

Thornburgh on Jackson, Security, Liberty, and Law

*John Q. Barrett**

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Every good Attorney General of the United States studies and learns from the lives, words, work, and examples of his or her predecessors in that vital Cabinet office.

Attorney General Dick Thornburgh, who served from 1988-1991 under Presidents Reagan and George H.W. Bush, was such an attorney general. Thornburgh had a special interest in, and he had high regard for, his fellow Pennsylvania native, Robert H. Jackson.



1940 or 1941: Attorney General Robert H. Jackson, at work in his office.

* Professor of Law, St. John's University, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York. I emailed an earlier version of this essay to The Jackson List on January 10, 2021.

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We know this from Attorney General Thornburgh's writing. In 2005, when Thornburgh was back in private law practice after decades and many roles in public service, he wrote in the *Albany Law Review* about Jackson, an Albany Law School alumnus.

Thornburgh's specific topic was the preservation of national security and liberty. He described what he saw as Jackson's successes, at the Department of Justice, on the U.S. Supreme Court, and as U.S. chief prosecutor at Nuremberg of Nazi war criminals, in thinking about and using law practically, with discretion and balance, to advance the security in which individuals can have and exercise freedoms. Thornburgh noted, quoting Jackson's former law clerk William H. Rehnquist, that we call individual freedoms our *civil* liberties—they exist when people are under and loyal to an organized government that is their own.

Thornburgh was writing in a particular context, explaining and defending the USA PATRIOT law that the U.S. government enacted after the 9-11 terrorist attacks. But much of his article applies generally to security and liberty. Indeed, Thornburgh, in his article, highlighted contemporary topics: incendiary speech and the violence, speaker crimes, breaches of peace, and threats to freedom and democratic government that such speech can produce.

To make this topic tangible, Thornburgh summarized the facts and issues in *Terminiello v. Chicago*, a 1949 Supreme Court case where the majority invalidated as unconstitutional a speaker's criminal conviction for breach of the peace:

The case stems from Father Arthur Terminiello, a suspended Catholic Priest and follower of American fascist leader Gerald L.K. Smith, being found guilty of disorderly conduct in violation of a Chicago city ordinance. Terminiello urged a mob of his sympathizers at a public meeting hall to rise up against a surrounding gathering of his critics. Terminiello warned of the risk of a Communist revolution in the United States, labeled former First Lady Eleanor Roosevelt a Communist, and condemned "atheistic, communistic . . . or Zionist Jews." He referred to the mob of his critics as "slimy

scum that got in by mistake.” Terminiello’s comments incited some members of the audience themselves to make callous remarks about Catholics, Jews, and African Americans, while inciting critics to throw bricks and rocks through the meeting hall windows and break down the auditorium doors. The police experienced difficulty in controlling the mob, but ultimately arrested seventeen individuals and charged Terminiello with provoking the episode.

Thornburgh then summarized Justice Jackson’s dissenting opinion in the case—which is one of Jackson’s most famous:

[He] wrote: “An old proverb warns us to take heed lest we ‘walk into a well from looking at the stars.’” Jackson faulted the Court’s majority for considering liberty and order diametric opposites of one another: “This Court seems to regard [liberty and order] as enemies of each other and to be of the view that we must forego order to achieve liberty.” Referencing the Nazi conspiracy and aggression with which he was intimately aware, Jackson argued that governments must have the power to control the speech and activity of organized demonstrators and “revolutionary fanatics” or risk being overtaken by terrorist factions; this was the consequence of unchecked factions that arose in pre-World War II Europe. He recognized that while the substance of Terminiello’s speech was protected..., Terminiello could not seek constitutional immunity for speech that incited such violence. Jackson concluded his dissent with these historic words: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

Thornburgh, in his article (linked below), addressed numerous topics, including national security and law challenges following 9-11, the PATRIOT act, terrorism, immigration, and criminal justice.

He also described some of Justice Jackson's work at Nuremberg and quoted from other Jackson writings. One that is especially striking following the January 6, 2021, violent attack on the U.S. Capitol and Congress, is this sentence, which Thornburgh quoted from Jackson's January 1954 address to the New York State Bar Association:

Mussolini, Hitler, Stalin, and lesser imitators rejected the process of out-arguing and out-voting adversaries and ... forcibly seized power, suppressed liberties and set up dictatorships.

* * *

Richard Lewis (Dick) Thornburgh, age eighty-eight, died on December 31, 2020.

His life, words, work, and example, like Robert Jackson's, are ours to study and relevant to our times and challenges.

Here are some links—

- Dick Thornburgh, *Balancing Civil Liberties and Homeland Security: Does the USA PATRIOT Act Avoid Justice Robert H. Jackson's "Suicide Pact"*, 68 ALBANY LAW REVIEW 801-13 (2005) ([click here](#));
- *Terminiello v. Chicago*, 337 U.S. 1 (1949) ([click here](#), and scroll down therein to Justice Jackson's dissenting opinion);
- Thornburgh obituary/death notice, PITTSBURGH POST-GAZETTE ([click here](#)); and

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- *Dick Thornburgh, Ex-Governor and U.S. Attorney General, Dies*, PITTSBURGH POST-GAZETTE ([click here](#)).



U.S. Department of Justice portrait of Attorney General Dick Thornburgh