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FIDELITY TO THE WARRANT CLAUSE: USING MAGISTRATES, INCENTIVES, AND TELECOMMUNICATIONS TECHNOLOGY TO REINVIGORATE FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

Today, Government officials performed an early morning warrantless search of a local handyman's home. At 2:10 a.m. police kicked in the door of his house and riddled the dwelling with 183 bullets. Mr. Durwood Foshee was shot and killed, apparently while still in bed. The mistaken raid location, chosen on the basis of an informant's erroneous tip, took place without the constitutional safeguard of a warrant. The search was performed under one of the exceptions to the warrant requirement allowed by the Supreme Court. In this case the reasoning was that the agents did not have the time or geographic ability to obtain a warrant.[1]

In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement . . . can be fulfilled virtually without exception. All that would be needed . . . would be a central facility with magistrates on duty and available 24 hours a day. All police . . . could call in by telephone or other electronic device . . . . The magistrates would evaluate [the] facts and, if deemed sufficient to justify a search and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed.[2]

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1. *See* Susan Watson, *A Little Stress Would Be Too Much*, DET. FREE PRESS, Jan. 16, 1989, at 3A. Had the police first sought a warrant, a neutral and detached magistrate could have prevented the search. The magistrate would have denied the warrant if—after reviewing all of the facts, including the source of the erroneous tip—the magistrate concluded that either probable cause was lacking or that the anticipated police conduct was unreasonable. *See infra* part III.A.

2. State v. Brown, 721 P.2d 1357, 1363 n.6 (Or. 1986).

Searches by government agents should normally be conducted with, rather than without, pre-approved judicial warrants. The Fourth Amendment's Warrant Clause provides an essential safeguard against government tyranny and capriciousness.[3] The warrant requirement maintains the Fourth Amendment's delicate balance between the liberty and privacy interests of each citizen and the safety and security needs of the public. Additionally, the warrant requirement is consistent with the original intent of the Framers of the Constitution to limit the government's discretion to search and seize.[4] For more than a century the Supreme Court has stressed the importance of the warrant requirement.[5]

Today, however, the Court seems more willing to disregard the Warrant Clause and instead focus its decisions exclusively on an analysis of the reasonableness clause.[6] During the past thirty years, the Court has increasingly created various exceptions to the warrant requirement.[7] Indeed, instead of a general warrant requirement with specific exceptions, one Justice recently submitted

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3. The Fourth Amendment reads:

> 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.

U.S. CONST. amend. IV.

4. The Framers did acquiesce, however, in limited types of warrantless searches that were then permitted under the common law. At the time the Fourth Amendment was drafted, an official could make a *public arrest* and conduct a *search incident to arrest* without a warrant. *See infra* text accompanying notes 43-44. This article does not propose that either of these two exceptions to the warrant requirement be modified or eliminated. The focus of this article is not on those warrantless searches and seizures permitted when the Fourth Amendment was drafted, but on the increasing amount and variety of warrantless conduct that has subsequently been permitted.

The first of these two exceptions, a warrantless public arrest, is not inconsistent with this article's thesis: due to the actual—and not simply theoretical—exigency which is inherent in the arrest situation, a government agent should be permitted to make a public arrest without a warrant. *See generally* United States v. Watson, 423 U.S. 411 (1976) (allowing a warrantless felony arrest in public).

While a thorough examination of the second exception, search incident to arrest, is beyond the scope of this article, it is also generally consistent with this article's thesis: an officer should generally be permitted to conduct this type of search without a warrant due to the danger that the arrestee might harm the officer or another person with a concealed weapon or destroy evidence. *See generally* Chimel v. California, 395 U.S. 752 (1969) (permitting a warrantless search incident to a lawful arrest but limited to the person and the area from which they could obtain a weapon or destroy evidence).

The search incident to arrest doctrine is also an exception to the probable cause requirement. A convincing argument can be made that the exception to the probable cause requirement should be limited to those situations where one of the exigent circumstances supporting the exception is actually present, and not just theoretically possible. *See generally* Tim A. Thomas, Annotation, *Constitutionality of Searching Premises Without Warrant as Incident to Valid Arrest—Supreme Court Cases*, 108 L. Ed. 2d 987 (1992) (discussing whether a warrantless search of premises is constitutionally permissible as an incident to a valid arrest). In contrast, searches incident to arrest are being permitted without warrants even in situations where the arrestee can neither destroy evidence nor harm anyone. *See, e.g.*, New York v. Belton, 453 U.S. 454, 466 (1981) (Brennan, J., dissenting) ("As the facts of this case make clear, the Court today substantially expands the permissible scope of searches incident to arrest by permitting the police officers to search areas and containers the arrestee could not possibly reach at the time of the arrest.").

5. *See infra* text accompanying notes 67-93.

6. *See infra* text accompanying notes 183-87.

7. *See infra* text accompanying notes 94-107.

that a warrant should only be required when a case-by-case analysis indicates that it is necessary to satisfy the reasonableness requirement.[8] The Court has also been increasingly willing to abandon the warrant requirement, as well as other Fourth Amendment threshold requirements, by engaging in a "special needs" analysis.[9] These exceptions have become so numerous that the warrant requirement has become eclipsed by its exceptions.[10] Consequently, the Court has, in many instances, sacrificed the vital safeguards provided by the warrant requirement.

However, with current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation. Miniaturization of computer hardware, cellular facsimiles, the direct transmission of electronic documents between cellular computer modems, and other associated technologies, have changed the face of modern communications. What was not feasible ten years ago is now viable due to developments in computer and electronic telecommunications technology. These developments should usher in a renewed commitment to the warrant requirement.

Part I of this article identifies advancements in available computer and electronic telecommunications technology, and suggests how this technology can be used to satisfy the warrant requirement. Advances in technology not only permit a renewed and robust commitment to the warrant requirement, but also enable the Supreme Court to correct previous encroachments on Fourth Amendment principles.

Part II examines the historical evidence in support of the warrant requirement and in opposition to government searches without pre-approved judicial warrants.[11] This Part first argues that the original intent of the Framers of the Constitution favors a renewed and meaningful commitment to the warrant requirement. Part II then considers key Supreme Court decisions regarding the Warrant Clause over a one hundred year period. Finally, this Part argues that

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8. California v. Acevedo, 500 U.S. 565, 584-85 (1991) (Scalia, J., concurring).

9. *See infra* text accompanying notes 183-87.

10. Most of these exceptions were initially based on exigency, which applies when government agents do not have the time or geographic ability to obtain a warrant due to the urgency surrounding the search or seizure. *See also* Michigan v. Tyler, 436 U.S. 499 (1978) (explaining that burning fire creates exigency); United States v. McDonald, 916 F.2d 766 (2d Cir. 1990) (holding that exigent circumstances existed due to imminent threat of loss of evidence), *cert. denied*, 498 U.S. 1119 (1991); United States v. Riccio, 726 F.2d 638 (10th Cir. 1984) (explaining that entry was justified because officers had a reasonable belief that an individual had been shot); United States v. Bell, 335 F. Supp. 797 (E.D.N.Y.) (permitting magnetometers in airports by balancing the need for airline safety against the minimal intrusion upon individual privacy), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). *See generally* United States v. McConney, 728 F.2d 1195, 1199 (9th Cir.) (defining exigency as "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of a suspect, or some consequence improperly frustrating legitimate law enforcement efforts"), *cert. denied*, 469 U.S. 824 (1984).

11. The thesis of this article focuses on *judicial* warrants. Administrative warrants, such as those used to inspect for compliance with building codes, are not addressed. For a discussion of administrative warrants, see generally Bernard A. Nigro, Jr., Note, *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564 (1986).

it is more consistent with enduring Fourth Amendment jurisprudence to require that searches be conducted with warrants.

Part III identifies several advantages that flow from government compliance with the warrant requirement. This Part also acknowledges that, for the identified advantages to emerge, the magistrate's check must be more than a mere affirmative and spontaneous reflex to the agent's request to search. Therefore, Part III argues that the warrant process must be strengthened to ensure that the magistrate provides a meaningful control on the government's unchecked discretion. Specific methods are discussed for catalyzing the warrant process so as to make the magistrate's assessment more meaningful.

Part IV argues that Congress, state legislatures, and the courts should implement substantive and procedural incentives to encourage the use of the warrant process. Likewise, disincentives must be introduced to discourage agents from engaging in warrantless searches or seizures. The incentives and disincentives discussed involve changes to the following: an agent's liability for conducting an unconstitutional search; the time available to a victim to make a suppression motion; the burdens of production and persuasion applicable in a suppression hearing; the prosecutor's ability to obtain immediate appellate review of a trial court's suppression ruling; and the class of victims who have standing to challenge a search.

Part V proposes alternatives to current exceptions to the warrant requirement, and warns against the creation of a new exception to the exclusionary rule. Specifically, this Part examines existing exceptions to the warrant requirement and argues that the exceptions should be eliminated or narrowed due to the availability of electronic warrants. Second, Part V argues that compliance by government agents with the warrant requirement eliminates the need for either Congress or the courts to create a new "good faith" exception to the exclusionary rule for searches or seizures conducted without warrants. Noting that the existing *Leon*[12] "good faith" exception already permits the use of unconstitutionally-obtained evidence against a criminal defendant if it has been seized with a warrant, this section argues that an additional "good faith" exception is not only unnecessary, but is also harmful because it abolishes any significant control on the discretion of government agents to search and seize.

I. DEVELOPMENTS IN COMPUTER AND ELECTRONIC TELECOMMUNICATIONS TECHNOLOGY

Current technology includes portable and lightweight cellular facsimile machines. This equipment can be used by an officer in the field or in a squad car.[13] With a cellular facsimile machine, the officer can quickly, and without

12. United States v. Leon, 468 U.S. 897 (1984).

13. One example of a cellular facsimile machine is the Mitsubishi F15 Access Cellular Fax Machine available from Sprint Cellular. It is small (12.5" x 8" x 2.4"), lightweight (about 6.5 lbs.), and is powered by an AC adapter plugged into the car cigarette lighter. It can be wired directly into the vehicle's electrical system for a permanent installation. The machine operates on an existing cellular phone line and automatically differentiates between voice and data transmissions. Production has already begun on a newer, smaller, more advanced model. Telephone inter-

leaving the investigation area, transmit a written warrant application and affidavit to the magistrate. The magistrate can then transmit the approved warrant back to the officer. The Federal Rules of Criminal Procedure and the procedural rules in a number of states have been amended recently to permit facsimile transmission.[14] Reviewing courts have upheld the constitutionality of warrants obtained through the facsimile procedure.[15] These machines are now rather standard in the industry and are relatively inexpensive for government agencies to purchase. Unlike cellular computers, cellular facsimile machines do not require the purchase of computers.

Current technology also permits electronic transmission directly between cellular computer modems. Many police vehicles are presently equipped with laptop computers or motor data terminals.[16] Law enforcement officers can be supplied with portable and lightweight palm computers or personal digital assistants.[17] These computers can transmit both the warrant application and

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view with Diane McIlnay, Account Executive, Sprint Cellular (May 11, 1995).

14. *See* FED. R. CRIM. P. 41(c)(2)(A) ("If the circumstances make it reasonable to dispense, in whole or in part, with the written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission."); ALASKA STAT. § 12.35.015(a) (Supp. 1991) (permitting sworn affidavits to be transmitted via facsimile machine); CAL. PENAL CODE § 1526 (West Supp. 1995) (permitting application for, and issuance of, facsimile warrants); COLO. R. CRIM. P. 41(c)(1)(iv)(3) (allowing the judge to "act upon the transmitted papers as if they were originals"); DEL. J.P. CT. CRIM. P. 4.2(c) ("The Court may accept the filings of pleadings designated in this rule [including search warrants] by facsimile transmission in conjunction with videophone appearance."); IDAHO CRIM. R. 41 (allowing a warrant to be transmitted by facsimile from magistrate back to peace officer); ILL. REV. STAT. ch. 725 para. 5/108-4 (1992) ("The search warrant may be issued electronically or electromagnetically by use of a facsimile transmission machine and any such warrant shall have the same validity as a written search warrant."); MINN. R. CRIM. P. 33.05 ("[A] facsimile order or warrant issued by the court shall have the same force and effect as the original."); R.R.S. NEB. § 29-814.03 (1994) subject to NEB. CT. R. Fax Machine Use Rule (1994) (permitting facsimile warrants when immediacy is required); S.D. CODIFIED LAWS ANN. § 23A-35.4.2 (Supp. 1995) (allowing for facsimile transmission and requiring that original documents be filed with the court within five business days).

