# THE CONSTITUTIONAL RIGHT TO CHALLENGE THE CONTENT OF AFFIDAVITS IN WARRANTS ISSUED UNDER THE FOURTH AMENDMENT

BY MORRIS D. FORKOSH*

The fourth amendment's specific requirement that "no Warrants shall issue, but upon probable cause," has not been the subject of intensive judicial scrutiny until these past two decades. There is one problem which inheres in the requirement, and which can be posed as a question: Has a person[1] a constitutional right, immediately or at the very earliest opportunity, to challenge the truthfulness and credibility of the evidentiary facts[2] required in the affidavit or papers on which a warrant issues, the challenge being through some form of physical or non-physical confrontation and cross-examination, as well as his own introduction of evidentiary facts, that is, some form of a pretrial adversary hearing? Or is a statute necessary to permit one to question these facts, and thereby the probable cause flowing therefrom?[3]

Two subsidiary questions also appear, the first relevant and the second merely peripheral. First, what is the permissible scope of such questioning? And, second, are there any factual minima upon which a warrant may justifiably (constitutionally) issue before governmental[4] action thereunder is upheld, that is, may the attack upon sufficiency disclose the weakness or absence of these minima and thereby overturn the issuance of the warrant and its effectiveness and effectuation?

The posing of the problem and the two subsidiary questions discloses the narrow issue inquired into here. That issue involves the acceptability of the evidentiary facts qua facts, and not the sufficiency (for inferring probable cause) of those facts, which are presented in the supporting

* Visiting Professor of Law, University of Gonzaga School of Law.

[1] There is always present the question of, for example, standing; *see, e.g.*, Spinelli v. United States, 393 U.S. 410, 412 n.2 (1969). These questions are not treated here.

[2] In Aguilar v. Texas, 378 U.S. 108, 114 (1964), Mr. Justice Goldberg referred to "the underlying circumstances" from which conclusions flowed, but he also quoted the Colorado supreme court's reference to "underlying facts and circumstances" (*id.* n.5) and the late Justice Jackson's reference to "evidence" (*id.* at 111). Throughout, Mr. Justice Goldberg referred to "facts," "circumstances," "evidence," and even "sufficient basis" (*id.* at 113), all of which we here term "evidentiary facts," *i.e.*, as upon a trial, that testimony or other matter which is properly admitted and becomes evidence, to be weighed, used, etc.; *see also* note 10 *infra*; *see* note 153 *et seq. infra* regarding "underlying circumstances."

[3] *See, e.g.*, note 11 *infra.*

[4] Only governments are prohibited, thus illegal conduct by private persons is not ordinarily covered, although one state excluded the offer in evidence of such otherwise unreasonably seized material in a divorce case (Del Presto v. Del Presto, 92 N.J. Super. 305 (1966), 97 N.J. Super. 446 (1967)), while another permitted it (Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964), although the latter rejected it in a civil contempt case (violation of an injunction) and is noted at M. FORKOSCH, CONSTITUTIONAL LAW 467 n.86 (2d ed. 1969), also giving other items. *See also* note 29 *infra.*

papers before a warrant may issue. In this latter situation the facts are now taken on a prima facie basis, and ordinarily[5] the only question is their ability to permit or support the inference of probable cause.

Two situations may be posed[6] to illustrate further the narrow problem here involved. For example, if absolutely no (admissible) facts whatever are found, then as a matter of logic and law it is (constitutionally) impossible to deduce probable cause, and so the warrant is improperly (unconstitutionally) issued.[7] Or, on a second hypothesis, if facts one and two are given, then these may or may not be a sufficient base for a legally (constitutionally) permissible inference of probable cause to support the warrant's issuance; if these two facts are reduced to one, or increased to three or more, then at what point can the facts as such be deemed sufficient, that is, is there any minimum which the courts have accepted for this purpose?[8]

These two situations are not what concern us; for in both, the absence or presence of facts is disclosed on the face of the supporting papers, and whatever is found there is ordinarily to be taken on an "as is" basis and probable cause is sought only from them.[9] In the situation here examined the facts themselves are questioned for truthfulness, credibility, etc., and sought to be denounced and rejected as any basis for probable cause; it is not their sufficiency for such inference but, rather, their acceptability as facts which is at issue. That is, on a trial they would be subjected to cross-examination, cast against other facts introduced by opposing parties, and, finally, weighed in the total picture for substantiality, etc. before being accepted as true or basic facts from or upon which findings of fact might be drawn.

One result of the failure of the Supreme Court to come to grips with

---

[5] See, however, the situations explored in notes 9, 68, and 148 *infra.*

[6] See also the quotation in the text accompanying note 138 *infra* regarding the situations posed by Mr. Justice White. There is, obviously, an argument against such a pretrial right, namely, of what use to lock the barn door? For, if the determination occurs after the seizure, how can the adversary proceeding thereafter be of aid? The answer, of course, is that a challenge as here suggested goes to the merits (*see, e.g.*, notes 129, 137 *infra*) and a defendant may thus have a real basis on which to urge the exclusionary rule.

[7] *E.g.*, Byars v. United States, 273 U.S. 28, 29 (1927), opinion by Sutherland, J., for an unanimous Court which included Chief Justice Taft and later Chief Justice Stone. *See also* note 145 *infra.*

[8] *See, e.g.*, text accompanying notes 138 *et seq. infra.*

[9] Of course, if on the face of the facts as presented there develops an incredible tale, impossible of acceptance, then obviously the conclusions and inferences cannot be sustained and the warrant's issuance is improper; *see* text accompanying note 150 *infra. Aguilar* illustrated a corollary when it noted that "the affidavit did not provide a sufficient basis for a finding of probable cause," that because of this the warrant should not have issued, and the evidence obtained thereunder was therefore inadmissible on the trial. Aguilar v. United States, 378 U.S. 108, 115 (1964); *see also* note 148 *infra.*

The legal substantiality of the factual basis referred to in the following sentence is examined in general in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); see also the comprehensive analysis and synthesis in M. FORKOSCH, ADMINISTRATIVE LAW § 246c (1956).

this problem, and the questions flowing therefrom, is a continued *ad hoc* judicial approach which renders meaningless the efforts of defense lawyers, prosecutors, and law enforcement agencies to effectuate and apply somewhat definitive principles in this area.[10] This paper is limited to a consideration of the ability of a person to challenge the facts upon which a warrant issues, the challenge taking shape in showing such facts to be unworthy of belief, acceptability, credibility, etc., and also by introducing his own facts to discount the others, thereby presenting a question for the court as to which set of facts to believe and accept, wholly or partially, that is some form of pretrial adversary proceeding with probable cause, if present, based on the whole record thus presented.

Our examination will first review the applicable federal statutes and rules, then the literal language of the fourth amendment including its history as found in the early American and English judicial experience and cases, and, finally, its application today, from all of which a suggested judicial rationale and procedure may emerge.

## I. THE APPLICABLE FEDERAL STATUTES AND RULES

One major reason for initially examining the federal statutes and rules which may apply to our questions is reflected in a number of recent decisions in the California and New Jersey supreme courts. The former has held that a defendant may challenge the truthfulness of such an affidavit, but feels that it is the state's "Penal Code provisions [which] authorize

---

[10] *See, e.g.*, Rugendorf v. United States, 376 U.S. 528 (1964), in which the dissenting four (opinion by Douglas, J.) disagreed upon the application of the "informer's privilege," *i.e.*, that while ordinarily the identity of the factual informer (on whose information the warrant is based) need not be disclosed for use at the trial on the merits (*id.* at 539), there are certain times when this gives way to other considerations (*see, e.g.*, People v. Goliday, 8 Cal. 3d 771, 777, 106 Cal. Rptr. 113, 118, 505 P.2d 537, 542 (1973), and this case was such an exception. The dissenters thus either (a) refused to discuss the attack on "the validity of the search warrant" (*id* at 531, opinion by Clark, J.) because they agreed that, even if permitted, such an attack would fail because the recitations in the affidavit disclosed probable cause, or else (b) the dissenters rejected any such attack. This writer is inclined toward the first disjunctive proposition, which means that the entire Court subscribed to the majority's language that while "[t]his Court has never passed directly on the extent to which a [nisi prius] court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' . . . ;" in this case the facts were sufficiently present so that the question need not be answered. *Id.* at 531-32; *see also* note 62 *infra.*

The lower federal courts have not been uniform in their views, *e.g.*, United States v. Bolton, 458 F.2d 377 (9th Cir. 1972) and Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946), which rejected challenges, while United States v. Ramos, 380 F.2d 717 (2d Cir. 1967), King v. United States, 282 F.2d 398 (4th Cir. 1960), and United States v. Pearce, 275 F.2d 318 (7th Cir. 1960) somewhat permitted them. The commentators have not looked deeply into the background and have not given analytical consideration to the problem; *see, e.g.*, Kipperman, *Inaccurate Search Warrant Affidavits As a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970); and see the rejection of historical evidence in Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A.L. REV. 96 (1971). The state courts (see notes 11, 13 *infra*) have superficially disagreed on the constitutional issue (superficially, because a statute often applies).

such an inquiry, [and so] we need not reach the constitutional issue"[11] whether or not, independently of a statute permitting or denying such an inquiry, the fourth amendment constitutionally authorizes and compels it. If, therefore, on the basis of this California reasoning a federal statute or rule is similarly applicable, then superficially no further federal constitutional inquiry need be made.[12] This, however, is necessarily fallacious reasoning, for what is granted as a privilege may be restricted or withdrawn; further, what of the states and the application of the fourth amendment to them? Since we discuss a right under the Constitution which must be given to a defendant and which cannot be restricted or withdrawn, the constitutional question remains even though a federal statute or rule might be identical to the California code provision.

New Jersey, however, has taken up this constitutional question. It has unanimously rejected a challenge to the accuracy of the information contained in police affidavits, reasoning that the person issuing the warrant "is not called upon to decide whether the offense charged has in fact been committed," but only whether "the apparent facts" alleged lead a "reasonably discreet and prudent judge" to the "belief that the offense charged has been or is being committed." The fourth amendment's safeguards are met, concluded the court, "when the impartial judge finds the affidavit for the warrant credible and legally sufficient."[13]

---

[11] Theodor v. Superior Court, 8 Cal.3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972). Defendant moved to prevent the prosecution from using evidence obtained on a search warrant. The court stressed, however, that a warrant will be upheld even though erroneous material statements are found in the affidavits if these were made in good faith and resulted from a reasonable misunderstanding of the true facts. Here the erroneous statements were allegedly the product of "coercion" of the informer, and the defendant sought to introduce evidence to show this; the court permitted this without going into the merits. *See also* People v. Superior Court, 6 Cal. 3d 704, 710, 493 P.2d 1183, 1188, 100 Cal. Rptr. 319, 324 (1972) where, under CAL. PENAL CODE § 1538.5 (subd. (a) 1), the court held that "a defendant is entitled to a hearing de novo in the superior court with respect to the adequacy of a search warrant." See also the application of these concepts in People v. Bradford, 28 Cal. App. 3d 695, 700-01, 104 Cal. Rptr. 852, 855-56 (1972).

In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court finally made the fourth amendment applicable to the states through the use of the fourteenth amendment's due process clause.

[12] For example, the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), requires that only the Attorney General or a specially designated assistant attorney may authorize a wiretap application to a federal judge, and where the former's executive assistant (not specially designated) so authorized, defendant's motion to suppress was granted. *See* United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972), *aff'd without opin., sub nom.*, United States v. Giordano, 473 F.2d 906 (4th Cir. 1973), *cert. granted*, 41 U.S.L.W. 3573 (U.S. Mar. 27, 1973) (No. 1057). Of course this does not determine our problem; it indicates, however, statutory limits.

[13] State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972). The (unanimous) opinion details the conflict among the federal and state jurisdictions on "whether after a search warrant has been executed and has produced evidence of the crime charged, a defendant should be permitted to attack the truthfulness of the affidavit (here on a motion to suppress). The numerous pro and con citations are found at 61 N.J. 174-11, 293 A.2d 654-55, and the reasoning is given at 61 N.J. 173-79, 293 A.2d 653-56. As for the issuing "judge" aspects, *see* note 37 *infra*. Since this New Jersey holding its limited to the supporting papers, the warrant itself may still be attacked

Our starting point must be the current federal statutes or rules which bear upon or authorize the type of warrant we discuss under the fourth amendment. Chapter 205 of Title 18 of the United States Code is, to the minor extent that the Federal Rules of Criminal Procedure for the United States District Courts have not superseded it, still in force, but, for our purposes, not applicable;[14] we therefore concentrate upon the Rules.[15]

Rule 4 applies generally to arrests, while Rule 41 applies generally to seizures of property. The two are quite similar and, in minor respects, identical.[16] Both codify the law existing as of their promulgation,[17] and so only the first is here discussed, together with a contrast to indictment by the grand jury.

Rule 4 deals with arrests (or summonses) for which a warrant is issued based upon a complaint or an affidavit filed with the complaint. The Rule states that if it appears from such document "that there is probable cause to believe that an offense has been committed and that the defendant has committed it," an arrest warrant issues.[18] The subsequent arrest, and the preliminary proceedings which follow it, are given in Rule 5 which, in subd. c, requires that the magistrate "hear the evidence," with the defendant able to "cross-examine witnesses against him and . . . introduce evidence in his own behalf. If from the evidence it appears . . . that there is probable cause to believe that an offense has been committed and that the defendant has committed it . . ." then he is to be held.

The first opportunity that a person arrested[19] has to contest the suffi-

---

as to scope, *e.g.*, it may be a general warrant, which is definitely within the prohibitions of the fourth amendment.

[14] *E.g.*, 18 U.S.C. § 3103a (1970) adds a ground for the issuance of a warrant to § 3103, but this latter section has been superseded by Federal Rule of Criminal Procedure 41(b), and that Rule has not yet been amended to include the additional ground.

[15] The rules (as well as the statutes) must be read in the light of the fourth amendment's proscriptions and requirements which they implement as to probable cause, and such need of probable cause applies to both arrest and search warrants. Aguilar v. Texas, 378 U.S. 108, 112, n.3.

The Department of the Army is now studying a revision of its procedures in this search and seizure area, so that what is here suggested as a constitutional right may be adopted as a military regulation. *See generally*, McNeill, *Recent Trends in Search and Seizure*, 54 MILITARY L. REV. 83, 95 (1971).

[16] This does not necessarily mean or require that the facts and circumstances disclosing probable cause in the one area are therefore sufficient in the other, *e.g.*, an affidavit for a search warrant is not required to identify anyone as the offender. People v. Meaderds, 21 Ill.2d 145, 171 N.E.2d 638 (1961).

