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Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures

I. INTRODUCTION

Numerous rulings by the Supreme Court have confirmed the long-held assertion that the Fourth Amendment's warrant requirement is a "centerpiece for the law of search and seizure, and that prescreening by neutral and detached magistrates is [at] the heart of citizens' protection against police overreaching."[1] On September 21, 1994, however, these assertions proved inaccurate and painfully hollow for Betty Ingram, a fifty-three-year-old diabetic who awoke to the sound of armed police officers charging through her front door.[2] The officers, who were searching for a suspect involved in a buy-and-bust operation,[3] had neither obtained a search warrant nor knocked and announced their presence.[4] Mistaking Ingram's son for the suspect, they proceeded to handcuff and place him on the floor while pointing their guns at his head.[5] When Ingram's daughter asked what was happening, the officers told her to "shut up," lacing their language with expletives.[6] Ingram was hit in the face and knocked down, then handcuffed and shaken so violently that her head struck the couch repeatedly.[7]

Given the Fourth Amendment's general prohibition on "unreasonable searches and seizures," and its associated requirement that "no Warrants shall issue, but upon probable cause,"[8] one might wonder how Ingram found herself in such appalling circumstances. Under what authority did the police forcefully, and perhaps wrongfully, intrude into the home of an innocent citizen? The answer lies in a subtle jurisprudential shift away from the Fourth Amendment's warrant requirement that transpired during the latter part of the twentieth century.

Over several decades, the Supreme Court has routinely narrowed the range of cases to which the warrant requirement applies so that, in practice, warrants have become an exception rather than

1. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 932 (1991).

2. Ingram v. City of Columbus, 185 F.3d 579, 585 (6th Cir. 1999).

3. A buy-and-bust operation is "a pre-arranged police operation whereby the police arrest individuals after they sell narcotics to undercover officers." *Id.* at 584, n.1.

4. The plainclothes officers also failed to identify themselves as law enforcement officers. *Id.* at 585.

5. *Id.*

6. *Id.*

7. *Id.*

8. U.S. CONST. amend. IV.

the rule.[9] One scholar catalogued almost twenty such exemptions as of 1985, including searches incident to arrest, automobile searches, border searches, administrative searches of regulated businesses, exigent circumstances, searches incident to nonarrest when there is probable cause to arrest, boat boarding for document checks, welfare searches, inventory searches, airport searches, school searches, searches of government employees' offices, and mobile home searches.[10]

The exigent circumstances exception used to justify the warrantless entry in the *Ingram* case,[11] however, has arguably had the most dramatic effect on the use of search warrants. In *Ingram*, for example, police officers were pursuing Anthony Carroll, a drug middleman who had taken twenty dollars in marked bills to purchase crack cocaine for an undercover agent.[12] The officers, who had been in close interaction with Carroll, were aware that because of his minor intermediary role, he posed little danger of physical violence;[13] yet, their pursuit was vigorous and extensive, with three officers following on foot and several others tracking him in their vehicles.[14] When Carroll entered the basement of Ingram's residence, he was surrounded. Without hesitation or thought of procuring a search warrant, however, the officers deemed the situation "exigent," charged into the home, and assaulted its blameless residents. Was their evaluation correct? Did a fugitive drug runner, trapped in the basement of a home, truly pose a threat serious enough to bypass the constitutionally mandated warrant otherwise required to search a private dwelling? Possibly, he did not.[15] The United States Court of

9. Stuntz, *supra* note 1, at 882; *see* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 295 (1996) (indicating that exceptions to the warrant requirement have become so numerous that they have eclipsed the rule itself).

10. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (footnotes omitted).

11. 185 F.3d at 588.

12. *Id.* at 584.

13. *Id.* at 584. The officers had watched Carroll on the street and interacted with him in their undercover car. *Id.* After giving him the marked bills, the officers observed him walking to a residence and then down another street. *Id.* Arguably, his activities suggest he was merely a "runner," a middleman, who would have little knowledge of, or stake in, the drug operation.

14. *Id.*

15. Justice White's majority opinion in *Minnesota v. Olson*, 495 U.S. 91 (1990), suggests that the *Ingram* search may have been unreasonable. In *Olson*, a suspect involved in the armed robbery of a gasoline station was tracked to a duplex unit occupied by two women. *Id.* at 93-94. Multiple squad cars surrounded the building. *Id.* at 101. Without seeking a search warrant and with their weapons drawn, police officers entered the dwelling and arrested the suspect. *Id.* at 94. In upholding the Minnesota Supreme Court's determination that no exigent circumstances justified the warrantless entry, the Supreme Court stressed the following factors:

Appeals for the Sixth Circuit, however, interpreted Supreme Court precedent to excuse the failure to obtain a warrant on exigent circumstance grounds.[16] The factual background of the *Ingram* case thus shows the degree to which the exigent circumstances exception has allowed law enforcement officers to circumvent the Fourth Amendment's warrant requirement. Even basic phrasing from the court's opinion underscores the extent of the shift: "*[A]bsent exigent circumstances*, police officers may not make a warrantless nonconsensual entry into a private dwelling."[17] In its affirmative form, the rule therefore reads that if exigent circumstances exist, then officers may make a warrantless entry into a private dwelling.

The exception's ability to negate the warrant requirement depends on the definition and analysis of "exigent." For example, hot pursuit of a dangerous suspect or the need to prevent the destruction of evidence may, under certain conditions, justify invocation of the exigent circumstances exception. Implicit in these rationales, however, is the more basic assumption that traveling to a courthouse to procure a warrant may take too long and would unreasonably handicap law enforcement efforts.[18] In 1977, recognizing that the administrative difficulties of obtaining a warrant were fueling the frequent use of the "exigency" exception, Congress amended Rule 41 of the Federal Rules of Criminal Procedure to permit the issuance of search warrants by telephone.[19] Sixteen years later, the Rules were amended again to

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> [A]lthough a grave crime was involved, respondent "was known not to be the murderer but thought to be the driver of the getaway car," and that police had already recovered the murder weapon. "The police knew that . . . [the two women] were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. . . . It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended."

Id. at 101. Like Olson, the getaway driver, Carroll was trapped in the basement of a home surrounded by several police units. *Ingram*, 185 F.3d at 584. In actuality, he lived with his aunt and uncle in the building located behind Ingram's home. *Id.* at 584 n.2. His familiarity with the Ingram family would have thus provided little incentive to harm them. Like Olson, moreover, he was not accused of a violent felony, but rather of "offering to sell cocaine." *Id.* at 584. Clearly, Carroll had little chance of evading arrest. Factual similarities between *Olson* and *Ingram* thus suggest the search in the latter case was likewise unreasonable.

16. *Id.* at 598. The appellate court did, however, reverse the dismissal of Ingram's claim of "unreasonable entry in violation of the Fourth Amendment," because the agents failed to announce their entrance into her home. *Id.*

17. *Id.* at 587 (emphasis added).

18. For a more detailed discussion of the rationale underlying the expanding exigent circumstances exception and the federal telephonic search warrant procedures, see Part III *infra*.

19. Michael J. Kuzmich, *Review of Selected 1998 California Legislation: Criminal Procedure: www.warrant.com: Arrest and Search Warrants by E-mail*, 30 MCGEORGE L. REV. 590, 591 (1999); *see* United States v. Johnson, 561 F.2d 832, 843 n.12 (D.C. Cir. 1977); FED. R. CRIM. P. 41(c)(2).

allow for the use of facsimile machines in sending and receiving necessary documents.[20] Under Rule 41(c)(2), federal officers faced with a situation that might not be sufficiently exigent to justify a warrantless home search, but which still might risk destruction of evidence during the time necessary to obtain a traditional warrant, can request one by telephone and receive a relatively quick response.[21]

As technology continues to advance, telephonic and other electronic communication devices are providing increasingly viable methods for reinvigorating the Fourth Amendment warrant requirement.[22] These readily available technologies should lead courts to reexamine the exigent circumstances exception and determine whether, in light of expedited telephonic-facsimile warrant procedures, the circumstances of a particular case can truly be considered exigent.[23] Additionally, because telephonic procedures minimize the ability of law enforcement officers to engage in warrantless practices that might threaten Fourth Amendment privacy values,[24] implementation of telephonic search warrant provisions patterned after the federal model should be encouraged at the state level.[25] Recent advances in digital imaging, remote video transmission, cellular communication, and encryption technology should further enhance the reliability and desirability of telephonic search warrants. Thus, as new technologies make the connections between field officers and magistrates "seamless," exceptions to the warrant requirement should be narrowed just as the requirement itself was narrowed during the past half century.[26]

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20. *Id.*

21. *See* FED. R. CRIM. P. 41(c)(2) advisory committee's note.

22. *See generally* Beci, *supra* note 9 (suggesting that telecommunications and computer technology can help reinvigorate Fourth Amendment jurisprudence); Kuzmich, *supra* note 19 (explaining that California has installed personal computers equipped with E-mail access in police cruisers and now permits warrants to be requested and issued using those devices).

23. *See* Edward F. Marek, *Telephonic Search Warrants: A New Equation for Exigent Circumstances*, 27 CLEV. ST. L. REV. 35, 36 (1978) (stating that "the availability of telephonic search warrants affects most directly the body of decisional authority permitting warrantless searches where exigent circumstances exist").

24. *See* FED. R. CRIM. P. 41(c)(2) advisory committee's note.

25. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 95 (1973) (recommending that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers").

