I Swear: The History and Implications of the Fourth Amendment’s “Oath or affirmation” Requirement

David S Muraskin
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By David Muraskin
Abstract

This article seeks to reinvigorate the Fourth Amendment’s “Oath or affirmation” requirement. Fourth Amendment scholarship and jurisprudence typically dismiss the requirement as a mere procedural formality. However, reviewing pre-Revolution law and commentaries, early legal developments in the States, and the American justice manuals—treatises published by legal scholars to inform and influence judges and practitioners within the new nation—this article argues that the oath requirement is key to understanding and effectuating the Amendment’s purpose. The article demonstrates that the Amendment was partly motivated by a fear of how the Crown used its search and seizure power, as a primary investigatory tool rather than as a means to confirm established suspicions. At the same time, the Framers’ religious worldview led them to believe that oaths provided a unique assurance of accuracy, as an oath unsupported in fact would lead to unbearable social and spiritual consequences. Accordingly, the oath requirement was inserted to ensure investigators would only seek a warrant once they had conducted a thorough investigation, allowing them to satisfy the oath’s demands. Preliminary investigations could no longer solely be means to an end, to obtain warrants, but also had to be ends unto themselves, since only a careful and considered preliminary investigation could protect the warrant seeker from giving a false oath. This article argues that such a normative understanding of the Amendment can co-exist with more established interpretations of the Amendment, which conclude that it was an effort to strip power away from the Executive and place it in the hands of the Judiciary. Yet, the article also emphasizes that adopting this new view of the Amendment would require a wholesale reversal of recent Fourth Amendment jurisprudence. Since our society is no longer dominated by the Framers’ spiritual worldview, courts would have to expand existing legal structures that motivate more conscientious preliminary investigations, namely the warrant requirement, exclusionary rule, and the availability of § 1983 actions.
“[N]o warrant 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 This is the central clause of the Fourth Amendment. Innumerable Supreme Court decisions, legal histories, and even linguistic analyses have interpreted these twenty-nine words. However, none emphasize, and most barely even pause to consider, the demand that probable cause be “supported by Oath or affirmation.”

This article seeks to revitalize the “Oath or affirmation” requirement. It suggests that the Fourth Amendment intends judges to act not only as independent arbiters, weighing the evidence brought before them against a standard of probable cause or reasonableness, but also as unwavering administrators of the oath, assuring that warrant seekers swear to the truth of their complaints. Because the Framers believed no one was willing to suffer the spiritual and social consequences for a false oath, the oath requirement was intended as an incentive. It was viewed as inducing investigators to take special care during their pre-search or -seizure inquires, leading them to obtain factual confirmation and refuse to rely on insinuations, so that they could submit a warrant application to which God himself could attest to its accuracy. Because the judiciary could be relied upon to consistently administer the oath requirement, the knowledge that the oath was part of the warrant-seeking process would overshadow the actions of repeat players, and thus it would lead them to develop internal regulations to satisfy the oath’s demands.

In this manner, the oath requirement was designed to make investigators adopt the norm of probable cause as a guide for their pre-search or -seizure inquires. It did not simply ensure that investigators would produce the minimal showings necessary to persuade the judiciary they had satisfied the Fourth Amendment’s demands, as the probable cause and reasonableness

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¹ U.S. CONST. amend. IV.
requirements have been interpreted as mandating.\(^2\) Nor were the qualities of a truthful oath so clearly delineated that it required investigators to perform a specific set of steps or procedures. Rather, because taking the oath forced investigators to accept that inaccuracy would cause them to be subject to eternal, personal, and devastating consequences, it was meant to reorient the attitude with which they approached their pre-search or -seizure investigations. When constructed with the oath in mind, a preliminary investigation could not be a means to an end—to produce evidence to convince the judiciary that the investigator was not the proverbial “bad man” and thus deserved the right to search or seize.\(^3\) Rather, the investigation had to become an end unto itself—to establish that the all-knowing would agree that the warrant was only sought because there was probable cause, and therefore swearing in his name was appropriate.

That the oath requirement would be seen as having such a transformative effect should come as no surprise. The belief that a false oath would irrevocably damage the oath taker, and thus one would only swear if one was certain of the accuracy of one’s statements, has been an operating premise throughout the development of the Anglo-American legal system. As described by legal historian James Whitman, the oath gained prominence in the Middle Ages as an alternative to the ordeal because a successful oath was seen as comparable proof of one’s truthfulness. Ordeals of “hot iron, cold water, hot water, and trial by combat”\(^4\) were used to “force God to make the decision” whether or not to convict the accused.\(^5\) Litigants were made to do battle, suffer the burns of a “boiling cauldron” or hot poker, or risk drowning in icy waters

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\(^2\) See Locke v. United States, 11 U.S. (7 Cranch) 339, 342 (1813) (one of the first Fourth Amendment cases, stating “[p]robable cause is prima facie evidence” presented to a court (emphasis removed)); see also Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (holding that probable cause is reached when the court can make a “commonsense” determination, in which it balances concerns of “veracity,” “reliability,” and “basis of knowledge” as to whether the standard of “probabilities” is met by the “totality-of-the-circumstances”).