[17] Respectively, and as last amended, 1966 and 1948 (eff. 1949). *See also* note 31 *infra.*

[18] FED. R. CRIM. P. 4(a), with the form and execution following in subds. (b) and (c). As to the complaint, *see, e.g.*, United States v. Foster, 440 F.2d 390 (7th Cir. 1971), stating that the purpose of a preliminary examination on a complaint is to enable the defendant to challenge the existence of probable cause for so detaining him, and refusing to follow Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965). Note, however, that the probable cause here refers to that existing at the moment of the detention hearing on a complaint.

[19] The same type of situation arises when a person is arrested outside the district of the warrant's issuance for, although he may contest removal and cross-examination, etc., the same

ciency of the complaint or affidavit is, therefore, at such preliminary hearing. This hearing is apparently not a constitutional right,[20] so the California approach referred to above should be applicable here. Regardless, the purpose of this hearing is to determine "whether a case is made out,"[21] that is, its "function is to determine whether there is sufficient evidence to" restrain the accused. In other words, it is at such a granted hearing that, seemingly, a defendant may challenge the truthfulness and sufficiency of the facts from which probable cause is inferred.[22]

This warrant procedure may be contrasted with that in which a grand jury functions.[23] A preliminary hearing is not a constitutional or statutory requisite before an indictment may be returned; for example, it does not violate any constitutional right to confrontation,[24] but the grand jury may indict, if it so desires, after the warrant-preliminary hearing procedure has been used; it may ordinarily supersede and eliminate any such preliminary examination by utilizing its own procedures.[25] The role of

---

conclusions apply to him as for one arrested within the district. *See, e.g.*, FED. R. CRIM. P. 40(b)(3), and for other reasons for the arrest see subd. (a). Thus a certified copy of the indictment is sufficient to establish grounds for removal (*see, e.g.*, United States v. Winston, 267 F. Supp. 555 (S.D.N.Y. 1967)), although an information or complaint (on a warrant) requires proof of probable cause, *e.g.*, Gayon v. McCarthy, 252 U.S. 171 (1920), in which the evidence tended to show not only a violation but also probable cause, *i.e.*, the contrary might also have been shown; *see also* United States v. Cunningham, 40 F. Supp. 399 (M. D. Ga. 1941); *cf.* United States v. Winston, *supra*, in which the indictment was held to be conclusive on the question of probable cause in a removal proceeding. The Proposed Draft, note 31 *infra*, makes no substantial change in all this. *See also* notes 29, 32 *infra*.

[20] *See, e.g.*, United States *ex rel.* Hughes v. Gault, 271 U.S. 142, 149 (1926), opinion by Holmes, J.; Delaney v. Gladden, 397 F.2d 17 (9th Cir. 1968), *cert. denied*, 393 U.S. 1040 (1969); Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968). *See also* notes 23 *et seq. infra*.

[21] Benson v. McMahon, 127 U.S. 457, 463 (1888), opinion by Miller, J., followed by a quotation from Wood v. United States, 128 F.2d 265, 270 (D.C. Cir. 1942), opinion by Judge (later appointed Justice) Rutledge.

[22] *See, e.g.*, Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); United States v. White, 342 F.2d 379 (4th Cir. 1965), *cert. denied*, 382 U.S. 871 (1965).

Rule 41 authorizes a search and seizure warrant involving property on the three grounds listed in its subd. (b) if the supporting affidavit permits the issuing person to be "satisfied that grounds . . . exist or that there is probable cause to believe that they exist . . . ." (subd. c). After enforcement a "person aggrieved [*i.e.*, not only a defendant] by an unlawful search and seizure" may move to suppress or recover because "there was not probable cause for believing the existence of the grounds on which the warrant was issued . . . ." (subd. e).

[23] Rule 6 concerns the summoning, composition, and functioning of that body, provides for its secrecy as to proceedings and disclosure, and concludes with its findings and return of an indictment. Regarding the indictment, *see* Rule 6(f), although an information may be used under Rule 7(a). I shall ignore the information and concentrate upon the indictment. On the warrant then issued, *see* Rule 9(a); and for the form and execution, *see* subds. (b) and (c), the latter of which refers back to Rule 4(b) and (c).

[24] *E.g.*, Goldsby v. United States, 160 U.S. 70, 73 (1895); United States *ex rel.* Kassin v. Mulligan, 295 U.S. 396, 400 (1935).

[25] *See, e.g.*, Boone v. United States, 280 F.2d 911 (6th Cir. 1960); United States v. Lauchli, 444 F.2d 1037 (7th Cir. 1971); assuming the right to the hearing has not accrued (vested), these procedures have been criticized as depriving a person of various constitutional rights otherwise available.

this body is solely to ascertain whether probable cause exists to believe that an offense has been committed, even though the later plenary trial may result in an acquittal.[26]

In other words, at no time until the trial does a defendant ordinarily have a constitutional, or even other, right to know the witnesses and the evidence on which the indictment was based, or if the crime was shown to be within the federal jurisdiction.[27] This is so even though under Rule 6(e) the court has discretionary power to lift the veil of secrecy "preliminarily to or in connection with a judicial proceeding or" on defendant's "showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."[28]

The Supreme Court has refused to exercise its supervisory powers over the administration of justice in the federal courts so as to establish a rule which would permit "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence."[29] Apparently the only evidentiary basis for dismissing an indictment is, therefore, to show "that no rationally persuasive evidence was presented." Even though not all the pertinent and material evidence is before them, the grand jury may still indict so long as "some evidence" is presented; the

---

[26] *See, e.g.*, Hale v. Henkel, 201 U.S. 43 (1906); United States v. Cox, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). The indictment may be based solely on hearsay evidence (Costello v. United States, 350 U.S. 359 (1956)); *see also* United States v. Payton, 363 F.2d 996 (2d Cir. 1966); *cf.* the informer requirements as discussed in text accompanying note 138 *infra*; illegally seized evidence may also be used, even though later rejected in a trial; West v. United States, 359 F.2d 50 (8th Cir. 1966), *cert. denied*, 385 U.S. 867 (1966); Carter v. United States, 417 F.2d 384, 388 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970).

[27] *See, e.g.*, Stirone v. United States, 361 U.S. 212, 217-18 (1960); United States *ex rel.* Almeida v. Rundle, 383 F.2d 421, 424 (3d Cir. 1967).

[28] In Dennis v. United States, 384 U.S. 855, 875 (1966), the lower court's discretion and function was, according to Mr. Justice Fortas, to be utilized for and limited "to deciding whether a case has been made for production, and to supervise the process . . . ." *i.e.*, not to wade through the (voluminous) minutes but to permit the adversaries so to do and permit the government to seek protective orders. As for defendant's testimony before the grand jury, *see* Rule 16(a), and for a superseding of *Dennis see, e.g.*, § 102 of the Organized Crime Control Act of 1970, as well as § 3500 of the Jencks Act in Title 18 of the United States Code.

On a motion to dismiss for insufficiency the defendant ordinarily cannot go behind the indictment (save as in the preceding paragraph), and the facts as pleaded are assumed true. United States v. Sampson, 371 U.S. 75 (1962); United States v. Westbrook, 114 F. Supp. 192 (W.D. Ark. 1953). On motions to dismiss, *see also* Rules 10-12.

[29] Costello v. United States, 350 U.S. 359, 364 (1956). *See also* United States v. James, 290 F.2d 866 (5th Cir. 1961), *cert. denied*, 368 U.S. 834 (1961), regarding the sufficiency, adequacy, or competency of the evidence being immune to inquiry so that tainted evidence unconstitutionally obtained may not be made the basis of a motion to dismiss; United States v. Wolfson, 294 F. Supp. 267 (D. Del. 1968); Anderson v. United States, 273 F. 20 (8th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921); *but see* United States v. Lydecker, 275 F. 976 (W.D.N.Y. 1921) (inspection of the minutes is limited to situations in which it clearly is shown that the indictment is based solely on incompetent or illegal evidence, or wilfully disregards the defendant's rights). *See also* note 4 *supra* for a related item.

A warrant of arrest may issue upon an indictment, for the latter also establishes probable cause for the former; Giordenello v. United States, 357 U.S. 480 (1958). *See also* note 15 *supra* and note 32 *infra*.

court "cannot re-examine the indictment and weigh the sufficiency or the competency of the evidence considered."[30]

In other words, the grand jury's deliberations are secret, and the testimony and evidence before it are likewise to be kept secret except when lifted under Rule 6(e); even then, on any motion to dismiss, truthfulness and sufficiency are not within the province of the court and only when a court finds that "no rationally persuasive evidence" exists in the record will dismissal occur. In all of this no constitutional, statutory, or rule method or procedure exists whereby a person may challenge, directly or even indirectly, the veracity of a witness or the sufficiency of the acceptable evidence from which an indictment stems.

The preceding examinations of warrant and indictment procedures have not touched upon the 1970 proposed amendments by the Judicial Conference.[31] Rule 4 is now to include, *inter alia*, that, "The finding of probable cause shall be based upon substantial evidence," and the federal magistrate, before ruling on the request for or issuing of the warrant, "may require the complainant to appear personally" to be examined by him. Rule 5(d)(1) takes up after an arrest. The Rule refers to the procedures just mentioned, but then continues with a right to a preliminary examination, save in petty offenses, to determine probable cause. Rule 5.1 includes two items: "If from the evidence [at such preliminary hearing] it appears that there is probable cause," and, further, that this finding "shall be based upon substantial evidence . . . ." For these purposes the "defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. . . ." If no probable cause can be drawn from the evidence, then the defendant is to be discharged.

However, the distinction between a warrant procedure and that found in the grand jury, as discussed above, is continued in Rule 9. This Rule, referring to the government's request of the court for a warrant, permits one in an information (minor offense) only if supported "by a showing of probable cause as is required by rule 4(a)," but continues to remain silent as to an indictment's (infamous crime) basis, that is, the warrant issues without any limitation as in an information, and solely upon the issuance of the indictment.[32] In other words, the proposed revisions do not aid us in our quest for any constitutional basis for a person's right or ability to question the truthfulness or credibility of a warrant or indictment except as which heretofore has occurred.

---

30 United States v. Geller, 154 F. Supp. 727, 731 (S.D.N.Y. 1957).

31 FED. R. CRIM. P. (Prelim. Draft of Prop. Ams.) (1970). Rule 41 is not discussed here, although proposals are included with respect to its amendment.

32 *See, e.g.*, C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 151 (1969); Giordenello v. United States, 357 U.S. 480 (1958); *see also* note 19 *supra*. A caveat should be noted on the difference, in the federal system, between an information and an indictment which, in the states, may be used in a different sense.

## II. THE LANGUAGE OF THE FOURTH AMENDMENT

The statutes and rules examined above do not answer the questions propounded earlier. This requires that the fourth amendment itself be scanned, and this results, as will later be seen, in certain tentative conclusions which may or may not be justified. To ascertain their correctness it is necessary to inquire into the historic background of the amendment and its specific language.

The ability of a person to challenge the truthfulness of the affidavit (and any other supporting papers) upon which a warrant issues seems, logically, to be self-evident, although the converse proposition may also be logically supported. Legally, however, a challenge is not yet definitively permitted on a constitutional basis, even though a definitive rejection is found. These incongruities appear to be on the road to resolution by several decisions of state and federal courts. The overall constitutional argument in the federal jurisdiction stems from the Supreme Court's emphasis upon the facts from which the inference of probable cause flows,[33] and some cases and commentators have pointed out that this presupposes truthfulness.[34] Despite all this, the Supreme Court has continued to skirt the issue.[35]

### A. *The Amendment's Second Part*

The logical approach to determine whether the affidavit's truthfulness and sufficiency may be challenged begins with the language of the fourth amendment's second portion, which states: ". . . and no Warrants[36] shall

---

[33] Aguilar v. Texas, 378 U.S. 108 (1964); *cf.* Ker v. California, 374 U.S. 23 (1963); *see also* Shadwick v. Tampa, 407 U.S. 345 (1972).

[34] *E.g.*, United States v. Halsey, Stuort & Co., 296 U.S. 451 (1935).

[35] *E.g.*, Rugendorf v. United States, 376 U.S. 528 (1964).

[36] For an historically implied amendment to "general" warrants, *see* text accompanying note 71 *et seq. infra.*

The cases before 1972 referred to the person issuing the warrant as a judge, commissioner, etc. In Shadwick v. Tampa, 407 U.S. 345 (1972), Florida's authorization of court clerks to issue arrest warrants (for violations of municipal ordinances) was challenged. The city charter empowered a judge or court clerk to issue such an arrest warrent for a violation of the city's ordinances upon the affidavit of a policeman. This procedure was challenged on the ground that the clerk was not a "judicial officer." An unanimous Court upheld the procedure because the fourth amendment does not require

> that all warrant authority must reside exclusively in a lawyer or judge. . . .
>
> The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.

*Id.* at 349-50.

Justice Powell further commented: "We presume from the nature of the [instant] clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe . . . common offenses covered" had occurred. "There has been no showing that this is too difficult a task for a clerk to accomplish. . . . Grand juries daily

issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

Assume, first, that, as in the New Jersey holding noted above, no challenge to the warrant or supporting papers can be mounted by anyone — then the effect necessarily must be to emasculate all of the quoted language so that it simply reads, "unless a Warrant issues." In other words, the entire fourth amendment would become: "The right of the people to be secure in their persons [etc.] against unreasonable searches and seizures, shall not be violated unless a Warrant issues."

The effect of this *reductio ad absurdum* would be to permit two types of searches and seizures, *viz.*, any and all reasonable ones, and all others for which a warrant issues, regardless of the latter's nature, type, scope, bases, etc. In this posture the mere issuance[37] of a warrant would serve to nullify the amendment's prohibition against unreasonable searches and seizures, if any now existed. Without some judicial self-restriction[38] or interpretation of the Constitution[39] that a warrant requires some basis in fact for its issuance, there would be no other rein upon such governmental[40] conduct unless the Congress, by statute, and by virtue of its constitutional control over the inferior courts, so provided.[41] In other words, absent such Congressional or judicial action, the issuance of warrants could not be supervised, judicial subjective whim and caprice would be unregulated, and there would be no need to require any facts or factual bases. And these inferences also permit the separate conclusion that any warrant without a basis in fact could not be reviewed as to its truthfulness or sufficiency by any other body, judicial or otherwise.

But the fourth amendment's language does not conclude with the sec-

---

determine" this. *Id.* at 351-52. For an early case supporting this reasoning see Rex v. Muilman, 145 Eng. Rep. 768 (1766).

[37] The assumption is that such a warrant is executed and produces otherwise admissible evidence which is to be used against a person. See note 13 *supra.*

[38] *See, e.g.*, Brandeis' famous (concurring) comment in Ashwander v. TVA, 297 U.S. 288, 346 (1963): "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

[39] This type of judicial interpretation has occurred; witness the decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), that under art. III, § 2, cl. 1, and the Judiciary Act of 1789; Georgia could be sued by a South Carolina citizen, immediately reversed by the Eleventh Amendment. However, and taken literally, the amendment did not prohibit citizens from suing their own state (for interest due, in this case, on its bonds). In Hans v. Louisiana, 134 U.S. 1 (1890), the Court nevertheless plugged this loophole by so interpreting the amendment, *i.e.*, judicially enacting the eleventh-and-one-half amendment.

