Spring 1978

The Four Corners Requirement: A Constitutional Prerequisite to Search Warrant Validity

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THE "FOUR CORNERS" REQUIREMENT: A CONSTITUTIONAL PREREQUISITE TO SEARCH WARRANT VALIDITY

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I. *Introduction*

The fourth amendment provides:

> 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.[1]

The fourth amendment clearly requires as conditions precedent to search warrant issuance that "probable cause" be established and that such probable cause be "supported by Oath or affirmation." The amendment does not, however, further specify how this mandate should be carried out by an issuing authority. Thus, in a number of cases it has been held that the fourth amendment does not require that either the "Oath or affirmation,"[2] or the facts which underlie a finding of probable cause,[3] to be found with the "four corners" of a warrant affidavit or to be otherwise recorded prior to warrant issuance. Although through rule[4] or statute[5] some states and the federal government have adopted a "four

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[1] U.S. CONST. amend. IV.

[2] *See, e.g.*, Sparks v. United States, 90 F.2d 61 (6th Cir. 1937); State v. Walcott, 72 Wash. 2d 959, 435 P.2d 994, (1967) *cert. denied*, 393 U.S. 890 (1968).

[3] *See, e.g.*, Campbell v. Minnesota, 487 F.2d 1 (8th Cir. 1973); United States *ex rel.* Gaugler v. Brierley, 477 F.2d 516 (3d Cir. 1973); Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971); Sherrick v. Eyman, 389 F.2d 648 (9th Cir.), *cert. denied*, 393 U.S. 874 (1968); Miller v. Sigler, 353 F.2d 424 (8th Cir. 1965), *cert. denied*, 384 U.S. 980 (1966); United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D.N. Y.) 1970, *aff'd*, 441 F.2d 1073 (2d Cir. 1971), *cert. denied*, 404 U.S. 849 (1971); Simmons v. State, 233 Ga. 429 211 S.E.2d 725 (1975); State v. Chakos, 74 Wash. 2d 154, 443 P.2d 815 (1968), *cert. denied, sub nom.* Christofferson v. Washington, 393 U.S. 1090 (1969); State v. Smyth, 7 Wash. App. 50, 499 P.2d 63 (1972).

[4] *See, e.g.*, FED. R. CRIM. P. 41(c); OHIO CRIM. CODE R. 41(c) (Baldwin, 1973); PA. R. CRIM. P. 2003; VT. R. CRIM. P. 41.1(c) (1974).

[5] *See, e.g.*, ARK. STAT. ANN. § 43-205 (1947, 1975 Cum. Supp.); COLO. REV. STAT. § 163-303 (1973); MO. ANN. STAT. § 542.276 (Vernon 1974 Supp.).

corners" rule which requires contemporaneous recordation of facts underlying a finding of probable cause, courts have seldom indicated that such a procedure is constitutionally required. For example, in *United States ex rel. Gaugler v. Brierley*,[6] the Third Circuit held that in a federal habeas corpus proceeding arising out of a state conviction, sworn, unrecorded oral testimony presented to a state judicial officer while applying for a search warrant may supplement an affidavit which on its face fails to establish probable cause for the warrant's issuance. In holding that such a procedure does not violate the fourth amendment, the court emphasized that "a state has a right to formulate its own rules of procedure in cases arising out of violations of its criminal laws."[7]

The constitutionality of the use of unrecorded testimony given to a state judicial officer in application for a warrant to supplement a facially insufficient affidavit has never been decided by the Supreme Court of the United States.[8] However, in spite of the vague wording of the fourth amendment itself with regard to this question, there are cogent historical and policy arguments that suggest such a procedure is inconsistent and corruptive of the purpose underlying the amendment itself. The rule requiring that probable cause be contemporaneously recorded at the time of warrant issuance would seem to be, of necessity, an implicit element of the fourth amendment warrant requirement.

II. *Recent Judicial Consideration of the Four Corners Doctrine*

There have been a number of cases in the last decade which have debated whether the four corners rule is constitutionally mandated.[9] While courts now uniformly accept the proposition that all facts which are alleged to constitute probable cause must be presented to the issuing magistrate, a number of these courts assert that not all of those facts must be recorded at the time of issuance. For example, in *Gillespie v. United States*,[10] the

[6] 477 F.2d 516 (3d Cir. 1973).

[7] *Id.* at 525. Moreover, the *Gaugler* court held that in a federal habeas corpus proceeding testimonial and documentary evidence "not contained in the state court record is admissible, thus permitting a police officer to testify for the first time with regard to sworn unrecorded statements which he related had been given to the issuing magistrate in support of his search warrant application." *Id.* at 525, 526.

[8] The question has been presented to the Court in petitions for certiorari, but the court has never accepted such cases for review. *See, e.g.*, State v. Chakos, 74 Wash. 2d 154, 443 P.2d 815 (1968), wherein the Supreme Court of Washington upheld the use of supplementary sworn oral testimony. The Supreme Court denied certiorari over the dissent of Justices Brennan and Marshall, 393 U.S. 1090 (1969).

[9] *See generally* Annot., *Probable Cause for Search Warrant*, 24 A.L.R. Fed. 107 (1975).

[10] 368 F.2d. 1 (8th Cir. 1966).

Eighth Circuit noted that Iowa statutes required the filing of a written information, supported by oath or affirmation, alleging the existence of grounds specified by the state statute for warrant issuance. The statute also required the information to state that the applicant believed and had substantial reason to believe that the grounds existed in fact. The statute further authorized the magistrate to satisfy himself from his examination of the applicant and other witnesses as to the existence, or basis to believe the existence, of the alleged grounds for warrant issuance. The court in *Gillespie* held that probable cause need not be shown in the information itself; rather it might be shown by sworn, unrecorded oral testimony taken before the magistrate prior to issuance of the warrant and later related at a suppression hearing.

In *Leeper v. United States*[11] the Tenth Circuit held that an otherwise facially insufficient warrant might be rehabilitated by testimony at a suppression hearing relating to unrecorded, sworn oral statements allegedly before the magistrate at the time of warrant issuance. In *Leeper* a United States Secret Service agent was alleged to have given such unrecorded oral statements, as well as an affidavit, to the United States Commissioner who issued the warrant.[12] The court related that the agent had spent approximately one and a half hours with the commissioner before the warrant was issued, and that when the commissioner was asked upon what grounds he issued the warrant, he responded that he did so upon, *inter alia*, the unrecorded sworn statements of the agent, together with conversations the commissioner had with the agent. The court rejected the four corners doctrine, opting instead for a more "flexible" approach which would avoid *interpretation* of the affidavit in a "hypertechnical manner." The court emphasized that the commissioner had attempted to fulfill his obligations as a detached and neutral magistrate by extensively interrogating the federal agent and that the fact that he failed to record all of the facts he elicited from the agent during the course of his determined inquiry should not invalidate the warrant. It seems that the thrust of *Leeper* and every other case which has fully considered and rejected the four corners rule is that such a requirement is not expressly provided for by the Constitution. These cases hold that in the context of creating rules of criminal procedure the states should be given broad discretion to create approaches which, although differing, nevertheless comport with the basic premise underlying the fourth amendment—suppression of arbitrary and capricious governmental intrusions into the privacy of individual citizens, and the

[11] 446 F.2d 281 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972).
[12] *Id.*

maintenance of a bulwark against the garnering of official power in the hands of the police.

As there exist a number of cases which reject the four corners doctrine,[13] so also does there exist precedent for the opposite view. *United States v. Anderson*[14] was a case where the United States Commissioner allegedly heard oral testimony at the warrant application but failed to incorporate it into the affidavit which a postal inspector had presented to him. The court held that all facts and circumstances relied upon for the issuance of a federal warrant must be found in the written affidavit so as to insure that the commissioner might make an independent judgment of probable cause, and so that the reviewing court might determine whether the fourth amendment requirements had been met without relying on faded and often confused memories. The court stated that the case illustrated the very great danger inherent in allowing a magistrate to base his determination of probable cause on unrecorded oral statements. The court pointed to an important contradiction in the testimony of the commissioner and the postal inspector as to whether an oath had been properly administered. The court also indicated that there had been adequate time to reduce the oral statements to writing.