26. Beci, *supra* note 9, at 327 (indicating that "the Supreme Court must eliminate or narrow some of its previously created exceptions that are no longer necessary due to current technology"); Paul D. Beechen, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 UCLA L. REV. 691, 706 (1973); Marek, *supra* note 23, at 36 (indicating that the availability of telephonic or radio-obtained search warrants directly affects the "body of decisional authority permitting warrantless searches").

The remainder of this Note proceeds in seven parts. Part II details the history of the warrant requirement and places particular emphasis on the textual support and preference for warrants found in the structure of the Fourth Amendment and in numerous Supreme Court decisions. In addition, this Part outlines the rationale of the warrant requirement and its exceptions with the latter section explaining the importance of the exigent circumstances exception, the factors used to determine "exigency," and the potential effect the exception may have on the continued viability of the warrant requirement. Parts III and IV delineate state and federal telephonic procedures, while Part V addresses criticisms aimed at electronic search warrant methods. Part VI discusses the ability of telephonic provisions to circumscribe the growing exigent circumstances exception. Part VII explores new technological developments that will make electronic warrants even more beneficial, and Part VIII encourages states without such provisions to reevaluate their positions. This Note concludes by emphasizing that electronic warrant statutes can help bring about a return to Fourth Amendment values without sacrificing the interests of law enforcement agents.

II. BACKGROUND ON THE WARRANT REQUIREMENT

A. History of the Warrant Requirement

The Fourth Amendment was drafted in response to heavy-handed British law enforcement methods—in particular, the general search warrant and writ of assistance.[27] With the introduction of printing technology in England during the fifteenth century, the English monarchy found itself in need of a mechanism to suppress politically threatening publications.[28] In response, broad search and seizure powers were conferred upon royal officials as a means of restricting freedom of the press.[29] A national publication licensing system implemented under Henry VIII (1509-1547) allowed English courts to further expand governmental search and seizure powers to cover seditious printing.[30] This development resulted in virtually unlimited search powers allowing royal agents to seek out books and

27. *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926 (1997).

28. Anita Eve, *Project: District of Columbia Court of Appeals Project on Criminal Procedure: I. Search Warrants: B. Statutory Right to a Warrant*, 26 HOW. L.J. 844, 845 (1983) [hereinafter *Statutory Right to a Warrant*].

29. *Id.*

30. *Id.*

other publications.[31] By the time George III ascended to the throne in 1760, general warrants effectively allowed "messengers of the king" to arrest anyone, to search any house to apprehend the authors of alleged libels, and to seize personal property.[32]

General search warrants were used primarily in England, but customs officers in the American colonies utilized the writ of assistance to search buildings for smuggled goods.[33] While these abusive searches were technically conducted with warrants, the writs of assistance, like general warrants, did not limit governmental discretion.[34] In 1761, Sir James Otis, the Attorney General of Massachusetts, vehemently attacked the issuance of new writs, characterizing them as arbitrary exercises of governmental power that destroyed fundamental principles of law.[35] He argued that "a man who is obedient to the law should be as secure in his home as a prince in his castle."[36]

Controversy over the writs continued until the Revolutionary War[37] and is considered to be a major impetus in its occurrence.[38] Keenly aware of the inequities stemming from abuse of the writs and general search warrants, the Framers of the Constitution set about crafting a system that would curb governmental discretion to search and seize.[39] When the lack of a constitutional provision addressing searches and the right of privacy became an issue during the ratification debates,[40] James Madison drafted the Fourth Amendment:

> The Right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, 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.

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31. *Id.* The national licensing system required all publications to receive the nation's license or be destroyed. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a) (3d ed. 1996) (indicating that the national licensing system implemented in 1538 conferred vast search powers on those who enforced the system, allowing the Star Chamber and the Parliament to authorize virtually unlimited searches for books and other publications).

32. *Statutory Right to a Warrant*, *supra* note 28, at 846.

33. *Id.* at 848; LAFAVE, *supra* note 31, § 1.1(a); *see generally* Maclin, *supra* note 27.

34. Beci, *supra* note 9, at 303.

35. *Statutory Right to a Warrant*, *supra* note 28, at 846; *see* LAFAVE, *supra* note 31, § 1.1(a).

36. *Statutory Right to a Warrant*, *supra* note 28, at 848.

37. *Id.* at 849.

38. Beci, *supra* note 9, at 303.

39. *Id.*

40. *Statutory Right to a Warrant*, *supra* note 28, at 849.

B. Textual Support for the Warrant Requirement

Although the text of the Fourth Amendment does not expressly contain a requirement that a warrant be obtained before the government can conduct a home search, the historical background surrounding the Amendment's enactment,[41] along with the structure of its two clauses,[42] suggests a strong constitutional preference for warrants. In particular, the first clause of the Fourth Amendment protects the right of the people to be free from unreasonable searches and seizures while the second "Warrant Clause" sets forth informational and procedural prerequisites that must be satisfied before a warrant may be issued.[43] If the clauses are presumed to be interdependent, then the safeguards of the Warrant Clause define the reasonableness of a given search or seizure.[44] Police must thus obtain a warrant prior to any intrusion unless compelling reasons exist for proceeding without one.[45] As Justice Stevens concluded for the majority in *Payton v. New York*, "Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."[46]

C. Supreme Court Precedent Supporting the Warrant Requirement

Notwithstanding the unwillingness of certain Justices to support the warrant requirement, the Court, for more than one hundred years, has expressed a strong preference for warrants.[47] On numerous occasions, the Court has noted that law enforcement agents "must secure and use search warrants whenever reasonably practicable"[48] and that in doubtful or marginal cases, a search under a

41. *See generally* Beci, *supra* note 9, at 300-05 (discussing historical evidence in support of the warrant requirement and noting that the requirement is consistent with the Framers' intent to limit the government's power to search and seize).

42. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 11.01(a), 159 n.1 (2d ed. 1997).

43. *See id.*

44. *See* Maclin, *supra* note 27, at 928.

45. *Id.* An alternate interpretation of the Fourth Amendment asserts that its two clauses are independent. Under this approach, the Reasonableness Clause mandates a universal rule that all searches and seizures be reasonable. If police obtain a warrant, the second clause ensures its validity; however, if the police forgo the warrant procedure, the search need only be reasonable to withstand constitutional scrutiny. *See id.* at 927-28.

46. 445 U.S. 573, 585 (1980).

47. *See* Beci, *supra* note 9, at 294 ("For more than a century the Supreme Court has stressed the importance of the warrant requirement.").

48. Trupiano v. United States, 334 U.S. 699, 705 (1948).

warrant may be sustainable where a search without a warrant would fail.[49]

In 1877, *Ex parte Jackson* was one of the Court's first cases to address significantly the right of persons to be free from unreasonable searches and seizures.[50] In *Jackson*, the petitioner was convicted of knowingly and unlawfully depositing a (sealed) envelope in the United States mail containing circulars which described a lottery.[51] Section 3894 of the revised statutes of the Act of March 3, 1873 made such an action punishable by a fine of up to $500 in addition to the costs of prosecution.[52] On review, the Court indicated that "the constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, . . . closed against inspection, wherever they may be."[53] A sealed letter, the Court held, could therefore only be opened and examined with a warrant issued on oath or affirmation and particularly describing the things to be seized.[54] Justice Field, writing for the majority, indicated that all regulations and laws adopted as to mailed matter were subordinate to "the great principle embodied in the [F]ourth [A]mendment."[55]

In *Weeks v. United States*, the Court confronted another situation in which a petitioner was convicted of using the United States Postal Service to transmit lottery information.[56] Unlike in *Jackson*, however, police officers and federal marshals had engaged in two warrantless searches of the petitioner's home to obtain the evidence introduced at trial. A unanimous Court held that introducing the petitioner's letters and papers taken from his home without a search warrant constituted prejudicial error and was violative of the accused's constitutional rights under the Fourth Amendment.[57]

Some of the clearest statements expressing the strong preference for searches conducted pursuant to warrants, however, can be found in opinions from the late-1960s and 1970s. In 1969, for example, the Court decided *Chimel v. California*,[58] which involved a

49. United States v. Ventresca, 380 U.S. 102, 106 (1965); *see* United States v. Watson, 423 U.S. 411, 423 (1976) (indicating that "officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate").

50. 96 U.S. 727 (1877); *see Statutory Right to a Warrant*, *supra* note 28, at 850.

51. *Statutory Right to a Warrant*, *supra* note 28, at 850.

52. *Id.*

53. *Jackson*, 96 U.S. at 733.

54. *Id.*

55. *Id.*

56. 232 U.S. 383 (1914).

57. *Id.* at 386.

58. 395 U.S. 752 (1969).

warrantless search of the petitioner's entire home pursuant to an arrest warrant. Finding the search and subsequent seizure unlawful under the Fourth and Fourteenth Amendments, the Court stressed that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[59] Two years later, in *Coolidge v. New Hampshire*, the Court reiterated what it considered the "most basic constitutional rule" regarding searches and seizures: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment."[60] Justice Stevens later applied this maxim to a dwelling search, concluding that warrantless searches and seizures inside a home are presumptively invalid.[61]

D. Rationale of the Warrant Requirement

The essential purpose of the Fourth Amendment is to protect citizens from unwarranted intrusions into their privacy.[62] The preference for warrants effectively furthers this objective by interposing a neutral and detached magistrate between law enforcement officers and private citizens. As articulated by Justice Jackson in *Johnson v. United States*,

> The point of the Fourth Amendment['s warrant requirement], which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[63]

Simply put, prosecutors and police officers cannot be expected to maintain the requisite neutrality with regard to their own investigations.[64] Magistrates, conversely, are in a better position to determine reasonableness and probable cause without bias, haste, or competitiveness.[65] Thus, warrantless searches and seizures are not

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59. *Id.* at 762 (citing Terry v. Ohio, 392 U.S. 1, 20 n.6 (1968)).

60. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

61. Payton v. New York, 445 U.S. 573, 586 (1980).

62. *Id.* at 588.

63. Johnson v. United States, 333 U.S. 10, 13-14 (1948). Justice Stewart, in *Chimel*, also stressed the importance of the Fourth Amendment in light of the partiality of law enforcement officers: "[T]he Fourth Amendment has interposed a magistrate between the citizen and the police . . . not to shield criminals nor to make the home a safe haven for illegal activities . . . [but] so that an objective mind might weigh the need to invade that privacy in order to enforce the law." *Chimel*, 395 U.S. at 761.

64. *Coolidge*, 403 U.S. at 450.

65. *See* Beci, *supra* note 9, at 310.

unreasonable because they are condemned by the text of the Fourth Amendment, but because they qualify as intrusions into another's privacy without the approval of a neutral, objective decisionmaker.[66]

Relegating the determination of probable cause to neutral magistrates also helps ensure more accurate, uniform judgments of probable cause for two reasons. First, magistrates, unlike police officers, regularly have opportunities to participate in continuing legal education programs focused on developments in search and seizure laws.[67] Their determinations of probable cause and reasonableness will thus inevitably be more accurate than similar assessments made by law enforcement officers.[68] Second, having fewer magistrates involved in the decisionmaking process, combined with their superior training, means that their conclusions will be more consistent than the equivalent determinations made by officers in the field.[69] Thus to ensure the accuracy, uniformity, and objectivity of probable cause determinations, "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."[70]

A final advantage to the warrant requirement is that the application and approval process generates a contemporaneous record for review.[71] If issued, the warrant outlines the scope of the search and the government's basis for determining probable cause. Such documentation eliminates the need for a court to make difficult post hoc determinations as to what actually occurred based on conflicting testimony from officers and subjects of a search. A warrantless search, however, does not share this benefit.

E. Exceptions to the Warrant Requirement

Despite the multiple advantages of the warrant requirement, situations invariably arise where warrants are insufficient to justify either the additional burden placed on police officers or the harm to society that would result from a delay in enforcement efforts. For example, a long-standing exception recognized by the common law at the time of the Fourth Amendment's framing, permits warrantless searches and arrests of persons who commit felonies in the presence of

66. Maclin, *supra* note 27, at 938.

67. Beci, *supra* note 9, at 311.

68. *Id.*

69. *Id.*

70. Chimel v. California, 395 U.S. 752, 761 (1969) (quoting McDonald v. United States, 335 U.S. 451, 455 (1948)).

71. Beci, *supra* note 9, at 311.

law enforcement officers.[72] This exception has been endorsed by the Supreme Court and recognized by statute in almost every state as necessary to seize weapons or other objects which might be used to assault an officer or effect an escape, as well as to prevent the destruction of evidence.[73] In addition, police officers may search not only the arrestees, but any areas into which the arrestees might reach—technically defined as the area within their immediate control—based on the same rationales.[74]

Not all law enforcement actions incident to arrest, however, are permissible. For example, police officers may not search other parties who happen to be in a place occupied by a suspect without a prior finding of probable cause,[75] nor may they execute a warrantless search of a person's home in order to make a felony arrest.[76] The latter restriction exists not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause.

Illustrated by Sir James Otis's famous phrase, a man's home is his castle,[77] the home–search warrant restriction has a strong foundation in the history of the Fourth Amendment and in the Supreme Court's jurisprudence.[78] On numerous occasions the Justices have stated that "at the very core of the . . . Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,"[79] and that "the Fourth Amendment has drawn a firm line at the entrance to the house."[80] In recent decades, however, the Court has been willing to disregard the Warrant Clause's paramount concern for the protection of private dwellings by liberalizing the exigent circumstances exception.[81] As stated in *Minnesota v. Olson*, a warrantless intrusion based on exigent circumstances may be justified "by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or

72. *See* United States v. Watson, 423 U.S. 411, 418 (1976).

73. Payton v. New York, 445 U.S. 573, 590 n.31 (1980).

74. *Payton*, 445 U.S. at 618, 763; *Chimel*, 395 U.S. at 763.

75. Ybarra v. Illinois, 444 U.S. 85 (1979).

76. *See generally Payton*, 445 U.S. 573 (1980).

77. *See supra* notes 35-36 and accompanying text.

78. For an excellent review of Fourth Amendment history and Supreme Court precedent supporting the home–search warrant requirement, see Beci, *supra* note 9, at 300-09.

79. *Payton*, 445 U.S. at 589-90 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

80. *Id.* at 590.

81. Beci, *supra* note 9, at 294.

outside the dwelling."[82] The Court has intimated, however, that an even broader range of exigent circumstances might excuse the failure to obtain a warrant authorizing a home arrest entry.[83] Its current formulation actually makes the warrant requirement subject to an initial qualification, effectively relegating it to a position of secondary importance: In the absence of exigent circumstances, police officers may not make a warrantless home entry to arrest a suspect.[84]

Like the majority of exemptions from the warrant requirement, the exigent circumstances exception represents a balancing of law enforcement's legitimate needs against citizens' privacy interests. The factors used to determine "exigency" underscore this notion and typically include: (1) the gravity of the offense; (2) the likelihood that a suspect is armed; (3) probable cause to believe that the suspect committed the crime involved; (4) reason to believe the suspect is inside the premises being entered; (5) the likelihood that the suspect will escape if not swiftly apprehended; (6) the likelihood of making a peaceable, although nonconsensual, entry; and (7) the time of day when the warrant is sought.[85] By delineating each of the elements in the exigent circumstances exception, the Court has attempted to achieve equipoise between law enforcement interests and citizens' privacy rights.

One additional factor, the time necessary to obtain a warrant, has also been integrated into the exigent circumstances analysis. In *United States v. McEachin*, for example, the U.S. Court of Appeals for the District of Columbia held that officers faced exigent circumstances when they learned that a suspect intended to dispose of a gun used during a robbery.[86] In reaching this conclusion, the court indicated that "the amount of time necessary to obtain a warrant by traditional means has always been considered in determining whether circumstances are exigent."[87] Because the delay would have impeded efforts to prevent the removal of a deadly weapon from the suspect's apartment, the court found a warrant to be unnecessary.

Exactly how long a delay is needed before officers can forgo the warrant requirement inevitably depends on the particular facts of the

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82. 495 U.S. 91, 100 (1990).

83. LAFAVE, *supra* note 31, § 1.1(a).

84. *See generally* Steagald v. United States, 451 U.S. 204 (1981); *Payton*, 445 U.S. 573.

85. *See generally* LAFAVE, *supra* note 31, §6.1(f) (detailing the above factors and citing hundreds of court decisions that have used the factors in their analyses).

86. 670 F.2d 1139 (D.C. Cir. 1981).

87. *Id.* at 1146; *see also* United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983) (indicating that "the time necessary to obtain a warrant is relevant to a determination whether circumstances are exigent").

situation. The U.S. Court of Appeals for the District of Columbia has suggested that a delay of "at least a few hours" in combination with the possibility of imminent removal or destruction of contraband or a potential threat to human life would constitute exigent circumstances;[88] yet, the same court found that a delay of only one-and-a-half to two hours would unduly burden law enforcement efforts when distributable contraband substances were involved.[89] Thus it might be possible that a delay of less than one hour, given the right set of facts, could justify noncompliance with the warrant requirement.

As the law currently stands, there are more than twenty exceptions to the warrant requirement,[90] a development which prompted one commentator to assert that it has been eclipsed by its numerous exceptions.[91] The overwhelming majority, however, apply in relatively well-defined circumstances. For example, exceptions allowing officers to search curbside garbage,[92] privately owned open fields,[93] and mobile homes[94] without a warrant are fairly limited in their application because of the precise nature of the situations to which they apply. The exigent circumstances exception, conversely, is not limited in this way. Instead, its multifactor analysis makes it applicable to a wide variety of situations, giving it an accordion-like ability to expand or contract. The growing applicability of the exigent circumstances exception is arguably the greatest threat to the continued viability of the warrant requirement.

A substantial factor contributing to the exception's increasing use is the time needed to obtain a warrant.[95] More specifically, given the rate of population growth in the United States, the emergence of new forms of crime and terrorism, and the nation's ceaseless commitment to the war on drugs, it is unlikely that the country will experience a significant decrease in crime for the foreseeable future.[96]

88. *See* United States v. Hendrix, 595 F.2d 883, 885-86 (D.C. Cir. 1979).

89. *See* United States v. Johnson, 561 F.2d 832, 834 (D.C. Cir. 1977).

90. California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., dissenting).

91. Beci, *supra* note 9, at 295.

92. California v. Greenwood, 486 U.S. 35 (1988).

93. United States v. Dunn, 480 U.S. 294 (1987).

94. California v. Carney, 471 U.S. 386 (1985).

95. Marek, *supra* note 23, at 36.

96. According to *Uniform Crime Reports*, which collects data on violent crime reports and arrests in the United States, the number of reported violent crimes from 1990 to 2000 fluctuated between 1,556,800 (1990) and 1,222,500 (2000). *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Four Measures of Serious Violent Crime*, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/4meastab.htm (Oct. 22, 2001). While these statistics suggest an overall decrease in violent crime, it is apparent that the United States is still grappling with a significant crime problem.