[40] The states, of course, might come under the fourteenth amendment's due process clause with respect to its procedural aspects, *i.e.*, liberty or property would be involved and a deprivation occur without such a procedure.

[41] This is under art. I, § 8, cl. 9, and art. III, § 1. Compare this with the control of the federal courts exerted under the 1932 Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. §§ 101-15 (1970).

ond portion as quoted above, and this prevents the issuance of warrants except upon "probable cause." Literally, the language mandates that there be present ("upon") that which conduces to the inference (or conclusion) of "probable cause," and this is a judicially developed and honored phrase based upon and stemming from facts, with the assumption (and requirement) that these facts are true. Put differently, "upon probable cause" is not "upon possible cause" or "upon mere or suspected cause." By using the term "probable," Madison and his fellow Congressmen, many of them lawyers, understood its meaning to include a factual inference of something more than suspicion, surmise, or speculation, and their own experiences had developed an abhorrence for the general warrant and its insubstantial and nebulous basis.[42]

The second part of the fourth amendment may be further analyzed both as to its requirement of probable cause to support and its requirement of warrant specificity as to persons, etc. The first part's right of the people to be secure may conceivably be considered as a self-sufficient expression, with the second part elaborating upon the right so as to limit governmental efforts to search and seize so long as such are not unreasonable. In other words, even though reasonable warrantless conduct continues ordinarily to be upheld, still, if a warrant is to be obtained, then it must conform to these second-part expressions.

Put differently, the substantive right of the people is protected in four[43] ways: (1) unreasonable searches and seizures are not permitted, or, only reasonable ones are able to be had; (2) where, under the decisions and interpretations, a warrant is to be obtained, governmental conduct *sans* the warrant is an unconstitutional and procedural deprivation of the people's substantive right; (3) where a warrant is sought then it can issue only upon sworn probable cause; and (4) the warrant must specify and detail the place, persons, or things.

Read literally, and without an examination of cases and consequences, the last three items (especially the last two) seem to be unambiguous—there must be probable cause and specificity. The only questions to be raised should be the meaning and definition of probable cause, and whether or not particular descriptions are given. This latter question of,

---

[42] See text accompanying note 78 *et seq. infra.*

[43] Other ways also exist, *e.g.*, indictments for perjury or contempt; firing; a suit for damages, even against federal agents acting under a claim of federal authority, but without a warrant of probable cause, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), although in Rodriguez v. Jones, 473 F.2d 599, 605 (5th Cir. 1973) "the test to be applied is the common law criterion of reasonableness of belief on the part of the officers" (*cf.* text accompanying note 63 *supra*); *see also* text accompanying notes 78, 113 *infra;* on the lack of probable cause see *Bivens* at 389-90 n.1; *see also* United States v. United States District Court, 407 U.S. 297, 328 (1972), Douglas, J., concurring and referring to several English cases. However, Justice Harlan concurred in *Bivens* while Chief Justice Burger and Justices Black and Blackmun dissented. In the light of the present (and future) composition of the Court, *Bivens* probably will be distinguished, if not reversed, in the future, or perhaps even ignored by a new majority.

perhaps, enumeration or detail, is always one of application, that is, a term which is deemed specific for one warrant may not be so for another. In other words, a factual application of the term is involved. But the former question of probable cause is to be viewed in a different light.

Probable cause is not per se a fact admissible as evidence in a proceeding; it is ordinarily an inference of fact drawn from evidentiary facts, for example, sense testimony.[44] Whether or not the sworn affidavit (and other supporting papers) submitted with the request for the issuance of a warrant, does contain a substantiality of evidentiary facts sufficient to support such an inference of probable cause, is ordinarily a question of law for the judiciary. But the more important question is, if the issuing official decides that probable cause is shown, can his determination thereafter be challenged? Or is it unassailable even though the facts are untrue, incredible, insufficient, and the inference concededly not probable? The answer, logically, should be that bad facts make a bad warrant and, in turn, this makes a bad search and seizure; thus a trial or other reviewing judge should reject anything connected therewith. If this were not so, then a pliant and acquiescent official, and especially a friendly one, could issue warrants upon ridiculous applications, secure in the invulnerability of his determination (although, as later disclosed, logic and law do not always go hand in hand).

### B. *The Amendment's First Part*

The first portion of the fourth amendment may be examined both independently of and in conjunction with the second part which has just been discussed. The first part reads: "The right of the people[45] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,[46] shall not be violated . . . ." If this were all there was to the amendment, and, in addition, the words "against unreasonable searches and seizures" were to be deleted, then a full, complete, and absolute right would seemingly have been created. This would be analogous to the absolutistic conclusions of the late Justice Hugo Black insofar as the free speech and other guarantees in the first amendment's phrase, "Congress shall make no law," was, to him, a constitutional imperative which brooked

---

[44] Consult on this, and also on the substantial evidence rule ordinarily used in quasi-judicial administrative proceedings, references in note 10 *supra*; *see also*, on evidence and its ultilization, Forkosch, *The Nature of Legal Evidence*, 59 CAL. L. REV. 1356 (1971).

[45] On what is meant by this term in the Preamble, *see* Forkosch, *Who Are the "People" in the Preamble to the Constitution?* 19 CASE W. RES. L. REV. 644 (1968). *Pari Passu*, the apparent interpretation of "the people" (fourth amendment) and "the People" (Preamble) could be the same.

[46] There is a distinction between a warrantless search and a warrantless seizure; for example, if a "seizure" (*e.g.*, an arrest) of a person (or a calculated stopping in connection with a crime) is lawful, then a simultaneous (limited) search is permitted (Agnello v. United States, 269 U.S. 20 (1925)) as a consequence; see further FORKOSCH, *supra* note 4, § 424.

no exception.[47] It could also be analogized to the (fifth and) fourteenth amendment's due process clause, that is, if only the first portion were to be considered ("No State shall . . . deprive any person of life, liberty, or property"), then an unequivocal prohibition upon the powers of the governments would follow.[48]

Separately, the fourth amendment's "persons, houses," etc. would also have to be defined,[49] but this would not occasion overmuch of problems for the judiciary. Perhaps, since the Bill of Rights is a Madisonian expression of promises kept for the states' earlier ratifications,[50] Congress might well be entrusted with this definitional task. Even so, the statute would still have to square with the Supreme Court's view of what the constitutional terms meant and covered; thus in any event that tribunal would have the last word.

The fourth amendment's first part nevertheless does contain "unreasonable" and, solely on this first complete part, such a right given to the people would be an hortatory expression of little value. For if only unreasonable searches and seizures are denounced, then it follows that reasonable ones are to be permitted, that is, the amendment does not abolish the power of the government to search and seize, but only its abuses, and so the method "of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing."[51] But this method is found in the

---

[47] *See, e.g.*, FORKOSCH, *supra* note 4, at 420 n.6; *see also* Forkosch, *Freedom of Information in the United States*, 20 DEPAUL L. REV. 1 (1971).

[48] Of course in both the fourth, fifth, and fourteenth amendments the language which next follows provides for non-absolute applications.

[49] For example, "person" is a limited term, *i.e.*, corporations and labor unions do not come within its purview; Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1946); *cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (government's own illegal seizure condemned); United States v. White, 322 U.S. 694 (1944); to the effect that only private persons may claim its protections, *see* Hale v. Henkel, 201 U.S. 43 (1906). Anyone, however, may seek modification of a subpoena *duces tecum*, claiming unreasonableness as to relevancy, specificity, scope, time, etc.; Oklahoma Press Publ. Co. v. Walling, *supra.*

As to houses, for example, a prison room is not protected (Lanza v. New York, 370 U.S. 139 (1962), nor are open fields (Hester v. United States, 265 U.S. 57 (1924)), but a business office is (Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)), as is a friend's apartment (Jones v. United States, 362 U.S. 257 (1960)), a telephone booth (Katz v. United States, 389 U.S. 347 (1967)), and a garage (Taylor v. United States, 286 U.S. 1 (1932)).

It would appear that, unless encompassed within these terms, any other search or seizure would be upheld, *i.e.*, the right of the people is limited to the terms so enumerated and any others are not so embraced. This, of course, is a strict or literal approach. For example, art. I, § 8, cl. 3 (the commerce clause), enumerates commerce with foreign nations, among the several states, and with the Indian Tribes, thereby leaving intrastate commerce solely to the states (at least in constitutional theory). *See also* references in note 47 *supra.* However, it is suggested that in an area of personal rights, as distinguished from commerce, a different approach is necessitated. *See, e.g.*, Brandeis' views in Ng Fung Ho v. White, 259 U.S. 276 (1922), and note 170 *infra.*

[50] *See* Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE W. RES. L. REV. 644, 699 *et seq.* (1968).

[51] Opinion by Miller, J., concurring (with Waite, C.J.) in Boyd v. United States, 116 U.S. 616, 641 (1886); *see also* note 36 *supra* and notes 71-76 *infra.*

second part, here assumed not to be present, and so in this aspect a lifetime judiciary which so desired could well interpret away the restriction by defining and applying "unreasonable" so loosely as to make of it a shambles. Such a judicial power results from Justice Marshall's holding and views in *Marbury v. Madison*,[52] and while it may be exercised benignly,[53] it may also be exercised supinely,[54] all, perhaps, and to a degree only, subject to the power of the Congress over the Court's appellate jurisdiction.[55]

On these assumptions the term "unreasonable" may therefore be meaningless and a futile gesture, in that its definition and application may be susceptible of great miscarriages. In part to overcome this theoretical possibility, the provision adds additional language. This second part, however, was, historically, added for the practical reason that the general warrants of the Star Chamber, as used and applied by the English government and its representatives in the colonies, were anathema, but this did not reject all other warrants, such as those supported and particularized.

Several inferences, logical if not actual, theoretical if not practical, may be drawn from the two parts of the fourth amendment so juxtaposed: (1) between the two quoted parts there is a comma followed by a conjunction. It may be argued that the comma sets off two separate items, namely, the right to be so secure, and the limitations upon invading that right, with the conjunction serving merely to connect the two as parts of the same sentence; (2) conversely, it may be urged that the two parts are so inextricably connected that the understanding of "unreasonable" is determined by the language of the second part, that is, good warrants permit a reasonable search and seizure, and all others are unreasonable. A gloss

---

[52] 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, the recent distinguishing and partial emasculation of Miranda v. Arizona, 384 U.S. 436 (1966) (discussed in FORKOSCH, *supra* note 4, at 484), in Harris v. New York, 401 U.S. 222 (1971), in which a 5-4 majority felt that even though a prosecutor's inadmissible evidence (statements in violation of *Miranda*) could not be used in the case in chief, still, if trustworthy, could be used to attack the credibility of the defendant if he took the stand.

[53] For example, as in denouncing generally first amendment incursions, or, specifically, in denouncing an arrest without a warrant so "that the arrest was invalid, and concededly that made the packet [of seized evidence] incompetent against her." United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952). Further, "there was not the slightest need of arresting her without a warrant" and "[n]o sudden emergency forced the hands of the agents." *Id.* at 635. *Cf.*, however, a different indictment and conviction on the same facts, with the court holding the arrest to be lawful and the evidence admissible; Coplon v. United States, 191 F.2d 749, 755 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

[54] For example, as in upholding the power of the Army's surveillance of lawful civilian political activity, even though on the technicality that no justiciable controversy had been presented, *see* Laird v. Tatum, 408 U.S. 1 (1972). Worse still, consider the Japanese Relocation Cases, *e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943), permitting concentration camps on American soil by order of an American President.

[55] Art. III, § 2, cl. 2; *see also Ex parte* McCradle, 74 U.S. (7 Wall.) 506 (1868); distinguished (apparently because of an emergency) in *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1968); and questioned as to current vitality by Justice Douglas dissenting in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n. 11 (1962).

on this latter inference suggests that "unreasonable" and "probable cause" go hand in hand such that if there is probable cause, then there is reasonableness, to which must be added the necessity, if available, for obtaining a warrant; (3) further, that even though probable cause be present, the absence of a warrant dooms the government's conduct, regardless of other considerations, for example, the need for immediacy of action.

This last inference is not impossible to draw from the language of the amendment. However, the consequences would be disastrous for the government and the people, for too many cases arise in which a physical or emergency situation compels a search or seizure without a warrant.[56] For example, even though *Rochin*[57] denounced the forced use of a stomach "pump" to extract two morphine capsules swallowed when the officers jumped the suspect, the reason was not the warrantless search and seizure, but the "brutal conduct" which the Court was asked to sanction. So too, other and analogous types of warrantless searches and seizures are upheld: loss of evidence due to natural body functions;[58] police engaged in a search for weapons used in an armed robbery for which any delay might "gravely endanger their lives or the lives of others,"[59] so that "the exigencies of the situation make that course imperative;"[60] although in some cases two different federal courts may decide contrariwise on an identical fact-situation.[61]

The preceding situations highlight a grim peculiarity found in the 1968 *Terry* case. There Chief Justice Warren refused to "retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," but nevertheless agreed that "exigent circumstances" might excuse this condition precedent. One such involved "an entire rubric of police conduct," that is, the required swift action based on the on-the-spot observations of

---

[56] *See, e.g.*, Chief Justice Warren's language in Terry v. Ohio, 392 U.S. 1, 20 (1968); warrantless searches are discussed in Landynski, *The Supreme Court's Search For Fourth Amendment Standards: The Warrantless Search*, 45 CONN. BAR J. 2 (1971).

[57] Rochin v. California, 342 U.S. 165 (1952).

[58] Schmerber v. California, 384 U.S. 757 (1966); extraction of blood from a conscious, protesting individual being treated for injuries in a hospital, leading to his conviction for driving while under the influence of intoxicating liquor. This was upheld, one reason being the "emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence' . . . ." *Id.* at 770.

[59] Warden v. Hayden, 387 U.S. 294 (1967), *cited* in Terry v. United States, 392 U.S. 1 (1968).

[60] *Id.* at 298, *quoting from* McDonald v. United States, 335 U.S. 451, 456 (1948) (permitting entry without a warrant so as to search for a robber); *but see* the *Coplon* cases collected at note 53 *supra* (the Second Circuit's holding there that the lack of a warrant was fatal). *See also* United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965).