15. *See* People v. Fournier, 793 P.2d 1176 (Colo. 1990) (upholding a facsimile application and warrant where all magistrates were out of town at a judicial conference); People v. Paul, 511 N.W.2d 434, 435 n.2 (Mich. 1994) (Levin, J., dissenting) (discussing "widespread use of facsimile equipment in recent years" and looking favorably upon facsimile warrants); People v. Snyder, 449 N.W.2d 703 (Mich. Ct. App. 1989) (upholding a warrant where officer called magistrate at home and transmitted unsigned warrant documents to magistrate's home via facsimile, and magistrate approved and returned warrant by facsimile to officer.); *see also* FED. R. CRIM. P. 41(c)(2)(A) advisory committee's note on 1993 amendment ("[F]acsimile transmissions provide some method of assuring the authenticity of the writing transmitted by the affiant."). For a general survey of facsimile machine use in the judicial system, see MONICA R. LEE, NATIONAL CENTER FOR STATE COURTS, FACSIMILE TRANSMISSION OF COURT DOCUMENTS: A FEASIBILITY STUDY 1990.

16. As an example, the North Carolina Highway Patrol and the Charlotte-Mecklenburg Police Department (N.C.) presently use in-car computers for various tasks. Telephone interview with Larry Blume, Systems Programmer, Charlotte-Mecklenburg Police Department (June 12, 1995). In addition, throughout the area of North Carolina known as the "Research Triangle," which includes Wake County, the city of Durham, the city of Raleigh, and the towns of Cary, Chapel Hill, and Garner, laptops and/or motor data terminals (MDTs) are being used. Elizabeth Wellington, *Machines Help Cary Police Take Byte Out of Crime: In-Car Computers Ease Officers' Jobs*, NEWS & OBSERVER (Raleigh, N.C.), July 31, 1995, at B1.

17. A hand-held computer can be either a personal digital assistant (PDA), which is accessed with a pen rather than a keyboard, or a palm computer, which is accessed via a keyboard. One example of a currently available, suitable, portable, lightweight palm computer is the Hewlett Packard HP 200 LX. It has the processor capability to run a graphics program which would allow

the approved warrant electronically—directly from the officer's computer to the magistrate's computer and then back again—through a cellular modem. The confidentiality of these transmissions can be protected through the use of existing encryption technology.[18] If a paper copy of the issued warrant is desired, a portable printer can be used.[19] Electronic copies of the application and the warrant can be routinely and automatically retained, one on the magistrate's hard drive and the other on the agent's computer. For security and historical accuracy, the magistrate's hard drive could also be systematically copied and inventoried. Procedural rules in some states have already been amended to permit use of such electronic transmission.[20] Courts that have addressed warrants obtained via electronic transmission suggest that there are no constitutional impediments to their use.[21] One unresolved detail that must be addressed is the development of a method to authenticate one's electronic signature.[22] Such authentication is necessary to satisfy the requirement that the affiant's information be provided under oath or affirmation.[23] It is this

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an officer to view and complete the warrant application on the screen, a modem to transmit the application to a magistrate for approval and receive the approved warrant back, and a printer port which could be used with a portable printer to produce a hard copy of the approved warrant. It also has the capability to utilize a portable scanner to input a handwritten application. The physical dimensions of the HP 200 LX are 16 x 8.64 x 2.54 (cm). It weighs approximately 11 ounces. Telephone interview with Lucy Honig, Product Manager, Hewlett Packard (Aug. 9, 1995).

18. Various software programs exist which allow for encryption of text prior to transmission via facsimile or modem. Alternatively, existing hardware also can be used to scramble the output of the cellular transmission. Encryption rearranges the order of the transmission signals into an unintelligible format which prevents anyone who intercepts a transmission from understanding the contents. A decryption device is used at the receiver to rearrange the transmission signals so they may be understood. Technology would prevent sophisticated criminals from monitoring police requests for warrants, denying them the opportunity to dispose of any incriminating evidence prior to a search. *See generally Cryptology, in* 16 THE NEW ENCYCLOPEDIA BRITANNICA 860 (15th ed. 1995) (discussing various methods to secure communications).

19. The Hewlett Packard HP 320 Portable Deskjet Printer is one example. It is available in black/grey scale or color printing options, 300 dpi resolution, and it prints at about 3 pages per minute. The unit easily fits into a briefcase. Its dimensions are 12"W x 9.5"D x 2.5"H. Telephone interview with Lucy Honig, *supra* note 17.

20. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-39149(c) (1989) ("telephone, radio or other means of electronic communication"); LA. CODE CRIM. PROC. ANN. art. 162.1 (West Supp. 1995) ("may be communicated . . . by telephone, radio, or other such electronic method of communication deemed appropriate by the judge"); OKLA. R. WSDCND W.D.R. 36 (1995) ("telephone or other appropriate means"); UTAH CODE ANN. § 77-23-204 (1995). *But see* FED. R. CRIM. P. 41(c)(2)(A) advisory committee's note on 1993 amendment ("The Committee considered, but rejected, amendments to the Rule which would have permitted other means of electronic transmission, such as the use of computer modems.").

21. *See, e.g.*, California v. McCraw, 276 Cal. Rptr. 208 (Cal. Ct. App. 1990) (holding that a warrant sent electronically from Washington to California is as effective as the original).

22. Software technology currently exists which allows the user to actually sign the computer screen with a special pen (i.e. a screen signature). The signature is then added directly into the electronic document. Another option is a scanner which would input the signature into the document prior to transmission. Telephone interview with Lucy Honig, *supra* note 17.

23. This problem has already been resolved when a warrant is obtained via facsimile or telephone transmission. Courts have upheld oaths taken over the phone, by a third party, or at a later date. *See, e.g.*, Mills v. Graves, 930 F.2d 729 (9th Cir. 1991) (holding telephonic search warrant valid even where oath was taken five days later); People v. Fournier, 793 P.2d 1176 (Colo. 1990) (explaining that facsimile warrant was valid where oath was taken by clerk of court prior to facsimile transmission); People v. Paul, 511 N.W.2d 434, 449 n.2 (Mich. 1989) (Levin, J., dissenting) (recognizing that a magistrate may "orally administer an oath or affirmation by telephone"). Unlike oral telephone warrants, however, these additional steps are arguably unnecessary

technology, permitting a police officer to apply for a warrant electronically via a cellular modem on a small computer located within the squad car, that this article prefers. The production and transmission of electronic documents directly between computer modems would be quicker than the facsimile procedure described above and would eliminate legibility problems. In addition, this application is not as experimental as the miniaturized computers, which are discussed next.

Ongoing miniaturization of computer hardware increasingly facilitates the use of computer warrants. Computers have decreased in size from desktop to laptop, laptop to notebook, and notebook to personal digital assistant. Moreover, a wearable computer, which can be clipped to one's belt, is now available.[24] A wearable computer is a miniaturized version of an IBM-compatible 486 and, along with its battery, weighs less than three pounds.[25] The computer is voice-activated and has no keyboard.[26] It was designed for hand-free operation, but can also be accessed with a small mouse.[27] While the monitor measures only one-half inch in diameter, it produces a display which appears much larger.[28] Police should not be required to possess wearable computers until further study determines if this equipment can be used without interfering with an officer's mobility.[29] But the availability of this hardware today is an encouraging sign that numerous possibilities for electronic warrants will be available in the near future.

Today's technology frees the Supreme Court from the dilemma in which it has been mired. The Court no longer must choose between the warrant requirement, which protects liberty interests, and warrantless searches, which permit the government to move swiftly in exigent circumstances. An effective warrant process can be reclaimed and preserved, and the officer can proceed quickly without leaving the area of investigation.

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when a warrant is requested via facsimile transmission. The oath or affirmation requirement is satisfied when the magistrate receives a facsimile copy of the affiant's signature formally attesting to the truth of the statements in the warrant application.

24. The wearable computer was developed by and is available from InterVision Systems Inc., Raleigh, N.C. It was designed to be used with an attached video camera by service technicians in the field, and it has been purchased by the Army after being tested during war exercises. David Ranii, *The Ultimate in Computer Portability: Raleigh Firm Makes Wearable Computer*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 5, 1995, at D1. In addition, federal law enforcement agencies, including the Federal Bureau of Investigation and the Drug Enforcement Agency, are presently considering its surveillance applications. Telephone Interview with John Lontos, Cofounder, InterVision Systems Inc. (Aug. 5, 1995).

25. It is likely that wearable computers will weigh even less in the future considering the current version weighs half as much as the previous model. Ranii, *supra* note 24, at D6.

26. *Id.* at D1.

27. *Id.*

28. *Id.* The monitor is attached to the user's cap or helmet, and can be ignored without obstructing the user's regular vision. *Id.*

29. The price of the wearable computer—between $8,000 and $12,000—may also be an obstacle to its current use. But the price is likely to be reduced as anticipated competitors enter the market. The price has already been reduced from its original price of $20,000. *Id.* at D6.

II. HISTORICAL EVIDENCE IN SUPPORT OF THE WARRANT REQUIREMENT

A. *The Warrant Requirement Is Consistent with the Framers' Intent to Limit Government Discretion to Search and Seize*[30]

The Framers' original intent when creating the Fourth Amendment of the Bill of Rights is consistent with a renewed and meaningful commitment to the general principle that a government agent must first obtain a warrant before conducting a search or seizure. Even though the Framers implicitly approved of certain types of warrantless searches,[31] the Framers' overriding intent was to limit the government's general discretion to search and seize.[32]

While many legal historians have attempted to comprehend the mosaic of what the Framers meant by the Amendment,[33] they have reached dissimilar conclusions.[34] These scholars generally agree that the Amendment was intended as a means of controlling governmental intrusion into an individual's privacy.[35] Legal historians disagree, however, as to how the Framers foresaw that the Amendment would accomplish this purpose. Some have concluded that the Framers intended that the Amendment prohibit any search or seizure conducted without a warrant. Others have concluded that the Framers intended that the absence of a warrant be only one factor considered in determining whether the search or seizure is reasonable and therefore constitutional.[36] This

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30. The author gratefully acknowledges Lee Cumbie for his research, suggestions, and contributions to this section.

31. *See supra* note 4.

32. There are many early writings warning of the danger that the government may usurp power and intrude on individual liberties. *See* THE FEDERALIST No. 84, at 79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (warning against giving to "men disposed to usurp, a plausible pretence for claiming that power"); 21 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445-49 (Jonathan Elliot ed., 1881) (quoting Patrick Henry's warning against the terrors of federal authority without a protective bill of rights); John Adams, *Petition of Lechmere: Adam's "Abstract of the Argument", reprinted in* 2 LEGAL PAPERS OF JOHN ADAMS 134, 142-44 (L. Kinven Wroth & Hiller B. Zobel eds., 1965) (condemning the abuse of power that resulted from the use of general warrants and writs of assistance).

33. An in depth discussion of the historical events leading up to the Fourth Amendment is beyond the scope of this article. For thorough attention to this history, see generally JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761-1772 (1865); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

34. *Compare* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (generally viewing exceptions to the warrant requirement as granting too much discretionary power to law enforcement officers) *and* LANDYNSKI, *supra* note 33, at 42-44 (advocating that it clearly was not the Framers' intent to allow judicially created exceptions to the warrant requirement except in compelling circumstances) *with* TAYLOR, *supra* note 33, at 46-47 ("[Those] who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head. Such was not the history of the matter, such was not the original understanding.") *and* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991) ("We can now see the Fourth Amendment with fresh eyes. Searches without warrants are not presumptively illegitimate. Rather . . . a jury could subsequently assess its reasonableness.").

35. *See supra* note 33.

36. *See supra* note 34; *see also* California v. Acevedo, 500 U.S. 565, 581-83 (1991) (Scalia, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

article suggests that the positions are at the same time both accurate and inaccurate. Furthermore, this article contends that *today* the Framers' original intent is best satisfied through the warrant requirement.

