. *Id.* at 729.

436. *Id.* at 730.

437. *Id.* at 731.

the dissent, said pointedly, “I cannot square the decision in this case with that made in *Townsend v. Burke*.”⁴³⁸ After citing and quoting from *Townsend* throughout the opinion, Rutledge concluded by complaining that the two cases—*Townsend* and *Gryger*—“illustrate how capricious are the results when the right to counsel is made to depend not upon the mandate of the Constitution, but upon the vagaries of whether judges, the same or different, will regard this incident or that in the course of particular criminal proceedings as prejudicial.”⁴³⁹

Jackson’s apparently inconsistent opinion writing persists in the confession context. Consider two illustrative cases: *Watts v. Indiana* and *Stein v. New York*. On November 12, 1947, petitioner Watts was arrested in Indiana and interrogated in relays from 11:30 P.M. until between 2:30–3:00 A.M. the next morning regarding his suspected role in a murder.⁴⁴⁰ Petitioner was thereafter interrogated in relays at varying points during the days of November 13–18,⁴⁴¹ after which he made a series of incriminating statements.⁴⁴² During that period, and among other adversities, Watts endured solitary confinement, did not receive a “prompt preliminary hearing before a magistrate,” did not have counsel, and received limited sleep and food.⁴⁴³ A majority of the Court held that such methods violated the petitioner’s due process rights.⁴⁴⁴ Accordingly, it concluded, his incriminating statements were involuntary.⁴⁴⁵

Writing separately, Jackson concurred.⁴⁴⁶ In doing so, Jackson was not troubled so much by the police’s interrogation methods; to the contrary, Jackson emphasized that certain aspects of the police behavior in this case were permissible.⁴⁴⁷ After all, he said, there was no

438. *Id.* at 732 (Rutledge, J., dissenting).

439. *Id.* at 736 (Rutledge, J., dissenting).

440. *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

441. *Id.* at 52–53.

442. *Id.* at 53.

443. *Id.*

444. *Id.* at 54–55.

445. *Id.* at 55.

446. *Id.* at 57 (Jackson, J., concurring in part and dissenting in part). The Court in *Watts* heard cases involving docket numbers 610 (*Watts*), 76 (*Harris v. South Carolina*), and 107 (*Turner v. Pennsylvania*). *Id.* Jackson dissented from the Court’s holding as it applied to *Turner* and *Harris*, but concurred with the majority opinion as it applied specifically to petitioner *Watts*. *Id.* As an aside, Jackson enjoyed concurrences: “It’s more fun to write a dissenting opinion or a concurring opinion than to write a majority opinion, because you can just go off and express your own view without regard to anybody else.” Philip B. Kurland, *Robert H. Jackson*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2563–64 (Leon Friedman & Fred L. Israel eds., 1969).

447. *Watts*, 338 U.S. at 59–61 (discussing the merits of certain interrogation methods, like extended durations).

physical violence, and the confession itself was independently verified as trustworthy.⁴⁴⁸ The real difficulty, he wrote, was that “[t]he suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom.”⁴⁴⁹ Apart from that troubling scenario, though one that Jackson admitted he did not have an answer for, he indicated that the Bill of Rights should not provide expanded protection to suspects.⁴⁵⁰

Compare Jackson’s 1947 interrogation related concerns to his 1952 majority opinion in *Stein v. New York*.⁴⁵¹ Following three petitioners’ arrests for murder in connection with a robbery gone bad, two petitioners—Stein and Cooper—were interrogated without counsel and ultimately confessed.⁴⁵² Premised in some part on their confessions,⁴⁵³ both were convicted of felony murder in New York state court and sentenced to death.⁴⁵⁴ Despite both Stein and Cooper enduring lengthy periods of interrogation that, according to petitioners included physical violence and threats,⁴⁵⁵ Jackson upheld the police behavior by noting first that insufficient evidence existed to corroborate petitioners’ claims of police brutality.⁴⁵⁶ Second, Jackson believed that the petitioners’ interrogation was not inherently coercive, even though it involved multiple officers and lasted for twelve hours over a thirty-two hour period.⁴⁵⁷ Jackson’s own opinion never mentions petitioners’ absence of counsel, despite petitioners lacking counsel during their interrogations, two dissents mentioning this absence,⁴⁵⁸ and Jackson’s

448. *Id.* at 58.

449. *Id.* at 59.

450. *Id.* at 61 (Jackson, J., concurring in part and dissenting in part) (counseling against “unnecessary expansion” of the Bill of Rights).

451. *Stein v. New York*, 346 U.S. 156 (1953).

452. *Id.* at 166–70.

453. *Stein* is a trickier case than the textual discussion would suggest, although the specific details are excluded from the text as irrelevant to this Article’s thesis. But, in short, New York procedural law at the time mandated that it was a jury’s decision as to whether a petitioner’s confessions were voluntary. *Id.* at 159–60. Given that the jury in *Stein* issued a general verdict, one issue in the case was whether it was permissible for a general verdict of guilt to possibly be premised on a coerced confession. *Id.* at 170.

454. *Id.* at 159.

455. *E.g., id.* at 168 n.10 (describing, in part, petitioners’ contentions about police brutality during the interrogation sessions).

456. *Id.* at 183–84.

457. *Id.* at 185–86.

458. *Id.* at 197–99 (Black, J., dissenting) (citing cases he wrote noting the trouble with holding suspects in secret without counsel). See generally *id.* at 204–06 (Douglas, J., dissenting) (discussing the right to counsel generally in conjunction with the right to be free from coerced confessions).

own concerns expressed in *Watts* about this very scenario.⁴⁵⁹

Finally, consider and compare Jackson's post-Nuremberg work in the search and seizure context where he was most active. Just following his Nuremberg service, Jackson, in several late 1940s opinions,⁴⁶⁰ showcased his skepticism of *federal* police action unchecked by the judiciary. First, in the 1947 decision of *United States v. Di Re*,⁴⁶¹ the Court considered the constitutionality of a warrantless arrest and search of an automobile passenger following a lawful traffic stop of the driver.⁴⁶² 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 surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."⁴⁶³

One year later, in *Johnson v. United States*,⁴⁶⁴ the Court evaluated the lawfulness of an officer gaining consent to search a room in a residence by telling the suspect, "I want you to consider yourself under arrest because we are going to search the room."⁴⁶⁵ In holding that the resulting search violated the Fourth Amendment, Jackson reasoned for the majority in oft-quoted language,⁴⁶⁶ "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence."⁴⁶⁷

By way of final illustrative example, Jackson in 1949 penned a strongly worded dissent in *Brinegar v. United States*⁴⁶⁸ after a majority of the Court upheld the warrantless search of a vehicle suspected of transporting liquor across state lines.⁴⁶⁹ In *Brinegar*, the petitioner's

459. *Watts v. Indiana*, 338 U.S. 49, 59 (1949).