[61] See the *Coplon* cases collected at note 53 *supra*, especially the most recent opinion. Of course the consequences of any erroneous abuse of police power may be devastating, such as the uncalled-for break-in of William Pine's home by the Massachusetts State Police on a narcotics raid—but at the wrong address. N.Y. Times, March 16, 1973, at 36, col. 1.

the policeman on the beat; this, he felt, had not been historically, and could not as a practical matter be, subjected to the warrant's availability and procedure. But, he continued, in order to assess the officer's warrantless conduct on the basis of reasonableness, and utilizing a balancing procedure, which weighs the governmental need as against the invasion (of privacy and rights) entailed, there had to be a justification of "the particular intrusion [and so] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . . ."[62]

In other words, an exigent warrantless search requires detailed facts which can be attacked and the contrary disclosed; for example, " 'simple good faith . . . is not enough. . . . If subjective good faith alone were the test' . . . " then only "the discretion of the police" would be the standard for the fourth amendment's protections.[63] Which is why the Chief Justice went into excruciating detail on exactly what petitioner Terry and his two companions did that night, and justified not only the officer's investigative approach to and stopping of the three, but also the immediate search of Terry's person for weapons. In other words, this warrantless seizure and search had been subjected to a strict judicial pre-trial obtaining and scrutiny of the facts which allegedly existed at the on-the-spot moment; that is to say, on the motion to suppress the officer had taken the stand, testified, been subjected to cross-examination, and opposing evidence could have been admitted. It was on the basis of this record that the state court had denied the motion and that the Supreme Court proceeded to inquire whether the facts as found to be true were sufficient to uphold the warrantless conduct. Assume, however, that the officer had been able to obtain a warrant in time, and had then proceeded as he did—would any pre-trial motion to suppress have been granted on the sole basis that the affidavit was a tissue of lies, able to be so proved by cross-examination and the introduction of contrary evidence, if the affidavit, superficially, was sufficient? The warrantless procedure permits this, but the warrant procedure seemingly does not, even though in the latter situation it would appear that time and reflection conduce to a less hurried and more reasonable and proper articulation of the facts.

What comes through, in this brief analysis of the terms of the fourth amendment to this point, is the generality that a government, committed to the Preamble's goal to "insure domestic Tranquility," cannot sit idly by while crimes are committed. This constitutional truism is itself ambiguous, for if "Tranquility" as an end is found in the Constitution, the specific means of attaining it are not. What are the criteria which define, prescribe, or limit these means? Justice Marshall, in the *Bank Case* of 1819,

---

[62] Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

[63] *Id.* at 22; see also note 11 *supra.*

permitted the federal power there to be exercised so as to charter a bank because "all means which are appropriate, [and] which are plainly adapted to that end,"[64] are to be implied.

But the unanswered question still is, on what basis does one conclude that such a means is appropriate, etc.? Analogically, the absolutistic approach given above rejects any tampering with the first amendment's admonitions because of emergencies, exceptions, balancings, natural law concepts, or otherwise;[65] the contrary coin-face of the majority utilizes a balancing approach.[66] This balancing test or formula points up the problems observed 20 years ago by a brilliant Justice, that " 'like all those with which we are concerned, [the problem] is one of balance; too little liberty brings stagnation, and too much brings chaos.' "[67] Applied to the search and seizure clause, the absolutistic application must yield to, at least, the balancing one, even though language, theory, and inference may support the former's strict application so as to reject any such (tainted) evidence when offered in a court of law.

One other approach, to an extent a corollary of the balancing one, is that of Chief Justice Burger, namely, that in the final analysis, "[s]ome clear demonstration of the benefits and effectiveness of [these exclusionary conclusions] . . . is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."[68] Of necessity, therefore, is some accommodation between the rights of an accused individual and the welfare of the accusing collectivity, that is, between individual rights and a functioning government.

---

[64] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); for an additional discussion of the means-end doctrine, *see* M. FORKOSCH, LABOR LAW § 199 (2d ed. 1965).

[65] *See, e.g.*, FORKOSCH, *supra* note 4, at 420 *et seq.*

[66] *Id.* at 421-23. One of the best illustrations is Konigsberg v. State Bar of California, 366 U.S. 36 (1961), in which Justice Harlan spoke for the majority in rejecting absoluteness, and Justice Black, speaking also for Justices Warren and Douglas, decried the instant use of such a balancing test which "permits California directly to abridge speech in explicit contradiction to the plain mandate of the First Amendment." *Id.* at 71.

[67] Jackson, J., in Kunz v. New York, 340 U.S. 290, 314 (1951) quoting Bertrand Russell in dissent; *see also* Chief Justice Warren's balancing approach in Terry v. Ohio, 392 U.S. 1 (1968).

[68] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (dissent), speaking of the exclusionary rule. This approach may well become the majority rule when new appointments make it truly a Nixon Court, for the exclusionary rule, as interpreted and applied to date, is under severe attack by the Nixon administration.

However, balancing must take account of what the New Jersey court conceded, namely, that it is only a "rare warrant [which is] issued on a false statement, State v. Petillo, 61 N.J. 165, 178, 293 A.2d 649, 655 (1972), so that on balance not too great a burden would be placed on the courts despite the New Jersey contrary language, especially if "an initial showing of falsehood or other imposition on the" judge issuing the warrant is required 61 N.J. at 176, 293 A.2d at 655 quoting the Second Circuit's language so limiting an attack on the affidavit, United States v. Dunnings, 425 F.2d 836, 839-40 (2d Cir. 1969) *cert. denied*, 397 U.S. 1002 (1970). *See*, on such a preliminary requirement in other situations, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922), and St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53 (1936). *See also* note 170 *infra.*

Assuming the Chief Justice's accommodation to be a need as between the governed and the governors, several questions may arise; for example, if a constitutional right is to be effectuated, but one consequence is "the release of countless guilty criminals," does this mean that the right (end to be protected) is to be abused because the consequences (as a result of the exclusionary means) are not desired? Or, in the Machiavellian language reminiscent of the 1930's, does the end justify the means if now the end is a desire that countless guilty criminals not be released even if it means that a person's constitutional rights are to be ignored or diminished? Stemming from this approach and its implicit corollaries is another one, namely, that a paternalistic government knows what is best. Or a third, that even though the first Congress wrote into fundamental law certain rights, thought to be "inalienable" and attached to the human spirit, still, when man later feels that changes should be made, these can be accomplished without further ado by fiat, whether judicial, executive, or legislative. Obviously these questions and corollaries are not suggested for adoption—the Chief Justice's language should not be stretched to the logical limits of possibilities, but rather only of probabilities.[69]

The language of the fourth amendment therefore indicates that, without more, the application of ordinary rules of logic should compel the courts to permit the questioning of the affidavit and supporting papers insofar as truthfulness and sufficiency are concerned, that is, the warrant can be attacked on such a basis. This conclusion is somewhat, if not completely, strengthened when the history of the concept is examined on the English and American scenes.

## III. The History of the Fourth Amendment

Earlier I have said that Madison and his fellow-Congressmen understood probable cause to mean something more than suspicion, surmise, or speculation, and that their own experiences had caused a rejection of the general warrant because of its scope, breadth, and insubstantial and nebulous nature and basis.

There were, in fact, quite a few reasons for Madison and the first Congress to propose 12 restrictions upon the government, and with respect to the fourth amendment these included the following: First was the fact that the search and seizure experiences of the colonists under the English rulers were not happy ones; second, this led to the incorporation of formal bills of right in many of the pre-Convention constitutions of the original states, and three others had similar constitutional provisions; third, a good many of the delegates at the state ratifying conventions held throughout 1787 and 1788 inveighed against the proposed Constitution because of its lack

[69] *See, e.g.*, the Holmesian final statement in Buck v. Bell, 274 U.S. 200 (1927), that horrendous possibilities are usually the last refuge of constitutional arguments.

of such bills or provisions; and, fourth, quite a few of the conventions appended to their ratifications proposals for bills of right, one such ratification even initially declaring that adoption should be a condition "previous to the Ratification."[70]

These selected reasons disclose not only why the amendment in question was proposed with little debate, but also why its provisions were not adumbrated further than the slight introduction into the Congress. In other words, there was a vast reservoir of experienced understanding within the ken of the participants to the ratifying conventions and the members of the first Congress, from which today may somewhat be drawn the interpretation and application of the amendment's language, particularly "upon probable cause." This approach, that is, seeking an understanding of the Constitution by creating an understanding of the language and its meaning as of those years, has been the basis upon which the late Professor Crosskey, 20 years ago, fashioned his views of the Constitution and its powers and limitations;[71] it is one of the bases upon which the Supreme Court has always sought to understand our fundamental document, even if not constrained to follow it (as the late Justice Hugo Black often charged); and, regardless, it must be somewhat presented for what it is worth, even if only in the light of current needs and limitations.

The background of the fourth amendment reaches into the common law of England. Our heritage from the mother country includes the concepts and practices stemming from the Norman invasion and conquest of England in 1066. From then until 1215, when Magna Carta was promulgated, the theory of right by might created resentment among not only the nobles but also the serfs, villeins, and vassals.[72] When the articles of

---

[70] Forkosch, *supra* note 50, at 696 n.224, 697-98.

[71] W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). It may be apropos to point out that opposite the title page to volume 1 Prof. Crosskey quotes from Holmes as follows: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." The quotation is, as Prof. Crosskey discloses in volume 2 of his work, from GREAT DISSENTER'S COLLECTED LEGAL PAPERS 204 (1920), giving an 1899 article on "The Theory of Legal Interpretation."

However, whereas Prof. Crosskey utilizes the quotation for the general purposes indicated, Holmes used it in the context of the interpretation of a legal document representing a contractual agreement, a situation in which

> its [the document's] words are [to be] translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. . . .

Prof. Crosskey quotes this last sentence *sans* the last clause after the last comma.

[72] *See, e.g.*, J. C. HOLT, MAGNA CARTA 69 (1965):

> [G]overnment was still very personal. A king's first responsibility was still to manage his vassals, to reward the faithful, to promote the efficient, to suppress the dangerous, and to harry the ineffectual. In the process kings overrode, ignored and exploited such law as there was to their own convenience. They disseised and dis-

the Great Charter are read there comes through the unmistakable insistence upon freedom from oppression in the form of distraints, seizures, etc.[73] However, it is from the concepts found in the fifth amendment's self incrimination clause that we see the common law's birth of fourth amendment rights.

Prior to 1763 the English courts utilized the "right to silence" to prevent the required production of books, records, and documents, by one accused of a misdemeanor, which might tend to incriminate him.[74] This new right against production was, by virtue of the right to silence, also extended to seditious libel cases and prevented the use of general warrants to obtain evidence by searches and seizures. However, this new right did not last long.

Contemporaneously with the growth of the colonies in America and their subjection to the kings' powers came their continued insistence upon their rights as Englishmen. One of the clashes in this area involved the problem of money and taxes—revenue for the crown. England thus sought to prevent smuggling into the colonies as well as the latter's reliance upon sources outside the mother country for manufactured goods, and to channel trade and commerce for its own aggrandizement. For this purpose one of the methods used was to issue writs of assistance[75] to the revenue officers who, in their discretion, could now enter and search for smuggled goods and confiscate them with, perhaps, the arrest of those involved. This, James Otis argued, was "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of

---

possessed their men on a multiplicity of grounds, sometimes with little regard for legal process. Henry I deprived men for offences against the forest law; Henry II disseised one who had refused dinner to one of his huntsmen, and another who gave support to his arch-enemy, Becket; Richard I was alleged to have seized the land of a minor in royal custody; and John disseised men by royal precept, or seized property and destroyed buildings to make way for the improvement of a castle. . . . All used the threat or fact of imprisonment as a potent deterrent.

[73] For example, relief is demanded in the famous Article 39 so that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." *Id.* at 327. While this may be the progenitor of the due process clause in the fifth and fourteenth amendments, it also illustrates against what the procedure is directed, and somewhat the early background, if not the genesis, of the struggle against authority by the nobles and later the freemen and the colonists.

[74] For example, in Dominus Rex v. Cornelius, 93 Eng. Rep. 1133 (K.B. 1744), the court rejected an effort to compel production because of such reason; and in Richard Roe v. Harvey, 98 Eng. Rep. 302, 305 (K.B. 1796), the court, by Lord Mansfield, although conceding the rule to be different in civil cases, felt that in a criminal case it would not so order production even though the defendant "should hold it in his hands, in Court."

[75] The common law background of these writs discloses their Star Chamber initial use for the purpose of ferreting out seditious libels, thus enabling officers to search any suspect's home or place of business and even arrest a person merely on suspicion of being implicated in any way with these libels. In other words, general warrants were issued in these misdemeanor cases and employed promiscuously. "Search, seizure, and arrest were used as a means of harassing antiadministration writers and editors against whom the evidence might not warrant a trial." L. LEVY, LEGACY OF SUPPRESSION 12 (1960).

law, that ever was found in an English law book . . . [because now] the liberty of every man [was placed] in the hands of every petty officer."[76] This pronouncement occurred in a famous debate in Boston, in February, 1761, and, according to John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

Between 1761 and the Revolutionary War several other incidents occurred. Judicially, three are of present interest and importance, with the first creating a new hero in America, comparable to Peter Zenger's famous trial in defence of freedom of press.[77] That first incident was the successful suit for damages by John Wilkes in England against the under-secretary of state, one Wood; it appeared that Lord Halifax, the Secretary of State, had issued a general warrant, enforced by Wood, whereby Wilkes' papers and other items were indiscriminately, and now held to be illegally, seized.[78] The second incident was a suit in trespass by one Entick against several of the King's messengers (enforcing the warrant) who broke into his home and searched and examined his papers;[79] Lord Camden's opinion extolled the security of property and the privacy of papers to such a degree that, in 1886, Mr. Justice Bradley would write concerning it that:

> The principles laid down in this opinion affect the very essence of constitutional liberty and securities. . . . ; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible ["sacred"] right of personal security, personal liberty and private property[80] . . . which underlies and constitutes

---

[76] Quoted in Boyd v. United States, 116, 616, 625 (1886). This opinion abounds in background material and references and is here used frequently, as are the majority opinion of Justice Powell and the concurring opinion of Justice Douglas in United States v. United States District Court, 407 U.S. 297 (1972).

[77] *See*, for this and another famous trial, Forkosch, *Freedom of the Press: Croswell's Case*, 33 FORD L. REV. 415 (1965).

[78] Wilkes v. Wood, 19 How. St. Tr. 1153 (C.P. 1763); *see also* note 43 *supra* and note 13 *infra*. Wilkes' publication, the *North Briton*, in its 45th issue, had libeled the king and this was unendurable. Upon an information for libel, general search warrants were issued, about 45 to 59 persons arrested, including Wilkes, his printer, and his publishers, with numerous others following.

Wilkes was eventually convicted, ran off to France, later returned, and was continually re-elected to Parliament despite all these problems, even though thrown out of that body time and time again. Despite his conviction, Wilkes successfully sued for damages. On all these aspects, *see, e.g.*, T. P. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 759-60 (8th ed. 1919) (details at 731-32); LEVY, *supra* note 75, at 145; R. POSTGATE, THAT DEVIL WILKES (1929). For the successful damage suit by one of the printers, *see also* the *Leach* cases collected at note 82 *infra*.