[13] *Id. See, e.g.*, United States *ex rel.* Gaugler v. Brierley, 477 F.2d 516 (3d Cir. 1973); Boyer v. Arizona, 455 F.2d 804 (9th Cir. 1972); Radcliff v. Cardwell, 446 F.2d 1141 (6th Cir. 1971); United States v. Berkus, 428 F.2d 1148 (8th Cir. 1970); Naples v. Maxwell, 393 F.2d 615 (6th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); Dewitt v. United States, 383 F.2d 542 (5th Cir. 1967); United States *ex rel.* Schnitzler v. Follette, 379 F.2d 846 (2d Cir. 1967); Lopez v. United States, 370 F.2d 8 (5th Cir. 1966); Miller v. Sigler, 353 F.2d 424 (8th Cir. 1965), *cert. denied*, 384 U.S. 980 (1966); United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 1073 (2d Cir. 1971), *cert. denied*, 404 U.S. 849 (1971). *See also* United States v. Babich, 347 F. Supp. 157 (D. Nev. 1972), which held that where the affidavit on its face was merely ambiguous rather than insufficient, unrecorded oral testimony might be used as clarification. *Compare* Perial Amusement Corp. v. Morse, 482 F.2d 515 (2d Cir. 1973), a case decided after the 1972 amendment to Rule 41 of the Federal Rules of Criminal Procedure. Rule 41, both before and after the 1972 amendment, provided that a "warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant." FED. R. CRIM. P. 41(c). In the 1972 amendment the warrant issuing officer was specifically authorized to consider oral testimony; but the amended rule requires such testimony to be "taken down by a court recorder or recording equipment and made part of the affidavit." A number of presently existing federal statutes, however, authorize the issuance of search warrants while not requiring an affidavit or sworn document. *See, e.g.*, 7 U.S.C. § 150ff. (1976), authorizing the issuance of search warrants with respect to enforcement of the Plant Pest Act; 16 U.S.C. § 668b(a) (Supp. V 1975), authorizing search warrants with regard to federal statutory provisions designed to insure the protection of bald eagles; 16 U.S.C. § 852d (a) (1970), authorizing issuance of search warrants with regard to regulating interstate transportation of fish and game; 19 U.S.C. § 1595(a) (1970), concerning warrants to search for smuggled goods; 31 U.S.C. § 1105, search warrant issuance pertaining to transportation of monetary instruments in interstate or foreign commerce. The warrant procedure authorized by these statutes are not governed by Rule 41(c).

[14] 453 F.2d 174 (9th Cir. 1971).

Most pointedly, in *Glodowski v. State*,[15] the Wisconsin Supreme Court stated:

> It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant issued. Judicial action must be reviewed upon the record made at...the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. The record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all of these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court.[16]

Glodowski was cited by Mr. Justice Brennan in his dissent to the Supreme Court's denial of certiorari in *Christofferson v. Washington*, wherein the Justice urged that "the substantive right created by the requirement of probable cause is hardly afforded full sweep without an effective procedural means of assuring meaningful review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of the right."[17]

Thus, the cases presently stand divided, with substantial authority for the position that probable cause need not be recorded prior to warrant issuance within the four corners of the relevant affidavit, information, or other official document of record.

It would seem, then, that an inquiry into the historical background of the fourth amendment would be in order to determine if there is other evidence that might be brought to bear upon the conflicting policy arguments and statutory interpretation which constitute, in the main, most of the judicial dialogue on the issue.

[15] 196 Wis. 265, 220 N.W. 227 (1928).

[16] *Id.* at 271-72, 220 N.W. at 230.

[17] 393 U.S. 1090-91 (1969) (dissenting opinion); Justice Marshall joined in the dissent.

III. *The Fourth Amendment Warrant Requirement In Historical Context*

The Pre-Revolutionary War Anglo-American Experience

English Common Law Development

Although the antecedents of the fourth amendment may properly be traced to Biblical times,[18] the inquiry here will begin in England several centuries prior to the American Revolution. The legislative history of the English law of search and seizure can be traced to the regulation of customs in the fourteenth century.[19] A later development was the practice of granting a general search power to certain organized trades as an aid in enforcement of their many regulations. This practice probably originated during the reign of Henry III (1422-1461).[20] It was subsequently adopted by Parliament and the court of Star Chamber.[21] During the Elizabethan and Stuart periods oppressive laws relating to religion, printing, and seditious libel and treason were the subject of rigorous enforcement.[22] For example, in the mid-sixteenth century the Star Chamber granted agents of the Stationers' Company[23] authority to search any warehouse, shop, or any other place where they suspected a printing law violation existed; authority was granted to seize any books printed contrary to law and to bring any suspected offender before the courts.[24]

During the next century, the failure of these measures to suppress illicit printing activity resulted in even more oppressive Star Chamber decrees which increased penalties, provided for more strict censorship, and

[18] *See, e.g.*, N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 13-24 (Johns Hopkins Studies in Historical and Political Science, ser. 55, No. 2, 1937) [hereinafter cited as LASSON]; M.RADIN, ROMAN LAW, 475-76 (1927); 5 M.RODKINSON, THE BABYLONIAN TALMUD 158 (1918); W.DAVIES, CODES OF HAMMORABI AND MOSES (1915). Clearly, the constitutionally exalted position of privacy and integrity of the home and person ("a man's home is his castle") did not originate with the development of English law. An example of ancient solicitude of such interests is noted in Article 21 of the Code of Hammurabi which allows: "If a man makes a breach into a house, one shall kill him in front of the breach, and bury him in it." W. DAVIES, CODES OF HAMMURABI AND MOSES, 33 (1915). *See also* A. KOCOUREK & J. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 395 (1915).

[19] LASSON, *supra* note 18, at 23. *See* 9 Edw. III, St. II ch. 11, which provided that innkeepers in seaports were to search guests for counterfeit money smuggled into the country from abroad, one quarter the value of which would be a reward to the successful searcher.

[20] LASSON, *supra* note 18, at 23-24. *See* 11 Hen. VII, ch. 27; The Act 39 Eliz. I, ch. 13 (1597).

[21] LASSON, *supra* note 18, at 24.

[22] *Id.*

[23] *See* 6 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 362 (3d ed. 1926); W. RINGLE, SEARCH AND SEIZURES, ARRESTS AND CONFESSIONS, § 2, (1972); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20-21 (1966).

[24] LASSON, *supra* note 18 at 25.

similar unlimited powers of search and seizure.[25] Contemporaneously the Privy Council and its related Courts of Star Chamber and High Commission zealously sought to detect and punish seditious libel, nonconformism and like offenses. Professor Lasson, in his well-documented analysis of the period, notes that:

> No limitations seem to have been observed in giving messengers powers of search and arrest in ferreting out offenders and evidence. Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge.[26]

Writs of assistance, a permanent type of general search warrant used in the customs service developed from the similar practices of the Privy Council.[27] Escalating repression of what we now call "civil liberties" and attempts by the Crown to extract onerous customs duties resulted in growing public resentment and dissatisfaction.

In the 1640's this unrest led, at least in part, to an armed struggle between Charles I and Parliament which resulted ultimately in the execution of the King in 1649, and eventually parliamentary supremacy over the monarchy.[28]

The ascendency of Parliament, however, did not result in alleviation of the suppression of civil rights. On the contrary, the parliamentary regime continued in large measure the same practices which had brought public condemnation of monarchial rule.[29]

This was so in spite of contemporaneous development of English common law principles, largely ignored by Parliament, which indicate that the chief limitations on search and seizure embodied in the fourth amendment were already accepted by the English common law.[30] Thus, Chief

[25] *Id. See* E. ARBER, TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 807 (1894); J. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS 282-83 (1922). *See also* The Act 13 & 14 Car. 2, c. 33 (1662).

[26] LASSON, *supra* note 18, at 26.

[27] *Id.* at 28-29.

[28] After the execution of Charles I, England was ruled by Parliament presided over by Oliver Cromwell, designated "Lord Protector." The Stuarts' reign was restored in 1660 when Charles II assumed the throne. The revolution of 1688 confirmed the predominant position of Parliament.

[29] *See* LASSON, *supra* note 18, at 33. The licensing act for regulation of the press, enacted shortly after the Restoration, contained provisions for search and seizure just as broad as those granted by the decrees of Star Chamber, 13 and 14 Car. II, ch. 33 § 15.

[30] *See generally* 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN (1847) [hereinafter cited as HALE]; LASSON, *supra* note 18, at 35.