Law enforcement departments and the judicial system are already overburdened with substantial backlogs of cases.[97] Each request for a warrant will therefore contribute further to the existing overload. As workloads increase more rapidly than budget adjustments, each request requiring judicial attention will inevitably take longer to complete until, at some point, the administrative difficulty of filing and processing a warrant application may take too long to justify the burden on law enforcement.[98] At that time, the exigent circumstances exception will have eclipsed the warrant requirement itself. In short, these sociological developments, which have strengthened the "time-to-procure-a-warrant" element critical to a finding of exigent circumstances, have expanded the applicability of the exception and resulted in a corresponding decrease in the strength of the warrant requirement. In effect, the exception's time variable has tipped the balance of governmental and private interests in favor of law enforcement officials.

III. TELEPHONIC SEARCH WARRANTS: FEDERAL RULE OF CRIMINAL PROCEDURE 41(C)(2)

In 1977, recognizing that the administrative difficulty of obtaining warrants was contributing to their nonuse, Congress amended Rule 41 of the Federal Rules of Criminal Procedure to allow magistrates to authorize search warrants over the telephone.[99] The end result was subsection 41(c)(2), embodying methodological innovations that maintain the essential safeguards of the warrant request process while also expediting the procedure.[100]

Rule 41(c)(2) authorizes magistrates to issue a warrant based upon sworn testimony communicated by telephone or other

97. *See generally* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, 59-166 (1985) (discussing the "litigation crisis" that has contributed to the backlog of cases in the federal system); *see, e.g.*, Backlog Jams Courtrooms in Pierce County, *available at* http://www.oregonlive.com/news/99/08/st080315.html (Aug. 3, 1999) (explaining that citizens filing civil suits in Superior Court in Pierce County, Washington can expect two to three-year delays in getting their cases to court).

98. *See* Jerold H. Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 256 (1974) (noting that "the first obstacle [to obtaining a warrant] is finding an *available* magistrate") (emphasis added); Marek, *supra* note 23, at 36 (indicating that exigent circumstances have been found "where obtaining a timely search warrant by the traditional method of an affiant appearing before a magistrate would, in effect, be unreasonable because of conditions then existing" and emphasizing that "lapse of time in obtaining a warrant and the unavailability of a magistrate or state judge have been the usual obstacles").

99. *See supra* text accompanying note 19.

100. *See* FED. R. CRIM. P. 41(c)(2) advisory committee's note.

appropriate means, including facsimile transmission, when circumstances make it reasonable to dispense with a written affidavit.[101] In general, the officer requesting a telephonic warrant must prepare a "duplicate original warrant" containing information that would normally be provided by an affiant in front of a magistrate.[102] After describing the circumstances of time and place which make it reasonable to request the issuance of a warrant based on oral testimony[103] and after being placed under oath,[104] the officer must then read the duplicate original warrant verbatim to the federal magistrate who will document the conversation using a recording device or stenographic transcript.[105] If the magistrate determines that probable cause exists to justify the search, the magistrate will direct the requesting officer to sign the duplicate warrant while the magistrate signs and dates the original.[106] Copies of these documents are then filed at the courthouse.[107]

Notes from the Advisory Committee and transcripts from the House and Senate debates suggest that the amendment was intended to circumscribe use of the exigent circumstances exception.[108] The Committee expressly noted in its report on the Supreme Court proposal that the preferred method of conducting a search was with a search warrant and that the rationale of the proposed rule change was to encourage federal law enforcement officers to seek search warrants whenever practicable.[109] To clarify its reasoning, the Committee stated:

> One reason for the nonuse of the warrant has been the administrative difficulties involved in getting a warrant, particularly at times of the day when a judicial officer is typically unavailable . . . . Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently exigent to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence will be lost in the time it would take to obtain a search warrant by traditional means . . . . The unavailability of (a

101. FED. R. CRIM. P. 41(c)(2).

102. FED. R. CRIM. P. 41(c)(2)(B).

103. FED. R. CRIM. P. 41(c)(2)(A) ("If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a [f]ederal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means.").

104. FED. R. CRIM. P. 41(c)(2)(D).

105. *Id.*

106. FED. R. CRIM. P. 41(c)(2)(C).

107. FED. R. CRIM. P. 41(c)(2)(D).

108. *See* FED. R. CRIM. P. 41(c)(2), Notes of Advisory Committee on Rules, 1977 Amendment, reprinted in 19 U.S.C. App., at 1672-73, 1674 (Supp. III 1979) (citations omitted).

109. *See* FED. R. CRIM. P. 41(c)(2) advisory committee's notes.

telephonic warrant) procedure . . . makes more tempting an immediate resort to a warrantless search."[110]

It is clear that the Committee intended the availability of the telephonic procedure to discourage federal law enforcement officers from engaging in other practices, under cover of the exigent circumstances exception, which might threaten values protected by the Fourth Amendment.[111] Moreover, both the House and Senate specifically referred to the quoted language from the Advisory Committee's notes to stress that the revised rule should make it more administratively feasible to procure a warrant, thereby encouraging federal officers to use them.[112] Based on these unambiguous records, federal courts, in dealing with Rule 41(c)(2), have concluded that the telephonic provision was intended to encourage officers to use the expedited electronic procedure, particularly where the existence of exigent circumstances is a close question.[113]

IV. ADOPTION OF TELEPHONIC PROCEDURES BY STATES

The success of the telephonic procedure in both the federal system and in Arizona and California, whose provisions predated Rule 41(c)(2), has encouraged other jurisdictions to adopt similar statutes authorizing the use of "electronic" warrants.[114] Alaska, Colorado, Delaware, Idaho, Illinois, Minnesota, Nebraska, and South Dakota, among others, have enacted some form of telephonic procedure using elements from the federal model. Review of the basic contours of these states' codes highlights several core similarities while also illustrating how the federal model can be successfully adapted to suit various states' needs. Moreover, procedures not explicit in the federal rule, but common to several of the state codes may provide guidance to other jurisdictions developing their own electronic warrant provisions.

110. FED. R. CRIM. P. 41(c)(2), advisory committee's notes, 1977 Amendment, reprinted in 19 U.S.C. app., at 1672-73, 1674 (Supp. III 1979) (citations omitted).

111. *See* FED. R. CRIM. P. 41(c)(2), advisory committee's note.

112. S. REP. NO. 354, at 10 (1977); H.R. REP. NO. 195, at 10 (1977).

113. United States v. Cuaron, 700 F.2d 582, 588 (10th Cir. 1983); United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1981).

114. *See* Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 PROSECUTOR 385, 386 (1974) (noting a dramatic increase in law enforcement agents' utilization of the warrant process following the enactment of California's telephonic warrant statute); *see also* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE, Recommendation 4.2 (1973) (urging that every state enact legislation similar to the federal rule).

A. Alaska

Alaska's Code of Criminal Procedure closely follows the federal rule and provides for the issuance of search warrants upon testimony communicated "by telephone or other means."[115] The statute specifies that, where personal appearance before a magistrate would cause a delay that could result in loss or destruction of evidence, field officers may either present oral testimony via telephone or transmit a sworn affidavit by facsimile.[116] As under the federal rule, the magistrate is required to place the caller under oath, document the proceeding using a "voice recording device," and note the exact time when the warrant was executed.[117] When the request is made by phone, the officer must prepare a duplicate original warrant and, after receiving authorization, sign the magistrate's name on the document.[118] Where a facsimile is available, the magistrate may transmit the search warrant directly to the applicant, thus making preparation of a duplicate original warrant unnecessary.[119]

B. Arizona

Arizona, one of the two states whose electronic search warrant procedure predated the federal model, has a clause similar to Alaska's provision. Section 13-3915(d) of Arizona's Revised Statutes indicates that if a peace officer applying for a warrant is not in the physical presence of the magistrate, the magistrate may orally authorize him to sign the magistrate's name on a duplicate warrant prepared by the officer at his remote location.[120] The magistrate is then required to write the exact date and time of execution on the "original" warrant in his possession.[121] Interestingly, no specific provision limits the application process to telephones or facsimiles. Thus, the statute appears to allow for the use of new technologies as they are developed.