460. In addition to the three examples discussed immediately above, Jackson also wrote opinions in *Harris v. United States* and *McDonald v. United States*. *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson, J., concurring); *Harris v. United States*, 331 U.S. 145 (1947) (Jackson, J., dissenting). Both are discussed *infra*.

461. *United States v. Di Re*, 332 U.S. 581 (1948).

462. *Id.* at 582.

463. *Id.* at 595.

464. *Johnson v. United States*, 333 U.S. 10 (1948).

465. *Id.* at 12.

466. For examples of prominent cases that cite Justice Jackson, see *Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting); *Payton v. New York*, 445 U.S. 573, 586 n.24 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *United States v. Davis*, 657 F. Supp. 2d 630, 653 (D. Md. 2009); *State v. Hale*, 288 P.3d 1, 7 (Or. Ct. App. 2012).

467. *Johnson*, 333 U.S. at 13–14.

468. *Brinegar v. United States*, 338 U.S. 160 (1949).

469. *Id.* at 161–62.

vehicle was “weighted down with something,” the petitioner increased his speed upon seeing the officers, and one officer knew the vehicle’s driver had previously hauled whiskey.⁴⁷⁰ Although the petitioner contended that such facts did not provide sufficient probable cause for officers to warrantlessly search his vehicle, a majority of the Court disagreed and upheld the officers’ actions.⁴⁷¹

Jackson, it seemed, was incensed. In his dissent, Jackson asserted that, “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”⁴⁷² Moreover, he protested, “the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, *there is no enforcement outside of court.*”⁴⁷³ Calling the search of petitioner’s car the search of the car of “Everyman,”⁴⁷⁴ Jackson added:

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, *kept purposely beyond the court’s supervision* and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. *There is no opportunity for injunction or appeal to disinterested intervention.*⁴⁷⁵

But, despite Jackson’s concern about the impact of unchecked law enforcement conduct on the *rights* of the accused, his concerns seemingly did not extend to a *remedy*. Indeed, he joined the 1949 majority in *Wolf v. Colorado* that declined to incorporate the Fourth Amendment’s (then only federal) exclusionary rule.⁴⁷⁶ Accordingly, although he apparently believed that the *text* of the Fourth Amendment should apply to the states, he did not agree that the judicially created *federal* exclusionary rule should be imposed on the states.⁴⁷⁷

Amidst the apparent chaotic inconsistencies in Jackson’s criminal procedure writings exists a fluid but consistent judicial philosophy. During the London Negotiations, Jackson often expressed his belief in the procedural importance of a trial to determine guilt.⁴⁷⁸ Indeed, to Jackson, it was a *judicial* procedural experience that mattered—a

470. *Id.* at 162–63.

471. *Id.* at 178.

472. *Id.* at 180 (Jackson, J., dissenting).

473. *Id.* at 181 (emphasis added).

474. *Id.*

475. *Id.* at 182 (emphasis added).

476. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

477. *Id.* at 33.

478. *E.g.*, HARRIS, *supra* note 11, at 15–18.

procedural experience accompanied, most importantly, by counsel.⁴⁷⁹ The more likely the accused received a full, neutral judicial procedure correspondingly suggested to Jackson that the accused also received a dispassionate criminal procedural experience overall,⁴⁸⁰ even if questionable law enforcement investigative techniques were involved.⁴⁸¹ The key for Jackson, if such techniques were utilized, was to thereafter ensure that they were subjected—not to a rule specifically—but to neutral judicial review generally.⁴⁸²

Apply the foregoing to each of the prior seemingly contradictory examples. Return first to the apparent conflict in the right to counsel context between *Gryger* and *Townsend*. Although the *Gryger* dissent could not understand why *Townsend* did not mandate a different outcome,⁴⁸³ Jackson was faithful to his criminal procedure judicial philosophy in both cases. In *Townsend*, he reversed the conviction of a petitioner who was held incommunicado for forty hours, did not receive counsel, and was sentenced less than one week from the time of his arrest by a judge who misconstrued his criminal history.⁴⁸⁴ That petitioner, in short, did not receive a full and fair judicial procedural experience.

In contrast, however, the petitioner in *Gryger*—although unrepresented by counsel—had a substantial criminal history and thus presumably *knew* he should request a lawyer.⁴⁸⁵ And, despite the petitioner’s sentencing error allegation, Jackson, in language nicely illustrative of his philosophy, explained, “[n]othing in the record impeaches the fairness and temperateness with which the trial judge approached his task.”⁴⁸⁶ In other words, the petitioner’s substantial prior experience with the criminal justice system, alongside the neutral judicial review he received in the instant case, assured him a dispassionate and full procedural experience. Affirmance was therefore appropriate for the *Gryger* petitioner.

Similar logic pervades in Jackson’s approach to confessions through *Watts* and *Stein*. Although, again, the two opinions appear inconsistent,

479. *E.g.*, Revised Draft of Agreement and Memorandum Submitted by American Delegation § 14(b)(2), *supra* note 321, at 123.

480. *See Gryger v. Burke*, 334 U.S. 728, 731 (1948).

481. *See Stein v. New York*, 346 U.S. 156, 192–33 (1953).

482. *See generally* SCHUBERT, *supra* note 170, at vii (suggesting that “judicial neutrality” was, to Jackson, “the norm that ought to govern all judicial decision-making”).

483. *Gryger*, 334 U.S. at 732–33 (Rutledge, J., dissenting).

484. *Townsend v. Burke*, 334 U.S. 736, 737–38 (1948) (describing forty-hour incommunicado holding followed by resolution of his case in the space of less than a week).

485. *Gryger*, 334 U.S. at 730.

486. *Id.* at 731.

a closer look suggests the opposite. More specifically, in *Watts*, the petitioner was held in solitary confinement for six days without either seeing a magistrate or being provided with counsel before he confessed.⁴⁸⁷ Thus, in Jackson's eyes, the *Watts* petitioner did not receive a dispassionate criminal procedure experience.⁴⁸⁸ In contrast, the petitioners in *Stein*, though exposed to constitutionally questionable interrogation tactics, received a trial that lasted over seven weeks and generated a record of more than 3000 pages.⁴⁸⁹ These petitioners, in short, received a complete and full procedural experience.⁴⁹⁰ Thus, even if some errors occurred, Jackson believed them inconsequential:

In a trial such as this, lasting seven weeks, where objections by three defense counsel required in excess of three hundred rulings by the trial court without the long deliberation and debate possible for appellate court consideration, it would be a miracle if there were not some questions on which an appellate court would rule otherwise than did the trial judge.⁴⁹¹

Two other points amplify the harmony between *Watts* and *Stein*.⁴⁹² First, Jackson remarkably *concurred* in *Watts*—a case with facts nearly identical to the pre-Nuremberg case, *Ashcraft*, wherein he vigorously dissented. But gone is the scathing language Jackson used in *Ashcraft* to criticize the petitioner's failure to request counsel⁴⁹³—replaced instead post-Nuremberg by language of concern in *Watts* about the “real dilemma in a free society”⁴⁹⁴ when an unrepresented suspect is

487. *Watts v. Indiana*, 338 U.S. 49, 57 (1949) (Douglas, J., concurring) (noting that *Watts* was held in confinement for six days prior to confessing).