Justice Hale, in his authoritative seventeenth-century treatise on English criminal law,[31] held that a general arrest warrant which commanded the seizure of all persons suspected of committing a criminal act was void and could not be used in defense to a suit for false imprisonment.[32] A party seeking a warrant, Hale indicated, must be examined by the justice of the peace under oath to determine the nature of the accusation and whether the suspicions of the warrant seeker were reasonable.[33] The examination of the party demanding the arrest warrant was to be recorded in writing.[34] The warrant also was required to specify by name or description the particular person to be arrested. Thus, Hale suggests that it was good form for the justice to record information underlying issuance of an *arrest* warrant.[35] Hale does not indicate whether a similar recording was required by English

[31] For a critical examination of Hale's work, *see* HOLDSWORTH, *supra* note 23, at 574-95.

[32] 1 HALE, *supra* note 30, at 580; 2 HALE at 112, 150.

[33] *Id.*, 2 HALE, *supra* note 30, at 110.

[34] *Id. But see* John Wilkes Case, 19 Howell's St. Tr. 981 (1763). John Wilkes, a member of Parliament and a noted critic of the King's government, was arrested pursuant to a general warrant which directed agents of the Secretary of State to search for and arrest the authors of a "treasonous and seditious" newspaper called *The North Briton.* The warrant also authorized the search for and seizure of personal papers of such persons. Notwithstanding Hale's statement that it was good practice to take down in writing the evidence supporting warrant issuance, Chief Justice Pratt (later Lord Camden) rejected Wilkes' claim on habeas corpus that such a written statement of the evidence was essential to the warrant's validity. Wilkes was discharged on another ground.

[35] Support for Hale's position is found in a short-lived statute of Charles II which provided in pertinent part: "Whereas by the ancient and fundamental laws of this realm, in case where any person is...arrested by any writ,...issuing out of any of his majesty's courts...the true cause of action ought to be set forth and particularly expressed in such writ ...whereby the defendant may have certain knowledge of the cause of the suit, and the officer who shall execute such writ ...may know how to take security for the appearance of the defendant to the same, and the sureties for such appearances may rightly understand for what cause they become engaged; (2) and whereas there is a great complaint among the people of this realm, that for divers years now last post very many of his majesty's good subjects have been arrested upon general writs of trespass...not expressing any particular or certain course of action,...31 Charles Sat. II, Chap. II, 8 Stat. at Large 27 (1661)."

The early common law rule recognized an exception to the arrest warrant requirement; a peace officer could arrest without a warrant for a felony or misdemeanor committed in his presence, as well as for a felony not committed in his presence, if he had reasonable grounds for making the arrest. Warrantless felony arrests have recently been sanctioned by the Supreme Court in United States v. Watson, 423 U.S. 411 (1976). *See also* ALI, A MODEL CODE OF PRE-ARRAIGNMENT PRECEDURE 289, 303 (1975), which supports this view. *But see* dissenting opinion of Mr. Justice Marshall in *Watson,* which notes that only a few crimes were considered serious enough to be called felonies. *Id.* As Hale suggests, to make an arrest for most crimes at common law, the police officer was required to obtain a warrant unless the crime was committed in his presence. To the extent that the *Watson* Court suggests that warrantless arrests were the general English common law rule, it is simply historically wrong. In any case, *Watson* does not and cannot reasonably suggest a similar rule for search warrants. *See* concurring opinion of Mr. Justice Powell. *Id.* at 427-32.

search warrant procedure. It is clear, however, that the issuance of search warrants to recover stolen goods at the instance of the victim of theft required the warrant seeker to testify under oath before the justice that a felony had been committed; that he could "show the cause of his suspicion"; that the goods were in a place certain,[36] and he was required to relate to the justice the facts underlying his suspicions.[37] It has been said that it was the general practice of English magistrates to take affidavits of charges so they might retain proof of the justification they had for issuing the warrant.[38]

If either an arrest or a search warrant were found later to be unlawfully obtained or executed (for example, the warrant issued without probable cause), the person who sought and obtained the warrant, or the justice of the peace who issued it might be held civilly liable and required to pay damages to the person aggrieved.[39]

Notwithstanding the thoughtful exhortations of distinguished English commentators and jurists to place restrictions on the indiscriminate use of search and arrest warrants, the use of general warrants was not uncommon and was often sustained by the courts in the one hundred and fifty years preceding the American Revolution.[40] The impact of the development of common law safeguards against oppressive search and seizure was also perhaps muted by the practical operation of the English magisterial system:

[36] 2 HALE, *supra* note 30, at 113. It should be mentioned that Hale disavows Lord Coke's earlier rejection of the argument that a justice of the peace should be permitted to issue search or arrest warrants on mere suspicion. Coke had stated: "That justices of the peace have no power upon a pure surmise to break open any man's house to search for a felon or stolen goods either in the day or night." The use of carefully circumscribed search warrants, argued Hale, had become acceptable and necessary elements of criminal procedure. *See also* 4 E. COKE, INSTITUTE OF THE LAWS OF ENGLAND 176-77 (1671); and comment of the editor, HALE, *id.* at 110: "Yet inasmuch as justices of peace claim this power rather by connivance than by express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as the liberty of the party, a justice of the peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the using, but also of the party grieved if he grant any such warrant groundlessly and maliciously, without such a probable cause, as might induce a candid and impartial man to suspect the party to be guilty. Coke and Hale seem to disapprove of such warrants granted only upon suspicion, and the old books seem generally to disallow all arrests for the suspicion of felony...except the very person who hath the suspicion...."

[37] *Id.* It is "convenient," Hale added, that the warrant should state that search be made in the daytime, that no doors be broken open and that the goods not be delivered to the complainant unless and until a court order issues. *Id.* at 113-15, 149-51.

[38] Welsh v. Scott, 27 N.C. 57, 60, 5 Ired. 72, 76 (1844).

[39] 2 HALE, *supra* note 30, at 110 n.2, 116 n.19, 150 n.5; 1 HALE, *supra*, note 30 at 577-82. In some situations the officer who executed the warrant could be liable. *See also* 2 J. CHITTY, THE PRACTICE OF LAW 156 (1835); 3 VINERS, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 530 (16—).

[40] *See generally* the comments of Lord Camden in Entick v. Carrington, 19 Howell's St. Tr. 1029 (1765).

> They [Justices of the Peace] raised the hue and cry, chased criminals, searched houses, took prisoners. A Justice of the Peace might issue the warrant for arrest, conduct the search himself, effect the capture, examine the accused, and summon witnesses, extract a confession by cajoling as friend and bullying as magistrate, commit him, and finally give damning evidence on trial.[41]

The political struggle between King and Parliament during the seventeenth and eighteenth centuries and the concomitant imperfections of the day-to-day operations of the minor judiciary militated against the effectiveness of procedural safeguards which might otherwise have substantially deterred warrant abuses. In spite of this it does seem evident that the rationale of English common law development of search and seizure restraints was, in theory at least, very similar to the notions underlying the fourth amendment. English judges were generally of the view that placing unbridled power to search and seize in the hands of the government was antithetical to the maintenance of the rather unique (for their time) freedoms that English subjects had come to enjoy. Thus it was that Chief Justice Hale suggested a number of devices to limit the power to search and seize, including a four corners-like recording requirement in the instance of arrest warrant issuance.[42] While such admonitions may have had little impact on the magisterial practices of the day, it is evident that such considerations were extant long before the formulation of the fourth amendment.

Colonial Resentment and the Writs of Assistance

It was not until the first waves of unrest in the American colonies were felt on English shores that British courts took search and seizure practices firmly in rein. Ironically, as American resentment of general warrants increased to a crescendo of revolutionary fervor, the English themselves were in the process of abandoning the use of the general warrant.

Entick v. Carrington,[43] decided in 1765, was a trespass action involving a general search warrant which directed that agents of the Secretary of State search for and seize certain personal papers of the plaintiff John Entick. The search and seizure was premised on the general assertion that Entick had authored a paper which was allegedly libelous to the King and his

[41] J. POLLACK, THE POPISH PLOT 267 (1903). *See also* LASSON, *supra* note 18, at 36 n.86; J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (1883).

[42] HALE, *supra* note 30, and accompanying text. As to some felonies, however, a general statement in the warrant noting the nature of the offense was held to be sufficient.