C. California

California, another early adopter of electronic warrant procedures, has been the most progressive state in expanding the

115. ALASKA STAT. § 12.35.015 (Michie 2000).
116. § 12.35.015(a)(1)-(2).
117. § 12.35.015(b), (d).
118. § 12.35.015(c)-(d).
119. § 12.35.015(g).
120. ARIZ. REV. STAT. § 13-3915(d) (2001).
121. § 13-3915(d).

methods by which an officer may apply for a search warrant. Like Alaska and Arizona, California allows a magistrate to take an oral statement made under oath from a field officer via telephone.[122] In addition, because the State has equipped the majority of its police cruisers with personal computers,[123] the applying officer may also send his written, signed proposal to the magistrate via facsimile transmission.[124] If the magistrate decides that probable cause exists, he may then complete the warrant, sign it, and send it back to the officer via facsimile, noting the exact date and time of execution on the copy retained at the courthouse.[125] In the event such transmission is unavailable, a magistrate may authorize the officer to sign his name on a "duplicate" original warrant prepared on location.[126]

In 1998, California amended its telephonic search warrant statute to include electronic mail as an acceptable method of application.[127] An officer's oath can still be taken over the telephone, but "the warrant application and all supporting documents may [also] be transmitted using . . . e-mail."[128] A digital signature is further required from the officer to ensure the application's authenticity.[129] Under the new provision, a magistrate who decides to issue a warrant may return it to the applicant via either facsimile or electronic mail.[130]

D. Colorado

Colorado, in its revised statutes, takes a more conservative approach to electronic warrants than does California. Although its provision applies to both the application for and issuance of search warrants, the only alternate mode of submission is by facsimile. Specifically, the rule indicates that "a warrant, signed affidavit and accompanying papers may be transmitted by electronic fax transmission . . . to the judge, who may act upon the transmitted papers as if they were originals."[131] In addition, a warrant affidavit may be affirmed by oath administered over the telephone to the applicant. The rule, however, specifically prohibits a court from

122. CAL. PENAL CODE § 817(c) (Deering 2001).
123. *See* Kuzmich, *supra* note 19, at 592 n.17.
124. § 817(c)(2)(A).
125. § 817(c)(1)(2)(A)-(D).
126. § 1528(b).
127. § 817 amendments.
128. § 817(c)(2)(A)-(D); Kuzmich, *supra* note 19, at 593-94.
129. § 817(c)(2)(A).
130. § 817(c)(2)(D).
131. COLO. R. CRIM. P. 41(c)(3).

issuing a warrant "without having in its possession either the original or the fax copy of the signed affidavit"—a qualification which precludes use of the telephone alone to obtain a search warrant.[132]

E. Idaho

Idaho, like Colorado, employs a more circumscribed approach to electronic search warrants. Rule 41(c) of the Idaho Rules of Criminal Procedure requires that an applicant-officer present his sworn affidavit in the physical presence of a district judge or magistrate.[133] Subsection three, however, allows an issuing judicial officer to send a copy of the search warrant by "telecommunications process or . . . facsimile" to any police officer serving the warrant.[134] Thus, although the Idaho rule allows for both telephone and facsimile procedures, it restricts their use to the issuance of search warrants and eliminates a field officer's ability to apply for such authorization electronically, a major benefit to any e-warrant procedure.

F. Illinois

Illinois's updated warrant statute also may be characterized as applying to the electronic issuance, but not to the application, of a search warrant. Specifically, the Illinois Code of Criminal Procedure allows search warrants to "be issued electronically or electromagnetically by use of a facsimile transmission machine" and emphasizes that "such search warrants shall have the same validity as a written search warrant."[135] It also states, however, that a warrant will be issued "upon the *written* complaint of any person under oath or affirmation."[136] Although appearing to leave room for transcribed, sworn telephonic statements, the Illinois Court of Appeals for the Third District ruled that the language of the statute does not include "authorization for long-distance factual findings by telephone and for oral issuance of a warrant."[137] Illinois's procedure thus allows only for the electronic issuance of search warrants, eliminating (as does the Idaho rule) the significant advantage of expedited application.

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132. COLO. R. CRIM. P. 41(C)(3).

133. IDAHO R. CRIM. P.41(c) (2001) (stating that a "[w]arrant shall issue only on an affidavit or affidavits sworn to *before a district judge or magistrate* or by testimony under oath and recorded and establishing the grounds for issuing the warrant") (emphasis added).

134. IDAHO R. CRIM. P. 41(c)(3).

135. 725 ILL. COMP. STAT. 5/108-4 (2001).

136. 5/108-3 (emphasis added).

137. Illinois v. Taylor, 555 N.E.2d 1218, 1220 (Ill. App. Ct. 1990).

G. Minnesota

Minnesota has adopted a rule of criminal procedure concerning facsimile transmissions which specifies that they "may be used for the sending of all complaints, orders, summons, . . . and arrest and search warrants."[138] The Rule maintains the same heightened evidentiary standard associated with traditional written applications by mandating that the normal procedural and statutory requirements, including documentation of the proceedings, be met. It further emphasizes that "a facsimile order or warrant . . . shall have the same force and effect as the original."[139]

Although the statute makes no reference to electronic application procedures, the Minnesota Supreme Court has explicitly endorsed Federal Rule 41(c)(2). In *State v. Andries*, for example, the court upheld the validity of a telephonic search warrant issued pursuant to procedures "remarkably similar" to those in the federal rule.[140] It reached this conclusion even though (1) Minnesota had no rule setting forth the procedures followed by the officers, and (2) the warrant process used violated a Minnesota statute requiring the issuing judge to sign the warrant.[141] In a more recent opinion, the Minnesota Supreme Court added that the telephonic procedure should be used "where the circumstances make it reasonable to dispense with a written affidavit"—for example, when the place to be searched is a significant distance from the magistrate, when the agent cannot reach the magistrate in his office during regular office hours, and when delay would create a risk that evidence might be destroyed.[142] Thus, through case law and statutory developments, Minnesota has endorsed the equivalent of Federal Rule 41(c)(2).

H. Nebraska

Nebraska specifically allows for the application and issuance of a search warrant using telephonic procedures similar to those of the federal model; however, it interposes a county attorney between the warrant applicant and the issuing magistrate to assess the necessity of forgoing the traditional written process.[143] Under Nebraska's

138. MINN. R. CRIM. PROC. 33.05.

139. *Id.*

140. 297 N.W.2d 124, 125 (Minn. 1980).

141. *Id.*; *see* State v. Lindsey, 473 N.W.2d 857, 862 (Minn. 1991); *see also* MINN. STAT. §§626.05, .11 (2001).

142. *Lindsey*, 473 N.W.2d at 863.

143. *See* NEB. REV. STAT. ANN. § 29-814.03 (Michie 1999).

statute, a police officer requesting a telephonic warrant is required to contact the county attorney (or a deputy county attorney) for the county in which the warrant is to be issued to explain the need for a telephonic search warrant.[144] If the attorney is satisfied that the telephonic procedure is justified, he or she contacts the magistrate and provides a number where the requesting officer can be reached.[145] The magistrate may then call the officer, place him under oath, and record and transcribe his statement.[146]

If probable cause exists, the magistrate follows procedures virtually identical to those of the federal model. First, the magistrate may direct the officer to prepare a duplicate warrant, sign his name, and specify the date and time of issuance on the document.[147] Second, the magistrate completes the original warrant with the same information.[148] The Nebraska statute, however, makes the continued validity of the warrant dependent on the magistrate's signing of the duplicate warrant when it is filed at the courthouse.[149] Aside from the additional requirement of independent assessment by the county attorney and an explicit requirement that the issuing magistrate sign the duplicate warrant, the Nebraska statute closely follows the federal guidelines.

I. South Dakota

South Dakota law, in multiple statutory sections, authorizes the use of telephones, facsimiles, and other appropriate means for the application and issuance of search warrants. Section 23A-35-5 of South Dakota's Codified Laws explicitly allows the use of sworn oral testimony from a person who is not in the physical presence of a magistrate for the purpose of determining probable cause.[150] Telephones and "other appropriate means" are listed as acceptable media of communication.[151] As a safeguard, a magistrate may require the officer or prosecuting attorney "to read to him verbatim the contents of the [duplicate] warrant."[152] If satisfied, the magistrate will

144. § 29-814.03 (explaining that the "county-attorney-contact" requirement may actually decrease the time needed to obtain a telephonic warrant); *see infra* notes 184-88 and accompanying text.

145. § 29-814.03.

146. § 29-814.03.

147. § 29-814.05(1).

148. § 29-814.05(2).

149. § 29-814.05(4).

150. S.D. CODIFIED LAWS § 23A-35-5 (Michie 2001).

151. *Id.*

152. § 23A-35-6.

then direct the officer to sign his name on the warrant and, in turn, will write the exact date and time of execution on the original document.[153] When the duplicate is filed at the courthouse, the affiant is further required "to sign a copy of it."[154]

In situations where a facsimile is available, section 23A-35-4.2 authorizes its use by a committing magistrate to "receive an affidavit in support of the issuance of a search warrant and . . . [to] issue a search warrant by the same method."[155] Like the Minnesota statute, the South Dakota rule indicates that all applicable procedural and statutory requirements must be met for the warrant to be valid and enforceable and that the facsimile shall have the same force and effect as an original warrant prepared by a magistrate.[156] As an additional safeguard, the requesting officer must document that the magistrate signed the original warrant before it can be executed.[157]

J. Overview of State Procedures

Based on the foregoing review, the various electronic warrant procedures can be divided into three general categories. First, a few states (Idaho and Illinois) have taken a circumscribed approach, allowing only electronic issuance, but not application, of search warrants. Their statutory provisions allow only for the electronic issuance of search warrants but do not include corresponding application procedures.[158] While such statutes cannot take full advantage of all emerging communication technologies, the ability of a judicial magistrate to issue a warrant by electronic means can still aid law enforcement efforts by allowing one officer to apply for a search warrant while others wait for approval and transmission near the suspect's location.[159] Colorado's electronic warrant procedure falls into an intermediate category, allowing both application for and issuance of search warrants by electronic means. A written or "hard" copy, however, is required before a magistrate may issue a warrant—a provision which disallows the use of only the telephone for an application. The third category is composed of states which have

153. *Id.*

154. § 23A-35-7.

155. § 23A-35-4.2.

156. *Id.*

157. *Id.* Note, however, that receipt of the facsimile warrant constitutes proof that the committing magistrate has signed the warrant. *See* § 23A-35.4.2.