488. *See id.* at 59 (Jackson, J., concurring) (“To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom.”).

489. *Stein v. New York*, 346 U.S. 156, 159 (1953).

490. *See id.* at 182 (citations omitted) (“When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.”).

491. *Id.* at 193.

492. Jackson's approach to a 1951 case, *Gallegos v. Nebraska*, likewise showcases his consistency. 342 U.S. 55 (1951). In *Gallegos*, the petitioner confessed to a homicide after four days of interrogation during which he did not receive counsel. *Id.* at 57. Following his receipt of counsel, the petitioner was tried and convicted in state court. *Id.* at 56. The Supreme Court affirmed his conviction against the petitioner's argument that the State's procedure violated his federal due process rights. *Id.* at 66–68. Jackson concurred. Writing separately, he focused generally on the validity of petitioner's overall procedural experience, rather than the specific circumstances of his interrogation. *E.g., id.* at 71 (Jackson, J., concurring) (“This defendant's trial appears to have been scrupulously fair and dispassionate.”).

493. *Ashcraft v. Tennessee*, 322 U.S. 143, 169 (1944) (Jackson, J., dissenting) (noting that the *Ashcraft* petitioner “did not throw himself at any time on his rights, refuse to answer, and demand counsel, even according to his own testimony”).

494. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

interrogated without counsel. Second, and of equal interest, Jackson went so far as to *rely* on the majority opinion in *Ashcraft*—the very opinion he rejected pre-Nuremberg—in his *Stein* majority.⁴⁹⁵

Similar post-Nuremberg growth pervades in Jackson’s search and seizure opinions,⁴⁹⁶ which likewise initially appear inconsistent; how could Jackson so vigorously condemn certain discretionary police action but decline to feel as strongly about the remedial consequences for that action? In *Di Re*, *Johnson*, and *Brinegar*, law enforcement acted independently and without judicial supervision—thus drawing Jackson’s ire. Apart from that trio of opinions, Jackson showcased his concern for the “Everyman’s” Fourth Amendment rights in *Harris v. United States* and *McDonald v. United States*—both also decided shortly after Jackson’s return to the Supreme Court.⁴⁹⁷ His authoring from 1947–1949 of five opinions that were skeptical of unchecked discretionary police action was likely no temporal accident; Jackson, remember, returned from Nuremberg in 1946.

His vote in *Wolf v. Colorado*, declining to incorporate the Fourth Amendment’s exclusionary rule, is not to the contrary. Given his newfound concern about subjecting officer conduct to judicial scrutiny,⁴⁹⁸ Jackson’s vote in *Wolf* is noteworthy because it

495. *Stein*, 346 U.S. at 190 (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 145 (1944)).

496. See HOCKETT, *supra* note 48, at 280 (“Jackson’s Fourth Amendment opinions (at least those involving the federal government), like his opinions on procedural justice, also revealed Nuremberg’s liberalizing effect.”).

497. In addition to the textual examples, Jackson dissented in *Harris v. United States* and concurred in *McDonald v. United States*. *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson, J., concurring); *Harris v. United States*, 331 U.S. 145 (1947) (Jackson, J., dissenting). In *Harris*, officers searched a residence without a search warrant following petitioner’s arrest with an arrest warrant. *Harris*, 331 U.S. at 148–49. Despite engaging in a five-hour search and tearing open petitioner’s personal papers, the Court upheld the search as valid incident to petitioner’s arrest. *Id.* at 151. Jackson, however, dissented and, in part, indicated his concern that the Court’s holding provided “no practicable limits.” *Id.* at 198 (Jackson, J., dissenting). Jackson’s concern with search and seizure extended beyond the strictly legal realm, as his handwritten notes in *McDonald v. United States* reflect. His notes include five revisions of a hypothetical situation involving the landlady of the home where McDonald was arrested. Drafts of *McDonald v. United States* by Robert H. Jackson, No. 36 (on file with Library of Congress, Robert H. Jackson Papers, Box 151, Folder 5) (including drafts with revisions to the hypothetical situation from Oct. 29, 1948, Nov. 1, 1948, Nov. 3, 1948, Dec. 9, 1948, and Dec. 13, 1948). In the prolonged hypothetical, Jackson explored the possibilities of either the landlady shooting the unidentified officers when they pried open her window or the officers shooting the landlady if she were to draw her gun on them. *Id.* Jackson’s carefully constructed hypothetical nicely illustrates his concern with practical dangers that may arise when officers fail to follow criminal procedure rules.

498. *McDonald*, 335 U.S. at 457 (1948) (Jackson, J., concurring); *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Di Re*, 332 U.S. 581 (1948); *Harris*, 331 U.S. at 195 (1947) (Jackson, J., dissenting).

incorporated the Fourth Amendment's text—not because it declined to incorporate the Fourth Amendment's exclusionary rule.⁴⁹⁹ Remember, prior to *Wolf*, the only constitutional vehicle able to constrain the state police action in the search and seizure context was the Due Process Clause. For a Justice so focused on judicial restraint,⁵⁰⁰ Jackson's voting to create an entirely new method of limiting state action was remarkable.

Thus, by the time of *Wolf*, judicial restraint as a norm seemingly took on reduced importance for Jackson when compared to the prospect that, even at the state level, officer conduct could go on unchecked. *Wolf* assured citizens, at a minimum, of the Fourth Amendment's textual protection and correspondingly reassured Jackson that officer conduct would receive judicial scrutiny.⁵⁰¹ Thus, a state's decision on remedy—that is, whether to adopt the exclusionary rule—was, to Jackson, a wholly separate matter.⁵⁰² After all, by the time a remedy question could procedurally arise in criminal litigation, Jackson's thirst for a full, fair, and neutral procedural experience for the accused would already have been satisfied.

Collectively, Jackson's post-Nuremberg approach to search and seizure, confessions, and right to counsel issues showcases what he learned in London: fairness to the accused is achieved through meaningful trial procedure and neutral judicial review. Leaving the Nazis' guilt in the hands of the Crimea Declaration, rather than at the

499. See generally Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 484 (noting the effect of *Wolf* on the states' ability to reject the exclusionary rule in favor of alternative remedies as well as incorporation of the Fourth Amendment); Paul Simon, *The Fourth Amendment's Exclusionary Rule—Judicial Remedy or Constitutional Mandate: Is There Room for the “Good Faith” Exception?*, 41 S. TEX. L. REV. 1101, 1117 (2000) (discussing the “broad expansion of rights” under *Wolf*); Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 424 (2010) (describing *Wolf* as “the beginning of a new stage in the Court's exclusionary rule analysis”); E. H. Schopler, Annotation, *Modern Status of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R.2d 531 (1956) (discussing the impact of *Wolf* on later Fourth Amendment case law).