[79] Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1796); *see also* note 82 *infra*.

[80] Justice Bradley's extensive quotation from Lord Camden's opinion opens with: "The great end for which men entered into society was to secure their property." Boyd v. United States, 116 U.S. 616, 627 (1886). In United States v. United States District Court, 407 U.S. 297, 312 (1972), Justice Powell wrote: "It has been said that '[t]he most basic function of any government is to provide for the security of the individual and of his property.' *Miranda* v.

> the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; . . .
>
> Can we doubt that when the Fourth and Fifth Amendments . . . were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures?[81]

The third incident which occurred between 1761 and the Revolutionary War was an offshoot of the first, being a second damage suit brought by a printer of Wilkes' paper, the *North Briton*, the general warrant having also been executed against him. Several quotations from the lengthy arguments and the opinions in this case are apropos. Plaintiff's attorney argued, *inter alia*, that in the warrant "no reason is given, stated, pretended, or even existed, why this matter was so transacted. Therefore there was no probable cause or reason whereupon to ground a justification of this their conduct," and Lord Mansfield, who was one of the appellate justices, replied to the arguments of the solicitor general in these respects:

> "Whether there was a probable cause or ground of suspicion," was a matter for the jury to determine: that is not now before the Court. . . . As to the arrest being made in obedience to the warrant, or only under colour of it and without authority from it—This question depends upon the construction of the warrant; whether it must not be construed to mean "such persons as are under a violent suspicion of being guilty to the charge;" (for they cannot be conclusively considered as guilty, till after trial and conviction). The warrant itself imports only suspicion; for, it says,—"To be brought before me, and examined, and dealt with according to law:" and this suspicion must eventually depend upon future trial. Therefore the warrant does not seem to me, to mean conclusive guilt; but only violent suspicion. If the person apprehended should be tried and acquitted, it would shew "that he was not guilty:" yet there might be a sufficient cause of suspicion.[82]

The impact of these decisions and judicial opinions was felt in England when, in April of 1766 the House of Commons passed resolutions condemning the use of general warrants for the seizure of persons or papers; the opinion was likewise felt in the colonies, not only as suggested above, but also as one of the bases for the Revolution; and there is no doubt that

---

*Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)." This language was apparently concurred in by four other Justices (Douglas and White wrote separate concurring opinions, and Rehnquist did not participate (although undoubtedly agreeing).

[81] Boyd v. United States, 116 U.S. 616, 630 (1886). *See also* United States v. Weinberger, 4 F. Supp. 892, 899 (D.N.J. 1933): "The general warrants and their application to John Wilkes wrote the Fourth Amendment into the Constitution of the United States." On the rejection of a fourth-fifth amendment conjunction, although conceding that "cases can present facts which make the considerations behind these Amendments overlap," *see* late Chief Justice Vinson's opinion in Nueslein v. District of Columbia, 115 F.2d 690, 693 (D.C. Cir. 1940) (historical background at 692-93 n.5).

[82] Money v. Leach, 3 Burr. 1692, 1742 at 1765-66, 97 Eng. Rep. 1050, 1075, at 1087, *sub nom.* Leach v. Money, 19 How. St. Tr. 1002 (K.B. 1765).

when the Second Continental Congress, in 1775, recommended to the colonies that they form governments and adopt constitutions, these documents utilized those English judicial principles to create the language of the later fourth amendment. But the important point at this moment is the historical fact that these were *general* warrants which had been issued and which were the bane of the revolutionaries. These general warrants were not specific, were unsupported by facts, were uniformly held void by the English courts, and were used in the colonies for purposes far removed from their common law genesis. It was this misuse for political and other purposes against which the people also rebelled—at least insofar as this was a point of exacerbation in their relations with the mother country.

As just mentioned, the newly-freed colonies were asked to adopt constitutions for their self-governance, and it is with these that we are now concerned. Mr. Justice Bradley's opinion also included the hyperbole concerning *Entick* as "one of the landmarks of English liberty." He continued:

> It was welcomed and applauded by the lovers of liberty in the colonies . . . . As every American statesmen [*sic*], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom . . . it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.[83]

*Pari passu*, this great landmark was also known to the framers of the first state constitutions during the Revolutionary War, as well as to those who framed the fourth amendment.

Each of the new states eventually produced a constitution, sometimes only altering their existing charters, as with Connecticut and Rhode Island. Pennsylvania, for example, utilized a special convention, but most were drawn up by the state provincial congresses; Massachusetts, however, submitted a draft to the voters. All of the constitutions stemmed from a background of colonial experience, were drafted by lawyers, emphasized the separation doctrine and the primacy of the legislatures elected by those people entitled to vote,[84] and all had, in some fashion or another, a bill of rights appended or included.[85] One of the most famous of the bills of right, and perhaps the most influential, was that drafted by George Mason for the Virginia Convention of 1776 and adopted June 12th, although the constitution was not adopted until June 29th. Included as § 10 was the following:

---

[83] 116 U.S. 116, 626-27.

[84] *See, e.g.*, Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE WEST. RES. L. REV. 644 (1968).

[85] *See, e.g.*, E. WRIGHT, FABRIC OF FREEDOM 1763-1800, 145-46 (1961).

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[86]

North Carolina, for example, utilized the language verbatim in its Declaration of Rights, while Pennsylvania's Declaration was slightly different:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Vermont adopted this language verbatim in its Declarations, while Maryland's was not too far away; New Hampshire, however, adopted that of Massachusetts, which read:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Several things stand out in these three early formulations of this right, for instance, only the Virginia language referred to "general warrants" and apparently was too brief; it also omitted an introductory statement of a substantive right in the people and subjects, which the others included; and it, that is, the Virginia section, did not include the legal consequences of the absence of evidence, whereas the others stated it as not "affording a sufficient foundation," or "if the cause or foundation . . . be not previously supported." By 1788, however, Virginia fell in line with the others, and it is these new-but-old formulations which prepare the groundwork for today's streamlined version.

---

[86] II THE FEDERAL AND STATE CONSTITUTIONS 1909 (P. Poore ed. 1878); VII THE FEDERAL AND STATE CONSTITUTIONS 3814 (F.N. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS]. All of the state constitutions, and whatever bills of right were adopted, are found in these sets of volumes; those used are taken from Poore and Thorpe respectively, and their citations are as follows: Maryland, I CONSTITUTIONS 817; North Carolina, II CONSTITUTIONS 1409; Pennsylvania, II CONSTITUTIONS 1540; Vermont, II CONSTITUTIONS 1857 (although not admitted as a state until 1790 when New York so consented); Massachusetts, I CONSTITUTIONS 956; New Hampshire, II CONSTITUTIONS 1280 (its constitution of January 5, 1776, was the first framed by the states, but was not sufficient and it was not until 1784 that an acceptable one, with a bill of rights, was adopted).

The Revolution terminating successfully, the new United States lasted but ten years under the Articles of Confederation. This document had no bill of rights, although certain privileges and immunities were to be found in its Article IV. Economic and constitutional problems conduced, by January 21, 1786, to the Virginia proposal that the states send commissioners to a meeting on commerce and trade to explore the possibilities of agreeing on an act which could "enable the United States in Congress, effectually to provide for the same."[87] Commissioners from five states met at Annapolis that fall, but could not propose any form of relief; instead, they suggested "a general meeting, of the States, in a future Convention, for the same . . ."[88] which, of course, resulted in the Constitutional Convention of 1787 at Philadelphia. In that Convention little of present importance is to be found;[89] it is after the submission, by Congress on September 28, 1787, of the proposed Constitution to the states and the latters' ratifying conventions, that pressures are found for what resulted in today's Bill of Rights.[90]

The ratifying conventions were not all milk and honey. Language flew and tempers flared. Many viewed the internecine struggles as indicative of the inability of the states and their representatives to surrender their powers, and of the people as being suspicious of a new gargantua. The debates are replete with expressions of distrust and fear. Because of Hamilton's (and Madison's) views as to the lack of need for a bill of rights, and that its inclusion might even reduce such rights,[91] Thomas Jefferson's contrary views were solicited from abroad.[92] Throughout numerous exchanges the proponents of a bill urged its inclusion in the proposed document because, for example, it would "check the power of this Congress . . . . The safety of the people depends on a bill of rights."[93] The

---

87 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 38 (1927) [hereinafer cited as DOCUMENTS].

88 *Id.* at 41.

89 *See, e.g.*, DEBATES, (J. Elliott ed. 1941) [hereinafter referred to as DEBATES]; a five volume series of debates in the ratifying conventions, as well as other material. In connection with the Mason aspect, *see* V DEBATES 538, relating how George Mason, of Virgina, on September 12th, discussing the absence of a provision for juries (raised by Hugh Williamson, of North Carolina), observed further that "[h]e wished the plan [of the Constitution as introduced by the Committee of Style & Arrangement] had been prefaced with a bill of rights, and would second a motion, if made for the purpose. It would give great quiet to the people, and, with the aid of the state declarations [see text accompanying note 84 *et seq. supra*], a bill might be prepared in a few hours." Such a motion was made by Elbridge Gerry, of Massachusetts, *i.e.*, "for a committee to prepare a bill of rights," but lost by a 5-5 vote (on this vote see I DEBATES 306, reporting that the motion "passed unanimously in the negative").

90 The submission to the states required each one to ratify by "a convention of Delegates chosen in each state by the people thereof . . . ." V DEBATES 1007; *see id.* at 1008 giving the circular letter of the Secretary of Congress to the states embodying that language.

91 THE FEDERALISTS 559 (1937) (No. 84).

92 V DEBATES 573: "The defects of the Constitution which he continues to criticise are, the omission of a bill of rights, . . ."

93 II DEBATES 80 (the Massachusetts convention, which eventually ratified by the slight

resulting ratifications expressed these apprehensions and, in several instances, appended proposals for future constitutional amendments to overcome doubts and to allay fears. For example, Massachusetts ratified, but opined "that certain amendments & alterations in the said Constitution would remove the fears & quiet the apprehensions of many of the good people" and therefore did "recommend" a series of such amendments.[94] Three general types of search and seizure proposals were made, and these can be illustrated by quoting the Maryland, Virginia, and North Carolina proposals, respectively:

> That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous, and ought not to be granted.[95]
>
> That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous (sic) and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.[96]

---

margin of 19, the vote being 187-168). Other state ratifying conventions likewise include these views and expressions, *e.g.*, New York, where the respected John Lansing, of Albany, moved "a draft of a conditional ratification, with a bill of rights prefixed, and amendments subjoined," which motion was carried, although later on "in full confidence" replaced "on condition"; South Carolina, where one delegate stated that his constituents were "nearly all, to a man, opposed to this new Constitution, because . . . they have omitted to insert a bill of rights therein . . . . [T]hey will not accept of it unless compelled by force of arms, . . . [and you] must ram it down their throats with the points of bayonets . . . ." IV DEBATES 337-38; the vote for ratification was 149-73 (*id.* at 340, with a recapitulation showing the vote to be 140-73 [*id.* at 341]).

The Connecticut and New Hampshire conventions, are barren of material (II DEBATES 185-204). Pennsylvania illustrated the influence of James Wilson, who early took the floor and made the principal speech, extolling the document and urging ratification as proposed, pointing out that South Carolina, New Jersey, New York, Connecticut, and Rhode Island were states which had no bills of rights in their constitutions, *id.* at 434-38, and received support for his view that these were unnecessary *e.g.*, *id.* at 540, with the result being ratification without any request of the new government for any such amendments.

[94] DOCUMENTS, *supra* note 87, at 1018-19.

[95] Maryland, II DEBATES 551, the proceedings then disclosing:

> This amendment was considered indispensable by many of the committee; for, Congress having the power of laying excises, (the horror of a free people) by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government.

*Id.* at 551-52.

[96] Virginia, III DEBATES 658.

> That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property; all warrants, therefore, to search suspected places, or to apprehend any suspected person, without specially naming and describing the place or person, are dangerous, and ought not to be granted.[97]

The Maryland and North Carolina proposals had much in common as to substance and form. All differed, however; for example, Maryland's proposal did not contain any statement of a "right," whereas Virginia's and North Carolina's immediately opened with it, and in identical language; Maryland's and Virginia's stated that unsworn warrants "are grievous and oppressive," whereas North Carolina's ignored this; Maryland's and Virginia's closed in almost identical language that general warrants not particularizing the place or person "are dangerous, and ought not to be granted," whereas North Carolina's ended on that identical note (without "general"), but did not preface it with the clause found in the other two, utilizing the second clause of its proposal to combine what the other two states had separated into two clauses, that is, North Carolina's was condensed, perhaps to the point of ambiguity; finally, only Virginia's contained the requirement of "legal and sufficient cause," but it is suggested that this was implicit in the other two formulations.

The point to be made is that the conventions were not certain as to exactly how to formulate what they wanted to state, although they all knew what they were concerned about; they sought to aid in each other's formulations and, sometimes, copied word for word an entire passage; and, finally, conceptually, if not grammatically, they rebelled at infringements on their right of privacy by "unreasonable" conduct, and as a consequence ("therefore") unsworn statements, or sworn ones not "of legal and sufficient cause" (Virginia's), were denounced, and non-specific descriptions "ought not to be granted" (in all three). Regardless, there came through a desire to enunciate a right in the people, and then to protect this right by condemning certain governmental conduct. The substantive right is then to be made secure against "unreasonable searches and seizures," and the procedural protection is to reject general warrants and require particular ones, with these to be granted only if supported by legal and sufficient cause, the "probable cause" found in the later fourth amendment.

But the basic practical approach is found in the Virginia Bill of Rights of 1776, § 10 of which has been quoted above. That language referred to a command to an officer or messenger to search suspected places "without evidence of a fact committed," and it is this "evidence" which is a necessity before any warrant is to be issued. The different formulations of this concept do not thereby emasculate its vitality; as seen, variations eventually gave way to a suggested uniform one. The fourth amendment's back-

---

[97] North Carolina, IV DEBATES 244.

ground thus contains not only its English and colonial history, but also the fears and dreads which went into the Virginia language. And this Virginia language does require supporting evidentiary facts which never, because of their experience under the English crown, could be acceptable without challenge by the colonists, the revolutionaries, and the constitutionalists.

By 1789, when the first Congress convened, there were thus available quite a few versions of a search and seizure limitation on the federal and state governments; not only did several of the state constitutions present language for consideration by Madison and his allies, but the ratifying conventions appended such limitations during 1788 and 1789. In this posture of the country's mood it is not surprising that Madison, on June 8, 1789, arose in the first Congress and "considered [himself] bound in honor and in duty" to propose amendments to the constitution, even though some of his colleagues felt otherwise; and one of those amendments which he suggested to art. I, § 9, which limited the federal government, but not to § 10, which limited the state governments, was the following:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[98]

---

[98] I ANNALS OF CONGRESS 452 (1934) [1789-1790] (Gales and Seaton eds.) [hereinafter referred to as ANNALS]. Madison's further amendments included those to art. I, § 10, restrictions on the states, and here nothing appeared with respect to searches and seizures. *Id.* For a good analysis of these proceedings *see also*, D. Matteson, *The Organization of the Government Under the Constitution*, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 139 (U.S. Const. Sesquicentennial Comm. 1968).