158. *See supra* Part IV.E-F.

159. Presumably, these states have refrained from further expanding their telephonic search warrant procedures because of the drawbacks which some commentators have indicated are inherent in these processes. For a more detailed discussion of these criticisms, see *infra* Part V.

adopted electronic warrant procedures most similar to the federal model, including Alaska, Arizona, California, Minnesota, Nebraska, and South Dakota.[160] Like Federal Rule 41(c)(2), these states' provisions allow for both application and issuance of search warrants by electronic means without additional restrictions, like those imposed by the Colorado Code. Because of the unique demographics and needs of each jurisdiction, however, variation exists within the group. Nebraska, for example, has interposed a county attorney between the officer and the judicial magistrate to streamline the information that an applicant includes in his or her request, which makes the determination of probable cause less complicated.[161] In general, however, the procedures in these states closely approximate the federal guidelines and allow law enforcement officials to take full advantage of emerging communication technologies to procure search warrants.

V. CRITICISMS OF TELEPHONIC PROCEDURES:

Presumably, the variance in existing electronic warrant statutes and the failure of some states to adopt any form of telephonic provision has resulted from two major criticisms of the procedure. Challengers of electronic warrants based on oral affidavits disparage both (1) the lack of demeanor evidence and (2) the absence of a written record for a magistrate to review before issuing a search warrant.[162] Lack of face-to-face interaction between a judicial officer and an affiant, it is argued, prevents a credibility assessment based on behavioral or other nonverbal cues. Furthermore, the lack of "hard" documentation may compound the problem by making it more difficult for a magistrate to evaluate the relevant facts fully when determining the existence of probable cause.[163] These criticisms, however, are unfounded and should not be viewed as legitimate barriers to enacting electronic warrant procedures.

With regard to the lack of demeanor evidence from which a magistrate could make credibility assessments, several facts surrounding the warrant application procedure, as well as recent technological advances, render this criticism baseless. First, the demeanor objection implicitly assumes that magistrates carefully observe affiants and make fine discriminations based on behavioral cues. While those unfamiliar with the criminal justice system may

160. *See supra* Part IV.A, B, C, G, H, I.

161. *See supra* Part IV.H.

162. Beechen, *supra* note 26, at 701; Israel, *supra* note 98, at 261.

163. *Id.*

believe that magistrates scrupulously review evidence and meticulously question affiants, in reality, warrant applications are often approved after only minimal inspection.[164] As Professor LaFave has indicated, "[I]n those locales where the judge signs the warrant himself, he will at most merely scan the documents[;] [o]ften the warrant is signed without any examination of its contents."[165]

This lack of scrutiny, however, may be more logical than it first appears. For example, an affiant in a warrant application proceeding is frequently a police officer who has had substantial exposure to the courtroom setting.[166] An inevitable effect is that the "nervous" behavioral cues associated with lying (i.e., decreased pupilary size, sweating, blinking, lowered gaze, etc.) will not be as obvious to the magistrate as they would be in the case of an ordinary citizen who is unfamiliar with the warrant application process.[167] Moreover, even though a magistrate using conventional telephone equipment may not be able to visually evaluate the affiant, he still has the opportunity to examine the caller or requesting officer orally. This benefit appears to be far more significant than merely observing an applicant who has received his information from another individual.[168] As one California court has stated,

> The essence of the [telephonic warrant] statute is not to require a face-to-face confrontation between the magistrate and the affiant, but that the magistrate shall have an opportunity to examine the affiant should any questions arise in his mind concerning any of the allegations in the affidavit or of the sufficiency of the affidavit as a whole.[169]

Moreover, both the state electronic warrant procedures and the federal model require that a requesting officer be placed under oath before making a declaration of fact.[170] This solemn duty to tell the truth should further weigh against a magistrate's need for demeanor evidence.[171] Law enforcement agents, for example, frequently interact with the same judicial officers. This repeated interaction arguably encourages them to be truthful and discourages the use of inaccurate

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164. *See* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, 34 (1965).

165. *Id.*

166. Beechen, *supra* note 26, at 702.

167. *Id.* at 702-03.

168. Israel, *supra* note 98, at 261.

169. People v. Chavez, 27 Cal. App. 3d 883, 886 (Cal. Ct. App. 1972).

170. *See supra* Parts III, IV.

171. *See* United States *ex rel.* Pugh v. Pate, 401 F.2d 6, 7 (7th Cir. 1968) (specifying that the oath requirement is significant because it forces the requesting officer to take ultimate responsibility for the facts alleged).

or false statements while under oath.[172] If an officer were to disregard this obligation, it would likely result in substantial damage to his professional reputation, which in turn could ultimately affect his ability to enforce the law. The oath requirement thus ameliorates the need for demeanor evidence by making it less probable that an officer would perjure himself to procure a warrant.

The demeanor criticism is also less justifiable in light of recent technological advances. With the integration of personal computers into police cruisers across the nation, field officers have become linked to each other and to their judicial counterparts in ways that were previously not possible.[173] Many patrol cars are now equipped with dash-mounted miniature video cameras which record stops to preserve evidence in the event charges are filed against either the state or the arrestee.[174] In addition, many are outfitted with cellular transmission technology enabling them to send and receive information to police headquarters or to other officers on patrol.[175] Thus, existing technology could easily be adapted to transmit a visual signal of the requesting agent to a magistrate in his chambers making "remote" face-to-face application possible. This combination would clearly weigh against the demeanor criticism by allowing a magistrate to question a warrant applicant and monitor his responses. As an added benefit, a field officer also could transmit images of events or items in plain view

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172. *See id.*

173. *See* Beci, *supra* note 9, at 319-21.

174. Tom Jackman, *Police Enter Video Era, Cameras Installed on Five Cruisers*, WASH. POST, Apr. 13, 2000, at V1 (indicating that the Virginia State Police have had video camera-equipped patrol cars for years and that the Fairfax County Police Department is following suit by equipping their cruisers with similar technology); Beth Kaiman, *14 Seattle Police Cruisers to Roll With Video Cameras*, SEATTLE TIMES, July 17, 2001, at B3 (indicating that video cameras will be installed in fourteen Seattle police cruisers as a first step toward deciding whether to equip Seattle's 220 patrol cars with the cameras); Tom McWilliams, *Video Cameras in Police Cars Benefit Citizens*, STATE NEWS, July 8, 1999, *available at* http://www.state-news.com/editionssummer99/071299/op_col2.html (indicating that Michigan has budgeted $430,000 for video cameras in police patrol cars around the state and detailing the benefits of implementing such technology); Ben Schmitt, *Squad Cars Get Video Cameras, Detroit Chief Hails Department's New Technology*, DETROIT FREE PRESS, Oct. 11, 2000, at 1B (indicating that Detroit is implementing a video system for more than three hundred of its patrol cars in order to provide a clear record of police encounters); *Jersey Police Trial New Communications System*, *available at* http://www.ananova.com/news/story/sm_354503.html (July 18, 2001) (indicating that police in New Jersey are experimenting with a new communications system using cameras fixed on patrol cars to beam live video footage recorded at crime scenes to computer screens).

175. *See* P. J. Huffstutter, *Heard on the Beat in Orange County; Police Get Mini Laptops*, L.A. TIMES, June 8, 1998, at D5 (indicating that the Newport Beach Police Department has full-sized, E-mail-capable laptops in all of its patrol cars); Bill Pietrucha, *DC Cops Get Wirelcss Network*, NEWSBYTES NEWS NETWORK, Mar. 18, 1998, *available at* 1998 WL 5032488 (noting that Washington, D.C. will have installed a network of e-mail capable computers in its police vehicles by the end of 1998).

that would aid a judicial determination of probable cause. Given tbe insignificant reliance of magistrates on demeanor evidence and the new ability of law enforcement officials to transmit simultaneous audio-visual images during the warrant application process, the demeanor criticism clearly is no longer valid.[176]

Another alleged shortcoming concerns the lack of a written record before issuance of a telephonic warrant. As illustrated by the state and federal provisions detailed in Parts III and IV, a written record is generally created *after* the application is made, leaving the magistrate with only oral testimony on which to rely.[177] This criticism is presumably based on the assumption that magistrates do not take notes of the application conversation and that they lack the capacity to make accurate determinations of probable cause without a written record. This criticism, however, is unfounded for a number of reasons.

The first, and most obvious, response is that the written record criticism extends to only telephonic warrant applications and not to facsimile or E-mail submissions. This distinction may explain why some states have enacted facsimile warrant procedures but have made no provision for oral telephonic procurement. Because both state and federal procedures require that oral applications be recorded, however, a permanent record is created, albeit one that is not visually reviewable.[178]

To help ensure the accuracy of his analysis, a magistrate, while questioning an applicant, may choose to make note of certain determinative facts, develop a personal checklist for the requisite elements of probable cause, or simply question the affiant again as to specific details of his or her situation. These precautions should be more than sufficient to protect the validity of issued warrants, especially in situations with relatively simple factual scenarios.[179] As emphasized by one California court, "Magistrates must frequently determine probable cause and make other significant rulings on oral testimony."[180] The telephonic procedure thus does not require judicial officers to perform tasks with which they are not familiar. Admittedly, complex investigations may be ill-suited for oral application.[181] But because warrant requests in such cases "are

176. *See* Beechen, *supra* note 26, at 703; Israel, *supra* note 98, at 261.

177. *See supra* Parts III, IV; Beechen, *supra* note 26, at 703.