500. Jaffe, *supra* note 405, at 969 n.114 (“Jackson is among the Justices who are most opposed to Supreme Court control of state action under the fourteenth amendment.”).

501. See generally *Wolf v. Colorado*, 338 U.S. 25, 30–34 (1949) (noting that states can provide remedies besides exclusion of evidence, and that states can “rel[y] upon other methods which, if consistently enforced, would be equally effective.”), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

502. Even in that context there are signs that Jackson's stance on judicial restraint softened. Three years after *Wolf*, Jackson joined a majority of the Court in *Rochin v. California*, holding that the Due Process Clause contains a limited exclusionary rule. *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

hands of an impartial trial complete with robust individual rights, was unacceptable to Jackson.⁵⁰³ So too was it unacceptable to him in the domestic realm to *always* leave the accused without counsel, tolerate *all* law enforcement interrogation methods, and/or *always* permit warrantless police investigations. In short, law enforcement conduct by itself—unchecked and unviewed by the judiciary—was unacceptable to Jackson. The need for dispassionate and fair judicial review became critically important to him abroad and that importance stuck with him upon his return to the Court.

B. Modern Applicability

On April 1, 1954, Jackson suffered a “mild” heart attack.⁵⁰⁴ He knew he had inherited a genetically weak heart and,⁵⁰⁵ although he improved after the April 1 incident, his health had been fading for the previous two years.⁵⁰⁶ Perhaps not surprisingly, Jackson suffered a seizure on October 9 that same year while driving from his home in McLean, Virginia, into Washington.⁵⁰⁷ What seemed treatable when he drove to his secretary’s nearby home for help quickly became fatal; Jackson died of a heart attack at 11:45 A.M., shortly after his physician arrived.⁵⁰⁸

Media reports following his death, alongside subsequent scholarship, sought to assess Jackson’s legacy.⁵⁰⁹ Although those collective efforts highlighted many of Jackson’s notable life accomplishments,⁵¹⁰ most agreed that his work at Nuremberg comprised his most impactful and lasting work⁵¹¹—and for good reason. That work, after all, had a

503. See *supra* note 310 and accompanying text.

504. Special to *The New York Times*, *Justice Jackson Dead at 62 of Heart Attack in Capital*, N.Y. TIMES, Oct. 10, 1954, at 1 [hereinafter *Justice Jackson Dead*].

505. JARROW, *supra* note 31, at 56 (noting that Jackson’s father died at age fifty-two from heart trouble and that Jackson “knew he might have inherited the Jackson heart”).

506. *Justice Jackson Dead*, *supra* note 504, at 86 (“Justice Jackson suffered much from illness in the last two years of his life.”).

507. *Id.* at 1.

508. *Id.*

509. *Id.* at 86; *Some Events That Wrote Headlines in ‘54*, DIXON EVENING TEL., Dec. 24, 1954, at 29; see, e.g., Fairman, *supra* note 172, at 445 (discussing how Jackson left a “shining mark”); James A. Nielson, *Robert H. Jackson: The Middle Ground*, 6 LA. L. REV. 381, 384 (1945) (engaging in “a study of Robert Jackson’s political and legal philosophy”).

510. See, e.g., Fairman, *supra* note 172; Jaffe, *supra* note 405; Stark, *supra* note 30; Paul A. Weidner, *Justice Jackson and the Judicial Function*, 53 MICH. L. REV. 567 (1955).

511. See, e.g., Gordon Dean, *Mr. Justice Jackson: His Contribution at Nuremberg*, 41 A.B.A. J. 912 (1955); Moritz Fuchs, *Robert H. Jackson at the Nuremberg Trials, 1945–1946 as Remembered by his Personal Bodyguard*, 68 ALB. L. REV. 13 (2005); Viscount Kilmuir, *Justice Jackson and Nuremberg—A British Tribute*, 8 STAN. L. REV. 54 (1955); Meltzer, *supra* note 148, at 55–56; Richard W. Sonnenfeldt, *For Me, Robert H. Jackson is Alive*, 68 ALB. L. REV. 71

tremendous impact on international law.⁵¹² But this Subpart argues that Jackson's work at Nuremberg lives on in another important area: domestic criminal procedure—as demonstrated by the many citations to Jackson's post-Nuremberg search and seizure, confessions, and right to counsel opinions by the Supreme Court and lower courts. Fascinatingly, although Jackson died fifty-nine years ago, citations to his post-Nuremberg criminal procedure opinions continue, and the legacy of his work at Nuremberg thus seemingly persists domestically.

Consider first the significance of Jackson's right to counsel opinions. Recall that *Townsend* and *Gryger* both considered the extent to which a state must provide a lawyer to the accused at varying procedural points.⁵¹³ Given that both cases' holdings are premised on the Due Process Clause,⁵¹⁴ the Supreme Court's 1963 *Gideon v. Wainwright* decision largely undermined their value to a defendant as a constitutional source for obtaining counsel.⁵¹⁵ And, given *Gideon*'s command that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,”⁵¹⁶ it emerged as a far more robust source for the accused to receive counsel than *Gryger/Townsend*.⁵¹⁷

The rise of *Gideon* as a replacement for the constitutional prominence of *Gryger/Townsend* as right to counsel cases makes more remarkable the fact that both cases remain modernly relevant. Take *Gryger* first. Recall the petitioner's argument that applying Pennsylvania's Habitual Criminal Act to him was inappropriate because one of his predicate

(2004).

512. King, *supra* note 411, at 337–38; Allan Ryan, *Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193 (1996); Taylor, *supra* note 18, at 488.

513. See *Gryger v. Burke*, 334 U.S. 728, 729 (1948); *Townsend v. Burke*, 334 U.S. 736, 739 (1948).

514. *Gryger*, 334 U.S. at 731; *Townsend*, 334 U.S. at 738–39.

515. *Gideon v. Wainwright*, 372 U.S. 335 (1963); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 826 (1968) (referring to the diluted effect of *Townsend* and *Gryger* after *Gideon*).

516. *Gideon*, 372 U.S. at 344.