[43] 19 Howell's St. Tr. 1029 (1765). *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886). *Entick* has been called a landmark of English liberty, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 381 (1974).

government. In upholding Entick's claim, Lord Camden rejected the Crown's assertion that there had been ample precedent for the use of the general warrant since the days of Star Chamber, and that the right to issue such warrants had not been challenged:

> But still it is insisted, that there has been a general submission, and no action brought to try the right. I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute.[44]

The court analogized *Entick*, which involved a warrant to search for evidence of libel, to cases regarding search warrants issued for the recovery of stolen goods.[45] The former was a criminal proceeding prosecuted by the government, while the latter was generally a private action by an aggrieved citizen who sought to recover his own property. The court emphasized that the issuance of search warrants for stolen goods "crept into the law by imperceptible practice" and that Lord Coke had denied its legality altogether.[46]

Accepting *arguendo* the legality of search warrants for stolen goods, the court emphasized that the law placed rigorous safeguards on their use:

> There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.[47]

No similar safeguards attached to the procedure advocated by the defendants for issuance of warrants to search for evidence.

In holding that general warrants to search for evidence of libel were illegal, Lord Camden noted: "[I]f this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a

[44] 19 Howell's St. Tr. 1029, 1068 (1765).

[45] *Id.* at 1066-68. The Court noted that a primary difference between the two was that "[I]n the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal." *Id.* at 1066.

[46] *Id.* at 1067. *See also* 4 COKE, INSTITUTES OF THE LAW OF ENGLAND 176 (1671).

[47] 19 Howell's St. Tr. 1067 (1765).

messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person...."[48]

This disfavor of general warrants in the mother country, and developing restraints on search and seizure activity, however, did not extend to England's treatment of its American cousins who were treated as less than first-class citizens of the realm.

The Massachusetts Bay Province was the situs of the first serious friction between England and her American colonies. That controversy, which concerned the writ of assistance[49] form of general search warrant used by British customs officials,[50] has been identified as "the first in the chain of events which led directly and irresistibly to revolution and independence."[51]

Most of the important events concerning the writs of assistance took place in the Massachusetts Bay Province. Until the middle of the eighteenth century, the practice of American customs officers in Massachusetts and many other colonies had been to enter buildings forcibly by the mere authority of their commissions.[52] This practice went unopposed in the colonies for a long period: "Indeed, from 1748 to 1756, the Massachusetts legislature itself had provided that collectors of provincial duties...had the right to search wherever their suspicion directed for wines and spirits upon which the local duty had not been paid."[53]

[48] *Id.* at 1063. *See also* Wilkes v. Wood, 98 Eng. Rep. 489 (1763); Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763), which dealt with the controversy surrounding John Wilkes' struggle against the ministers and policies of George III. In the latter case, Chief Justice Pratt, later Lord Camden, held a general warrant to be illegal, stating that "[T]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition." In *Huckle* and later cases arising from the Crown's illegal search and seizure of Wilkes' home and papers, juries returned verdicts including exemplary damages totaling 100,000 pounds (an incredible sum for that time), reflecting the jurors' outrage at the general warrant procedures. *See* LASSON, *supra* note 18, at 43-47. *See generally* 2 T. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 245-52 (1864).

[49] These writs received their name from the fact that they commanded all English subjects to assist in their execution. This assistance (which was not the objectionable aspect of the writ) only required that one see that customs officers were not hindered in the performance of their duties; no assistance in unloading cargos or the like was required. Noncompliance with the writ constituted a contempt of court. *See* LASSON, *supra* note 18, at 53-54.

[50] Hart, *American History Leaflets*, No. 33, Introduction, *quoted in* LASSON, *supra note* 18, at 51. *See* QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF THE PROVINCE OF MASSACHUSETTS BAY, 1761-1772, at 395-540 (App. I, Horace Gray's notes) (1865) [hereinafter cited as QUINCY], for an extensive contemporary account of the history of the writs of assistance in the colonies; LASSON, *supra* note 18, at 51-78, and citations contained therein.

[51] *See, e.g.*, LASSON, *supra* note 18, at 51-78; 2 WORKS OF JOHN ADAMS 523-24 (1850); T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 364 (6th ed. 1890).

[52] LASSON, *supra* note 18, at 56.

[53] *Id.* at 66.

English customs duties and attendant powers of search and seizure had not been vigorously enforced in America until the outset of the Seven Years War with France, an event which necessitated strict enforcement of English trade laws in the British colonies. The effect of such enforcement was felt on American trade with the French West Indies and other areas. This trade, which had for so long been virtually ignored by London and had become a mainstay of the New England colonies' economy, almost overnight became a heinous offense—smuggling enemy goods. From 1760 until the outbreak of the American Revolution a decade and a half later, the English used the writs of assistance in an effort to curtail wartime smuggling and as a tool in enforcing revenue-raising importation duties.[54]

Reflections On the Import of Early English Warrant Procedures

From the above discussion of the early Anglo-American search and seizure experience, certain conclusions may be drawn. It seems clear that there is no direct historical evidence that a four corners requirement was accepted procedure in seventeenth and eighteenth-century England. This is not surprising for, as noted above, English history during that period is in large part an account of the constant conflict between and among king, Parliament, courts, and citizens over the rights and roles of each in a society evolving uncertainly from the repressions of centuries of absolute monarchy. We do know from Blackstone and Hale that four corners requirements were represented to be the best practice in issuance of warrants of arrest or jail commitment.[55] The purpose of making a record of the grounds for warrant issuance was that a record was essential for effective habeas corpus review.[56] The early commentators indicate that an oath and probable cause for issuance of a search warrant to recover stolen goods was required, but there is no mention of a recording requirement similar to that which attached to arrest and jail commitment procedure. There are several plausible reasons for this disparity of treatment.

[54] *See id.*, at 51-78; QUINCY, *supra* note 50; Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA AT THE AMERICAN REVOLUTION 40-75 (R. Morris ed. 1939). Colonial attorneys attacked the writs of assistance on various grounds, including failure to indicate with specificity the place to be searched. *Paxton's Case*, QUINCY, *supra* note 50, at 51. It also appears that American judges in most of the colonies refused in large measure to issue writs of assistance or general warrants. QUINCY, *supra* note 50 app. I, at 500.

[55] See text accompanying notes 30-38, *supra*.

[56] *Id. See also* Bushell's Case, 6 Howell's St. Tr. 999, 1002 (1670). It was the duty of magistrates at common law and later by statute to cause their clerks to write down the verbatim material testimony of witnesses in any proceeding where jail commitment might follow. CHITTY, *supra* note 39, at 189. *See also* Stat. of 3 Geo. 4. c. 23 (1822); M. BACON, A NEW ABRIDGEMENT OF THE LAW (Gwyllim ed. 1856); Tracey v. Williams, 4 Conn. 107 (1821).

There seemed to have been no practical necessity for a recording of probable cause in the search warrant context. There would be no judicial review of the magistrates' action similar to habeas corpus review. There was no notion of nor legal basis for the procedure that we today call a "suppression hearing." As a matter of fact the warrant for recovery of stolen goods was primarily a remedy utilized by private citizens rather than by government prosecutors. The remedy for erroneously obtaining a search warrant for recovery of stolen goods was an action in trespass. As noted above, the right to recover in a trespass action was established rather simply: the person seeking the warrant accompanied the officer to the alleged situs of the stolen goods and pointed them out. If the search failed to locate the stolen items, a cause of action would accrue to the person whose premises were searched, and the official conducting the search would likely testify on behalf of the plaintiff. In brief, there was no reason to make a record of the cause upon which the search warrant issued.

As to the issuance of general warrants and writs of assistance, the government was bound by almost no procedural restraints similar to those pertaining to warrants to search for stolen goods, until the time of *Entick v. Carrington.*

It is evident that the procedures utilized by English common law courts to restrain the arbitrary exercises of official power met with mixed success at best. Moreover, although the Supreme Court of the United States has recently suggested that the early English procedures governing issuance of warrants for recovery of stolen goods, and warrants of arrest and commitment were regarded by the Framers of the Bill of Rights as a model for reasonable searches and seizures under the fourth amendment, it can hardly be argued that the Framers regarded English common law procedures as a bulwark against government repression. The various provisions of the Bill of Rights stand as poignant testimony to the failure of the English common law to effectively restrain the power of government. It was precisely because of this failure that the Bill of Rights was conceived and adopted as an essential corollary to the Constitution of the United States. While some aspects of the Bill of Rights may indeed have been derived from the precepts or practices of the English common law, it cannot reasonably be argued that such procedures were intended to mark the outer limits of the protection afforded by the first ten amendments.