It may be worthy of note that Madison's initial recommendations were stated in two groups, applying separately to the federal and the state limitations in the Constitution, after which he came to what he proposed as a new article to the Constitution which, he continued, "relates to what may be called a bill of rights." *Id.* at 453. However, he finally contented himself "with moving 'that a committee be appointed to consider of and report such amendments as ought to be proposed . . . .'" *Id.* at 459 (whether proper as amendments to the Constitution or as a bill of rights).

The above conclusion of a federal search and seizure limitation only, and not one on the states, is strengthened by virtue of the suggested insertions to art. I, § 10, between clauses 1 and 2, which contain only the following: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." And if additional support is required for this conclusion, it is found in the fact that these insertions as state limitations are repetitions of the language found in a small portion of a larger group of limitations on the federal government (as amendments to art. I, § 9), this latter setting forth in detail what eventually becomes the basis for the present Bill of Rights (plus one sentence of a penultimate proposal by Madison which becomes the tenth amendment).

Thus as Madison and the first Congress, as well as the states which later ratified, respectively desired limitations solely on the federal government, these were particularized and specified, and if limitations were desired on the states, these likewise were separately so done (*see id.* at 775 for acceptance of this amendment limiting the states). It is also suggestive that the states were willing to (further) limit the central government, but not their own; *but see id.* at 765, 767, adoption by the House, which may account for Madison's proposal to amend art. I, § 10, which was rejected by the Senate when forwarded to that body (even though Madison specifically spoke in favor of it as a limitation on the states; *id.* at 440-41).

When this proposal is cast against those found in the state constitutions and those appended to the ratifications, then the conclusions suggested above are not without justification. Madison appears to have combined the right and the protective limitations into the pithy suggestion quoted. All of his proposals, however, were first referred to a Select Committee (of the States) and then eventually to a Committee of the Whole, that is, the House so acting which took the matter up in August of that year and, discussing the items *seriatim*, eventually brought up the proposition, but in slightly altered language:

> The right of the people to be secured in their persons, houses, papers, and effects, [against unreasonable seizures and searches] shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[99]

When the Committee reported to the House several days later, there was no discussion on this quoted portion, which was apparently adopted without any explanation or debate.[100] Two days afterwards the House completed its examination of the propositions and referred these to a committee of three "to arrange the said amendments and make a report thereof;" the report was made promptly (on August 24th, the next working day) and at that time 17 articles of amendment were sent to the Senate for their concurrence.

The Senate received these proposals the next day, debated them a week later for about five days,[101] and, finally, suggested some amendments and then, on September 9th, "agreed to a part of them, and disagreed to others; of which they informed the House."[102] This message and their 12 proposals[103] were relayed to the House the next day,[104] but it was not until 11 days later, on September 21st, that it finally completed its consideration of the Senate's amendments and appointed Madison and two others as House managers for a conference with three Senators to resolve the disagreements.[105] The conference was held almost immediately, and a report rendered to both bodies. The House now receded from its disagreements with the Senate and, as to that body's amendments, proposed its own

---

[99] *Id.* at 783. The bracketed portion was inadvertently omitted by the committee, but Elbridge Gerry caught the error and his motion to include such language was adopted.

[100] *Id.* at 796 (August 20th).

[101] *Id.* at 72 (for receipt of proposals on August 25th). *See id.* at 76-80 for the debates of September 2d, 4th, 7th, 8th and 9th. The Senate acted in secrecy so that nothing is available concerning its debates. *But see* Matteson, *supra* note 98, at 313.

[102] 1 ANNALS, *supra* note 98, at 77.

[103] The House's original 17 having been reduced by elimination or consolidation.

[104] I ANNALS, *supra* note 98, at 923. (September 10th).

[105] *Id.* at 939 (September 21st) (after having briefly "considered" the Senate's version on September 19th; *id.* at 938.) Besides Madison, there were Sherman and Vining, and for the Senate, Ellsworth, Carroll, and Paterson.

changes or version which the Senate, the following day, September 25th, concurred in, *i.e.*, both houses now agreed on the proposals and amendments to be submitted to the states for ratification.[106] However, the version so agreed upon and submitted as a sixth article of amendment was slightly changed in language, and as finally ratified became the fourth amendment.[107] The ratifications of the proposed amendments in the states shed no light on our inquiry.[108]

Can a conclusion be drawn from the English and American backgrounds just given, that affidavits and papers in support of a warrant may be questioned as to truthfulness and veracity, and then sufficiency? The answer is a somewhat qualified yes, albeit the counter-argument may also be made. The backgrounds, already examined, may now be summarized so as to support the conclusion.

There seems to be no doubt that during the Star Chamber period in England any questioning would result in added punishment, and the same result probably occurred in the colonial period when the King's messengers and agents enforced their own general warrants. The spirit of liberty and freedom from oppression, manifested in the thirteenth century Magna Carta and the eighteenth century clashes between the colonials and the Crown, however, indicate that *Wilkes*, *Entick*, and *Leach* may have become cornerstones upon which the emerging nation's search and seizure policies were to be built.

Lord Camden's opinion probably fired the dissidents in America who inveighed for independence, but it was Lord Mansfield who gave form to the concepts and principles evolved. The latter, it will be recalled, had to answer the opposing contentions of the parties as to the existence in the papers of probable cause; he did so by leaving it "for the jury to deter-

---

[106] *Id.* at 948. Except for what has been quoted and discussed above, nothing further appeared with respect to the fourth amendment.

[107] The proposal can be cast against that offered by Madison and changed by the Committee, both quoted in the text, and then cast against the fourth amendment as it is in the books. The source for this proposal and its language is at I ANNALS 2032 (Appendix), at which the ratification by New York is given and which sets forth in full the proposals circulated by the federal government. "Article the Sixth" being:

> The right of the People to be secure in their persons, papers, houses [papers and houses are reversed today], and effects, against unreasonable searches and seizures, shall not be violated; [today a comma] and no warrant [today a plural] shall issue [today a comma follows] but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.* Compare, however, the language as given in DOCUMENTS, *supra* note 87, at 1064, in which language identical to today's fourth amendment was given as the proposed Sixth Article.

[108] *See, e.g.*, Matteson, *supra* note 98, at 317-28. It may be noted that of the 12 proposals submitted, only five of the states ratified all (including Rhode Island), four rejected the second proposal, and two rejected the first proposal; nine states having been required for adoption, the first and second thus failed to obtain the necessary approval. No returns were then made by Massachusetts, Connecticut, Georgia or Kentucky. *Quaere*: in the light of Coleman v. Miller, 307 U.S. 433 (1939), would any subsequent ratification by two or four of these four states respectively of the first or second proposal invigorate a ratification?

mine" whether "there was a probable cause or ground of suspicion" for the issuance of the warrant, that is, to consider the evidence (facts) in the case. This language must be construed to mean that: (a) there had to be facts set forth to disclose probable cause; and (b) these facts could be inquired into for sufficiency (as to probable cause).

Assuming, therefore, that the facts could be inquired into, then it followed that the next questions would be, by whom and how, as well as when? Six decades earlier Chief Justice Holt had apparently held that, "A warrant must be grounded on legal information," and also wrote that "if complaint were made to him . . . he would send for the justice and bind him over . . . ."[109] Since he was presiding in an appellate or reviewing capacity, the Chief Justice's language must indicate that he inquired into the facts to see if they formulated legal grounds, etc. for the warrant.

Thus, in the *Leach* case, Lord Mansfield could then proceed to write that, in determining this sufficiency, the facts need not disclose "conclusive" guilt, but "only violent suspicion," and this language indicates the scope and depth of the facts required—their quantity and their quality. The reviewer or trier of this fact, whether or not the warrant's facts disclose such a "violent suspicion" as to equate with probable cause, as well as these facts themselves, is to be kept (insulated?) from considering the warrant per se and its effectuation, for these latter may be perfectly proper regardless of, or on the assumption of, sufficiency. In other words, sufficiency is independent of the warrant and its effectuation, which in turn means that if sufficiency is disclosed to be lacking, then any issuance of a warrant as well as the warrant and its enforcement are void and may always be inquired into even after effectuation.

As Mr. Justice Bradley wrote in the *Boyd* case, when the fourth and fifth amendments "were penned and adopted" the English experience and judicial approaches were known and followed by the first Congress.[110] This is substantiated by the language used in the first state constitutions and the bills of right appended to the ratifications of the Constitution. For example, Virginia's famous declaration of rights in 1776 required "a sufficient foundation" for a warrant, while Massachusetts voided all warrants "if the cause or foundation of them be not previously supported by oath or affirmation;" subsequently, Virginia fell in line with the formulation devised by the others.

The ratifications of the Constitution disclosed much opposition because, for one thing, no bill of rights was to be found in it. The suggestions for amendments included what later became the fourth amendment, and the three general types of proposals contained language which, explicit in

---

[109] Anonymous, 7 Mod. 99, 87 E.R. 1121 (1702). The one-sentence opinion is barren of any language applicable here, save for that quoted last, and the first quotation appears to be a headnote.

[110] *See, e.g.*, Carroll v. United States, 267 U.S. 132, 147-49 (1925).

Virginia's "of legal and sufficient cause," was implicit in the others. That this was and is so is found in the background of the 1788 period, particularly in the fact that the people had actually experienced the oppressions under general warrants issued without any rhyme or reason, save suspicion, and in their desire that not only were general warrants to be done away with, but also that the issuance of particular warrants was to be based solely upon "legal and sufficient cause," or, as it was formulated, "upon probable cause." Additionally, since the issuance of warrants in the past had been anything but judicial by those who neither knew nor cared about the bases required, this evil, too, was to be guarded against by having these bases susceptible to inquiry—although this conclusion cannot be supported by this writer by a definite expression or reference; it seeps through and inheres throughout the factual background explored above.

Madison and the first Congress, therefore, not only had a background of bad experiences under general warrants but also penned suggestions on how to overcome these illegal methods. They took the proposals which had originated decades before and had culminated in the ratification conventions and sought to follow the desires of the delegates and the people. Their proposed amendments were sent to a committee to reframe, just as in the Constitutional Convention of 1787, with language and not concepts to be smoothed out. While speculation on a conspiracy aspect in the formulation of language in the Constitutional Convention[111] and in the later fourteenth amendment[112] is not impossible to substantiate, no such allegation has ever been directed at the members of the first Congress and their Bill of Rights. It must therefore be taken as a fact that the language of the fourth amendment included the concepts found in the state constitutions and the ratification proposals, all based upon the grievances directed at the Crown's illegalities, and that such concepts permitted, nay, required, that the truthfulness and sufficiency of the affidavit's facts be subject to inquiry.

On the assumption that the facts may be so scrutinized for truthfulness and sufficiency, then the method must next be examined. A few illustrations may suggest other situations; for example, a suit for damages, as in the *Wilkes* case, requires this, but locking the stable door at this moment is too late. Since the warrant is held to be void, then the evidence so illegally garnered, or the arrest so illegally made, may be opposed on the appearance or trial in court, but again questions may arise as to waiver or use in another context. A preliminary motion to suppress and turn over, as well as a writ of habeas corpus, may be utilized. Or, as in one foreign case, prohibition seems to be in order,[113] while in another, common law

111 *See, e.g.*, Forkosch, *supra* note 50, at 694-95.

112 *See, e.g.*, FORKOSCH, *supra* note 4, at 374.

113 Ridley v. Whipp, 22 Commw. L.R. 381 (Austl. 1916). On the suit for damages see notes 43, 78 *supra.*

certiorari was used.[114] Whatever the method, whether immediate or late, one ultimate result should be that the illegality contaminates all that follows, that the warrant's illegality (unconstitutionality) permeates whatever conduct occurs under it, and that any seizure or search is tainted *ab initio*.

## IV. A Judicial Rationale Illustrated in Current Decisions

The preceding analysis has concluded with the probability of a logical and historical right of inquiry into the truthfulness and sufficiency of the papers upon which a warrant is issued, so as then possibly to denounce whatever occurs thereafter. From the welter of historical, judicial, and statutory material there has also seeped through an approach which, unconsciously, the courts may have utilized in their efforts to fashion a viable base upon which warrants may issue, while still protecting the rights of the people. That approach, and the decisions which may illustrate it, follow, albeit our conclusion and the judicial approach do not correspond.

The grand jury is historically an offshoot of the machinery that William the Conqueror employed when he ordered Domesday Book to be made.[115] In today's language, these early jurors "finked" on their neighbors by swearing that rumor had it that Jones had done so-and-so, that is, had committed a crime.[116] A double process is later born, fed by several streams, whereby after such a "jury presents a crime, or rather a reputation of crime, then the justices turn to the representatives" of another group which may, if agreeing with the first body, have "the defamed man [go] to the ordeal." The grand jury-petty jury system which eventually results is primarily a procedural change, not substantive; the former still deals with and considers material which the latter, under the developing evidentiary rules,[117] cannot utilize, and in this respect the grand jury is less of a "judicial" body than is the trial jury.

In a sense, therefore, the administrative bodies which prepared Domesday Book had nothing of the judicial base, power, or structure which we associate with courts of law; similarly, the grand jury which succeeded the

---

[114] Rex *ex rel.* Guloien v. Frain, 32 West. L.R. 387 (Can. 1915), in which it was held that such procedure could be used to quash a warrant which did not allege any offense; no facts or circumstances were disclosed showing the causes of suspicion or tending to a belief of the commission of any alleged offense, and no cause of suspicion or reasonable or other grounds were given to disclose that the goods were concealed on defendant's premises.

[115] II F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 642 (2d ed. 1898).

[116] *Id.*, stating that the jurors did not give testimony against criminals, nor to the effect that one has committed a crime or even that they believe him guilty; rather, "they are to give up the names of those who are defamed by common repute or theft or of certain other crimes . . . . The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute."