517. Despite *Gideon*'s prominent role in providing counsel to the accused, the Supreme Court in 1972 relied in part on *Townsend* to remand petitioner's case for resentencing where his sentence was premised on prior felony convictions obtained without his having received counsel. *United States v. Tucker*, 404 U.S. 443, 447 (1972) (citing *Townsend*, 334 U.S. at 736); see *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (noting that *Townsend*, along with two other right to counsel cases, “clearly” stands “for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”). Other courts have relied on *Townsend* as a basis for providing a more substantive and robust right to counsel. *E.g.*, *Gutierrez v. Estelle*, 474 F.2d 899, 901 (5th Cir. 1973); *United States ex rel. Cleveland v. Casscles*, 354 F. Supp. 114, 119 (S.D.N.Y. 1973).

convictions took place *before* promulgation of the act.⁵¹⁸ According to Jackson though, it was not “clear” from the record that the sentencing court misconstrued the habitual offender statute.⁵¹⁹ Although the *Gryger* Court did not consider the *ex post facto* implications of the petitioner’s argument in detail,⁵²⁰ modern courts have nonetheless heavily relied on that aspect of Jackson’s opinion.⁵²¹ In perhaps its most impactful application, lower courts have relied on *Gryger* to uphold as constitutional the use of felony three strikes statutes to defendants whose crimes preceded the statutes’ enactment.⁵²²

Recall *Townsend* next. The Supreme Court in *Mempa v. Rhay*⁵²³ held that indigent defendants have a Sixth Amendment right to counsel at sentencing.⁵²⁴ Citing *Townsend*, Justice Marshall emphasized the importance of a flexible approach. He wrote, “appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”⁵²⁵ He fascinatingly added, “[i]n particular, *Townsend v. Burke*, . . . illustrates the critical nature of sentencing in a criminal case and might well be

518. *Gryger*, 334 U.S. at 729.

519. *Id.* at 731.

520. In response to petitioner’s argument, Jackson said, “[n]or do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy.” *Id.* at 732. He added only, “[i]t is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.” *Id.*

521. *See, e.g.*, *McCall v. Dretke*, 390 F.3d 358, 365–66 (5th Cir. 2004) (relying on *Gryger* to uphold the supervisory component of a driving while intoxicated statute a “stiffened” penalty rather than an “additional” one); *United States v. Shepard*, 231 F.3d 56, 70 (1st Cir. 2000) (noting that sentencing enhancements provide for “a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.” (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948))); *United States v. Saenz-Forero*, 27 F.3d 1016, 1021 (5th Cir. 1994) (citing *Gryger* and holding that an enhancement provision increases the punishment but “does not affect the punishment that [defendant] received for the crimes committed prior to the effective date of the Act.”); *United States v. Forbes*, 16 F.3d 1294, 1302 (1st Cir. 1994) (“*Gryger* . . . recognized the legislature’s authority to enact an enhanced penalty for future conduct preceded by a criminal conviction obtained prior to enactment of the enhanced penalty provision.”); *Covington v. Sullivan*, 823 F.2d 37, 39–40 (2d Cir. 1987) (relying on *Gryger* and indicating “[t]he State could enhance penalties for future crimes because of all prior convictions or only because of certain designated prior convictions . . .”).

522. *See, e.g.*, *United States v. Kumar*, 617 F.3d 612, 629 (2d Cir. 2010) (“The one-book rule, when it leads to a higher sentencing range than would be applied to a single offense, operates in a manner similar to that of the recidivist statutes and ‘three strikes’ laws upheld by the Supreme Court and our sister circuits in the past.”); *Forbes*, 16 F.3d at 1302 (“*Gryger* thus recognized the legislature’s authority to enact an enhanced penalty for future conduct preceded by a criminal conviction obtained prior to enactment of the enhanced penalty provision.”).

523. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

524. *Id.* at 134.

525. *Id.*

considered *to support by itself* a holding that the right to counsel applies at sentencing.”⁵²⁶

The Supreme Court aside, lower courts have cited *Townsend* 1876 total times (1417 times at the federal level, 458 times at the state level, and even once at the tribal level).⁵²⁷ Although the cites are too numerous to list in this context, alongside the specific basis for those citations, one thing is clear: *Townsend* is consistently cited by federal and state courts alike as a basis to raise the minimum due process protections guaranteed to a defendant at sentencing.⁵²⁸ But more specifically, recall in *Townsend* the sentencing court’s erroneous application of petitioner’s criminal history.⁵²⁹ Jackson said, “on this record[,] we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.”⁵³⁰ That aspect of Jackson’s opinion has impressively matured, around the nation at the state and federal court level, into a due process right of the accused to be sentenced based only on materially correct information.⁵³¹

526. *Id.* (emphasis added).

527. *Townsend v. Burke*, 334 U.S. 736 (1948), Westlaw Citing References (last accessed Sept. 22, 2014).

528. *See, e.g.*, *Bryan v. Brandon*, 228 F. App’x 578, 584 (6th Cir. 2007) (holding that *Townsend* stands “for the proposition that a sentence imposed on the basis of an erroneous prior conviction is constitutionally invalid” and therefore finding petitioner’s sentence unconstitutional); *Lewis v. Lane*, 832 F.2d 1446, 1457 (7th Cir. 1987) (citing *Townsend*, 334 U.S. at 741) (vacating death sentence in part based on due process concerns arising from false nature of defendant’s prior convictions presented during sentencing); *Drummer v. United States*, No. 3:01cr31-10, 2013 U.S. Dist. LEXIS 60031, at *3 (W.D.N.C. Apr. 26, 2013) (quoting 28 U.S.C. § 2255(a) (2012)) (holding that *Townsend* provided petitioner with “a cognizable claim that his ‘sentence was imposed in violation of the Constitution’”); *D’Ambrosio v. State*, 146 P.3d 606, 626 (Haw. Ct. App. 2006) (quoting *Townsend*, 334 U.S. at 741) (holding that, as a “‘requirement of fair play,’” a convicted person is constitutionally entitled to be represented at a minimum-term hearing to ensure that the minimum sentence imposed is not based on misinformation); *United States v. Hamid*, 531 A.2d 628, 643–44 (D.C. 1987) (citing *Townsend*, 334 U.S. at 740–41) (holding that a sentence based on incomplete information does not comport with due process).

529. *Townsend*, 334 U.S. at 740.

530. *Id.* at 740–41.