Formulation and Ratification of the Fourth Amendment

That the roots of the American Revolution are deeply imbedded in colonial resentment of the enforcement of British trade regulations needs

no documentation.[57] Thus it was that the abuses of the writs of assistance and general warrants were fresh in the minds of the men upon whom devolved the task of creating a new nation—a nation which would, in the words of the Declaration of Independence, "provide new Guards for their future security."[58]

Colonial leaders wasted no time in providing a legal foundation upon which to base the protection of individual rights which had been trammeled by the government of George III. Starting in 1776 with the Virginia Declaration of Rights, every former colony in America (with the exception of New Jersey) adopted some provision relating to search and seizure in their various state declarations or bills of rights.[59] None of those documents, however, incorporated an explicit four corners requirement.

Seven state formulations closely approximated the language and emphasis of the fourth amendment, which was drafted almost fifteen years later.[60] During this fifteen-year hiatus, which culminated in the adoption of the Bill of Rights, state courts also displayed considerable sensitivity to warrant abuses.[61]

During the period when the relationships between the former colonies were governed by the Articles of Confederation, the national government was weak and was perceived by most to pose little threat to individual liberty. When the clamor for a more effective central government resulted in the summoning of the Constitutional Convention in Philadelphia in 1787,

[57] The Molasses Act, Stamp Act, Townshend Acts, and Boston Tea Party are an integral part of the American experience so ingrained in generations of grammar school students as to have become synonymous with the Revolution itself. *See* T. HALIBURTON, RULE AND MISRULE OF THE ENGLISH IN AMERICA (1851).

[58] In relating his youthful exposure to James Otis' famous denunciation of general warrants (1762), John Adams emphasizes the import of the general warrant issue in the development of revolutionary sentiment: "I do say in the most solemn manner, that Mr. Otis' oration against the Writs of Assistance breathed into this nation the breath of Life. [Otis] was a flame of fire. Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance....Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free." C. ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 247-48, 276 (1858) [hereinafter cited as ADAMS].

[59] LASSON, *supra* note 18, at 80. Article X of the Virginia Bill of Rights provided: "That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not be granted."

[60] LASSON, *supra* note 18, at 79-81. *See also* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 42 (1955); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41-42 (1969).

[61] *See, e.g.*, Frisbie v. Butler, 1 Kirby 213 (Conn. 1787). In *Frisbie*, a case in trespass arising from an illegal search, one issue raised by the plaintiff but not decided was the validity of granting a warrant upon a mere oral complaint. *See also* 2 ADAMS, *supra* note 58, at 124.

many of the most able and eminent men in America met and drafted not a revision of the unsatisfactory Articles of Confederation, but rather a completely new system that included the creation of a strong central government which was granted extensive powers, the exercise of which could directly affect the lives and labors of the people.[62] In spite of the fact that governmental intrusion into the lives of citizens and infringement on fundamental liberties were major factors in the American colonies' break with Great Britain, astonishingly enough it was not until the waning moments of the Federal Constitutional Convention that the notion of a bill of rights was entertained by the delegates. The existing records of the proceedings of the Convention indicate that the question of a bill of rights was not considered until five days before adjournment and then only with regard to a collateral matter.[63]

George Mason and Elbridge Gerry led the belated move to have the Convention consider inclusion of a bill of rights as part of the seminal document. The Convention rather perfunctorily rejected this suggestion after only brief argument to the effect that the specific delegated power of the central government did not extend to regulation of such things as religion and the press, and that the bills of rights enacted by the states provided adequate safeguards.[64] This amazing inadvertence played into the hands of the opponents of the Constitution, who used it as a weapon in the acrimonious struggle over ratification which followed immediately on the heels of the adjournment of the Philadelphia conclave.[65]

Patrick Henry, the leader of the opposition in Virginia, used his gifted oratory to suggest the possible impact of the omission of a bill of

[62] LASSON, *supra* note 18, at 83.

[63] *Id.* at 83-86, *See* 33 JOURNALS OF THE CONTINENTAL CONGRESS 540-41 (Ford ed. 1904-37); 3 M. FARRAND RECORDS OF THE FEDERAL CONVENTION 128-29 1911).

[64] Only a month and a half after adjournment of the Federal Constitutional Convention, the Pennsylvania convention summoned to consider the proposed Constitution queried James Wilson, a leading advocate of the document at the federal convention, as to the reason for its omission of a bill of rights. Wilson responded: "The truth is sir, that this circumstance, which has occasioned so much clamor and debate, never struck the mind of any member...till, I believe, within three days of the dissolution of that body, and even then of so little account was the idea that it passed off in a short conversation without assuming a formal debate...." LASSON, *supra* note 18, at 86, *citing* J. MCMASTER & STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 251 (1888). *See also* MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 188 (1964).

[65] Both George Mason and Elbridge Gerry opposed ratification on the ground that the Constitution did not contain a bill of rights. The search and seizure issue was the first example used by both to show the necessity of such a reservation of rights in the people. Gerry, arguing against Massachusetts ratification, emphasized: "I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance...is not yet forgotten in Massachusetts." LASSON, *supra* note 18, at 89, *citing* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 689-90 (Scott ed. 1894).

rights, alluding to the potential abuses that federal sheriffs might commit while acting under minimal oversight of distant superiors:

> When these harpies are aided by excisemen, who may search, at any time, your house and most secret recesses, will the people bear it?...Where I thought there was a possibility of such mischiefs, I would grant such power with a niggardly hand; and here there is a strong possibility that these oppressions shall actually happen.[66]

The rising crescendo of opposition to ratification quickly brought forth a willingness to compromise on the part of the Constitution's advocates. They promised that a bill of rights would be added by amendment as soon as possible after ratification. After such assurances were made known, ratification quickly followed, as did subsequent adoption of the first ten amendments.[67]

The language of the fourth amendment was chosen from competing versions of bills and declarations of rights of the states. Some models forbade only general warrants, some proscribed both unreasonable searches and seizures as well as general warrants, and some "split the difference," so to speak.[68]

An examination of the literal terms of the fourth amendment does not, of course, reveal the precise scope of protection it was intended to provide. What is obvious on the face of the fourth amendment, however, has been confirmed by historians and legal scholars who have analyzed contemporary accounts of its drafting and adoption. It is clear that the second, or warrant clause of the amendment was intended to prohibit the use of general warrants and writs of assistance. The distaste of colonial Americans for these tools of English oppression is well documented. If the amendment had been directed exclusively to general warrant abuses of the English, it would have been unnecessary for the Framers to go beyond the warrant procedure (oath, probable cause, and particularity of description of persons, places, and things) set forth in its second clause.[69] The first clause of the amendment, however, assures the security of the people in their persons, houses, papers, and effects against unreasonable searches and seizures. The language of the first clause has led to the generally ac-

[66] LASSON, *supra* note 18, at 92, *citing* MCMASTER & STONE, *supra* note 64, at 58.

[67] *See generally* LASSON, *supra* note 18, at 88-105; E.: DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 458 (1964); C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 185 (1925); J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Holmes devise) 414 (1971); TAYLOR, *supra*, note 60, at 43.

[68] Amsterdam, *supra* note 43, at 399 n.465. *See also* LASSON, *supra* note 18, at 79-82.

[69] Amsterdam, *id.* at 399; LASSON, *id.* at 103; Taylor, *supra*, note 60, at 43.

cepted assumption that the protective sweep of the amendment is broader in scope than a mere prohibition of general warrants. Professor Lasson has stated that "[t]he general right of security from unreasonable search and seizure was given a sanction of its own [in the first clause] and thus intentionally given a broader scope."[70] Even Professor Telford Taylor, who has argued with much ardor that the Supreme Court has interpreted the fourth amendment too broadly, concedes that the first clause of the amendment was "[q]uite possibly...to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforseeable consequences."[71] It seems apparent that the first clause of the amendment extended its coverage beyond the then contemporary evils with which the Framers were acquainted.

As Professor Amsterdam has so aptly explained it:

> Growth is what statesmen expect of a constitution. Those who wrote and ratified the Bill of Rights had been through a revolution and knew that times change. They were embarked on a perilous course toward an uncertain future and had no comfortable assurance what lay ahead. To suppose they meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the sea seems to me implausible in the extreme....The revolutionary statesmen were plainly and deeply concerned with losing liberty. That is what the Bill of Rights is all about.[72]

This view does no more than recognize a construction of the amendment accepted by the Supreme Court for almost a century.[73] Such a recognition, however, does little to resolve the problem confronted in this discussion. Generalizations concerning the relative breadth or narrowness of the

[70] LASSON, *supra* note 18, at 103.