Historical certainty as to the Framers' precise meaning of the Amendment's terms may never be obtained.[37] Such a microscopic inquiry may be counterproductive. As noted by Alexander Hamilton in his initial opposition to the Bill of Rights: "[M]inute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns."[38]

An historical inquiry into the Framers' general intent, their purpose in creating the Amendment, and their desires as to what the Amendment was to accomplish would be more productive than a detailed study of the Amendment's specific terms. Only by understanding the dangers and threats to individual liberty that the Framers were attempting to avoid, can one interpret and apply the Fourth Amendment with genuine deference to the Framers' original intent.

This article suggests that the Framers of the Constitution had a three-tiered approach in mind when promulgating the Fourth Amendment. First, the Framers implicitly approved of the status of the limited types of warrantless searches permitted under the common law at the time.[39] Arguably, this approval was based on the assumption that common law remedies, such as suits for trespass and false imprisonment, would continue to prevent such warrantless searches from becoming onerous. Second, the Framers intended to require that any extensions in search and seizure doctrine pass through a warrant requirement.[40] This would limit the types of warrantless searches to those already permitted under the then-existing common law. Third, clear limits would be placed on the government's ability to obtain a warrant by requiring that certain conditions be satisfied before a magistrate issues the warrant.[41] The overall effect of this three-tiered approach was to encapsulate and limit the power of the government to invade the "right of the people to be secure in

37. The wording of the Fourth Amendment was altered from the form proposed by the Committee of Eleven and initially approved by the House of Representatives. Purportedly, Chairman Benson of the committee charged with preparing the final draft, changed the text to conform with an earlier version that he had proposed. The House had already soundly rejected Benson's proposed version. Without comment, and presumably unaware of the change, the House then passed the altered version. The Senate approved the altered version, and it was ratified by the States. This revised version became the Fourth Amendment. *See* United States v. Matlock, 415 U.S. 164, 180-83 (1974) (Douglas, J., dissenting) (setting out the Amendment's history); LASSON, *supra* note 33, at 97-103 (referencing 1 ANNALS OF CONGRESS (J. Gales ed., 1834) to show this sequence of events); *see also* Clark D. Cunningham, *A Linguistic Analysis of the Meanings of 'Search' in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 541-53 (1988) (illustrating the linguistic analysis of the Fourth Amendment and its confusing history).

38. THE FEDERALIST No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

39. *See supra* note 4 and *infra* notes 43-44.

40. *See infra* notes 56-57 and accompanying text.

41. *See infra* notes 59-63 and accompanying text.

their persons, houses, papers, and effects"[42] from either a warrantless search *or* a search conducted with a warrant.

The first of these three tiers—that the Framers approved of the limited types of warrantless searches then permitted under the common law—is evidenced by the Framers' failure to explicitly respond in the Amendment to two realities. At the time the Framers created the Fourth Amendment, the common law permitted two types of warrantless searches and seizures: an official could conduct a search incident to arrest without a warrant,[43] and certain arrests could be made without a warrant.[44] Most of the original states generally adopted the English common law as the law of the state unless specifically preempted by state or federal law.[45] Yet in drafting the Amendment, the Framers did nothing to explicitly abrogate these common law warrantless searches.[46] Therefore, it is unlikely the Framers intended the Fourth Amendment's Warrant Clause to preempt the common law doctrine. The Framers would have expressly eliminated the common law doctrine permitting warrantless searches if it were their intent to do so. It would be inconsistent for the Framers to articulate explicitly the standards of a warrant requirement, and simultaneously abrogate the longstanding common law doctrine permitting warrantless searches through implication.[47]

Because of the system of checks and balances, the Framers arguably acquiesced to these limited types of warrantless searches. Abuse of these warrantless searches had been deterred historically through actions such as trespass and false imprisonment:[48] officials who conducted warrantless searches were generally not entitled to immunity unless vindicated by finding the felon or illegal goods;[49] there was no "good faith" exception for mistakes;[50] and recovery for trespass could be substantial because it was not limited to actual damages.[51] Presumably, the Framers felt that these safeguards provided an

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42. U.S. CONST. amend. IV.

43. The first case challenging the ancient search doctrine in England was not until the late nineteenth century. Dillon v. O'Brien, 16 Cox C.C. 245 (Ex. D. 1887) (rejecting the challenge and affirming the doctrine's validity).

44. *See generally* LASSON, *supra* note 33 (discussing permissible warrantless arrests in colonial times); TAYLOR, *supra* note 33 (same). One could also be arrested without a warrant "upon hue and cry" when the officer was unable to find the felon. WILLIAM SHEPPARD, THE OFFICES OF CONSTABLES, ch. 8, § 2, no.4 (1650).

45. *See* Wilson v. Arkansas, 115 S. Ct. 1914, 1917 (1995) ("Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law . . . ."); *see also* N.J. CONST. of 1776, § 22, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS 2598 (Francis N. Thorpe ed., 1909); N.Y. CONST. of 1777, art. 35, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2635; ORDINANCES OF MAY 1776, ch. 5, § 6, *reprinted in* 9 STATUTES AT LARGE OF VIRGINIA 127 (W. Hening ed., 1821).

46. *See* U.S. CONST. amend. IV. In addition, none of the variations of the Fourth Amendment adopted in state constitutions expressly abrogated the common law warrantless search doctrine. *See* 3-5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 45.

47. *See generally* TAYLOR, *supra* note 33, at 27-29 (providing alternative analyses supporting the argument that the Framers did not intend to prohibit the limited types of warrantless searches then permitted under the common law); Amar, *supra* note 34, at 1175-81 (same).

48. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW 582-84 (2d ed. 1903).

49. *Id.*

50. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 17 (1975); Akhil R. Amar, *Of Sovereignty and Federalism* 96 YALE L.J. 1425, 1486-87, 1506-07 (1987).

51. *See* Wilkes v. Halifax, 19 Howell St. Tr. 1382, 1401 (1769) (permitting substantial re-

ample deterrent against abuse of the limited types of searches permitted without a warrant. These warrantless searches had been permitted in the colonies, and for several hundred years in England, without creating significant problems for the individual or the public.[52] The Framers did not see a need to prohibit the limited types of warrantless searches then permitted under the common law because there were relatively few professional police in colonial times.[53]

The Framers were keenly aware, however, of the inherent dangers arising from a government with unbridled discretion to search and seize. In crafting the Fourth Amendment, the Framers intended to deter the virtually limitless searching which took place under general warrants and writs of assistance. The inequities which resulted from abuse of the general warrant and the writs of assistance are well documented[54] and were a major impetus in the occurrence of the American revolution.[55]

While these abusive searches were technically conducted with warrants, the general warrant and the writs of assistance did not limit government discretion. The Framers were concerned that unless the warrantless system was limited, it would lead to the type of abuse which occurred under general warrants and writs of assistance. This insight and anxiety led to the second and third tiers of the Fourth Amendment's Warrant Clause. While they acquiesced to the limited types of warrantless searches permitted under the common law, the Framers intended that a warrant requirement—one with teeth—be imposed upon any new type of search subsequently arising.

Under the second tier, a government agent would have to obtain a warrant from a neutral magistrate before conducting a search or seizure.[56] This requirement placed a check on unregulated government intrusion into individual liberty and privacy, regardless of the number of new types of searches arising or the increasing number of government officials engaged in searching activi-

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covery from Earl (Lord) Halifax, Secretary of State and Lord of the King's Privy Council, and demonstrating the lack of immunity by even high ranking government officials); Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763).

52. *See* 2 POLLOCK & MAITLAND, *supra* note 48.

53. *See id.* "[T]here is no professional police force. The only persons specially bound to arrest malefactors are the sheriff, his bailiffs and servants and the bailiffs of those lords who have the higher regalities." *Id.* at 582.

54. *See, e.g.*, Wilkes v. Halifax, 19 Howell St. Tr. 1382, 1401 (1769); Entick v. Carrington, 19 Howell St. Tr. 1029 (1765); Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763); 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 32, at 106-47.

55. *See* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 32, at 107 ("Then and there the child Independence was born."). The General Warrant was authorized during the reign of Charles II. Chief Justice Scroggs upheld the warrant's validity after its statutory authorization expired, but he was subsequently impeached by the House of Commons for having done so. The King v. Scroggs, 8 Cobbett St. Tr. 163, 192-93, 200 (1680); Entick v. Carrington, 19 Howell St. Tr. 1029, 1071-72 (1765). In addition, two types of statutory warrants, the Writ of Assistance and the Special Warrant (to search out seditious libel), were similar to general warrants in that they authorized uncontrolled government searches. Used in both England and the Colonies, their abuse is generally credited with creating the impetus for the Fourth Amendment. *See supra* note 33. These statutory warrants were consistently compared unfavorably to the common law stolen goods warrant for not containing the same quality of safeguards. *See supra* note 54 and *infra* text accompanying notes 59-61.

56. *See* U.S. CONST. amend. IV.

ties. As noted by the Supreme Court approximately two hundred years later, "The prominent place the warrant requirement is given in our decisions reflects the basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."[57]

However, because the Framers recognized that the government could become abusive in a system where searches are conducted with warrants, the third tier placed limits on what the government was able to do with a warrant.[58] To prevent abuse of the warrant process, the Framers placed particular requirements in the Fourth Amendment which were modeled after the conditions required to obtain a common law stolen goods warrant. A common law stolen goods warrant required the victim of a theft to make an oath before a Justice of the Peace, demonstrating probable cause that the stolen goods would be found in a particular place.[59] The Justice would then issue a warrant authorizing the victim and a constable to search and seize the goods and bring the goods and the suspected felon back before the Justice for disposition.[60] Failure to find the goods left the oath-giver open to an action for damages.[61] Under the Fourth Amendment, a warrant requires specificity, oath, probable cause, and approval by a neutral and detached magistrate.[62] The magistrate limits oppressive government searches by refusing to issue a warrant if any of the requirements are not satisfied or if the intended search is unreasonable.[63] This requirement protects the individual from government abuse of warrant power similar to that which had been common under English rule.[64]

Consequently, in the second and third tiers the Framers sought to limit warrantless searches, and warrant searches, respectively. These tiers work together to prevent capricious searches in all situations where a warrant is required for a search. The historical evidence suggests that the warrant requirement was seen as a double-edged sword which would have to be carefully utilized in order to preclude causing the very harm it was designed to prevent. While the Framers endorsed an enhanced warrant requirement[65] as a means of controlling government discretion, they were also keenly aware that a toothless warrant requirement would lead to a more intrusive government.

Today, the Framers' original intent to limit government discretion to search and seize can best be satisfied through a strengthened warrant requirement. The current exceptions to the warrant requirement allow for a plethora

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57. Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (quoting United States v. United States District Court, 407 U.S. 297, 317 (1972)).

58. *See* U.S. CONST. amend. IV.

59. HALE, PLEAS OF THE CROWN, ch. 18, 149r-52 (published posthumously, 1609-76).

60. *Id.*

61. *Id.*

62. U.S. CONST. amend. IV.; Johnson v. United States, 333 U.S. 10, 14 (1948).

63. Winston v. Lee, 470 U.S. 753 (1985) (denying the government a search warrant, even though probable cause was satisfied, to surgically remove evidence, a bullet, from an individual, because the intended search was unreasonable).

64. *See supra* note 54 and accompanying text.

65. For a discussion of specific methods to strengthen the warrant process, see *infra* part III.B.

of warrantless searches other than those historically permitted under the common law. Requiring a government agent to obtain a warrant before conducting a search or seizure still allows the government to investigate, but only in a controlled fashion. Modern technology facilitates timely searches, without sacrificing the protection of a warrant.

B. *The Warrant Requirement Is Consistent with the Supreme Court's Fourth Amendment Precedents*[66]

Despite the willingness of some current Justices to dispense with the warrant requirement, the Supreme Court has underscored the importance of the warrant requirement for more than one hundred years. It is more consistent with Fourth Amendment jurisprudence to require that searches be conducted with warrants.[67] It would further the Supreme Court's guiding role if the Court were to eliminate or narrow some of the exceptions to the Fourth Amendment warrant requirement, and rearticulate an earnest commitment to the principle that government agents must first obtain a warrant before conducting a search or seizure.

Stare decisis requires that courts abide by decided cases and adhere to precedent.[68] Because stare decisis makes the law more predictable, individual citizens, the community, and government agents can more easily conduct themselves in accordance with the law. Such consistency and predictability are particularly important in criminal law where community safety, individual privacy, and individual liberty interests are at stake.