\(^3\) See Justice Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at is as a bad man, who cares only for the material consequences which such knowledge enables him to predict. . . .”).


\(^5\) Id. at 17.
based upon the legal system’s and society’s belief that if they returned from these ordeals “relatively unscathed” then God had sanctified their assertions and their claims or defenses could be trusted.\(^6\)

However, the ordeal could be made unnecessary if the defendant in a criminal case or one of the litigants in a civil case was willing to swear the purgative oath. By swearing the oath both the legal system and society believed that one, at that moment, “confront[ed] God.”\(^7\) One was literally requesting that God serve as one’s witness and attest to the accuracy of one’s statement. Thus, the fact that a litigant remained standing or uninjured following his or her statements under oath “was a dispositive declaration of innocence.”\(^8\) God would not endorse a false statement; therefore lying under oath would have led one to be smote instantaneously. The belief that God’s revenge would directly follow from all lies under oath was so great in fact that litigants were willing to accept the risks of trial by battle rather than “face the temptation to perjure themselves.”\(^9\) The oath thus substituted for the ordeal in that the willingness to swear and the uneventful consequences were not only an indication that one believed one’s statements and actions were correct and legal, but also that God had certified that one spoke the verifiable truth.\(^10\)

By the 1700s, individuals became less resistant to taking the oath and it became a tool to establish the particular facts of a case.\(^11\) God acted not only as the jury, declaring the victor in legal contests, but also as a “rational method of proof,” determining significant details offered by

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\(^6\) Id. at 60.

\(^7\) Id. at 62 (Whitman notes that the oath was not available to all. One had to be of a certain status to swear, so that society believed one’s soul was valuable enough that one would not risk its damnation simply to escape a finding of guilt.).

\(^8\) Id.

\(^9\) Id. at 78 (also noting that Charlemagne declared that “[i]t is better that [the accused] should fight with clubs on the field of battle, rather than that they should commit perjury”).

\(^10\) See id. at 80 (stating that the point of the ordeal was to determine the “truthfulness, of the veracity of the parties”) (emphasis in original).

\(^11\) See id.
witnesses.\textsuperscript{12} Nonetheless, according to Helen Silving, the consequence for a false oath was still understood to be “divine retribution.”\textsuperscript{13} As one legal commentator put it, the aim of the oath was to call “the attention of man to God; not to call on Him to punish the wrong-doer; but on man to remember that He will.”\textsuperscript{14} Thus, even though the superstitions of the Middle Ages might have waned, as the populous no longer feared that a liar would be directly smote, the incentivizing effect of the oath was secure. The ritual of the oath was transformed from a direct threat of harm for lying to a reminder that God’s retribution for falsehood was, at some point, certain to follow. Consequently, as with the oath given in Middle Ages, before swearing one had to be sure that one’s statements were not only likely, but provable to the all-knowing.

Lest there be any doubt that witnesses understood and acted upon this incentivizing effect, George Fisher demonstrates that the oath’s spiritual consequences, and thus its resulting demands on the oath taker, were accepted by lay people throughout the eighteenth century. For instance, while juries of ordinary citizens were allowed to judge whether or not to rely upon unsworn statements, they were believed to assume the truth of all sworn declarations.\textsuperscript{15} Moreover, legal commentators noted that oaths provided an extra assurance of accuracy because exposed liars would suffer social consequences for having violated the community’s “common Principles of Honesty and Humanity,” not only for sinfully invoking the lord’s name in vain, but also for their falsehood.\textsuperscript{16} Average citizens expected sworn witnesses to be sure of their claims

\textsuperscript{12} Helen Silving, The Oath: I, 68 YALE L.J. 1329, 1366 (1959).
\textsuperscript{13} Id.; see also George Fisher, The Jury’s Rise as Lie Detector, 107 YALE L.J. 575, 607 (1997) (“As a sixteenth-century court reasoned, ‘[T]he law intends the oath of every man to be true; and therefore…there was not any punishment for any false oath of any witness at the common law.’”’) (alterations in original).
\textsuperscript{14} Silving, supra note 12, at 1371 (quoting 1 GREENLEAF, EVIDENCE § 364a (16th ed. 1899)) (describing this quote as representative of English society’s understanding of the oath after the society stopped believing in the oath’s “magical powers,” e.g. after the society no longer saw the oath as a direct counterpart to the ordeal).
\textsuperscript{15} See Fisher, supra note 13, at 614.
\textsuperscript{16} See id. at 625 (quoting JEFFRY GILBERT, THE LAW OF EVIDENCE 142-43 (1756)).
before they spoke under oath and consequently even the irreligious were incentivized to be certain their statements were based in fact.