[71] TAYLOR, *supra* note 60, at 43.

[72] Amsterdam, *supra* note 43, at 399-400.

[73] *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886), where Justice Bradley, speaking for the Court, pushed the scope of the amendment to its farthest extreme, indicating that it expresses "the very essence of constitutional liberty and security....It is not the breaking of [a person's]...doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,..." *Id.* at 630. The fourth amendment is not the only provision of the Constitution which has been read broadly by the Court so as not to limit it only to those situations contemplated at the time of its adoption. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); Brown v. Board of Educ., 347 U.S. 483, 492 (1954) ("In approaching this problem we cannot turn the clock back to 1868 when the [fourteenth] Amendment was adopted...."). *See also* Missouri v. Holland, 252 U.S. 416, 433 (1920); *Ex parte* Wilson, 114 U.S. 417, 427 (1885).

fourth amendment's scope of application does not answer the question posed here: Is the four corners doctrine a concept necessarily of constitutional dimension?

It does, however, suggest that contrary to the holdings in several recent cases,[74] the absence of a literal reference to a four corners requirement is not a determinative answer to the question. While it may be quite reasonable to maintain that the Framers intended to regulate certain oppressive government practices of which they were fully cognizant, it is quite another thing to argue from their silence that they did not intend the amendment to reach other practices, the dangers of which were not apparent in 1790. The problem of official attempts to skirt the probable cause mandate for search warrant issuance in pre-Constitution times had rarely been an issue; even if such abuses of the canons of the common law had occurred, objections were raised so infrequently and involved so subtle a nuance that they could scarcely have received attention at a time when much more common and egregious governmental abuses were the subject of public controversy. The precise parameters of the words, "no warrants shall issue, but upon probable cause, supported by oath or affirmation" (or for that matter most constitutional language), were not self-evident in 1790 and are still evolving through the gradual metamorphosis of almost two centuries of judicial analysis and interpretation. The ability of our courts to interpret the Constitution would have been limited indeed if they had accepted the premise that constitutional interpretation must be confined to the document's literal language or to an eighteenth-century conceptual straitjacket. To accept such arguments would be to deny the very flexibility of construction that has allowed our constitutional system to confront and resolve a myriad of conflicts, the precise nature of which could not have been contemplated by the Framers.

Thus, in order to determine whether a four corners requirement should be considered of constitutional dimension, one should not look only to the literal language of the fourth amendment. Attention should also be focused upon the early judicial opinions which initially attempted to grapple with the intricacies of constitutional interpretation. The early cases, decided as they were by men who had experienced first-hand the repressions the Bill of Rights was designed to prevent, provide some insight into the intentions of those who drafted the fourth amendment.

[74] See text accompanying notes 9-12 *supra.*

[75] *See* Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

Initial Judicial Response to the Fourth Amendment Warrant Requirement

Following its inclusion in the Bill of Rights and until the Supreme Court made it applicable to the states via the due process clause of the fourteenth amendment,[75] the courts generally held that the fourth amendment was directed only to searches made under federal authority.[76] This does not mean that the states afforded no protection to the citizen from capricious searches and arrests by state law enforcement officials. On the contrary, state courts utilized state constitutional, statutory, and common law prohibitions to control governmental searches and seizures.

Some states had requirements concerning the drafting of the warrant that can be seen as attempts to insure that it was issued upon probable cause. The minimum requirement seems to have been that the warrant be signed by the issuing magistrate. A number of jurisdictions followed Blackstone's rule of hand and seal.[77] Other state courts required an oath be given by the person seeking the warrant, as well as clear identification of the person or things to be seized.[78] In *Frisbe v. Butler*,[79] the Connecticut Supreme Court limited searches to places named. Among the errors assigned in *Frisbe* but not reached by the court was the contention that the warrant was improperly issued upon mere verbal, rather than written, complaint. In similar fashion, the Massachusetts Supreme Judicial Court in *Sandford v. Nichols*[80] awarded damages for a trespass which had resulted from a search based on a nonspecific warrant; the court failed to reach the plaintiff's contention that the warrant was void for lack of a written copy of the complaint attached to it.

Thus, from the beginning American courts were concerned that the issuing magistrate have a sound factual basis before him upon which to gauge his issuance of a warrant. Moreover, *Frisbe* and *Sandford* are further evidence that a four corners doctrine has long been within the contemplation of courts and lawyers alike.

Two early federal cases decided by the Supreme Court of the United

[76] *See, e.g.*, Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); United States v. Crosby, 25 F. Cas. 701 (C.C.D.S.C. 1871) (No. 14,893); Reed v. Rice, 25 Ky. 44 (1829).

[77] 4 W. BLACKSTONE, COMMENTARIES, *290. *See* Tackett v. State, 11 Tenn. 312 (3 Yerger) 392 (1832), which represents an early adoption of this position. Some states quickly dispensed with this formality; however, *see, e.g.*, Burley v. Griffith, 35 Va. (8 Leigh) 442 (1836).

[78] Grumon v. Raymond & Betts, 1 Conn. 39, 6 Am. Dec. 200 (1814); Commonwealth v. Lottery Tickets, 5 Cush. 369 (Mass. 1850); Humes v. Tabe, 1 R.I. 464 (1850).

[79] 1 Kirby 213 (Conn. 1787).

[80] 13 Mass. 286 (1816).

States are also relevant to our inquiry.[81] In *Ex parte Burford*,[82] a warrant was issued by several justices of the peace of the District of Columbia, sitting en banc, for the arrest of one John Burford, who was charged with being "an evil-doer and disturber of the peace of the United States, so that murder, homicide, strifes, discords...amongst the citizens of the United States...are likely to arise thereby,..."[83] Burford was subsequently arrested and brought before the eleven justices of the peace of the District of Columbia, who required him to provide a surety in the sum of four thousand dollars (a tremendous sum at that time) for life to insure that he would keep the peace. When Burford failed to provide such a surety, the justices remanded him to jail until he could provide it.[84] Burford brought a petition for a writ of habeas corpus to the United States Circuit Court for the District of Columbia. The circuit court modified the warrant of commitment to the extent that it reduced the amount of the surety sought from the petitioner from four thousand to one thousand dollars, and put a one-year limit upon the period to which Burford would be subject to such security.[85] Judge Cranch, who was at that time both the Supreme Court reporter and Chief Judge of the Circuit Court of Columbia, dissented, insisting that the prisoner should be released because the warrant of arrest did not state within its four corners the nature of the testimony leading to its issuance: "It [the arrest warrant] ought to have stated the names of the persons on whose testimony it was granted, and the nature of the testimony, so that this court may know what kind of ill-frame it was, and whether the justices have exercised their discretion properly."[86]

Having lost in the circuit court, Burford brought another petition for a writ of habeas corpus to the Supreme Court of the United States.[87] In

[81] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

[82] 7 U.S. (3 Cranch) 448 (1806), *rev'g* 5 U.S. (1 Cranch) 276 (C.C.D.C. 1805). The issue does not appear in any reported opinions until United States v. Tureaud, 20 F. 621 (E.D. La.) (1884), where a federal district court in Louisiana required warrants to be based on affidavits which show probable cause. For an explanation of the absence of federal case law on the subject, see note 87, *infra*.

[83] *Id.* at 450-51.

[84] *Id.* at 449-50.

[85] 5 U.S. (1 Cranch) 276 (1805) *rev'd*, 7 U.S. (3 Cranch) 448 (1806).

[86] *Id.* at 278.

[87] In accepting jurisdiction of the case, Chief Justice Marshall noted that the right to seek habeas corpus relief is constitutionally mandated. Supreme Court jurisdiction was provided for in the Judiciary Act of 1789. Marshall emphasized, however, that its appellate jurisdiction (excepting habeas corpus) to review criminal cases is limited to that granted to it by act of Congress and such jurisdiction had not, at the time, been granted. The import of the failure of Congress to grant appellate jurisdiction in criminal cases is that it barred any review of search and seizure questions, and accounts in substantial measure for the complete absence of fourth amendment precedents until the late nineteenth century when such appellate criminal jurisdiction was finally granted.

reviewing the case, the Court focused its attention not on the warrant of arrest as Judge Cranch had done, but rather on the warrant of jail commitment because it found that the petitioner complained only of the impropriety of the latter.