As previously suggested, the Framers of the Constitution created the Fourth Amendment to protect individuals from the arbitrary and capricious behavior of the government. "[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to free people than the escape of some criminals from punishment."[69]

When the courts do not adhere to precedent, they fail to guide police officers and other government agents. Consequently, such agents are left to decide how to balance public safety against individual privacy interests and, in their zeal to protect the public, they may search individuals without reason. It is

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66. The author gratefully acknowledges Shannon Hall for her research, suggestions, and contributions to this section.

67. The United States Supreme Court has repeatedly held that a search conducted without a warrant is unreasonable. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). Furthermore, the Court has consistently held that unreasonable searches and seizures are forbidden by the Fourth Amendment. *See, e.g.*, Nathanson v. United States, 290 U.S. 41 (1933); United States v. Lefkowitz, 285 U.S. 452, 464 (1932). Consequently, except in narrow circumstances of absolute necessity, warrantless searches are presumptively unconstitutional. Chimel v. California, 395 U.S. 752, 768 (1969).

68. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct 2791, 2808 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); Lewis F. Powell Jr., Stare Decisis *and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16.

69. United States v. Di Re, 332 U.S. 581, 595 (1948).

important, therefore, that the Supreme Court follow precedent and fulfill its guiding role.

Over the years, the Court has repeatedly emphasized the importance of the warrant requirement. In 1877, the Supreme Court held that a government agent must first obtain a warrant before searching mailed letters and packages.[70] The Court concluded that the warrant required to search or seize mail demands the same particularity and probable cause required to search or seize papers within one's house.[71] Significantly, the Court did not question the postulate that the government can search for such papers with a warrant in the home.

In the early 1900s, the Court emphasized that probable cause alone, without a warrant, is generally not enough to search one's home.[72] The Court held that the "[b]elief, however well founded, that an Article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant."[73] The Court emphasized that the judicial magistrate is essential in the warrant process. Notably, the Supreme Court also has held that the "informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers and others who happen to make arrests."[74]

The Court continued to emphasize the necessity of magistrates and "adherence to judicial processes"[75] during the middle of the twentieth century. The purpose of interposing a magistrate between the police officer and the citizen was to ensure that a citizen's privacy and possessory interests were not overtaken by overzealous police officers. The Supreme Court eloquently expressed this thought in *Johnson v. United States*:[76]

> The point of the Fourth Amendment, which is often 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.[77]

In several decisions the Court held that the "essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into [the citizen's] privacy."[78] For example, in *Jones v. United States*,[79] the Court found that a search conducted at night and with probable cause was unconstitutional because the warrant to search was limited to daytime hours. The Court has consistently held that probable cause without a warrant is generally not enough to search a home.[80] Noting the important role of the magistrate in the

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70. *Ex Parte* Jackson, 96 U.S. 727 (1877).
71. *Id.* at 732.
72. Agnello v. United States, 269 U.S. 20, 33 (1925).
73. *Id.*
74. United States v. Lefkowitz, 285 U.S. 452, 464 (1932).
75. United States v. Jeffers, 342 U.S. 48, 51 (1951).
76. 333 U.S. 10 (1948).
77. *Johnson*, 333 U.S. at 13-14.
78. Jones v. United States, 357 U.S. 493, 498 (1958).
79. 357 U.S. 493 (1958).
80. *Jones*, 357 U.S. at 498. "Were federal officers free to search without a warrant merely

warrant process, the Court announced:

> In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.[81]

In the 1960s and early 1970s, the Court took advantage of many opportunities to guide and lead, repeatedly holding that a warrant is generally required to search.[82] In *Rios v. United States*,[83] the Court held that a warrantless search could not be justified as a search incident to arrest because probable cause for arrest did not exist when the police officers approached the petitioner.[84] Consequently, the police could not search without a warrant. In *Stoner v. California*,[85] the Court ruled that a hotel guest is entitled to the same constitutional protection against unreasonable searches and seizures that the guest would have in his own home.[86] The Court concluded that if the search is conducted without a warrant, "[it] can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant."[87] The Court reasserted the constitutional significance of the magistrate's predetermination that probable cause is present in *Beck v. Ohio*.[88] Finding a warrantless arrest unconstitutional, the Court stated that "the far less reliable procedure [of] an after-the-event justification for the arrest or search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[89] In *Katz v. United States*,[90] the Court held that an individual has a reasonable expectation of privacy in a conversation from a public telephone and a warrant is required to listen to that conversation.[91] Without a warrant, such a search is unconstitutional even if government agents have probable cause to believe they will discover evidence of a crime and the officers use the least intrusive means to obtain the evidence.[92] Emphasizing the historical importance of the warrant requirement, the Court stated:

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upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.*

81. Jones v. United States, 362 U.S. 257, 270-71 (1960).

82. *See, e.g.*, Chapman v. United States, 365 U.S. 610 (1961) (holding that a landlord's consent was not enough to justify a warrantless search); *see also* Agnello v. United States, 269 U.S. 20, 32 (1925) ("[We have] always . . . assumed, that one's house cannot lawfully be searched without a search warrant . . . .").

83. 364 U.S. 253 (1960).

84. *Rios*, 364 U.S. at 261.

85. 376 U.S. 483 (1964).

86. *Stoner*, 376 U.S. at 490.

87. *Id.* at 486.

88. 379 U.S. 89 (1964).

89. *Beck*, 379 U.S. at 96.

90. 389 U.S. 347 (1967).

91. *Katz*, 389 U.S. at 353.

92. *Id.* at 356-57.

> The warrant requirement has been a valued part of our constitutional law for decades . . . . It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.[93]

For more than one hundred years, the Court has emphasized the importance of the warrant requirement. Recently, however, it has been increasingly willing to dismiss the Warrant Clause and create additional exceptions to the warrant requirement. Even without a warrant, police are free to make a protective sweep in a home after an arrest,[94] search a foreign national's property located outside the United States,[95] search and seize curbside garbage,[96] search privately owned open fields,[97] and search some mobile homes.[98] Similarly, government agents without a warrant may search the entire passenger compartment of a vehicle, and all closed containers therein,[99] as well as open and search an arrestee's possessions.[100] Government agents may avoid the warrant requirement by obtaining the consent of a third-party to search,[101] or they may obtain an individual's consent and search without a warrant, regardless of whether the individual truly understands the right to refuse.[102] Furthermore, police who have not obtained a judicial warrant[103] may seize anything seen within "plain view,"[104] stop and frisk a citizen with only "reasonable suspicion,"[105] conduct administrative searches,[106] and conduct a search, or seize items, when any of a vast variety of exigent circumstances are present.[107]

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93. Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).
94. Maryland v. Buie, 494 U.S. 325 (1990).
95. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
96. California v. Greenwood, 486 U.S. 35 (1988).
97. United States v. Dunn, 480 U.S. 294 (1987).
98. California v. Carney, 471 U.S. 386 (1985) (permitting the warrantless search of a motor home when the motor home comes within an extended version of the automobile exception).
99. New York v. Belton, 453 U.S. 454 (1981) (extending the search incident to arrest doctrine).
100. South Dakota v. Opperman, 428 U.S. 364 (1976) (permitting the opening and search of an arrestee's items, pursuant to a standardized procedure, such as an inventory search).
101. United States v. Matlock, 415 U.S. 164 (1974).
102. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
103. *See infra* notes 183-87 and accompanying text (addressing additional exceptions to the warrant requirement under the Court's "special needs" analysis). *But see* Welsh v. Wisconsin, 466 U.S. 740 (1984) (rejecting an exception for the nighttime entry into a home to arrest for a civil traffic offense); Michigan v. Clifford, 464 U.S. 287 (1984) (declining to create a broad exception to cover searches for arson after a fire); Payton v. New York, 445 U.S. 573 (1980) (resisting an invitation to permit an automatic exception to the warrant requirement for the in-home arrest of all felons); Mincey v. Arizona, 437 U.S. 385 (1978) (refusing to create a broad exception to the warrant requirement for prolonged searches of murder scenes).
104. Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971).
105. Terry v. Ohio, 392 U.S. 1 (1968).
106. Camara v. Municipal Court, 387 U.S. 523 (1967) (holding that warrants to conduct administrative inspections do not need to be based upon "probable cause" but instead can be based upon a "reasonable governmental interest" in conducting periodic, areawide inspections).
107. *See infra* part V.A.

The Supreme Court must recommit itself to requiring that law enforcement officers conduct searches with warrants. The Court satisfies stare decisis when it interprets the Fourth Amendment consistent with precedent.[108] Lower courts, prosecutors, the defense bar, and law enforcement personnel all benefit from such consistent interpretation.[109]

III. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT MUST BE RE-EMBRACED AND STRENGTHENED

The Supreme Court must earnestly articulate its commitment to the principle that government agents must first obtain a warrant before conducting a search or seizure. Although considerable benefits can be obtained through the use of warrants, the process must also be enhanced so that the magistrate's assessment is meaningful. Unfortunately, the warrant process has at times operated in such a way that some of its theoretical advantages have been illusive.[110] The magistrate's determinations of probable cause and reasonableness must not merely be affirmative and spontaneous reflexes to a government agent's request for a warrant. The magistrate must be more than a "rubber stamp."[111] The warrant process must be enhanced to effectively establish a balance between the privacy and sanctity of the individual citizen (in places such as the home) and the discretion of the government to invade, search, and impound. This section first discusses several benefits that could result from compliance with the warrant requirement. It then suggests specific methods to strengthen the warrant process so that these benefits are actualized.

A. *Advantages Flowing from Magistrates and the Warrant Process*

The warrant requirement does not prevent legitimate government searches. Rather, it serves as a check on the discretion of the police and other government officials. It accomplishes this in two ways. First, the magistrate must confirm that the officer has probable cause to believe that the area to be searched contains—or that the item to be seized is—contraband or evidence of a crime.[112] Second, the magistrate must also evaluate the intended police conduct to determine if it complies with the reasonableness clause of the

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108. Gore v. United States, 357 U.S. 386, 392 (1958) (recognizing that a long course of adjudication in the Supreme Court carries impressive authority); Smith v. Allwright, 321 U.S. 649, 665 (1944) (noting that continuity of decisions on constitutional questions is desirable).

109. *See generally* Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 836-37 (1992) (discussing the harm that results from the Court's lack of guidance when it succumbs to the temptation to issue politically popular, result-oriented decisions without regard to established Fourth Amendment precedent).

110. *See* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990) (arguing that issuing magistrates should base their decisions upon objective criteria rather than simply deferring to the requesting agent's conclusions).

111. Aguilar v. Texas, 378 U.S. 108, 111 (1964) (stating that the probable cause decision must be made by a neutral and detached magistrate "[and that] the courts must . . . insist that the magistrate . . . perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police").

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

Fourth Amendment: the desired search or seizure must be reasonable in light of all attending circumstances.[113]

The quintessential advantage of the warrant process is that a magistrate is in a better position than the criminal investigator to determine reasonableness and probable cause without bias,[114] haste,[115] or competitiveness.[116] The Supreme Court has invariably acknowledged this advantage.[117] A magistrate is assumed to have no bias or partiality between the individual citizen, whose liberty interest may be encroached upon, and the government agent, who seeks to uncover criminal activity.[118] In contrast, the agent has a personal role in the ongoing criminal investigation, which may generate intense emotion and some animosity.[119] An unbiased and impartial magistrate is customarily in a better position to determine reasonableness and probable cause than an officer who is immersed in what may unfold into an intense and emotional criminal investigation. There are at least five additional advantages.

The first advantage is that the warrant process benefits the innocent, law-abiding citizen because it provides a check on a government agent's actions *before* the agent conducts an unconstitutional search or seizure. The warrant requirement is preventive rather than remedial. If the magistrate determines that a proposed search or seizure is unreasonable or not supported by probable cause, the warrant is denied and the search or seizure never occurs.[120] The citizen's reasonable expectation of privacy has not been violated, and the citizen is not even aware of the government's intended breach. The warrant requirement balances individual privacy and liberty interests against intended law enforcement efforts. In the process, the warrant requirement protects the law-abiding citizen from overzealous government officials. In balancing individual privacy concerns and public safety, attention is focused on the privacy interests of the *innocent* individual. This is done without sacrificing reasonable law enforcement efforts.