178. *See supra* Parts III, IV.

179. *See* Beechen, *supra* note 26, at 704-05 (noting that when a simple warrant application is being made, a written record may add little if anything to aid the magistrate in determining whether probable cause exists, or to assist him in determining the scope of the allowable search).

180. People v. Peck, 38 Cal. App. 3d 993, 1000 (Cal. Ct. App. 1974).

181. Beechen, *supra* note 26, at 703-04.

usually the culmination of long investigations, speed in securing a search warrant is not often an essential factor."[182] There is consequently little need to use the telephonic (as opposed to the traditional written) procedure for lengthy, detailed applications.[183]

As evidenced by Nebraska's electronic provision, a State may also require an officer to contact a district attorney before submitting an oral application.[184] While this may seem counterproductive to an expedited warrant process, it has the benefit of allowing the applicant, with help from a trained legal professional, to streamline his submission, highlight the most crucial facts, and facilitate the magistrate's determination of probable cause.[185] One commentator has indicated that "the time expended at this conference will be offset by a reduction in the time it actually takes to obtain a warrant application from the magistrate."[186] Thus, all attorney consultation prior to the magistrate's review may be viewed as consistent with the goal of an expedited application while helping to ameliorate the potential problems resulting from the lack of a written record.

Bypassing the written application requirement is, in reality, one of the most effective ways to decrease the amount of time needed to procure a warrant.[187] As long as another permanent form of documentation is created, few criticisms of the telephonic procedure are justified. In situations where time is of the essence and the validity of a magistrate's probable cause determination will not be significantly enhanced by a written record, there is little reason not to forgo the requirement, thus allowing law enforcement officers to accomplish their objectives in a more effective, constitutionally permissible manner.[188]

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182. *Id.* at 704.

183. *Id.*

184. *See* NEB. REV. STAT. ANN. § 29-814.03 (Michie 1999).

185. Beechen, *supra* note 26, at 705.

186. *Id.*

187. *See id.* at 703.

188. Nothing in the Fourth Amendment requires that a warrant be based on a written affidavit. Only "probable cause supported by Oath or affirmation" is necessary. U.S. CONST. amend. IV; *see* United States v. Johnson, 561 F.2d 832, 843 (D.C. Cir. 1977) (stating that nothing in either the Fourth Amendment prevents the oral authorization of search warrants); Beechen, *supra* note 26, at 703-05; *see generally* John E. Theuman, Annotation, *Validity of, and Admissibility of Evidence Discovered in, Seareh Authorized by Judge over Telephone*, 38 A.L.R. 4th 1145 (1985) (discussing the validity of telephonically authorized searches and seizures).

VI. ELECTRONIC SEARCH WARRANTS' IMPACT ON THE EXIGENT CIRCUMSTANCES EXCEPTION

Notwithstanding the foregoing criticisms, electronic search warrant procedures have an undeniable advantage: By creating an adaptive, flexible, and expedited method for warrant applications, they discourage law enforcement officers from engaging in warrantless searches and make possible a return to the procedural dictates of the Fourth Amendment. Of particular importance is the potential impact of the new telephonic procedures on the exigent circumstances exception.[189] As noted in Part II, the exigency exception allows police officers to bypass the Fourth Amendment warrant requirement when there is an immediate need to search for objects or suspects or to prevent the loss or destruction of evidence, and when obtaining a warrant by traditional means "would be unreasonable because of conditions then existing."[190] New electronic search warrant procedures, however, have changed the equation used by courts in assessing whether a warrantless search was justified.[191] As one commentator has indicated, the reality under Rule 41(c)(2) and similar state provisions "is that a search warrant is usually only a phone call away."[192]

Several courts have already reached this conclusion. For example, in *United States v. McEachin*, the Court of Appeals for the District of Columbia expressly stated its belief that "courts must also consider the amount of time necessary to obtain a warrant by telephone in determining whether exigent circumstances exist."[193] The California Court of Appeals reached a similar conclusion in *People v. Blackwell*.[194] In *Blackwell*, Los Angeles County police officers Mumby and Boyce were investigating a chemical odor which suggested that phencyclidine (commonly referred to as PCP) was being manufactured in a particular apartment.[195] In addition to contacting other officers, Mumby phoned the fire department but made no attempt to call a judicial officer and request issuance of a telephonic search warrant.[196]

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189. Marek, *supra* note 23, at 36.

190. *Id.* "When officers have reason to believe that criminal evidence may be destroyed, or removed, before a warrant can be obtained, the circumstances are considered sufficiently critical to permit officers to enter a private residence in order to secure the evidence while a warrant is being sought." United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (citations omitted).

191. Marek, *supra* note 23, at 36.

192. *Id.* at 38.

193. 670 F.2d 1139, 1146 (1981).

194. 147 Cal. App. 3d 646 (Cal. Ct. App. 1983).

195. *Id.* at 649.

196. *Id.*

When the suspects attempted to flush some substances down a toilet, the officers entered the premises and arrested them.[197] Hours later and still without a search warrant, the police returned to the scene and recovered additional chemicals and paraphernalia.[198] When the defendants moved to suppress the evidence discovered during the second search, the officers claimed their actions were reasonable because a warrant would have taken between five and eight hours to procure and that, in the meantime, the chemicals could have mixed and created an explosion.[199] The trial court accepted this justification and found that the warrantless reentry and search were permissible because of a continuing emergency.[200] The Court of Appeals explicitly rejected the officers' assertion concerning the time necessary to procure a search warrant. Instead, it stressed that a telephonic warrant could have been issued within a shorter period, perhaps in as little as forty-five minutes.[201] As a result, the court suppressed the evidence seized during the second search and remanded the case.[202]

The United States District Court for the Southern District of Iowa also suppressed evidence obtained during the warrantless search of a defendant's home on the grounds that there was "abundant" time for the agents to obtain a telephonic warrant.[203] In *United States v. Baker*, federal agents had probable cause to arrest Southard, Baker's codefendant, for drug distribution at approximately three o'clock in the afternoon and believed that he might flee the vicinity if Baker did not return by five o'clock that evening.[204] Deducting half an hour for travel time to the defendant's home, the court concluded that the officers still had nearly an hour and fifteen minutes in which to seek a warrant.[205] While this would have been an inadequate amount of time to drive to the nearest courthouse, it was more than enough time "to seek and obtain a warrant from a federal magistrate by telephone."[206] The court noted further that if the telephonic procedure had in fact taken too long, the officers could have stopped and made a warrantless

197. *Id.*

198. *Id.* at 650-51.

199. *Id.* at 650.

200. *Id.*

201. *Id.* at 653. The court cited a 1973 study from the San Diego District Attorney's office which estimated that ninety-five percent of telephonic warrants take less than forty-five minutes to procure. *Id.* Miller, *supra* note 116.

202. 147 Cal. App. 3d at 654.

203. 520 F. Supp. 1080, 1084 (S.D. Iowa 1981).

204. *See id.* at 1082.

205. *Id.* at 1083.

206. *Id.*

entry justified by exigent circumstances.[207] Because the agents did not even attempt to obtain a warrant by phone, however, the court held that the government failed to establish the requisite exigency and granted the motion to suppress.[208]

Despite their potential to greatly circumscribe use of the exigent circumstances exception, expedited electronic procedures are not always a viable option. In *United States v. Hawkins*, for example, the defendant was observed standing beside a car that was parked on a public street. [209] After an apparent sale, he carried currency to the car's trunk and returned to his post without the cash in hand.[210] When the officers arrested him, they removed marijuana from his person, retrieved narcotics hidden by a nearby adjacent log, and searched the trunk of the automobile.[211] The court excused the officers' failure to obtain a warrant under the exigent circumstances exception, indicating that even the new procedure for obtaining a search warrant by telephone requires time before a warrant can be issued—a requesting officer must still "prepare a duplicate original warrant to be read verbatim to the federal magistrate requested to issue it."[212] The court thus concluded that even though the telephonic procedure was available, exigent circumstances justified the warrantless search of the defendant's trunk.[213]

The Court of Appeals for the Tenth Circuit, in *United States v. Cuaron*, also recognized functional limits on adherence to the warrant requirement via electronic methods.[214] In *Cuaron*, Drug Enforcement Agents arrested an individual who had sold them a pound of cocaine.[215] Immediately thereafter, the agents began efforts to obtain a warrant from state court to search the residence from which the drugs had come.[216] Approximately forty minutes after the initial arrest, however, law enforcement officials decided to secure the residence without waiting for a search warrant.[217] Cuaron was subsequently discovered trying to flush a large amount of white powder—later determined to be cocaine—down the toilet.[218] After noting that

207. *Id.* at 1084 n.3.
208. *Id.* at 1084.
209. *Id.*
210. *Id.* at 752.
211. *Id.*
212. *Id.* at 753 n.4.
213. *Id.*
214. 700 F.2d 582 (10th Cir. 1983).
215. *Id.* at 585.
216. *Id.*
217. *Id.*
218. *Id.*

"searches and seizures [conducted] inside a home without a warrant are presumptively unreasonable,"[219] the court indicated that under certain exigent circumstances, a warrantless entry would be permissible.[220] It cautioned against expansive use of such an exception, however, by suggesting that a trial judge who is determining whether a particular situation falls within that category should also assess the possibility of obtaining a federal warrant by telephone.[221] The procedures delineated in Rule 41(c)(2), nevertheless, made clear to the court that "more than a simple telephone call is required in order to obtain a warrant based on oral testimony."[222] Because of the substantial possibility that Cuaron would have destroyed the drugs if his distributor did not return promptly, the court held that time constraints justified the officers' proceeding without a warrant.[223] The court explicitly noted, however, that had the situation been less exigent, it "would not have hesitated to hold the warrantless search of Cuaron's house invalid."[224]

These cases clearly demonstrate that the availability of search warrants by telephone or other electronic means obviates much of the claimed exigency justification for warrantless searches.[225] Many factors previously used to invoke the exception, including the distance from a courthouse, the time required to locate and personally appear before a magistrate, and the inconvenience of obtaining a warrant after normal "business hours," are much less compelling now that new procedures exist.[226] Where electronic provisions are in place, such objections should no longer be deemed sufficient to characterize a noncritical situation as exigent.[227] Accordingly, courts should be less willing to accept excuses for not procuring a warrant in "emergency" situations and should permit warrantless searches only when the government can prove that the officer could not have obtained an electronic warrant in time to avoid the anticipated exigency.[228]

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219. *Id.* at 586 (citing Payton v. New York, 445 U.S. 573 (1980)).