Citing the fourth amendment admonition "that no warrants shall issue but upon probable cause, *supported by oath or affirmation*," Burford's counsel challenged the facial sufficiency of the warrant of commitment:

> That warrant states no offense. It does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him of their own knowledge or suspicion, or upon the oath of any person whomsoever.
>
> It does not allege that witnesses were examined in his presence, or any other matter whatever, which can be the ground of their order to find sureties.[88]

Burford's attorney also placed great emphasis on the necessity that the regularity of the issuing magistrate's action be reviewable in a habeas corpus proceeding by reference to a recording of the "cause certain":

> If the prisoner had broken jail, it would have been no escape, for the marshall is not answerable, unless a cause certain be contained *in the warrant* and the reason given by Blackstone, 1 Com. 137 why the warrant must state the cause of commitment is that it may be examined into upon habeas corpus.[89]

In upholding Burford's argument, which was based on the fourth amendment, Chief Justice Marshall related: "The judges of this court were unanimously of opinion, that the warrant of commitment was illegal, for want of stating *some good cause certain, supported by oath.*[90]

If the Constitution requires that the probable cause underlying a warrant of jail commitment be recorded by a magistrate, the conceptual distance from that procedure to the issuance of search warrants is not a great one. It is interesting to note that the fourth amendment does not explicitly refer to warrants of jail commitment. On the contrary, the second

[88] 7 U.S. (3 Cranch) 452 (1806).

[89] *Id.* (emphasis added).

[90] *Id.* at 453. Burford's primary argument had been "that the committment was illegal, both under the Constitution of Virginia, and that of the United States. It does not state *a cause certain, supported by oath*" (emphasis in original). *Id.* at 451. In upholding this claim Chief Justice Marshall merely paraphrased Burford's argument. There can therefore be no doubt that the Court's decision was founded upon the fourth amendment, although it does not explicitly so indicate.

clause of the amendment refers to the issuance of warrants which describe "the place to be searched and the persons or things to be seized"—clearly a reference only to search and arrest warrants—for there is no need for a warrant of jail commitment to mention places to be searched and persons or things to be seized. It would be reasonable to argue, then, that the basis for holding that a written record of the cause of jail commitment is required by the fourth amendment is found in the proscription of unreasonable searches or seizures contained in its first clause. If a warrant of jail commitment is constitutionally deficient because of the absence of a written record of its underlying probable cause, it seems only logical that a similar rule would attach to search and arrest warrant proceedings which were the principal and explicit practices toward which the fourth amendment was directed.

Less than one year after *Ex parte Burford* was decided, another petition for a writ of habeas corpus was lodged in the Supreme Court. In *Ex parte Bollman*,[91] the petitioners had been arrested on treason charges by military officials in New Orleans and transported to the District of Columbia where they were committed to jail after a hearing before the circuit court. Bollman claimed *inter alia* that his incarceration violated the fourth amendment because it was not based upon probable cause.[92] The case turned upon an analysis of affidavits which had been presented to the circuit court that purported to evince probable cause. After oral arguments which were held on seven different days over a nine-day period,[93] the Court found that there was insufficient evidence contained in the affidavits to support a charge of treason and thus discharged the petitioners. For our purposes, the most interesting aspect of *Ex parte Bollman* is its relation of the procedure followed by the circuit court in ordering the petitioners' commitment. The warrant of commitment stated that it was based on probable cause which was supported by the oath of five men. The oaths referred to in the warrant of commitment were written affidavits. Four of those affidavits were "sworn to in open court" at the commitment hearing.[94]

The affidavits were a part of the record of the circuit court; the full

[91] 8 U.S. (4 Cranch) 75 (1807). This was a case of some notoriety. It involved two men, Erick Bollman and Samuel Swartnout, who were accused of plotting with a former Vice President of the United States, Aaron Burr, to commit treasonous acts against the government of the United States.

[92] *Id.* at 110. Bollman's counsel argued that "the question...is whether these affidavits exhibit legal proof of probable cause."

[93] Given the extremely heavy caseload of today's Court, it seems incredible that in its earliest years petitioners could obtain such prompt (two weeks) and extensive review.

[94] 8 U.S. (4 Cranch) 75-76 (1807).

text of each is appended to the Supreme Court's opinion.[95] In reviewing the case on Bollman's habeas corpus petition, the Court inquired no further than an examination of these affidavits and found them insufficient to indicate that a crime had been committed.

We learn, then, from *Bollman* that as early as 1807 it was apparently accepted procedure for one seeking a warrant to make statements purporting to constitute probable cause under oath before a judge or magistrate; this testimony was transcribed and appended to the record in much the same way that it is done today. The procedure parallels that advocated by Blackstone as a necessary corollary to effective habeas corpus review.[96] In *Ex parte Burford*, Chief Justice Marshall had placed a constitutional imprimatur on the practice advocated by Blackstone, even though it was nowhere mentioned explicitly in the fourth amendment nor had it been widely accepted by English common law authorities.[97]

The early state and federal cases reveal a strong tendency in American courts to encourage procedural safeguards which protect fourth amendment interests, even though those safeguards were not explicitly required by the amendment. The four corners-like requirement applied by Chief Justice Marshall to warrants of jail commitment are indicative of this tendency. The fact that there is no indication that a similar four corners recording requirement was used with regard to issuance of search warrants should certainly not foreclose later adoption of such a constitutional rule when circumstances suggest a need for it. In fact, our entire history of fourth amendment jurisprudence is marked by the Court's preoccupation with devising reasonable procedures which, although not specifically mentioned in the amendment, vindicate the interests it seeks to protect.

For example, the primary, albeit imperfect, tool utilized by the Court to deter official disregard for fourth amendment rights is the exclusionary rule. It was fashioned out of whole cloth by the judiciary, which recognized that unless sanctions could be applied to encourage compliance with its mandate, the fourth amendment would pass on to the rhetorical graveyard where many meritorious precepts are interred. Unlike the exclusionary rule, the four corners requirement at least has substantial roots imbedded in early English and American habeas corpus practice.

[95] *Id.* at 455 (appendix A). One of the affidavits was sworn to before another judge at the time of the petitioner's arrest and was submitted to the circuit court in support of probable cause. The validity of the latter affidavit was challenged by the petitioners because it had not been sworn to before the committing judge.

[96] 1 W. BLACKSTONE, COMMENTARIES *137. *See also* Bushell's Case, 6 Howell's St. Tr. 999, 1002 (1670).

[97] 7 U.S. (3 Cranch) 453 (1806). In John Wilkes Case, 19 Howell's St. Tr. 981 (1763), the English Court specifically rejected the assertion that more than a statement of the type of crime alleged to have been committed should be recorded in writing.

Adoption of the four corners requirement as a rule of constitutional stature would clearly not be a departure from the well-established concepts underlying the evolution of fourth amendment doctrine.

The question narrows, then, to an examination of the arguments for and against the adoption of the four corners requirement as a constitutional rule in the context of present circumstances. If it is merely one of a number of ways to reach the same end, it would most likely be rejected as a rule of general application because of the well-settled policy of allowing states a large degree of latitude in formulating means to carry out constitutional directives. The discussion which follows focuses on a determination of this question.

IV. *Contemporary Criminal Procedure and the Four Corners Requirement*

Search Warrant Issuance—Current Practices

The most important aspect of current search warrant issuance practice that is relevant to the present inquiry is the ex parte nature of the proceeding: A police officer acting on information he has received appears before a justice of the peace, a judge, or a magistrate and under oath relates such information, often by affidavit, to the judicial official. The magistrate may or may not interrogate the police officer concerning this information;[98] if he is satisfied that probable cause exists, he will issue the warrant. Challenges based upon lack of probable cause in warrant issuance are usually reviewed in suppression hearings held anywhere from a month to more than a year after the warrant issues. As noted earlier, at the suppression hearing many courts allow the prosecution to supplement any written record of the magisterial proceeding with oral testimony elicited from the participants. Thus, a written record of warrant issuance may indicate on its face that the warrant was invalid because facts contained in the record do not show probable cause; however, when the written record is supplemented by additional facts given at the suppression hearing by police officers or magistrate the warrant's viability may be resurrected.