In contrast, when a judge reviews a warrantless search or seizure *after the*

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113. This safeguard allows the magistrate to deny a warrant for a search that is excessively intrusive, highly repugnant, or otherwise unreasonable, even if the officer has probable cause to believe the search will yield contraband or evidence. *See supra* note 63 and accompanying text.

114. United States v. Jeffers, 342 U.S. 48, 51 (1951) ("[T]he Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended.").

115. *Aguilar*, 378 U.S. at 110. "[T]he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred . . . ." *Id.* (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

116. *Johnson*, 333 U.S. at 14 (preferring a "neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime").

117. *See, e.g.*, Shadwick v. City of Tampa, 407 U.S. 345 (1972); Katz v. United States, 389 U.S. 347 (1967).

118. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

119. *See* Cynthia L. Cordes & Thomas W. Dougherty, *A Review and an Integration of Research on Job Burnout*, 18 ACAD. MGMT. REV. 621 (1993).

120. *But see* United States v. Pace, 898 F.2d 1218, 1230-31 (7th Cir.) (permitting the police to circumvent the magistrate's denial and obtain a warrant from another magistrate based on the same facts), *cert. denied*, 497 U.S. 1030 (1990). While the Supreme Court has not yet addressed the permissibility of such "magistrate shopping," it is the author's position that the Court should prohibit or discourage such conduct. *See infra* notes 145-51 and accompanying text.

fact, during a suppression hearing, it is too late for preventive measures. Instead, the judge's only option is remedial: suppression can be granted, depriving the prosecution of the use of incriminating evidence and benefiting the guilty defendant.[121] It is this belief—that exclusion serves as a windfall to the guilty defendant—that has led to much of the public opposition to the exclusionary rule.[122] Exclusion attempts to balance individual privacy and liberty interests against intended law enforcement efforts; in the process the defendant gains a windfall.

The second advantage stems from the magistrate's opportunity to regularly participate in continuing education regarding developments in search and seizure law. Similar opportunities are typically unavailable to law enforcement officers. Continuing education is critical in this context, because, unlike many other areas of the law, courts are constantly reexamining and reinterpreting the Fourth Amendment.[123] The magistrate is in a better position to remain up to date on developments in Fourth Amendment jurisprudence; thus, the magistrate's determinations of probable cause and reasonableness are arguably more accurate than such assessments made by police officers.

Third, magistrates' determinations of probable cause and reasonableness are more consistent due to continuing education[124] and the fewer number of decision-makers involved. Each magistrate reviews several officers' conclusions of what constitutes probable cause and of what is reasonable.[125] Because the officers differ among themselves in their conclusions, each magistrate brings consistency to determinations of probable cause and reasonableness. Consequently, because fewer individuals are making such determinations, together with superior training, the sum of all magistrate determinations are more consistent than the sum of all determinations by law enforcement officers.

The fourth advantage is that the warrant process generates a contemporaneous and complete record for subsequent review. The warrant application states what basis the government agent had *before* the search for determining probable cause.[126] In addition, the magistrate's warrant outlines the permissible scope of the search.[127] These provide the courts with the actual limita-

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121. While the exclusion of evidence after a warrantless search immediately benefits the guilty defendant, exclusion is also beneficial in that it often deters future unconstitutional searches and seizures by government agents. *See* Arizona v. Evans, 115 S. Ct. 1185, 1187 (1995) ("The exclusionary rule is a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through its deterrent effect.").

122. *See, e.g.*, Akhil R. Amar, *Are Truth and Justice the American Way? Hits, Runs, Trial Error: How Courts Let Legal Games Hide the Truth*, WASH. POST, Apr. 16, 1995, at C1; Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers; Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1.

123. California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (referring to "the . . . continuing . . . explosion in Fourth Amendment litigation").

124. *See infra* Part III.B, recommending additional magistrate training and continuing education.

125. *See* RICHARD VAN DUIZEND ET AL., NATIONAL CENTER FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES (1984).

126. *See, e.g.*, COLO. REV. STAT. § 16-3-303 (1986) (requiring that a statement of probable cause and written allegations of fact, supported by affidavit, be included within the application); N.C. GEN. STAT. § 15A-244 (1983) (similar requirements to those in Colorado).

127. The Fourth Amendment requires particularity as to the place to be searched and the

tions imposed at the outset of the search and the facts declared by the officer as the basis for the search. This record eliminates the courts' need to make a factual determination on the basis of conflicting and after-the-fact versions of what occurred or was intended. No such record exists when a search occurs without a warrant.

The fifth advantage of the warrant process is that it allows the officer to preserve evidence that would otherwise be lost in a suppression hearing if the officer conducted a warrantless search or seizure based on less than probable cause. This is because the magistrate alerts the officer that there is less than probable cause, giving the officer opportunity to gather more evidence. In contrast, if the officer conducted a warrantless search based on the initial evidence which did not constitute probable cause, the evidence would be excluded during a suppression hearing.[128]

B. *The Warrant Process Must Be Fortified So That the Magistrate's Determination of Probable Cause and Reasonableness Provides Its Intended Benefits*

The warrant process must be fortified if its benefits are to be genuine and not merely illusory. Three suggestions—one general and two specific—will be proposed for reinvigorating the warrant process so that the magistrate's check is meaningful.

First, a magistrate's entry-level job requirements, personality traits, initial training, and required continuing education must all be scrutinized. The goal of each requirement must be to increase the magistrate's accuracy and consistency, and to ensure that erroneous determinations of probable cause and reasonableness are minimized. While magistrate determinations are more consistent than those of law enforcement officers, there is still inconsistency among magistrates.[129] More stringent entry-level requirements, as well as additional magistrate training and continuing education, should result in more consistent determinations among magistrates. Such selection, training, and education requirements must also result in more accurate determinations, since consistency is only advantageous if the magistrate's determinations are accurate. When the warrant process results in determinations that are both more accurate and more consistent, fewer innocent citizens will have their privacy or possessory interests violated by unconstitutional searches and seizures. In addition to

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persons or things to be seized. U.S. CONST. amend. IV. Each state has also explicitly provided instructions as to the information it deems necessary to meet the Fourth Amendment requirements. *See, e.g.*, COLO. REV. STAT. § 16-3-304 (1986) (requiring a designation sufficient to establish the location of the premises, vehicles, or persons to be searched and a description of the items constituting the object authorized to be seized); N.C. GEN. STAT. § 15A-246 (1983) (similar to requirements in Colorado).

128. This same advantage has been articulated when police seek arrest warrants:

> [An] incentive for police to obtain a[n] [arrest] warrant is that they may desire to present their evidence to a magistrate so as to be sure that they have probable cause. If probable cause is lacking, the police will then have an opportunity to gather more evidence rather than make an illegal arrest that would result in suppression of any evidence seized.

United States v. Watson, 423 U.S. 411, 455 n.22 (1975) (Marshall, J., dissenting).

129. *See supra* note 125 and accompanying text.

being well-educated, a magistrate must not lack the courage to deny warrants when appropriate. While this personality trait may be difficult to assess, personality profile tests,[130] selection interviews, and professional references can help determine if a magistrate candidate has the requisite confidence and fortitude to deny warrants that are either unreasonable or not supported by probable cause.

This first suggestion can be implemented by either the Supreme Court or the various legislative bodies. The Supreme Court can take advantage of its review power and take the lead in establishing rigorous uniform standards for magistrates. In an effort to increase consistency and accuracy among magistrates, the Court can elaborate on the professional requirements set out for magistrates in *Shadwick v. City of Tampa*.[131] *Shadwick* only imposes two requirements: first, the magistrate must be "neutral and detached"; and second, the magistrate "must be capable of determining whether probable cause exists for the requested arrest or search."[132] The Court should explain what selection, performance, and continuing education standards are necessary to satisfy this second *Shadwick* requirement.

As an alternative, Congress and the state legislatures can act independently, and establish more rigorous standards for magistrate selection, performance, and continuing education. Some states presently have rigorous standards.[133] On the other hand, without uniform and base-level criteria, some jurisdictions will continue to have lax standards for magistrates.[134]

Second, to enhance the warrant process and make the magistrate's assessment more accurate, the magistrate should be exposed to potential liability for flagrant assessment errors. This approach would punish the magistrate more severely than the public for an unconstitutional search. Currently, in contrast, when evidence is seized through an unconstitutional search, the court's limited means of redressing the injury is to exclude the evidence at trial.[135] Diminished public safety is an unintended consequence that results from the exclusion of incriminating evidence.[136] Consequently, the public, rather than the

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130. Commonly utilized personality profile assessment tools include the Minnesota-Multiphasic Personality Inventory (MMPI), which appraises abnormal personality traits, and the Myers-Briggs Type Indicator (MBTI), which ascertains normal personality characteristics.

131. 407 U.S. 345 (1972).

132. *Shadwick*, 407 U.S. at 350.

133. *See, e.g.*, ALA. R. J. ADMIN., Rule 18 (forbidding a magistrate from issuing a search warrant unless licensed to practice law in Alabama.); ALASKA R. ADMIN., Rule 19.2(b)(5) ("[Deputy magistrates must] have received training from a training judge or training judge's designee, prior to appointment as a deputy magistrate, for each judicial duty which the appointee will be certified to perform."); COLO. REV. STAT. § 19-1-108 (1994) ("Every magistrate appointed pursuant to this section shall be licensed to practice law in Colorado; except that county judges who are not lawyers may be appointed to serve as magistrates . . . to hear detention and bond matters.").

134. *See, e.g.*, N.D. ADMIN. RULES, Rule 20 ("Minimum qualifications for magistrates shall include: (a) United States' Citizenship, (b) Physical residence in the county of appointment after appointment unless physical residence is waived by the appointing and confirming authorities.").

135. When an officer searches with a warrant, and the officer has an objective, good-faith belief that the warrant is valid, not even this remedy (i.e., exclusion) is available to the court. *See infra* notes 188-90 and accompanying text.

136. *See* Rakas v. Illinois, 439 U.S. 128, 137 (1978). "Each time the exclusionary rule is

magistrate, presently pays the price for the magistrate's blatant assessment errors. If liable for such errors, however, magistrates would be more careful in reviewing warrant applications. Arguably, the magistrate's extra care would result in greater accuracy. If magistrates are more accurate, there will be fewer unconstitutional searches necessitating exclusion. Hence, the public will be less burdened.

Magistrates, however, are presently not subject to liability for assessment errors. A state or local magistrate is granted absolute immunity from § 1983[137] claims when acting within the scope of the magistrate's official duties.[138] Likewise, a federal magistrate is granted absolute immunity[139] from claims arising under the judicially created counterpart to § 1983.[140] Consequently, a magistrate is presently immune from civil liability for issuing a warrant that violates an individual's Fourth Amendment rights.[141]

Instead, under this second suggestion, a magistrate would only be entitled to qualified immunity and would have greater motivation to accurately determine probable cause. The magistrate would only be immune from liability for an incorrect determination if a reasonably well trained magistrate in the same position could have made the same mistake and could have concluded that probable cause was demonstrated.[142] On the other hand, if the magistrate did not have an objectively reasonable belief that there was probable cause, then the victim of the unconstitutional search or seizure could seek compensatory damages from the magistrate.[143] Moreover, the victim would be entitled to

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applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Id.*

137. 42 U.S.C. § 1983 (1988). This statute, which creates a Fourteenth Amendment damages action, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

138. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Pierson v. Ray, 386 U.S. 547, 554 (1967). *See generally* SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 233-41 (1995) (noting absolute immunity for judicial conduct, and discussing exceptions to the doctrine). In contrast, law enforcement officers are only granted qualified immunity from § 1983 claims when acting within the scope of their official duties. *See infra* note 156.

139. *See* Butz v. Economou, 438 U.S. 478, 508-09 (1978).

140. The judicially created counterpart to § 1983 imposes liability on federal agents. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

141. For a thorough discussion of immunity and intricate aspects of § 1983 actions, see 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (3d ed. 1991 & Supp. 1995).

142. *See* Anderson v. Creighton, 483 U.S. 635 (1987) (applying this standard in a *Bivens*-type action against an FBI agent who conducted a warrantless search of the plaintiff's home); Malley v. Briggs, 475 U.S. 335, 341 (1986) (applying this standard in a § 1983 action against a police officer who arrested the plaintiff with less than probable cause).