[117] *See, e.g.*, Forkosch, *The Nature of Legal Evidence*, *supra* note 44.

earlier form continued in this vein, for it "informed" or "presented" on whatever it knew, whether of fact, rumor, or belief. It is only with the rise of a sophisticated and refined body of law and procedure, somewhat represented, curiously enough, in the Magna Carta's early formulations requiring judicial procedures before amercements, takings, etc.,[118] that one's right to a judicial type of hearing becomes part of English law. But this right does not extend to the preliminary aspects, that is, to complaints, charges, etc.; at the outset there can be investigations, examinations, and inquiries disassociated from the legalities connected with the subsequent judicial trial. In other words, the grand jury historically took root in an administrative need for factual knowledge so as to tax, adapted itself to a like need so as to inform or charge, and, since then, and probably because it had outlived its usefulness, was put to rest in England in 1933.[119]

While the American adoption and continuation of the grand jury system has not yet been reversed, still, in this era, its use has degenerated such that, for example, California utilizes preliminary examinations and informations in 97 percent of its felony cases.[120] While the grand jury in law remains within the judicial system still, in actuality, it is an adjunct of the executive arm's power of inquiry, aided by the ability to subpoena. Thus the body is not inhibited in what it may accept as fact, and, like any administrative agency today, it may utilize hearsay or even rumor for the purpose of investigation and even "publicity." In this last aspect it does not indict, but presents or informs, that is, it brings to the attention of concerned or appropriate bodies or officials those facts which, while perhaps not falling within criminal or other prohibitions, nevertheless are serious enough to warrant some form of action other than judicial.[121]

In all of this the grand jury somewhat parallels administrative proceedings, whether these are investigations, preliminary examinations and determinations,[122] or any other conduct save in its quasi-judicial capacity. As with the administrative body, so with the grand jury — any type of matter may ordinarily be properly within the latter's examination and scope. Later on, when the administrative investigation has resulted in the agency's quasi-judicial hearing, and this is then followed by judicial re-

---

[118] *See, e.g.*, art. 20, concluding that "none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood;" art. 38, that "no bailiff shall put anyone on trial by his own unsupported allegation, without bringing credible witnesses to the charge;" and, of course, the famous 39th article, that no free man is to be proceeded against "except by the lawful judgment of his peers or by the law of the land." *See also* HOLT, *supra* note 72.

[119] *See, e.g.*, D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 149 (1967).

[120] *See, e.g.*, Comment, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 644 (1956).

[121] For a criticism of this presentment without indictment, *see, e.g.*, In the matter of Wood v. Hughes, 9 N.Y.2d 144, 173 N.E.2d 21, 212 N.Y.S.2d 33 (1961); In the matter of Third September, 1958 Grand Jury, 19 Misc. 2d 682, 193 N.Y.S.2d 553 (1959).

[122] *See, e.g.*, Wagner Act § 9(c)(1) (as amended) (concluding paragraph).

view of its last such determination, the question of fact-substantiality comes to the fore; and this, in a few instances, may include credibility and trustworthiness, if not admissibility.[123] It is therefore entirely feasible to utilize those judicial concepts in administrative proceedings which here parallel a grand jury's proceedings so that a like approach may be applied. That like approach is seen in what occurs according to the Federal Rules of Criminal Procedure when a magistrate issues a warrant.

The proceedings involving a federal magistrate's issuance of a warrant have been examined at the outset. In the light of what has just been said about grand juries, what comes through from the decided cases is that the Supreme Court is interested in having the magistrate confronted by facts which ordinarily might be introduced into an administrative investigation and there form the basis for a preliminary finding, that is, evidence sufficient to warrant continuing with an investigation, and later bringing on a quasi-judicial proceeding or otherwise refusing to allow its activity in the area to cease. There is no need to have such absolute proof of a judicial nature and type that a respondent stands not only accused but also guilty beyond doubt.[124] But while agencies have investigatory and other powers of preliminary examination,[125] these powers are not unrestricted or unlimited; for example, "where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold."[126] So, too, is the power of a magistrate to issue a warrant dependent upon such a type of proof, facts, or circumstances ordinarily sufficient to create a belief in continuing with the investigation (here via the search or seizure) even though a doubt still exists concerning guilt, sufficient to warrant a later dismissal by a court if nothing further is presented on the trial or hearing.[127]

---

123 *See, e.g.*, FORKOSCH, ADMINISTRATIVE LAW, *supra* note 9, at 355-56, quoting the following from In re Rath Packing Co., 14 N.L.R.B. 805, 817-18 (1939): "Joe Gorman testified that he had been told by a girl named Casey, who in turn claimed to have been repeating a statement made to her by a girl named Padden, that the latter was told by the personnel manager's sister, Gladys Gillette, that her brother had instructions from the superintendent, Morris, to dispense with union members, or those likely to become union members." Can there be any question concerning rejection of this "testimony," not only for the purpose of substantiality, but even admissibility? The tribunal rejected it for the former, but *quaere*: should it have been rejected also for the latter reason?

124 *See, e.g.*, the principles set forth in note 157, *infra.*

125 *See, e.g.*, Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). See also note 49 *supra.*

126 Cardozo, J., in *In re* Edge Ho Holding Corp., 256 N.Y. 374, 382, 176 N.E. 537, 539 (1931). The Judge prefaced this by "Only," so that the quotation apparently is a difficult one to apply in practice.

127 *See, e.g.*, Mr. Justice Jackson's comments in Johnson v. United States, 333 U.S. 10, 13-14 (1948), that the protection afforded by the fourth amendment "consists in requiring . . . a neutral and detached magistrate" to draw a "disinterested determination" of probable cause, and Mr. Justice Goldberg's adoption of this approach in United States v. Ventresca, 380 U.S. 102, 106 (1965); Goldberg's principles are set out in *Ventresca, supra* at 107-09.

Separately, it has been stated that "if certain information were sufficient to constitute probable cause for a search without a warrant, the same information would certainly support probable

Since the issuing magistrate formulates his personal subjective conclusion of probable cause based upon what is presented to him, there is a built-in probability of error or even bias. Administrative determinations and proceedings were institutionalized because of this inherent violation of procedural due process,[128] albeit limited, for practical purposes, to the quasi-judicial proceeding. Nevertheless the very nature of our concept of the rule of law militates against permitting a single individual too much power, especially in a situation in which the consequences may prove disastrous for the respondent or defendant. This theory accounts for the distinction between the magistrate's and the grand jury's warrants, namely, that in the former the rules require a degree of accountability at the outset, whereas in the latter we assume that 23 or as few as 12 persons will ordinarily be sufficient to check out each other's biases, errors, and even idiosyncracies. In other words, the individual issuer is to be subjected to a degree of double-checking, but the collective issuer is presumed to have taken a reasonably good view of the facts and its determination of probable cause should ordinarily be sufficient.

How do the decisions approach the question originally presented as to the constitutional right to challenge the truthfulness and credibility of the evidentiary facts upon which a warrant issues? First, a question of procedural due process might be raised, akin to that in the administrative proceedings just discussed, although it might be questioned whether any "taking" has yet occured, that is, it might well be urged that the due process clause does not apply. However, the counter to this might well be that when a person or his property is seized, there is a physical taking of a sort that defies any sophisticated analysis to disclose the contrary; one's liberty is effectively squelched when one is arrested.

Analogically, the sixth amendment's right to counsel intrudes, with the question raised whether this right is violated when governmental interception of counsel's conversations occurs. Thus in granting a stay in a case in which no warrant was obtained because the alleged "foreign" surveillance was claimed to be sufficient solely under the Attorney General's authorization, Mr. Justice Douglas refuted the government's contention of lack of standing in the applicant insofar as the conversations had been held in the courts below not to be relevant to any issues on the trial, by stating:

> Therefore it would seem to follow from the reasoning of the Court of Appeals that whether or not there was "standing" would turn on the merits. The case, viewed in that posture, would seem to require an ad-

---

cause for the issuance of a warrant." Acosta v. Beto, 297 F. Supp. 89, 93 (S.D. Tex. 1969), *aff'd.*, 425 F.2d 963 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). However, what of aspects of time, necessity, safety, etc.?

[128] *See, e.g.*, FORKOSCH, ADMINISTRATIVE LAW §§ 200-201 (1956); K. DAVIS, ADMINISTRATIVE LAW ch. 11 (3d ed. 1972).

> versary hearing on the issue of relevancy. We held, in Alderman v. United States, 394 U.S. 165, 182 (1968), that the issue of relevancy should not be resolved *in camera*, but in an adversary proceeding . . . .[129]

The approach here applied, although by only one Justice, is somewhat indicative of the view that adversary proceedings should challenge the truthfulness, credibility, and sufficiency of the papers in a warrant proceeding, lest boot-strap operations occur.

It may, of course, be urged that it is somewhat illogical to claim the application of due process concepts because the warrant procedure is specifically permitted by the fourth amendment.[130] One specific counter to this is that a degree of confusion arises when this simplistic attack is made on the question here raised. The exact point is easily made: the fourth amendment permits warrants to be issued when based on sworn or affirmed papers disclosing probable cause. The amendment does not otherwise refer to that term, nor does it define it; thus we must go elsewhere for its understanding. Ordinarily a term with a common law (or judicial) background is interpreted in the light of its historical connotations, the contrary not appearing,[131] and so, for the use of probable cause in one amendment there is nothing constitutionally improper in going to another amendment; nor, one may add, is doing so illogical or inconsistent with established uses.[132]

Since probable cause does not stand alone, but is an inference (or conclusion of law) to be drawn from facts and circumstances presented in the papers, there is a connection between the two which, at the very least, presents a procedural due process issue; that is, there must be a rational connection between the facts proved and the fact inferred, and there is none

---

[129] Russo v. Byrne, 408 U.S. 929, 930 (1972), also referring to the liberalization of the concept of standing, and its application, in modern times. See also note 137 *infra*. Mr. Justice Douglas referred to the Court's rejection of such an Attorney General's authorization in domestic security cases in United States v. United States District Court, 407 U.S. 297 (1972).

In his overall due process area, note the constitutional requirement that an owner of material presumptively protected by the first amendment has a right to a prompt pretrial adversary hearing on the issue of, *e.g.*, obscenity. Marcus v. Search Warrants, 367 U.S. 717 (1961); Carroll v. President & Commissioners, 393 U.S. 175 (1968).

[130] *See, e.g.*, the broad analogy one might draw in the situation presented by the eighteenth and twenty-first amendments, which dovetail, as discussed in Hostetter v. Idlewild Bon Voyage Liquors Corp., 377 U.S. 324 (1964), and Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964). Of course the situations footnoted here and discussed in the text are not similar, and the analogy may be forced, but, in the context of what is presently suggested, these amendments may be referred to as such.

[131] *See, e.g.*, M. FORKOSCH, LABOR LAW § 290, at 532 n.81 (2d ed. 1965), quoting from Senator Taft that "This [amendment to the Wagner Act] restores the law of agency as it has been developed at common law." See, *e.g.*, the new definition of employee in the Act to overcome NLRB v. Hearst Publications Inc., 322 U.S. 111 (1944), and as to agency it overcomes United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395 (1947), as the latter construed § 6 of the Norris-LaGuardia Anti-Injunction Act.

[132] For example, to interpret the fourteenth amendment's privileges & immunities clause the Supreme Court has gone to the fourth article's identical clause; FORKOSCH, CONSTITUTIONAL LAW ch. XVII (2d ed. 1969).

"if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."[133] Thus it might well be urged that if a substantive due process taking or violation occurs or is properly claimed to have occurred, then procedural due process is a requirement; that is, some minimum form of hearing is a necessity even though the hearing occurs after the violation.[134] And, to the extent that the barest minimums entering into procedural due process require something along the lines found in the federal rules as already examined above, it can be argued that the rules are declaratory of constitutional requirements and so must be followed in all situations in which a warrant has been issued.

The substantive due process violation is not the only one to be considered in the context of requiring that procedural due process be accorded a defendant. There is also one's first amendment right to privacy,[135] which not only intrudes but, as Mr. Justice Douglas has observed in this search and seizure area, "We deal with the constitutional right of privacy that can be invaded only on a showing of 'probable cause' as provided by the Fourth Amendment."[136] Mr. Justice Douglas felt this to be a strict standard which, if accepted, urges the ability to challenge on the merits; nevertheless, this additional substantive violation makes for at least three constitutional rights which are involved, namely, the rights to privacy, to liberty and property, and the right in the fourth amendment to security (with, perhaps, a defendant's sixth amendment right to counsel involved, as in governmental interceptions of conversations).[137]

Regardless of the applicability or inapplicability of these constitutional clauses to the determination of probable cause in the fourth amendment, and especially to the constitutional need for a hearing at some point after the warrant's issuance or during its effectuation, has the Supreme Court indicated any view in this area? The answer is a confused yes, but the

---

[133] Tot v. United States, 319 U.S. 463,467-68 (1943), the quotations being out of context; *see also* Adler v. Board of Educ., 342 U.S. 485, 494 (1952). In *Tot*, the Supreme Court held that a presumption could not be created "that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute." 319 U.S. at 466.

[134] *See, e.g.*, FORKOSCH, ADMINISTRATIVE LAW ch. VIII, §§ 120-21 (1956).

[135] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[136] United States v. Ventresca, 380 U.S. 102, 117 (1965) (dissenting opinion). *See also* Schmerber v. California, 384 U.S. 757, 778-79 (1966) (dissenting opinion). Immediately after the quotation from *Ventresca* in the text, Mr. Justice Douglas stated: "That is a strict standard." Compare this with the stop-and-frisk case of Terry v. Ohio, 392 U.S. 1, 9 (1968), in the opinion of Chief Justice Warren; "wherever an individual may harbor a reasonble 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted." Mr. Justice Douglas dissented.

[137] Note Mr. Justice Douglas' grant of a stay in Russo v. Byrne, 408 U.S. 929 (1972), bringing in the sixth amendment's right to counsel as a basis for this determination when governmental interceptions of one or more conversations involving a defendant's attorneys occurred.

area must be divided, perhaps as did Mr. Justice White in his *Spinelli* concurrence:

> If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay. Because an affidavit asserting, without more, the location of gambling equipment at a particular address does not claim personal observation of any of the facts by the officer, and because of the likelihood that the information came from an unidentified third party, affidavits of this type are unacceptable.[138]

If Justice White's three possibilities are utilized, then it would appear that a challenge on the merits to the first would result in an outright factual disagreement between the challenger and the affiant; and in such cases the analogy would necessarily be to a jury's consideration of a mélange of facts, for and against, before determining truth or falsity, probable cause or not. But at this point there would emerge what Mr. Justice Harlan referred to as the "render[ing of] a judgment based upon a common-sense reading of the entire" record,[139] and here a subjective choice has to be made. However, what emerges is not the actuality of such a subjective choice, but the actuality of having the pros and cons before the issuer when he determines whether or not to issue (or, afterwards, to void) the warrant. Not only must there be available such a consideration, but it must also appear to have occurred; whether or not it has actually taken place is ordinarily impossible of ascertainment.[140]

The Justice's second and third possibilities are self-answering, and if supporting papers came within either situation then, *pari passu*, there

---

[138] Spinelli v. United States, 393 U.S. 410, 423-24 (1969) (citations omitted). The opinion further stated:

> Neither should the warrant issue if the officer states that there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past. This attests to the honesty of the informant, but *Aguilar v. Texas* . . . requires somehing more—did the information come from observation, or did the informant in turn receive it from another? Absent additional facts [such type of information is insufficient].