531. *See, e.g.*, *Stewart v. Erwin*, 503 F.3d 488, 499 (6th Cir. 2007) (“*Townsend* establishes the principle that the Due Process Clause of the Fourteenth Amendment is violated when a defendant is sentenced on the basis of materially false information.”); *Torres v. United States*, 140 F.3d 392, 404 (2d Cir. 1998) (citing *Townsend* as providing due process right not to be sentenced based on materially false information); *Gray v. Rowe*, No. 01-102-B-S, 2001 U.S. Dist. LEXIS 15551, at *30 (D. Me. Sept. 28, 2001) (relying on *Townsend* to provide “a ‘clearly established’ constitutional right to have a sentence imposed based on factually accurate information”); *State v. Bosworth*, 360 So. 2d 173, 175 (La. 1978) (citing *Townsend*, 334 U.S. at 740–41) (holding that, where the trial court relies upon materially false information, the defendant must be given an opportunity to deny or explain substantially significant misinformation); *Ford v. State*, 437 So. 2d 13, 14 (Miss. 1983) (citing *Townsend* as controlling in a case involving an unverified statement

Beyond Jackson's right to counsel work is the legacy left by two of his confession opinions: *Stein v. New York* and *Watts v. Indiana*. Although a later Supreme Court case overruled *Stein's* upholding of a particular New York trial procedure,⁵³² *Stein* has remained modernly relevant to confession law in two primary ways. First, and quite generally, *Stein* remains relevant to the judiciary's current conception of the due process voluntariness test.⁵³³ Second, keying on the distinction Jackson drew in *Stein* between interrogations involving physical coercions and psychological coercion,⁵³⁴ lower courts have crafted a per se rule against the admissibility of confessions secured in any part by police brutality.⁵³⁵

Jackson's discussion of the role of counsel in his *Watts* concurrence resonated with the Supreme Court in *Escobedo v. Illinois*.⁵³⁶ Premised on the Sixth Amendment, *Escobedo*, a controversial opinion when issued,⁵³⁷ held that petitioner's conviction was unconstitutionally based on an unlawful interrogation—one that occurred without petitioner having received counsel.⁵³⁸ The Court reasoned, after citing to Jackson's concurrence, that "[t]he right to counsel would indeed be hollow if it began at a period when few confessions were obtained."⁵³⁹ But more modernly, Jackson's opinion in *Watts* has influenced lower courts on issues related to the role of counsel during an interrogation,⁵⁴⁰

which defendant was not allowed to refute); *People v. Barnes*, 875 N.Y.S.2d 545, 547 (N.Y. App. Div. 2009) (quoting *Townsend*, 334 U.S. at 741) (remanding a case for resentencing where factors relied on by the sentencing court included "'materially untrue'" assumptions or "'misinformation'" about defendant's prior convictions).

532. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) ("In our view, the New York procedure falls short of satisfying these constitutional requirements. *Stein v. New York* is overruled.").

533. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 434 (2000); *United States v. Awadallah*, 349 F.3d 42, 56 (2d Cir. 2003); *United States v. Alfaro*, No. CR 08-0784 JB, 2008 U.S. Dist. LEXIS 108887, at *33–34 (D. N.M. Dec. 17, 2008); *United States v. Neha*, 411 F. Supp. 2d 1262, 1268 (D. N.M. 2005).

534. *Stein v. New York*, 346 U.S. 156, 183–85 (1953), overruled by *Denno*, 378 U.S. 368 (comparing the constitutional implications of interrogations that involve police brutality as opposed to psychological coercion).

535. *See, e.g.*, *United States v. Jenkins*, 938 F.2d 934, 938 (9th Cir. 1991); *Cooper v. Scroggy*, 845 F.2d 1385, 1390 (6th Cir. 1988); *Cranor v. Gonzales*, 226 F.2d 83, 88 (9th Cir. 1955).

536. *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

537. *See, e.g.*, LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 391–92 (2000); Sidney E. Zion, *Attorneys Chafe at Crime Rulings: Prosecutors Fear the Guilty Will be Able to Avoid Trial*, N.Y. TIMES, Mar. 21, 1965, at 61; Sidney E. Zion, *High Court Scored on Crime Rulings: Bars Against Confessions, Searches and Seizures Attacked by Murphy*, N.Y. TIMES, May 14, 1965, at 39.

538. *Escobedo*, 378 U.S. at 490–91.

539. *Id.* at 488.

540. *E.g.*, *State v. Stoddard*, 537 A.2d 446, 457 (Conn. 1988).

the treatment suspects should receive during police questioning,⁵⁴¹ and the role of constitutional safeguards more broadly for the accused⁵⁴²—among other topics.⁵⁴³

Despite the extraordinary heritage of Jackson’s right to counsel and confession opinions, his work on Fourth Amendment issues has had the most profound role in shaping modern criminal procedure.⁵⁴⁴ Like with his other post-Nuremberg criminal procedure opinions, lower courts have extensively cited *Di Re*, *Johnson*, and *Brinegar*.⁵⁴⁵ Thus, similar to the influence his right to counsel and confession cases have had on lower courts, Jackson’s Fourth Amendment jurisprudence has likewise impacted federal and state courts.⁵⁴⁶ But, unlike those other two substantive areas, Jackson’s Fourth Amendment opinions have *also* greatly impacted the Supreme Court.

In 1961, the Supreme Court in *Chapman v. United States*⁵⁴⁷ relied heavily on *Johnson* to invalidate law enforcement’s warrantless search of a resident’s home.⁵⁴⁸ *Di Re*, by contrast, most prominently began impacting modern Supreme Court Fourth Amendment jurisprudence in 1979,⁵⁴⁹ when the Court considered the validity of an Illinois statute authorizing police “to detain and search any person found on [a]

541. *E.g.*, *Day v. State*, 29 So. 3d 1178, 1180–81 (Fla. Dist. Ct. App. 2010).

542. *E.g.*, *State v. Moore*, 585 A.2d 864, 898 (N.J. 1991).

543. *E.g.*, *State v. Grant*, No. CR6481390, 2002 Conn. Super. LEXIS 48, at *17–18 (Conn. Super. Ct. Jan. 3, 2002); *People v. Bender*, 551 N.W.2d 71, 83–84 (Mich. 1996), *overruled by* *People v. Tanner*, No. 146211, 2014 WL 2853770, at *24 (Mich. June 23, 2014).

544. *See* HOCKETT, *supra* note 48, at 280 (arguing that Jackson’s Fourth Amendment opinions “disclosed his belief that the prohibition against unreasonable searches and seizures . . . is one of the most important procedural safeguards against arbitrary government”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 842 (1994) (“Justice Jackson returned to the Supreme Court a fervent believer in the warrant requirement.”).

545. *Brinegar v. U.S.*, 338 U.S. 160 (1949), Westlaw Citing References (last accessed Sept. 22, 2014) (listing 5394 case citing references); *U.S. v. Di Re*, 332 U.S. 581 (1948), Westlaw Citing References (last accessed Sept. 22, 2014) (listing 1178 case citing references); *Johnson v. U.S.*, 333 U.S. 10 (1948), Westlaw Citing References (last accessed Sept. 22, 2014) (listing 2978 case citing references).