143. *See, e.g., Bivens*, 403 U.S. at 397 (approving recovery of money damages from federal agents who violated plaintiff's Fourth Amendment right); *see also* Carey v. Piphus, 435 U.S. 247, 254-57 (1978) (asserting that damages in a § 1983 action should parallel common law damages where tort interests parallel the constitutional interest protected).

punitive damages if the magistrate violated the individual's Fourth Amendment rights with deliberate indifference or reckless disregard.[144] Exposing magistrates to this potential liability would make the warrant process more meaningful. Additional methods, such as fines, suspensions, dismissal, and other professional sanctions, should also be considered for making magistrate assessments more accurate.

Third, to enhance the warrant process and discourage "magistrate shopping,"[145] government agents should have a reduced level of immunity from § 1983[146] civil liability (or its judicially recognized counterpart)[147] when they unearth a second magistrate who will issue a warrant after a first magistrate has already denied the application based on the same showing of probable cause. While the Supreme Court has not yet addressed this practice,[148] some lower courts permit officers to circumvent the warrant requirement in this way.[149] To discourage this practice, government agents should have a reduced level of immunity from civil liability when they engage in "magistrate shopping." Their immunity from liability should be reduced by creating a presumption that an officer who has already been denied a warrant by one magistrate—but then secures one from another magistrate based on the same showing of probable cause—is lacking an objectively reasonable belief as to the sufficiency of probable cause.

As one alternative to this third recommendation, the Supreme Court could candidly address and prohibit this practice. Unless the officer is presenting additional evidence to the magistrate to demonstrate probable cause,[150] there is no reasonable justification for permitting an officer to secure a warrant from a second magistrate after a first magistrate has already denied the application. Arguably, the Court's tolerance of this practice demeans the entire magistrate system.[151]

As another alternative, this third recommendation could be expanded and

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144. *See* Smith v. Wade, 461 U.S. 30 (1983) (reformatory guard, named as a defendant in a § 1983 action, could be held liable for punitive damages).

145. *See* United States v. Czuprynski, 8 F.3d 1113, 1118 (6th Cir. 1993) (referring to the practice of seeking a warrant from a second magistrate after a first magistrate has denied the application based on the same showing of probable cause as "judge-shopping"); State v. Oakes, 598 A.2d 119, 122 (Vt. 1991) (referring to the practice of seeking a warrant from a second magistrate after a first magistrate has denied the application based on the same showing of probable cause as "magistrate shopping").

146. *See supra* note 137.

147. *See supra* note 140.

148. *See, e.g.*, United States v. Leon, 468 U.S. 897, 918 (1984) (making only oblique references to the undesirability of "magistrate shopping"); United States v. Pace, 898 F.2d 1218 (7th Cir.) (refusing to accept the opportunity to make a direct ruling on this issue), *cert. denied*, 497 U.S. 1030 (1990).

149. *See supra* note 120.

150. While the practice should be discouraged or prohibited when the officer presents the same evidence of probable cause to both magistrates, this article encourages the practice when the officer approaches the second magistrate only after the officer's additional investigation has developed additional evidence to demonstrate probable cause. For a discussion of the advantages that result when the officer has an opportunity to further investigate and develop probable cause, see *supra* note 128 and accompanying text.

151. *See generally* Charles L. Cantrell, *Search Warrants: A View of the Process*, 14 OKLA. CITY U. L. REV. 1 (1989) (discussing the repercussions of this practice).

made more far-reaching. Whenever an officer obtains a warrant after engaging in "magistrate shopping," the resulting search should be treated as if it had been conducted without the benefit of a warrant. None of the incentives normally available when a warrant is used would then be available to the officer, and all of the disincentives associated with a warrantless search would apply.

IV. INCENTIVES TO ENCOURAGE GOVERNMENT AGENTS TO USE THE WARRANT PROCESS AND DISINCENTIVES TO DISCOURAGE WARRANTLESS SEARCHES AND SEIZURES

Congress, state legislatures, and the courts should give government investigators incentives to use the warrant process and disincentives to engage in warrantless searches and seizures. While this article contends that, as a general rule, a government agent must obtain a warrant before conducting a search or seizure, some ambiguous situations will remain—particularly when vague exigent circumstances arise[152]—where an agent must be permitted to choose between a warrant or warrantless search. Five incentives and disincentives, to encourage the use of warrants, will be discussed.

As the first incentive, a government agent should be given greater immunity from civil liability for violating an individual's Fourth Amendment rights if the agent acts pursuant to a judicial warrant. An officer who conducts an unconstitutional search or seizure is subject to civil liability[153] under either § 1983[154] or its judicially recognized counterpart.[155] Presently, law enforcement officers are only entitled to qualified immunity from suits brought against them.[156] Consequently, a law enforcement agent can now be held civilly liable for an unconstitutional search or seizure even when acting pursuant to a search warrant. The magistrate's determination does not necessarily insulate the officer. The test is whether a reasonably well trained officer in the defendant officer's position would have known that probable cause was lacking.[157]

To achieve this first incentive, the agent's immunity from § 1983 civil liability and its judicially recognized counterpart should be increased by creating a presumption in the agent's favor when the agent acts pursuant to a search warrant. When the officer proceeds on the basis of a warrant that has been issued by a neutral and detached magistrate, the officer should be entitled to a presumption that the officer's belief regarding the sufficiency of probable

152. *See infra* part V.A.

153. In addition to liability under § 1983 and its judicially recognized *Bivens*-type counterpart, government agents who conduct unconstitutional searches or seizures may also be liable under state tort law, state statutes, or other federal statutes. While these additional areas of liability will not be expressly addressed, this article recommends that the incentive of increased immunity be made available in any civil action against an officer when the officer acts pursuant to a judicial warrant.

154. 42 U.S.C. § 1983 (1988).

155. *See* Butz v. Economou, 438 U.S. 473, 508-09 (1978).

156. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("For executive officials in general . . . our cases make plain that qualified immunity represents the norm [in a *Bivens*-type action].").

157. *See supra* note 142.

cause is objectively reasonable. While a plaintiff could offer rebuttal evidence, the defendant would have the benefit of the presumption.

As a second incentive for government agents to use warrants, the burden of production and persuasion should be placed on the defendant if a warrant has been obtained to show that a search or seizure is unconstitutional. While many states currently place these burdens on the defendant,[158] some states place the burden of production and persuasion on the government even when the officer conducts the search pursuant to a warrant.[159] As an incentive, this article instead recommends that these burdens uniformly be placed on the defendant whenever a warrant is used. On the other hand, if the officer conducts a warrantless search or seizure, the burden is now placed, and should remain, on the prosecution to prove that the warrantless search is constitutional.[160] To discourage warrantless activity, the state should have to prove that the search was reasonable, the search was based on probable cause, and one of the exceptions to the Warrant Clause justified the warrantless search.

A third inducement for government agents to use warrants involves limitations on the time available to the defendant to move for suppression. Presently, some states require a defendant to make a suppression motion prior to trial or lose the claim.[161] Other states allow a defendant to make a suppression motion during the trial.[162] This article recommends that the defendant should be required to either challenge the constitutionality of the seized evidence before trial or forfeit the right to the motion when an officer conducts the search with a warrant. This incentive would provide several benefits to the prosecution, including reducing the prosecutor's uncertainty regarding the witnesses to be called and the evidence to be adduced at trial. In addition, this incentive could provide the prosecutor with an opportunity to immediately appeal an adverse ruling. In contrast, if the officer conducts a warrantless search, the defendant should be permitted to challenge the search anytime prior to, or during, trial.

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158. *See, e.g.*, People v. Hoskins, 461 N.E.2d 941, 942 (Ill.), *cert. denied*, 469 U.S. 840 (1984); State v. Milliorn, 794 S.W.2d 181, 184 (Mo. 1990).

159. *See, e.g.*, People v. Crow, 789 P.2d 1104 (Colo. 1990); State v. Slaughter, 315 S.E.2d 865 (Ga. 1984); Brooks v. State, 497 N.E.2d 210 (Ind. 1986); State v. Heald, 314 A.2d 820 (Me. 1973); Canning v. State, 226 So. 2d 747 (Miss. 1969). *See generally* Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975) (discussing approaches to determining preliminary questions of fact).

160. *See* United States v. Matlock, 415 U.S. 164, 177 n.14 (1974).

161. *See* United States v. Sisca, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); State v. Neese, 616 P.2d 959 (Ariz. Ct. App. 1980); State v. Brogdon, 426 So. 2d 158 (La. 1983); State v. Baker, 409 A.2d 216 (Me. 1979); State v. Madsen, 414 N.W.2d 280 (Neb. 1987); State v. Neset, 462 N.W.2d 175 (N.D. 1990). *See generally* FED. R. CRIM. P. 12, 41 (requiring motions to suppress evidence be raised prior to trial).

162. *See* State v. Boose, 202 N.W.2d 368 (Iowa 1972); Shanks v. Commonwealth, 504 S.W.2d 709 (Ky. 1974); State v. Hicks, 488 N.W.2d 359 (Neb. 1992); State v. Ortega, 836 P.2d 639 (N.M. Ct. App. 1992); Whitnel v. State, 564 S.W.2d 373 (Tenn. Crim. App. 1978). Some jurisdictions predicate this right on meeting certain conditions. *See, e.g.*, N.C. GEN. STAT. § 15A-975(b), -976(b) (1994). The North Carolina statutes as interpreted by the North Carolina Supreme Court allow the defendant to make such a motion during trial when the prosecution seeks to adduce evidence from a warrantless search, but denies the defendant the right if the prosecution gives at least 20 working days notice before trial of the intent to introduce such seized evidence at trial. State v. Hill, 240 S.E.2d 794, 803 (N.C. 1978).

A fourth incentive to use warrants is to permit the prosecution to make an interlocutory appeal of all suppression rulings favorable to the defense whenever the suppressed evidence was acquired with a warrant. On the other hand, the corresponding disincentive to government agents that should result from not using warrants is that the prosecution should forfeit the right to an interlocutory appeal. As noted above, when a search is conducted pursuant to a warrant, the defendant should be required to raise relevant suppression motions prior to trial. If the court rules against the state, the state should then be permitted to make an interlocutory appeal. The trial could then be stayed until the issue is resolved. The state would then have the advantage, if the suppression order is overturned, of using the previously excluded evidence at trial. The availability to the prosecution of immediate appellate review encourages government use of warrants. In contrast, when a government agent does not use a warrant, the prosecution should lose the right to appeal suppression rulings favorable to the defense. As noted, when a warrantless search occurs, the defendant should be permitted to challenge the search anytime prior to, or during, trial. Moreover, if the court rules against the state, the state should not be permitted to make an immediate appeal. Consequently, the state would lose any advantage that would result from using the excluded evidence at trial. While some states presently deny the prosecution immediate appellate review from suppression rulings favorable to the defense,[163] this article recommends that the government uniformly be denied immediate review when the warrant process is not used.

As a fifth inducement for government agents to use warrants, the category of victims who have standing to challenge the constitutionality of the search should be broadened when no warrant is used. Over the years, the Supreme Court has narrowed the class of individuals who have standing to challenge the constitutionality of a search.[164] An individual who is legitimately on the premises searched no longer has automatic standing to challenge the search.[165] Additionally, an individual who is charged with criminal possession no longer has automatic standing simply because the individual legally possesses the item searched.[166] Presently, standing is only granted to an individual who has a legitimate expectation of privacy in the item searched.[167]

To encourage the use of warrants, only the present limited category of individuals recognized in *Rakas*[168] should continue to have standing to challenge a search or seizure conducted with a warrant. However, when the police

163. *See, e.g.*, State v. Parks, 415 So. 2d 704, 706 (Miss. 1982) (denying interlocutory appeal). *But see, e.g.*, State v. Perbix, 331 N.W.2d 14, 17 (N.D. 1983) (allowing interlocutory appeal).

164. United States v. Salvucci, 448 U.S. 83, 92 (1980) ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."); Rakas v. Illinois, 439 U.S. 128, 142 (1978) (rejecting automatic standing because it "creates too broad a gauge for measurement of Fourth Amendment rights").

165. *Rakas*, 439 U.S. at 142.