The primary argument in favor of a four corners requirement is that this procedure creates a fertile ground for abuse of the constitutional probable cause mandate. The potential for police misconduct is a fact rather than a fantasy. There would be no need for a Bill of Rights if government officials always respected the fundamental rights of citizens;

[98] Whether this is done depends upon the prevailing state law or rules of procedure and upon the circumstances of the case.

the fourth amendment is merely a confirmation of the existence of the age-old problem of abuse of power by law enforcers. Judge Irving Youngman, a former federal prosecutor, has well stated what anyone involved in the criminal justice system is well aware of:

> Every lawyer who practices in the criminal courts knows that police perjury is common place. The reason is not hard to find. Policemen see themselves as fighting a two front war—against criminals in the streets and against "liberal" rules of law in court. All's fair in this war, including the use of perjury to subvert "liberal" rules of law that might free those who "ought" to be jailed.[99]

Intentional subversion of the probable cause requirement through perjury at suppression hearings is not the only problem with regard to the ex parte procedures used when search warrants are issued. Because of the passage of months between warrant issuance and suppression hearing, the memories of the parties may fail and blurred recollections may not recognize the distinctions between a number of unrelated proceedings in which magistrate and police officer may have taken part.[100] If an otherwise invalid search warrant is resuscitated by a police officer's suppression testimony, the fact that he has innocently given erroneous information because of a cloudy memory does not mitigate the constitutional violation. The Supreme Court has often confirmed that only those facts actually before the magistrate can be considered in determining whether the probable cause requirement is fulfilled.[101]

[99] *The Perjury Routine*, THE NATION (May 8, 1967), at 596-97. *See also* P. CHEVIGNY, POLICE POWER c. 11 (1969); Chevigny, *Police Abuses in Connection with the Law of Search and Seizure*, 5 CRIM. L. BULL. 3 (1969); Grano, *A Dilemma for Defense Counsel: Spinelli Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405; Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. L.Q. 1; Comment, 60 GEO. L.J. 507 (1971).

[100] *See, e.g.*, Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78, 85 (1973), wherein Justice Pomeroy dissented from the majority's rejection of a four corners rule. In so doing, he pertinently observed that: "The record in the present case illustrates the hazards inherent in relying on the memories of those present at the time a warrant issued.... [A]ppellant's suppression hearing was held more than four months after the challenged search. At that hearing, as the majority opinion states, 'Detective Barbush was initially unable to recall giving any oral testimony whatsoever. The magistrate, while acknowledging the existence of the sworn oral testimony, admitted that his memory was dimmed by the fact that the proceeding was some time ago.' It is not surprising that the recollections of these witnesses were clouded. During a four month period a policeman normally makes numerous search warrant requests to a magistrate who must, in every case, make an independent review of the sworn facts presented to him and determine whether they constitute probable cause. To expect officer and magistrate to recall with accuracy at some time later what transpired on each occasion is to place an impossible burden on the individual officials and an onerous burden on the efficient administration of justice."

[101] "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964) (emphasis in original).

The hazards of ex parte proceedings are obvious and substantial. The cure for such procedural ills is not, however, an adversary proceeding. Warrant issuance is ex parte for a good reason: an adversary encounter would be completely inappropriate because the element of surprise is crucial to the success of a police search.

While ex parte search warrant issuance is necessary, it would seem that its inherent dangers can easily be ameliorated. The requirement that the facts giving rise to a probable cause determination be recorded in writing at the time of warrant issuance merely expands the scope of the written record demanded by the fourth amendment. While there is no compromise of the ex parte issuance proceeding, the practical import of a four corners rule would closely resemble the prophylactic effect of explicit constitutional requirements that the warrant contain a written description of the place to be searched and the things to be seized.

There may, however, be very sincere concern that placing a greater burden on the police officer who must obtain a warrant may have a counterproductive effect. The American Law Institute, in its Model Code of Pre-Arraignment Procedure, articulates this concern:

> Formulation of a model statute on the issuance of search warrants is rendered difficult by the pressure of an inherent and basically insoluble inconsistency between improvement of the warrant as a safeguard against abuse, and the encouragement of its use, in preference to warrantless searches, on all possible occasions. Almost every effort to "tighten" the warrant procedure, and give meaning to the "neutral magistrate's" scrutiny of the application, is bound to make it more difficult and time-consuming for the police officer to get a warrant, and stimulate his resort to a warrantless basis for the search.[102]

Having weighed the countervailing considerations, the Institute nevertheless adopts a four corner requirement, emphasizing that "its desirability for purposes of informed and effective post-search review is apparent."[103]

Another argument against a four corners rule has been that it is merely another instance of the type of hypertechnical restriction that some attempt to place on search warrants. These restrictions, so the theory goes, distort the true purpose of the fourth amendment by placing unreasonable constraints on procedures which of necessity must retain some modicum of

[102] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975), Commentary on Art. 220, at 508.

[103] *Id.* Commentary, § 220.1., at 11.

flexibility if law enforcement is to keep pace with lawbreakers.[104] The short answer to this suggestion is that while hypertechnicality in reviewing search warrants may rightfully be condemned, a four corners rule seeks only to provide a clear record of what transpired when the warrant issued, a factor which should prove to be a boon to a reviewing court when called upon to decide if there was a proper basis for warrant issuance.

Moreover, while the Supreme Court has displayed considerable concern that the "criminal justice system is already overburdened by the volume of cases and the complexities of our system," and that "the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice,"[105] it seems quite clear that a four corners requirement would serve to improve rather than exacerbate this situation. The slight inconvenience that a magistrate's writing or tape recording of probable cause might provoke would be more than offset by its positive effect. If all of the facts purporting to constitute probable cause are recorded and no other supplementary evidence may be used, a defense attorney would know to a reasonable certainty whether a motion to suppress should be made.

This would contrast greatly with the practice in jurisdictions which allow supplementary evidence to be given at suppression hearings. In those states diligent defense counsel will move to suppress if on the face of the written record of warrant issuance it is arguable that probable cause was lacking. If, however, all of the facts had been required to be recorded it might be evident that probable cause existed, thus making it clear that to contest the point would be an exercise in futility.

V. *Conclusion*

Requiring as a constitutional rule that probable cause be found within the four corners of the record of a search warrant issuance proceeding creates no significant problem for the administration of criminal procedure. Allowing later supplementation of the record serves only to promote abuse, on the one hand, and challenges to warrant validity on the

[104] *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965). Said the Court: "[T]he Fourth Amendment commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from from submitting their evidence to a judicial officer before acting," *Id.* at 108. *See also* United States v. Harris, 403 U.S. 573 (1971).

[105] Gerstein v. Pugh, 420 U.S. 103, 122 n.23 (1975).

other. While generally it may be advisable to allow states great latitude in devising criminal procedures to meet constitutional mandates, the four corners rule is the only way to effectively curtail the potential for abuse inherent in ex parte search warrant issuance proceedings. Moreover, the four corners requirement has significant practical advantages over the supplementation rule in that it tends to discourage suppression hearing challenges.

As Justice Pomeroy of the Supreme Court of Pennsylvania has cogently argued:

> In a different but analogous context the United States Supreme Court has pertinently observed: "the consequences of failure...to record the [juvenile court] proceedings,... may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to events that transpired in the hearings before him." To require a magistrate to reconstruct his grounds for determining probable cause from what must often be a cloudy memory is equally "unseemly," and...both the suppression court and the appellate court are saddled with the burden of attempting to reconstruct a record.[106]

The supplementation rule, as reasonable as it may seem at first blush, is subject to the very astute warning given by Mr. Justice Sutherland fifty years ago:

> The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.[107]

Allowing the prosecution to supplement the record of a search warrant issuance proceeding is a method which runs counter to the interests the fourth amendment was intended to protect.

[106] Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78, 86 (1973), *quoting from In re* Gault, 387 U.S. 1, 58 (1967). *See also*, Commission *ex rel.* West v. Rundle, 428 Pa. 102, 105-106, 237 A.2d 196, 197-98 (1968); Comment, *Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 181 (1969-70). The practical problems of application of the four corners requirement may be hypothesized but their resolution will best be achieved in the light of concrete circumstances. Some of the questions which may arise concern whether a record made wholly by tape-recording, either in the presence of the magistrate or by telephone is permissible; *see* Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691 (1973-74); the extent to which the record may diverge from a verbatim account; the degree to which a magistrate may be conclusory in transcribing his account of what transpired in his office; and the permissibility of eliciting testimony at the suppression hearing which tends to explore rather than supplement the record. *See* People v. Christian, 27 Cal. App. 3d 554, 103 Cal. Rptr. 740 (1972).

[107] Byars v. United States, 273 U.S. 28, 33-34 (1927).