546. *See, e.g.*, *United States v. Moustrophis*, No. 2:11-cr-141-GZS, 2012 U.S. Dist. LEXIS 113490, at *14 (D. Me. May 30, 2012); *Lee v. City of Charleston*, 668 F. Supp. 2d 763, 774 (S.D. W. Va. 2009); *United States v. Munoz-Villalba*, No. 1:05-CR-248, 2005 U.S. Dist. LEXIS 28974, at *25 (M.D. Pa. Nov. 15, 2005); *United States v. Moderacki*, 280 F. Supp. 633, 637 (D. Del. 1968); *United States v. Kowal*, 197 F. Supp. 401, 406 (D.R.I. 1961); *People v. Escollias*, 70 Cal. Rptr. 65, 69 (Cal. Ct. App. 1968) (Kaus, J., concurring); *State v. Peery*, 303 S.W.3d 150, 153 (Mo. 2010); *State v. Davis*, No. 18493, 2001 Ohio App. LEXIS 2457, at *4–5 (Ohio Ct. App. June 1, 2001).

547. *Chapman v. United States*, 365 U.S. 610 (1961).

548. *Id.* at 613–17.

549. The Supreme Court cited *Di Re* earlier, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968), but *Ybarra* is seemingly the first instance where *Di Re* was nearly—if not actually—dispositive of the issue.

premises being searched pursuant to a search warrant.”⁵⁵⁰ Justice Stewart’s majority opinion in *Ybarra v. Illinois* relied on *Di Re* extensively to invalidate the statute and hold that separate probable cause must exist to support the search of those on the premises.⁵⁵¹ He reasoned that “the governing principle” in both *Ybarra* and *Di Re*—the requirement of separate probable cause—“is basically the same.”⁵⁵² The impact of *Di Re* is collaterally noteworthy also because of *Ybarra*’s current doctrinal importance in Fourth Amendment jurisprudence.⁵⁵³

Perhaps more interestingly, though, is a more recent debate that emerged amongst the justices over *Di Re*’s meaning. It seemingly began in 1991 when the Supreme Court decided *California v. Acevedo*,⁵⁵⁴ a case of monumental importance to the legality of warrantless car searches.⁵⁵⁵ In restructuring decades of prior doctrine that drew a distinction between whether officers sought to search a car or a container within that car,⁵⁵⁶ Justice Blackmun for the majority

550. *Ybarra v. Illinois*, 444 U.S. 85, 87 (1979).

551. *Id.* at 94–96.

552. *Id.* at 95.

553. George M. Dery III, *Improbable Cause: The Court’s Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton*, 50 CASE W. RES. L. REV. 547, 595–96 (2000) (arguing that the fundamental logic of *Ybarra* applies equally to searches of persons or places and emphasizing the precedential value of *Ybarra*); Kevin Robert Glandon, *Bright Lines on the Road: The Fourth Amendment, the Automatic Companion Rule, the “Automatic Container” Rule, and A New Rule for Drug—or Firearm—Related Traffic Stop Companion Searches Incident to Lawful Arrest*, 46 AM. CRIM. L. REV. 1267, 1287 (2009) (“Perhaps the strongest argument against the automatic companion rule can be found in *Ybarra v. Illinois*.”); Sara L. Shaeffer, *Another Dent in Our Fourth Amendment Rights: The Supreme Court’s Precarious Extension of the Automobile Exception in Wyoming v. Houghton*, 45 S.D. L. REV. 422, 441–42 (2000) (citing *Ybarra*, 444 U.S. at 91; *United States v. Di Re*, 332 U.S. 581, 587 (1948)) (emphasizing that the Court has consistently rejected the idea of guilt by association in Fourth Amendment cases).

554. *California v. Acevedo*, 500 U.S. 565 (1991).

555. Robert Angell, *California v. Acevedo and the Shrinking Fourth Amendment*, 21 CAP. U. L. REV. 707, 721 (1992) (noting the importance of *Acevedo*’s departure from prior decisions holding that a search of a container is subject to the warrant requirement); Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 615 (2008) (describing the two approaches to search and seizure rules in the majority opinion and dissenting opinion in *Acevedo*); Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1438–41 (2010) (discussing the importance of *Acevedo* on searches of containers in cars).

556. Leading up to *Acevedo*, the Supreme Court treated warrantless car searches differently depending on whether officers sought to search the car itself or a container specifically located inside the car. Compare *California v. Carney*, 471 U.S. 386 (1985), and *Carroll v. United States*, 267 U.S. 132 (1925), with *Arkansas v. Sanders*, 442 U.S. 753 (1979), abrogated by *California v. Acevedo*, 500 U.S. 565 (1991), and *United States v. Chadwick*, 433 U.S. 1 (1977), abrogated by *California v. Acevedo*, 500 U.S. 565 (1991). *Acevedo* largely eliminated that distinction by simply requiring probable cause to search the car or containers within the car. *Acevedo*, 500 U.S.

wrote: “[W]e now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.”⁵⁵⁷ Accordingly, he concluded, “the police may search without a warrant if their search is supported by probable cause.”⁵⁵⁸

Although Justice Blackmun’s majority opinion in *Acevedo* did not rely on *Di Re*, Justice Stevens in dissent relied both on *Di Re* and *Johnson*. In arguing that *Acevedo* unconstitutionally undermined the role a warrant should play in car searches, Stevens cited both cases when highlighting the historical importance of warrants:

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 prosecutor at the Nuremburg trials—the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.⁵⁵⁹

Justice Stevens added, again relying on *Johnson*, “[t]he [warrant] requirement also reflects the sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual’s personal effects should be made by a neutral magistrate rather than an agent of the Executive.”⁵⁶⁰

The proper role—at least according to Scalia and Stevens—of Jackson’s jurisprudence more pointedly arose when the pair squared off in *Wyoming v. Houghton*.⁵⁶¹ 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 even a *passenger’s* belongings.⁵⁶² Writing for the majority, Justice 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.”⁵⁶³ 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:

at 579.

557. *Acevedo*, 500 U.S. at 576.

558. *Id.* at 579.

559. *Id.* at 586 (Stevens, J., dissenting) (emphasis added) (citing as an example *United States v. Di Re*, 332 U.S. 581, 595 (1948); *Johnson v. United States*, 333 U.S. 10, 17 (1948)).

560. *Acevedo*, 500 U.S. at 586 (Stevens, J., dissenting) (citing *Johnson*, 333 U.S. at 13–14).

561. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

562. *Id.* at 302.

563. *Id.* at 303.

[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.”⁵⁶⁴

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.⁵⁶⁵

Joined by Justices Souter and Ginsburg, Justice Stevens dissented, and in doing so, found *Di Re* directly on point as “the only automobile case confronting the search of a passenger defendant.”⁵⁶⁶ *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.⁵⁶⁷ Quoting from *Di Re*, Stevens finished by observing “[w]hat 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.’”⁵⁶⁸

Most recently, in *Virginia v. Moore*,⁵⁶⁹ the Supreme Court in 2008 considered “whether a police officer violates the Fourth Amendment by

564. *Di Re*, 332 U.S. at 587.