166. Rawlings v. Kentucky, 448 U.S. 98 (1980).

167. *Rakas*, 439 U.S. at 143.

168. *Id.*

choose not to use a warrant, the class of individuals permitted to challenge the search or seizure should be broadened. Logically, anyone against whom seized evidence will be used should have standing to challenge the constitutionality of the search or seizure. Standing could be granted to this broader class of individuals when government agents choose to act without warrants to discourage warrantless activity. By expanding the category of victims who have standing to challenge warrantless searches, prosecutors will be induced to persuade government agents to obtain warrants before searching, and thus reduce the number of potential suppression hearings at which they will have to defend.

V. THERE SHOULD BE FEWER EXCEPTIONS TO THE WARRANT REQUIREMENT AND NO ADDITIONAL EXCEPTIONS TO THE EXCLUSIONARY RULE

A. *Due to Technological Advances, the Exigent Circumstances Exception to the Warrant Requirement Should Be Narrowed, and Other Exceptions Should Be Studied, Narrowed, and Eliminated*

The Supreme Court should eliminate or narrow some of the exceptions to the warrant requirement and permit fewer warrantless searches and seizures because of the safeguards that warrants provide and the historical basis supporting their use. This is currently possible given advances in computer and telecommunications technology. Furthermore, future technological advances will enable the subsequent elimination or narrowing of additional exceptions to the warrant requirement.

Perhaps the exigent circumstances exception[169] is foremost among the exceptions affected by new technology. Under the exigent circumstances exception, an officer may conduct a search without a warrant if the officer has probable cause to believe that the person or item to be searched will be gone,[170] the evidence will be destroyed,[171] or someone will be put in danger[172] if the officer takes the time to obtain a warrant before searching. In addition to this freestanding exigent circumstances exception, most of the other exceptions to the warrant requirement were initially based on exigency.[173] Given the prior difficulty of obtaining a warrant and the attending exigent circumstances, the Supreme Court was compelled, in many situations, to sacrifice the vital safeguards provided by the warrant requirement.

Advances in electronic and telecommunications technology, however, have eliminated many of the temporal and geographic hurdles which previously

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169. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 299 (1967) (explaining that exigent circumstances do not require a warrant).

170. United States v. MacDonald, 916 F.2d 766, 769 (2d Cir. 1990), *cert. denied*, 498 U.S. 1119 (1991).

171. United States v. Sangineto-Miranda, 859 F.2d 1501, 1512 (6th Cir. 1988); United States v. Socey, 846 F.2d 1439, 1445 (D.C. Cir.), *cert. denied*, 488 U.S. 858 (1988).

172. United States v. Perez, 440 F. Supp. 272, 287 (N.D. Ohio 1977), *aff'd*, 571 F.2d 584 (6th Cir.), *cert. denied*, 435 U.S. 998 (1978); People v. Sirhan, 497 P.2d 1121, 1140 (Cal. 1972), *cert. denied*, 410 U.S. 947 (1973).

173. *See supra* note 10; *see also infra* note 179 and accompanying text.

prolonged the time needed to obtain a warrant. Consequently, trial courts must give greater scrutiny when government agents invoke the exigent circumstances exception. A warrantless search[174] or seizure should only be permitted when the circumstances of the case are such that an officer would not even be able to seek an electronic warrant. While many courts have already refused to permit the exigent circumstances exception in situations where the officer could have obtained a telephone warrant,[175] courts must probe further. To justify a warrantless search on the basis of exigency, the government must show that the agent could not have obtained an electronic warrant in time to avoid the anticipated exigency.

Additional judicial scrutiny of exigent warrantless searches provides an added benefit. While government agents should not be permitted to deliberately create exigent circumstances to circumvent the warrant requirement, courts hesitate to scrutinize defense claims that the police intentionally manufactured an exigency to circumvent the warrant requirement.[176] In addition, the

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174. Arguably, an exigency that justifies a warrantless seizure should not automatically justify a warrantless search. If the item (e.g., a suitcase) to be searched can be seized while the police obtain a warrant to search it, then the police should refrain from searching the seized item until the search warrant is obtained:

> In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.

United States v. Chadwick, 433 U.S. 1, 15-16 (1977).

175. *See, e.g.*, United States v. Ford, 56 F.3d 265, 266 (D.C. Cir. 1995) ("They could have secured the bedroom and telephoned a magistrate for a search warrant . . . ."); United States v. Patino, 830 F.2d 1413, 1416-17 (7th Cir. 1987) (holding no exigency existed because a telephone warrant could have been obtained in the 30 minute period), *cert. denied*, 490 U.S. 1069 (1989); United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1981) ("[C]ourts must also consider the amount of time necessary to obtain a warrant by telephone in determining whether exigent circumstances exist."); United States v. Baker, 520 F. Supp. 1080, 1083 (S.D. Iowa 1981) (explaining that one hour and fifteen minutes was "abundant" time to obtain a telephone warrant, therefore no exigency existed). *But see, e.g.*, United States v. Tarazon, 989 F.2d 1045, 1050 (9th Cir.) (permitting a warrantless search after concluding that 30 minutes was not enough time to obtain a telephone warrant), *cert. denied*, 114 S. Ct. 155 (1993); United States v. Cuaron, 700 F.2d 582, 589-90 (10th Cir. 1983) (holding that 20 to 30 minutes was not enough time to obtain a telephone warrant).

This article does not encourage the use of telephone warrants. The application for, and issuance of, a telephone warrant lacks the safeguards which are present when either a computer modem or facsimile is used. While this procedure frees the officer of the temporal and geographic hurdles of submitting a warrant application, it does not have the advantage of providing a contemporaneous and complete record of the warrant application. The telephonic application can be recorded by the magistrate, but the risk is present that the recording will not be accurately transcribed. *See, e.g.*, State v. Cook, 498 N.W.2d 17 (Minn. 1993) (noting that the magistrate issued a search warrant on the basis of a telephone application which was not recorded, and that neither the officer nor the magistrate made notes of the conversation). Additionally, unless the officer proceeds on the basis of the magistrate's oral authorization, the officer must still use valuable time to obtain the issued warrant. Even if the officer is permitted to proceed on the basis of an oral warrant, applications made by telephone are slower than those submitted by facsimile or modem. With a telephone warrant, the requesting officer must completely read the application over the telephone before the magistrate's assessment can begin.

176. *See, e.g.*, United States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986); United States v. Thompson, 700 F.2d 944, 950-51 (5th Cir. 1983); United States v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979); United States v. Scheffer, 463 F.2d 567, 575 (5th Cir.), *cert. denied sub nom.* 409 U.S. 984 (1972).

Supreme Court has not explicitly prohibited the practice. Until the Court does so, this troublesome practice would be diminished if the exception only applied when the circumstances of the case were such that an officer was not able to seek an electronic warrant. Because computer and facsimile warrants eliminate many of the temporal and geographic hurdles to obtaining a warrant, it becomes more difficult for criminal investigators to intentionally create the type of exigent circumstances that would permit them to proceed without a warrant.

The exigent circumstances exception is not the sole existing exception which could presently be narrowed due to technological advances. The Supreme Court should use its review power to thoroughly consider all other exceptions and determine which should be narrowed or eliminated in light of advances in computer and telecommunications technology. The automobile exception, and exceptions arising under the Court's "special needs" analysis,[177] are among the exceptions the Court should review.

The automobile exception allows a government agent to search an automobile without a warrant as long as the agent has probable cause to believe that the vehicle contains evidence relating to criminal activity.[178] This interpretation of the automobile exception deletes the warrant requirement, bypasses the magistrate, and allows a government agent to search a vehicle based on the agent's own determination of probable cause. The agent can search the vehicle even where there is no danger that the automobile will be moved. While the automobile exception was originally permitted because of the inherent mobility of—and encompassing exigency surrounding—the automobile,[179] the exception is now based on the reasoning that one has a reduced expectation of privacy in the automobile.[180] Thus, the police may conduct a warrantless search of a vehicle even if it is incapable of being moved.[181]

Arguably, one's expectation of privacy in the automobile is as great as, or greater than, it is in many other items of personal property. Given the mobility of American society, the percentage of the population engaged in commuting, and the amount of time people spend in automobiles, it seems unrealistic to conclude that an individual's automobile should be subject to a reduced expectation of privacy. Indeed, one Justice's comment can be interpreted as suggesting that in order to circumvent constitutional requirements, the Court has at times insincerely concluded that one has a lesser, or no, expectation of privacy: "Our intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement."[182]

The Court should not permit the warrantless search of an automobile

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177. *See infra* notes 183-87 and accompanying text.

178. Carroll v. United States, 267 U.S. 132, 149 (1925).

179. *Id.* at 146.

180. California v. Carney, 471 U.S. 386, 392 (1985).

181. Chambers v. Maroney, 399 U.S. 42, 52 n.10 (1970) (permitting the warrantless search of an automobile after the owner had been arrested and the vehicle taken to the police station).

182. California v. Acevedo, 500 U.S. 565, 636 (1991) (Scalia, J., concurring).

unless it can be justified on the basis of a *true* exigency rather than a theoretical reduced expectation of privacy. Perhaps the balance between the government's investigative powers and individual privacy and liberty interests would be better maintained if the automobile exception as it now exists were eliminated. Instead, taking advantage of up-to-date computer and telecommunications technology, the preferred method of searching an automobile would be for the police to comply with the warrant requirement. A warrantless automobile search would then be unconstitutional unless it satisfied the stricter exigent circumstances exception proposed above. There would be no separate and independent automobile exception.

The Court is also increasingly creating exceptions to the warrant requirement through its "special needs" analysis.[183] The Court applies this analysis when it concludes that government agents have "special needs" beyond criminal law enforcement. Under this analysis, the Court has not only suspended the warrant requirement, but it has increasingly been willing to dispense with one or both of the other Fourth Amendment threshold requirements of probable cause and individualized suspicion.[184] Recently, the Court used this "special needs" analysis to permit public school officials to test student athletes for drug usage without a warrant, without probable cause, and without any individualized suspicion.[185]

While a useful analysis of each "special needs" exception is beyond the scope of this article, the Court must consider these exceptions to determine which can be narrowed or eliminated in light of advances in computer and telecommunications technology. Many of these "special needs" exceptions seem to be created out of desperation rather than concern for Fourth Amendment doctrine. While they are permitted because of the government's interest in something other than criminal law enforcement, the Supreme Court has not hesitated to permit the government to use the fruits of the search to convict the search victim of a crime.[186] Ultimately, and regrettably, the "special needs" exceptions may permanently realign traditional Fourth Amendment

183. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (permitting suspicionless and warrantless urine testing of employees); O'Connor v. Ortega, 480 U.S. 709, 720-25 (1987) (allowing public employers to conduct warrantless searches of employees' desks and offices); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (allowing the warrantless search of a child's possessions within school on the basis of reasonable suspicion); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (permitting the temporary suspicionless seizure of motorists, without a warrant, at permanent checkpoints removed from the border); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (allowing warrantless and suspicionless border searches).

184. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990) (holding that sobriety checkpoints are constitutional without probable cause, individualized suspicion, or a warrant); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666-67 (1989) (allowing warrantless and suspicionless drug testing).

185. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995).

186. *Skinner*, 489 U.S. at 650-52 (Marshall, J., dissenting) (noting that a government agency conducting suspicionless and warrantless searches of its employees "appear[s] to invite criminal prosecutors to obtain the blood and urine samples drawn by the [agency] and use them as the basis of criminal investigations and trials" against its employees, notwithstanding that the government is only permitted to draw these samples because it claims to be conducting these searches on the basis of a special need other than law enforcement).

interests with minimal regard for the individual.[187]

B. *A New "Good Faith" Exception to the Exclusionary Rule Eliminates a Crucial Check on the Unbridled Discretion of Government Agents, and Should Not Be Created*

Under existing law, evidence obtained by government agents through a search or seizure conducted in the preferred manner—with a warrant—is already admissible in court against a criminal defendant.[188] The present *Leon* "good faith" exception permits the use of evidence against a criminal defendant in either state or federal court, even if it is obtained pursuant to a constitutionally defective warrant.[189] The existing "good faith" exception permits use of the evidence as long as the officer has an objective, good-faith belief that the warrant is valid, the officer acts within the scope of the warrant, and the issuing magistrate is neutral and detached.[190]

Notwithstanding the existing "good faith" exception to the exclusionary rule, however, many commentators have been anticipating an additional "good faith" exception—one that also permits the use of unconstitutionally seized evidence when an officer elects not to use the warrant process.[191] One example of such an exception has been advanced in Congress as part of the Republican party's "Contract with America."[192] The Exclusionary Rule Reform Act of 1995,[193] if enacted and upheld by the Supreme Court,[194] would permit

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187. *See generally* Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1033 (1990) (criticizing the "special needs" doctrine for essentially making balancing the norm rather than the exception).