*Id.* at 415. As to *Spinelli's* future, see this writer's view in text accompanying note 157 *infra.*

[139] Spinelli v. United States, 393 U.S. 410, 415 (1969), Mr. Justice Harlan referring not to the entire record, but to "the entire affidavit."

[140] Of course if it is factually ascertained that no consideration of the facts occurred in an ordinary trial or administrative hearing, then a procedural due process violation is found; *e.g.*, Morgan v. United States, 298 U.S. 468 (1936).

would ordinarily be no reason for a challenge on the merits to issuance; the insufficiency of the affidavit would be apparent on a prima facie basis. But, in either case, if an attempt is made to give additional facts (such as Justice Harlan's "independent corroboration"),[141] then a challenger is impaled on the horns of a possible dilemma, which is to claim insufficiency on the face or to attack on the merits; nevertheless, he must have this choice available to him, because otherwise his constitutional rights are violated. It is, therefore, in this type of situation that the problem posed at the outset is highlighted, for there is otherwise a rule of men and not of law, a rule of subjective and not objective evaluation and choice, which occurs. And this is antithetical to the American concept of the supremacy of the law.[142] It is this antithesis between constitutional right and practical requirement that makes cowards of judges and magistrates, for they see the need for a limitation on the ability of governments to search and seize, and yet also see the need for the exercise of such a power for a variety of purposes. It is in the reconciliation of right and need that hard law eventuates. That hard law may be examined now.

We may begin with the constitutional requirement that the warrant must be supported by an "oath,"[143] that is, a sworn statement. The lack of an oath, or its administration by an unauthorized person, results in a fourth amendment violation,[144] as the warrant is not "supported" as is constitutionally required. So, too, a "warrant clearly is bad" if the affiant gives no facts or circumstances, but "states only that [he] 'has good reason to believe and does believe the defendant . . .' " is violating the law.[145] A challenge to the warrant itself or its sufficiency may be upheld if the affiant, in the supporting complaint, "relied exclusively upon hearsay information,"[146] although the objection may be rejected if there are also presented "some of the underlying circumstances from which the infor-

---

141 Spinelli v. United States, 393 U.S. 410 (1969); *see also* text accompanying notes 147, 153, 154 *infra.*

142 *See, e.g.*, the discussion in FORKOSCH, ADMINISTRATIVE LAW § 25 *et seq.* (1956), and citations and references there given.

143 I omit the "affirmation" alternative.

144 Albrecht v. United States, 273 U.S. 1, 5 (1927). It does not necessarily follow that a court is without jurisdiction; a voluntary appearance, or the filing of proper affidavits prior to objections, permits the proceedings to continue. *Id.* at 8, 10.

145 Byars v. United States, 273 U.S. 28, 29 (1927). On the lack of facts and circumstances *see, e.g.*, Nathanson v. United States, 290 U.S. 41, 44, 47 (1933).

146 Giordenello v. United States, 357 U.S. 480, 483-84 (1958); this was a 6-3 decision, with the dissent contending that the majority was not deciding a constitutional question, but rather the validity of an exension of Rule 4; *id.* at 491. Justice Black (a majority member) agreed, thus a vote on that issue would be 5-4; *see also* Aguilar v. Texas, 378 U.S. 108, 118 n.1 (1964).

It is worthy of note that Mr. Justice Harlan wrote several opinions on the sufficiency or insufficiency of affidavits, *e.g.*, *Giordenello*, *Aguilar* (concurring briefly), Jaben v. United States, 381 U.S. 214 (1965), and, though not last, *Spinelli.* In *Jaben* Mr. Justice Harlan seemed to soften the strict requirements of *Giordenello* insofar as prosecutions for income tax evasion were involved and articulated his views on the minimum content of an affidavit. 381 U.S. at 223-24.

mant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.' "[147] The rationale behind these and other holdings is as follows:

> "the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests." The reasons for this rule go to the foundations of the Fourth Amendment. . . . Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present * * *."[148]

Following the distinction heretofore made between the facts and circumstances found in the papers supporting the issuance of a warrant, and the ability of a person to challenge these facts and circumstances on the merits, it appears that the Supreme Court utilizes only the first for the purpose of questioning the legal sufficiency of these facts,[149] and refuses to permit the second—or, at least, has not yet determined the contrary. In other words, the Justices take the facts and circumstances on an "as is" basis, do not question truthfulness or credibility (save, perhaps, those cases in which, on its face, the affidavit is too monstrous to believe or accept), and attempt to place themselves in the position of the issuing magistrate to see if they, subjectively, would be able to come to the same conclusion.[150] In so judging, they seek to assume the role of "a reasonably dis-

---

[147] Aguilar v. United States, 378 U.S. 108, 114 (1964) (citation omitted); *see also* note 138 *supra* and note 152 *infra.*

[148] *Id.* at 110-11, (citations omitted), quoting from cases, and including Nathanson v. United States, 290 U.S. 41, 47 (1933), holding that no warrant is to be issued unless the magistrate can "find probable cause therefor from facts or circumstances presented to him under oath or affirmation."

Assuming the facts alleged ordinarily to be sufficient for probable cause to be inferred, but either one or more of these facts is concededly not correct, or else the warrant is likewise so found to contain a word or two—is the affidavit or the warrant or both to be condemned, or is this to be condoned where no substantial right of the defendant has been transgressed? *See, e.g.*, United States v. Ravich, 421 F.2d 1196, 1201-02 (2d Cir. 1970), *cert denied*, 400 U.S. 834, applying FED. R. CRIM. P. 52 so as to overlook the affidavit's failure to request a search, even though factually sufficient therefore, and the warrant's daytime authorization, with execution at night; *see also* State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971), and Rugendorf v. United States, 376 U.S. 52B (1964).

[149] Analogically, we may refer to a demurrer to a complaint, or a motion to dismiss it, because, assuming the truth of the allegations, these admitted facts are unable to disclose a cause of action, *i.e.*, they are legally insufficient to permit a recovery.

[150] Analogically, although not exactly in point, we may refer to the substantial evidence rule in administrative proceedings, which provides that the reviewing court will affirm the agency's determination if based on a choice between two or more alternatives, *i.e.*, only if the agency's determination is an impossible inference or a conclusion not based on facts will it be reversed, and, even then, remand will occur unless no other inference or conclusion is possible.

creet and prudent man" who, on the facts given, would be led to believe that the offense charged had been (or was being) committed.[151] Because of this personal aspect, however, it is entirely possible, and the cases so indicate, that the Justices may nevertheless disagree on the sufficiency of the supporting papers,[152] even though they may possibly all agree in rejecting any challenge on the merits.

This slippery problem of how to eradicate bias which may enter a constitutional area involving the fundamental rights of the people is ever-present. *Aguilar* sought to overcome this by objectifying the minimum requirements—by creating a standard, in the term "underlying circumstances,"[153] to be applied to the two aspects of an informer-type of affidavit, namely, the reliability or credibility of the informant, and the reasonableness of the inference or conclusion that a crime has been committed.[154] Within five years even this two-pronged formulation had proved ineffective, and it was necessary "that the principles of Aguilar should be further explicated . . . ."[155] One hitch developed, though, which was that a majority of the Court could not agree on the present application of the

---

In the instant situation there is no choice involved, merely whether or not the issuance is possible, although, insofar as the scope of a search warrant is concerned, such a choice might be possible. On the administrative aspect *see, e.g.*, FORKOSCH, ADMINISTRATIVE LAW § 246 *et seq.* (1956).

[151] Dumbra v. United States, 268 U.S. 435, 441 (1925); *see also* Steele v. United States, 267 U.S. 498, 504-05 (1925); *see also* United States v. Ventresca, 380 U.S. 102, 108-09 (1965); United States v. Harris, 403 U.S. 573, 583 (1971).

The concept of reasonableness, as distinct from will, is a common law standard; *see, e.g.*, HOLT, MAGNA CARTA 78 (1965); Forkosch, *Determinism and the Law*, 60 KY. L.J. 350 (1972); in the context of a (reasonable) search incident to a lawful arrest, *see* Cooper v. California, 386 U.S. 58, 62 (1967).

[152] *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958), in which Justices Clark, Burton, and Whittaker dissented on this exact basis, while in Aguilar v. Texas, 378 U.S. 108 (1964), Justice Clark again wrote the dissenting opinion on the sufficiency of the affidavit, this time joined by Justices Black and Stewart (Justices Burton and Whittaker were no longer on the bench, Justice Stewart having replaced the former, and Justice White the latter).

[153] But even this effort to set up an objective standard must fail, for these "underlying circumstances" are given generally and are not spelled out in detail, although within the context of *Aguilar* they appear sufficiently particular; *cf.*, however, the dissenting views.

[154] Spinelli v. United States, 393 U.S. 410 (1969), in which Mr. Justice White's concurring opinion concluded:

> If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information . . . .

*Id.* at 425. In this connection, and also generally, it is interesting to compare the manner in which the federal rules of evidence, promulgated by the Supreme Court November 20, 1972, treat informers, their identity and testimony (Rule 510), and hearsay (art. VIII).

*See also*, in this connection, United States v. Bell, 457 F.2d 1231, 1238 (5th Cir. 1972), noting that the "supporting affidavits . . . must attest to the credibility of an informant and the reliability of his information," and holding that no such requirement is to be applied "to the identified bystander or victim-eyewitness to a crime . . . ."

[155] Spinelli v. United States, 393 U.S. 410, 412 (1969).

language or standard which had previously been enunciated.[156] *Spinelli*, therefore, is questionable insofar as its holding is to be followed and, in view of the recent changes in the Court, the dissenting application will probably be accepted.[157]

Throughout the opinions just examined there appears a concern that law enforcement will suffer if the fourth amendment is pressed to its logical application. The balancing concept applied in numerous other situations, for example, first amendment rights,[158] seems to be an approach used on an *ad hoc* basis; and this means that it is practically impossible to arrive at an objective standard capable of application by the inferior courts,[159] or at least, a standard not so heavily weighted on a subjective scale such that nothing jells well enough to present a sufficiently continuing, if not permanent, form.

This concern that law enforcement should not be stymied is not to be denigrated, and Chief Justice Burger's views have been given previously. However, the question resolves itself into the factors placed in the respective scales of constitutional search and seizure rights and the enforcement of statutory ones. It is a problem of balance between too little and too much liberty, the former bringing stagnation and the latter chaos.[160] Accommodation, obviously, must therefore occur, as no absolutistic principle is to be applied.

But when scales are to be weighted on one or the other side, the answer here seems to be self-evident. For example, there is a "suspect" category of classifications under the equal protection clause, such as race, so that a heavy burden is on the proponent to sustain it, and a first amendment right was previously given a "preferred" position within the Bill of Rights.[161]

---

156 Mr. Justice Harlan's opinion was concurred in by Chief Justice Warren and Justices Douglas and Brennan; Justice Marshall did not participate; Justice White concurred in a separate opinion, but reluctantly, "especially since a vote to affirm would produce an equally divided Court" 393 U.S. at 429; Justices Black and Fortas dissented in separate opinions, and Justice Stewart concurred in both these dissenting opinions. In other words, only a four-Justice "majority" could be mustered in applying *Aguilar's* tests to this *Spinelli* case.

157 Justice Harlan's peroration in *Spinelli* gives several principles which cannot be faulted, but it is their application, not enunciation, which is of importance. Those principles are:

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause; that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that their determinations of probable cause should be paid great deference by reviewing courts.

393 U.S. at 419 (citations omitted).

158 *See, e.g.*, FORNOSCH, CONSTITUTIONAL LAW 421-23 (2d ed. 1969); *see also* text accompanying notes 65-67, *supra*; and for Chief Justice Burger's views, *see* text accompanying note 68 *et seq. supra.*

159 *See*, in another context, Chambers v. Maroney, 399 U.S. 42 (1970).

160 *See* Kunz v. New York, 340 U.S. 290, 314 (1951).

161 *See, e.g.*, FORKOSCH, CONSTITUTIONAL LAW 428-29 (2d ed. 1969).

On the other side, however, a state's necessary exercise of its police power is not lightly to be overturned.[162]

Thus here, as elsewhere, reasonableness seems to be the touchstone,[163] so that it is, rather, reasonable alternatives which the judiciary finds placed before it, not a Hobson's choice.[164] The present alternative is the preference to be accorded a constitutional right over the degree of difficulty in its enforcement; that is, by enforcing one's constitutional right to question the truthfulness and credibility of an affiant there will necessarily result some cost, delay, and even calendar difficulty. However, these were not considered as overburdening factors in requiring counsel for indigents,[165] regardless of the classification of the offense,[166] and the logical, continuing, and costly enforcement of the *Desegregation Case of 1954*[167] also includes all branches of the federal and state governments, and has even involved a suggested constitutional amendment.

Put differently, the Supreme Court has, in the past, chosen a constitutional right to property as against human rights,[168] but has occasionally reversed itself because the public weal so demanded[169] or the individual had to be protected.[170] So, too, it follows that the question propounded at the outset should be answered affirmatively. In other words, in fourth amendment warrant searches and seizures the facts should be subject to questioning and where a slight preliminary showing so indicates,[171] the affiant permitted to be attacked on truthfulness and credibility, and opposing testimony admitted; that is, some form of a pretrial adversary proceeding, with a yes-or-no determination of probable cause stemming from the whole record thus created.

---

[162] *See, e.g.*, Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934); FORKOSCH, CONSTITUTIONAL LAW 297 *et seq.* (2d ed. 1969).

[163] *See, e.g.*, cases collected at note 145 *supra.*

[164] *See* FORKOSCH, CONSTITUTIONAL LAW 423-24 (2d ed. 1969).

[165] Gideon v. Wainwright, 372 U.S. 335 (1963).

[166] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[167] Brown v. Board of Education, 347 U.S. 483 (1954).

[168] *See, e.g.*, FORKOSCH, CONSTITUTIONAL LAW 409-12 (2d ed. 1969), noting (in n.52) that between 1899 and 1937 there were, excluding civil liberties cases, 159 due process and equal protection denunciations of state laws, as well as 25 other assorted ones.

[169] *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 531 (1934), and its progeny.

[170] *See, e.g.*, Gideon v. Wainright, 372 U.S. 335 (1963), although even in 1908 protection of a sort was accorded, as in Muller v. Oregon, 208 U.S. 412 (1908). Further, in Ng Fung Ho v. White, 259 U.S. 276 (1922), Justice Brandeis, for an unanimous court, granted a trial *de novo* to an individual claiming United States citizenship in a deportation matter, preferring human rights to property rights; but in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) he (with Justices Homes and Clark concurring) dissented when the majority granted a *de novo* review in a rate-making case, *i.e.*, denying to property what he granted to a human being (in a broad and general sense, of course).

[171] *See, e.g.*, note 68 *supra*, quoting the Second Circuit's language, here utilized in an even softer fashion.