565. *Houghton*, 526 U.S. at 303 n.1. Incidentally, there is nothing in Justice Jackson’s private papers to support Justice Scalia’s blanket assertion that Jackson’s opinion in *Di Re* focused on distinguishing a search of person versus property, as opposed to distinguishing between a search of a driver rather than passenger. If anything, the limited exchange between Jackson and his clerk suggests the opposite; indeed, the pair spoke in terms of searching “occupants of the car” rather than in terms of “people” or “property” more generally.

566. *Houghton*, 526 U.S. at 309 (Stevens, J., dissenting).

567. *Id.* at 309–10 (Stevens, J., dissenting).

568. *Id.* at 312 (Stevens, J., dissenting) (emphasis added) (quoting *Di Re*, 332 U.S. at 587).

569. *Virginia v. Moore*, 553 U.S. 164 (2008).

making an arrest based on probable cause but prohibited by state law.”⁵⁷⁰ In concluding that no violation occurs, the Court held “that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.”⁵⁷¹ The Court reasoned, in part, that cases like *Di Re* and *Johnson* confirmed the propriety of its resolution.⁵⁷² *Moore*, like the other Supreme Court cases influenced by Jackson’s post-Nuremberg work, quickly assumed an important role in Americans’ daily lives.⁵⁷³

Collectively, Jackson’s post-Nuremberg Fourth Amendment work has influenced the Supreme Court’s modern direction on automobile searches,⁵⁷⁴ searches of a car passenger’s property,⁵⁷⁵ searches of persons present during warrant-based property searches,⁵⁷⁶ and the role of state law in Fourth Amendment seizures of a person.⁵⁷⁷ But apart from the precise importance of Jackson’s search and seizure opinions to the doctrinal development of the Fourth Amendment is the overall impact of *what* Jackson wrote in those opinions. Like a broad contingent of lower courts,⁵⁷⁸ the modern Supreme Court has indeed often relied on Jackson’s choice of words to support its decisions.⁵⁷⁹

570. *Id.* at 166.

571. *Id.* at 176.

572. *Id.* at 173 (“Neither *Di Re* nor the cases following it held that violations of state arrest law are also violations of the Fourth Amendment.”).

573. See J. Thomas Sullivan, Danforth, *Retroactivity, and Federalism*, 61 OKLA. L. REV. 425, 436 (2008) (construing *Moore* as an “important decision having federalism consequences”). Perhaps most importantly, *Moore* sought to ensure consistency in Fourth Amendment jurisprudence by untying it from state law standards—at least in the context of arrest. See *Moore*, 553 U.S. at 176 (cautioning that “linking Fourth Amendment protections to state law would cause them to ‘vary from place to place and from time to time’” (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996))).

574. *California v. Acevedo*, 500 U.S. 564, 586 (1991) (Stevens, J., dissenting).

575. *Wyoming v. Houghton*, 526 U.S. 295, 303 n.1 (1999).

576. *Ybarra v. Illinois*, 444 U.S. 85, 94–96 (1979).

577. *Moore*, 553 U.S. at 170.

578. See, e.g., *United States v. Johnson*, 862 F.2d 1135, 1151 (5th Cir. 1988) (Goldberg, J., dissenting); *United States v. Alvarez-Gonzalez*, 561 F.2d 620, 629–30 (5th Cir. 1977) (Goldberg, J., dissenting); *United States v. Fern*, 484 F.2d 666, 670 (7th Cir. 1973) (Gordon, J., dissenting); *United States v. Stewart*, 468 F. Supp. 2d 261, 282 (D. Mass. 2007), *overruled by United States v. Stewart*, 532 F.3d 32 (1st Cir. 2008); *Polk v. District of Columbia*, 121 F. Supp. 2d 56, 66–67 (D.D.C. 2000); *Ramirez v. Webb*, 599 F. Supp. 1278, 1282 (W.D. Mich. 1984); *United States v. Thomas*, 314 A.2d 464, 473 (D.C. 1974) (Pair, J., dissenting); *State v. Barnaby*, 142 P.3d 809, 849–50 (Mont. 2006) (Nelson, J., dissenting); *State v. Deskins*, 799 P.2d 1070, 1074 (Mont. 1990) (McDonough, J., dissenting); *State v. Crom*, 383 N.W.2d 461, 469–70 (Neb. 1986) (Krivoshva, C.J., concurring); *State v. Irving*, 555 A.2d 575, 592–93 (N.J. 1989) (O’Hern, J., dissenting); *Commonwealth v. Rosenfelt*, 662 A.2d 1131, 1145–46 (Pa. Super. Ct. 1993).

579. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 436 (1986) (Stevens, J., dissenting) (“As Justice Jackson observed shortly after his return from Nuremberg, cases of this kind present ‘a real dilemma in a free society . . . for the defendant is shielded by such safeguards as no system of

Without further belaboring the point, it seems safe to conclude that Jackson's post-Nuremberg opinions remain profoundly influential on how criminal procedure issues are decided today.

CONCLUSION

Robert Jackson was a monstrously important legal figure, but not for the reasons we might traditionally think. Although his varied positions in the government alongside his work as an Associate Justice on the Supreme Court impacted the direction of tax law, antitrust law, and bankruptcy law—to name but a few examples—he never received credit for influencing an additional important doctrinal area: criminal procedure.

Prior to Jackson accepting an assignment from President Truman to become the Chief Prosecutor at Nuremberg, Jackson simply had no occasion to construct a coherent judicial philosophy on issues like search and seizure, police interrogation methods, and the importance of the accused receiving the assistance of a lawyer. But after struggling for months in London during the Summer of 1945, everything changed. That Summer, he came to understand the procedural importance of providing the accused with certain rights—those rights, he realized, are what set the American legal system apart.

Following his return to the bench after Nuremberg, Jackson commented, “I regard [the Nuremberg trials] as infinitely more important than my work on the Supreme Court.”⁵⁸⁰ He therefore unsurprisingly approached his work on criminal procedure issues with a renewed vigor and focus that produced several important opinions. Those opinions remain highly influential today on both lower courts and the Supreme Court. Nuremberg therefore did more than impact international criminal law; its influence on Justice Jackson's thinking reflects, through his opinions, that it touched the lives of Americans—both then and now. The influence of those opinions on modern courts—both at the lower court and Supreme Court levels—likewise remains pervasive.

law except the Anglo-American concedes to him.” (quoting *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result)); *United States v. Leon*, 468 U.S. 897, 973 (1984) (Stevens, J., dissenting) (“Justice Jackson’s reference to his experience at Nuremberg should remind us of the importance of considering the consequences of today’s decision for ‘Everyman.’”); *United States v. Villamonte-Marquez*, 462 U.S. 579, 609–10 (1983) (Brennan, J., dissenting) (relying on language from Jackson to emphasize “an unprecedented invasion of constitutionally guaranteed liberties”); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273–74 (1973) (holding warrantless roving border search unconstitutional and noting in doing so “[i]t is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg trials”).

580. Kurland, *supra* note 446, at 2565.