188. United States v. Leon, 468 U.S. 897, 919 (1984).

189. *Id.*

190. *Id.* at 919 n.20, 920, 923.

191. *See,* Ronald J. Bacigal, *An Alternative Approach to the Good Faith Controversy*, 37 MERCER L. REV. 957, 976 (1986) ("The flexibility inherent in a totality of the circumstances test allows the Court to attach some unspecified weight to police motivation, instead of being forced to *Leon's* all-or-nothing decision in good faith."); Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 303 (1985) (noting that "the primary focus of attention should be on clarifying the rules rather than on making them increasingly unclear by focusing attention on penalties and exceptions"); Elizabeth P. Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 1016 ("A good faith exception similar to the mistake defenses in criminal law would restore partially the balance between the conduct rule and the decisional rule.").

192. The "Contract with America," as explained by Congressman Newt Gingrich (R-Ga.), Speaker of the House, is "a planning model [setting forth the Party's] vision, strategies, projects and tactics." Newt Gingrich, 1995 Summer Meeting, Republican National Committee, Phila., Pa. (July 14, 1995).

193. Introduced on January 25, 1995, the Exclusionary Rule Reform Act of 1995 requires:

> Evidence which is obtained as a result of a search or seizure shall not be excluded . . . on the ground that the search or seizure was in violation of the Fourth Amendment . . . if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

Exclusionary Rule Reform Act of 1995, H.R. REP. NO. 104-17, 104th Cong., 1st Sess. 13 (1995).

194. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (emphasizing that the Supreme Court is the "ultimate interpreter of the Constitution"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177

prosecutors to use unconstitutionally seized evidence in federal court, even if no warrant was used, as long as the officer had an objectively reasonable belief that the search or seizure was constitutional.

An additional "good faith" exception is not necessary when the warrant process is followed and, while enactment of a new exception may result in political gain to its sponsors,[195] such an exception is likely to produce a multitude of unintended new harms. Perhaps most insufferable among these harms is that the new exception would abolish any significant check—either before or after—on the uninhibited discretion of government agents when they search and seize evidence. This check would be absent regardless of how reasonable a citizen's expectation of privacy in the area searched or the item seized. Presently, in contrast, there is a check on the officer's actions either prior to the search or afterwards: if the search is conducted with a warrant, a magistrate screens the officer's actions in advance;[196]if the search is conducted without a warrant, a judge reviews the officer's actions afterwards during a suppression hearing.[197] Under an additional "good faith" exception, all meaningful review would be abolished. Unlike the existing *Leon* "good faith" exception, the proposed exception abolishes the need for *prior* review by a magistrate, and because it essentially discontinues the suppression of unconstitutional evidence, the proposed exception also eliminates any meaningful *subsequent* judicial review.

Regrettably, an additional "good faith" exception to the exclusionary rule—one that arises when an officer elects not to use the warrant process—confers upon government agents virtually unbridled discretion to intrude, search, and seize evidence. In contrast, the warrant process and present "good faith" exception more fittingly balance and satisfy relevant Fourth Amendment liberty, privacy, and security interests. When government agents follow the warrant requirement, a citizen's liberty and privacy interests can be protected *and* effective law enforcement measures can be secured. The magistrate will customarily serve as a check on government discretion and—when the magistrate errs—evidence seized unconstitutionally, but in good faith, will

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(1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* Miller v. Johnson, 115 S. Ct. 2475, 2491 (1995) ("Were we to accept the Justice Department's objection . . . we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so.").

195. *See Congress' Get Tough Act Is a Real 'Crime'*, USA TODAY, Oct. 3, 1990, at A12 ("Like its predecessors . . . the 1990 crime bill . . . won't do much to protect us from crime. At best, it will only help its perpetrators get re-elected."); Debra J. Saunders, *Crime: What Congress Thinks of You*, S.F. CHRON., Apr. 13, 1994, at A23 ("President Clinton put the heat on Congress to pass a version of the Senate $22 billion omnibus crime bill, and quickly . . . . Clinton won't blow this opportunity to . . . look effective and curry favor with a crime-wary electorate.").

196. *See supra* notes 112-13 and accompanying text.

197. A defendant may also be entitled to both forms of review: even when a magistrate has reviewed the search warrant request in advance, a defendant can obtain subsequent judicial review at a suppression hearing. However, in this situation the judge does not make a de novo determination of probable cause but merely determines whether there was a substantial basis for the magistrate to find probable cause, and the judge gives great discretion to the magistrate's initial determination. Illinois v. Gates, 462 U.S. 213, 236 (1983). Even if the magistrate incorrectly issues a constitutionally defective warrant, the judge will not suppress the seized evidence if the officer acted in objective, good-faith reliance upon the warrant. *See supra* notes 188-90.

be used in court against a criminal defendant. Use of the warrant process, together with the existing *Leon* "good faith" exception, eliminates the need for either Congress or the courts to create a new "good faith" exception to the exclusionary rule.

CONCLUSION

Today's advanced computer, facsimile, and cellular technology permits the Supreme Court to reaffirm a meaningful commitment to the warrant requirement. Due to the availability of portable and lightweight cellular facsimile machines, the ability to transmit electronic documents directly between cellular computer modems, and the continual miniaturization of computer hardware, an officer can now quickly—and without leaving the investigation scene—obtain a warrant. The officer can electronically transmit a written but wireless warrant application and affidavit to the magistrate. The magistrate can then transmit the approved warrant back to the officer in the same fashion. Because investigators can now quickly obtain a warrant without leaving the area of investigation, the Court has the ability to respond to exigent circumstances *and* declare a renewed commitment to the warrant requirement.

The warrant requirement is consistent with the Framers' original intent in crafting the Fourth Amendment. The Framers endorsed a three-tiered approach to deterring capricious searches and seizures. First, they agreed to permit some types of warrantless searches. They were comfortable with these warrantless searches because of their belief that existing common law remedies would continue to prevent such warrantless searches from becoming threatening. Second, the Framers desired to prohibit any new types of search unless they were conducted pursuant to a warrant. Third, to prevent the new warrant requirement from becoming meaningless, the Framers intended that it be demanding enough to deter capricious government searches. By limiting the circumstances under which a warrant could be issued, the Framers sought to protect citizens from the type of warrant abuse similar to that recently suffered through the use of general warrants and writs of assistance under English rule.

The warrant requirement is also harmonious with over one hundred years of Supreme Court precedent. Recently, however, the Court has displayed an increased willingness to ignore the Warrant Clause and focus exclusively on the reasonableness clause through both its traditional analysis and the Court's "special needs" analysis. This has resulted in an increase in the creation of new exceptions to the warrant requirement. This trend must cease, and the Court must re-embrace the warrant requirement.

While the warrant requirement should be embraced because it is compatible with the Framers' original intent and over one hundred years of Supreme Court precedent, the requirement should also be championed because it produces several advantages. Its quintessential advantage is that it allows threshold decisions regarding the intrusion into a citizen's liberty and privacy to be made in an orderly, deliberate, and impartial manner. Additional advantages of the warrant process include the following: rather than award the guilty defendant a windfall, the warrant process protects the innocent, law-abiding citizen;

magistrate determinations of reasonableness and probable cause are more accurate, since the magistrate has greater opportunity to stay abreast of continuing developments regarding search and seizure law; due to continuing magistrate education and because fewer decision-makers are involved, a magistrate's determinations of probable cause and reasonableness are more consistent; it eliminates the need for courts to make uncertain factual determinations during subsequent review because the warrant process generates a contemporaneous and complete record of the government's basis for searching and of the scope of search initially authorized; and the warrant process allows the officer to preserve evidence that would otherwise be excluded due to a premature search, since the officer can gather more facts and strengthen the showing of probable cause if a magistrate has denied the officer's initial request.

The warrant process must also be improved to ensure that the magistrate's review provides a genuine check on the government's unrestrained discretion to search and seize evidence. The assessment must be meaningful, and not merely the spontaneous and routine approval of a police officer's application for a warrant. First, the Supreme Court must define what is constitutionally required—professionally and personally—for one to become and remain a magistrate. The Court must be more rigorous than it was in *Shadwick*[198] in articulating the entry-level, initial training, and continuing education requirements for a magistrate. Each requirement must increase the accuracy and consistency of the magistrate's assessment. If the Court is unwilling to establish rigorous uniform standards for magistrates, Congress and the state legislatures should establish the needed standards.

A second suggestion for enhancing the warrant process is to make a magistrate liable for flagrant assessment errors. A magistrate should no longer be absolutely immune from § 1983 claims or *Bivens*-type[199] claims. Instead, a magistrate should only be entitled to qualified immunity. In order to minimize potential liability, magistrates will then be more accurate in their determinations of reasonableness and probable cause. Third, to reinforce the warrant process, government agents must have a reduced level of immunity from civil liability when they seek and find a second magistrate who will issue a warrant after a first magistrate has already denied the application based on the same showing of probable cause. This practice of "magistrate shopping" mocks the warrant requirement.

While this article has sought to demonstrate why the warrant requirement must be the norm rather than the exception, some uncertain situations will remain where an officer must be allowed to choose between using a warrant or conducting a warrantless search. To encourage government agents to use the warrant process when these ambiguous situations arise, Congress, state legislatures, and the courts must implement the following incentives and disincentives: agents must be given greater immunity from civil liability when they conduct a search pursuant to a judicial warrant; the burden must be placed on the defendant to show that a search or seizure was unconstitutional

198. Shadwick v. City of Tampa, 407 U.S. 345 (1972).
199. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

when the officer conducts the search pursuant to a warrant; when a warrant is used, the defendant must be deemed to forfeit the right to a suppression hearing unless the defendant challenges the constitutionality of the seized evidence *prior* to the commencement of trial; when a trial court suppresses evidence seized pursuant to a warrant, the trial must be stayed and the prosecution given an opportunity for immediate appellate review, thereby giving the government an opportunity to use the excluded evidence at trial; and, when a government agent conducts a warrantless search, the class of victims who have standing to challenge the constitutionality of the search must be expanded.

In addition to articulating a new commitment to the warrant requirement, the Supreme Court must eliminate or narrow some of its previously created exceptions that are no longer necessary due to current technology. Foremost among these is the exigent circumstances exception. This exception must be narrowed, since today's advanced technology eliminates much of the time and many of the geographic hurdles which previously delayed obtaining a warrant. The exigent circumstances exception should be modified so that it only permits a warrantless search if an officer is unable to obtain a facsimile or computer warrant via cellular modem before searching. A second exception, the automobile exception, should be eliminated entirely. The Court should only permit the search of an automobile without a warrant if the stricter exigent circumstances test has been satisfied. The exigency must be such that the officer does not even have the time to obtain an electronic warrant prior to searching the vehicle. In addition to these two exceptions, the Court should diligently use its review process to determine which additional exceptions—arising under either the Court's traditional analysis or its "special needs" analysis—should be narrowed or eliminated due to advances in telecommunications technology.

While existing exceptions to the warrant requirement should be narrowed or eliminated, no further changes should be made to the exclusionary rule. Neither Congress nor the courts should create a new "good faith" exception to the rule. A new exception would eliminate a crucial check on the uncontrolled discretion of government agents. Moreover, a new exception serves no purpose when the warrant process is used since evidence obtained by government agents with a warrant is already admissible in court under existing law, even if the warrant is constitutionally defective.

The Court no longer has to choose between the warrant requirement and warrantless searches because of advances in telecommunications technology. Today's technology promotes a superior balance between the government's need to swiftly investigate during exigent circumstances, and an individual's privacy and liberty interests. Due to today's advanced telecommunications technology, the Supreme Court has the opportunity, without sacrificing public safety, to reclaim and preserve the Fourth Amendment's warrant requirement.