220. *Id.* (citations omitted).

221. *Id.* at 588.

222. *Id.* at 590.

223. *Id.*

224. *Id.*

225. Marek, *supra* note 23, at 38; *see* Beci, *supra* note 9, at 319-20, 325, 327.

226. Beechen, *supra* note 26, at 706-10; Marek, *supra* note 23, at 38; *see* Miller, *supra* note 116, at 385.

227. *See* Beechen, *supra* note 26, at 717 (indicating that "[t]be timeliness and flexibility of the oral warrant concept sbould cause both the courts and the police to reexamine the circumstances which have been used to circumvent the warrant requirement); Marek, *supra* note 23, at 46.

228. Beci, *supra* note 9, at 320; Beechen, *supra* note 26, at 710; Marek, *supra* note 23, at 39.

VII. NEW DEVELOPMENTS IN TECHNOLOGY AND THE EASE OF IMPLEMENTATION

As communication and computer technology continues to progress, the advantages of electronic warrant provisions are becoming even more apparent. Over the past decade, there have been astounding developments in the fields of digital imaging, cellular and other wireless technology,[229] and miniature personal computing devices. Manufacturers including Canon, Toshiba, Minolta, Casio, and Olympus all produce compact, inexpensive digital cameras that can generate both still and live video images.[230] For a relatively low cost, police departments may be able to equip officers with similar devices that would enable them to photograph anything from evidence found in plain view to a suspect at the scene of a crime. These images could then be transferred to a police cruiser's personal computer and digitally attached to either a facsimile or E-mail warrant application. Even if the officer phoned in a request, the corroborating images could be sent via fax or E-mail to the courthouse for a magistrate's review.

With respect to officers who are away from their cruisers, Sony, Hewlett-Packard, Compaq, Palm, Visor, Handspring, and other companies manufacture a host of personal digital assistants that can be outfitted with cameras and cellular communication technology.[231] With relatively little effort, standardized warrant application forms could be uploaded into these palm-sized devices, thus enabling an officer to submit a search warrant request without ever leaving the scene of investigation. The issuing magistrate could even send the actual warrant directly back to the requesting officer who could print

229. *See generally* Timothy Captain, *The Wireless Web: What Are You Missing*, LAPTOP, Feb. 2002, at 64-70 (discussing the evolution of the wireless web, the recent developments that have accelerated wireless data transfer rates, and the implementation of third-generation data-transfer services which will provide transfer rates of up to two megabytes per second and allow for full-motion wireless video conferencing).

230. Comprehensive listings of these manufacturers' digital imaging products are available on their respective websites: http://www.usa.canon.com (last visited Feb. 20, 2002), http://www.dsc.toshiba.com (last visited Feb. 20, 2002), http://www.dimage.minolta.com (last visited Feb. 20, 2002), http://www.casio.com (last visited Feb. 20, 2002), http://www.olympus.com (last visited Feb. 20, 2002).

231. For example, Handspring manufactures the Treo ($399), a personal digital assistant that combines a cellular phone, a pager, and an organizer complete with a keyboard into a pocket-sized device measuring 4.3 x 2.7 x 0.7 inches and weighing only 5.4 ounces. Hewlett-Packard makes the Jornada ($599), a pocket-PC similar is size and weight to the Treo that runs applications such as Microsoft Word and Microsoft Internet Explorer. The Samsung SPH-1300 is another example of a fully integrated cellular phone and personal digital assistant. Additional information about these products is available at http://www.handspring.com (last visited Feb. 20, 2002), http://www.hp.com (last visited Feb. 20, 2002), and http://www.samsungusa.com (last visited Feb. 20, 2002).

a copy in his patrol car or show the homeowner a duplicate warrant as displayed on the personal digital assistant.[232] Advancement in encryption technology and digital authentication techniques also ensure that this equipment could be used with little risk of corruption from an outside source.[233]

At the very least, police officers or their patrol cars could be equipped with cellular telephones that would enable them to contact a district attorney or judicial officer not accessible through the existing police radio network. Many phone manufacturers now make cellular models that are slightly larger than a package of chewing gum.[234] These devices may be worn with minimal interference to an officer's mobility. Furthermore, they would eliminate the need for an officer to locate a landline from which to place his call. Inexpensive cellular phones could thus maximize the amount of time saved under the telephonic application process by eliminating the last distance which a requesting officer must travel—from the investigative scene to the telephone. These new technologies, if implemented, could help to reinvigorate the warrant requirement and thus protect citizens' liberty interests while allowing the government to move quickly in exigent circumstances.[235]

VIII. DEVELOPMENT OF STATE ELECTRONIC PROVISIONS BASED ON THE FEDERAL MODEL

Although the federal government and a handful of states have taken the lead with respect to innovation in criminal procedure, the undeniable advantages of electronic warrants suggest that states which have not updated their criminal codes should reevaluate their position.[236] In light of the diversity of geography, size, population density, financial resources, and myriad other factors among the fifty states, it would be difficult, if not unwise, to develop a uniform model for adoption nationwide. Nevertheless, the procedures delineated in

232. All of the devices described *supra* note 231 are capable of receiving and displaying such documents.

233. For an excellent overview of encryption technology and its availability, see Richard M. Nunno, *IB96039: Encryption Technology: Congressional Issues*, CRS ISSUE BRIEF FOR CONGRESS (July 14, 2000), *available at* http://cnie.org/NLE/CRSreports/Science/st-40.cfm (indicating that the ability to break 128-bit encryption (considered strong encryption) has not yet been demonstrated in the commercial sector).

234. For example, the Nokia 8260, released in 2000, measures 4.1 inches tall and 1.8 inches wide. *See* http://www.nokia.com (last visited Sept. 21, 2002).

235. Beci, *supra* note 9, at 325, 327.

236. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 95 (1973) (recommending that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers").

Rule 41(c)(2) of the Federal Rules of Criminal Procedure provide a general guide that can direct state legislators' efforts to update their criminal codes. States whose demographics are similar to jurisdictions that already have adopted electronic warrant statutes may also look to those particular state codes for additional insight on altering the federal model to maximize its effectiveness for law enforcement officers in their locales.

New advancements in computer and cellular technology have made electronic warrant provisions even more advantageous. By creating a host of alternative methods that enable warrants to be obtained in a fraction of the time required under the traditional procedure, electronic warrant provisions have enabled a return to a more balanced Fourth Amendment jurisprudence.[237] Courts will no longer be forced to choose between facilitating law enforcement efforts and protecting individual liberties via the warrant requirement.[238] Rather, both goals may be simultaneously accomplished using the more flexible and efficient telephonic processes.[239] The various doctrines used to justify warrantless searches should thus be reviewed in light of the new standard of warrant availability under the electronic procedures and circumscribed appropriately.[240] With respect to the exigent circumstances exception, at a minimum, prosecutors should be required to demonstrate a much more immediate and critical emergency to justify the constitutionality of a warrantless search.[241]

Adoption of some form of electronic warrant provision by states that have not already done so seems functionally inevitable. In light of increasing urban sprawl, escalating rural population densities, frequent traffic problems, and the diffusion of criminal activity throughout populated areas across the nation, mandating that police officers physically appear before a magistrate to obtain a warrant could result in virtual abandonment of the requirement. History has shown that the continued viability of any system depends on its ability to adapt to new circumstances. As the Eight Circuit stated in *United States v. Bozada*, "If the processes of our government are such that

237. Miller, *supra* note 116, at 386 (noting that in 1973, sixty-five percent of all telephonic search warrants took one hour or less from the time when the field officer decided he wanted a search warrant until the time of issuance, and the remaining thirty-five percent were completed in less than two hours.).

238. Beci, *supra* note 9, at 327.

239. *See id.*

240. Beechen, *supra* note 26, at 717 (indicating that "the timeliness and flexibility of the oral warrant concept should cause both the courts and the police to reexamine seriously the circumstances which have been used to circumvent the warrant requirement").

241. *See* Marek, *supra* note 23, at 39.

police officers are unable to secure search warrants . . . then the cure for that problem is not to sacrifice the Fourth Amendment rights of our citizens, but to streamline the warrant procuring procedure."[242] Flexible electronic warrant procedures clearly present the most effective method by which the present system can be updated to withstand the challenges of the twenty-first century.

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242. 473 F.2d 389, 394 (8th Cir. 1973); Beechen, *supra* note 26, at 718.

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