The affirmation came to be accepted alongside the oath to allow Quakers, whose religion will not allow them to swear, to be able to testify in the same manner as others. For these individuals, the penalty for a false statement made following an affirmation was understood to be of the same “essential theology” as the oath; they would suffer “divine retribution.” Only because the affirmation created similar spiritual and social consequences for error and therefore the same incentives for the affirmand, could it be thought to carry the same weight as the oath. True, at times, the declaration that one had made an “affirmation” was derogatory. Fisher recounts how in one mid-1600s trial, the prosecutor told the jury that they could not find for the defendant as he had testified by “bare affirmation,” as compared to the government’s witnesses who testified under oath. Yet, given the Amendment’s treatment of the oath and affirmation as interchangeable, it seems unlikely that it intended to allow warrant seekers to avoid the potency of the oath by giving a meaningless affirmation. Typically, when the word affirmation was used in a formal legal sense, it referred to the type of spiritually significant affirmations used by conscientious objectors to the oath. This interpretation would also be consistent with the context within which the Amendment was written and ratified, seeking the approval of the Quakers of Pennsylvania.

However, for inexplicable reasons, Fourth Amendment jurisprudence and literature ignore this rich and suggestive history behind the oath requirement. Instead these works see the

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17 See id. at 657.
18 Id. at 621.
19 See BLACK’S LAW DICTIONARY 64 (8th ed. 2004).
20 As will be discussed at greater length, infra, the legislative history of the Amendment is almost nonexistent. Thus, it is difficult to discern exactly what the Framers intended with each word or phrase. The best one can do is use the historical context and legal interpretations of the era to hazard a guess at the Amendment’s meaning.
Amendment as establishing baseline evidentiary requirements of probable cause and reasonableness. “Oath or affirmation” is treated not as extraneous text, but as a procedural formality to be satisfied but of no consequence.

Indeed, according to the Supreme Court, the Amendment creates standards by which the judiciary should review a search or seizure, but is in no way aimed at reforming the warrant applicant. In *Boyd v. United States*, its first major search or seizure decision, the Court explained that “to ascertain the nature of the proceedings intended by the [F]ourth [A]mendment . . . it is only necessary to recall the contemporary or then recent history.”21 That history, according to the Court, amounts to a fear of general warrants, which allowed executive officials “in their discretion, to search suspected places for smuggled goods.”22 In response, Englishmen and colonists brought cases objecting to the invasions of privacy and the colonial era courts acted as bulwarks against these abusive law enforcement techniques of the Crown. “Every American statesman . . . considered [this] as the true and ultimate expression of constitutional law.”23 Thus, the Court declared, the Amendment established a standard for the “reasonable and ‘unreasonable’ character of such seizures,” which American courts could administer.24 Through enforcing this standard they, too, could prevent unnecessary invasions of privacy. The only time “Oath or affirmation” was mentioned in *Boyd*, beyond direct citations to the Amendment’s text or other laws, was in a selection from the formative British search or seizure case *Wilkes v. Wood*. In that quotation, that court lists the oath only as one of a series of cumbersome and ultimately irrelevant steps that must be fulfilled during a seizure, e.g. the accuser of the crime for

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21 116 U.S. 616, 624-25 (1886).
22 Id. at 625.
23 Id. at 626.
24 Id. at 630.
which the warrant was issued must swear an oath, attend the warrant’s execution, and then
identify the individual or items listed in the warrant.\textsuperscript{25}

Consistent with Boyd’s interpretation, in \textit{Johnson v. United States}, one of the first cases
to establish a warrant requirement and thus provide the warrant clause its central role in the
Fourth Amendment, the Court stated, “a search without a [judicially granted and reviewed] warr
would reduce the Amendment to a nullity and leave the people’s homes secure only in
the discretion of police officers.”\textsuperscript{26} Oaths or affirmations were mentioned only once in this case,
in a citation to the Fourth Amendment itself.\textsuperscript{27} The understanding of the Amendment as
declaring judicial supremacy over search or seizure determinations was solidified. The intended
effect of the warrant process on the warrant seeker was of no moment.

The Court’s interpretation is entirely consistent with the accepted historical analysis of
the Amendment.\textsuperscript{28} As put by constitutional law scholar Jacob Landynski, legal historians
typically believe that “the ‘underlying vision’ of the [A]mendment[] [is to] ‘place[] the
magistrate as a buffer between the police and the citizenry so as to prevent the police from acting
as judges in their own cause.’”\textsuperscript{29} Specifically, historians too see general warrants as creating the
momentum behind the Amendment. According to Leonard Levy, such warrants were
emblematic of the tyranny of the centralized executive that the colonists desired to overthrow.\textsuperscript{30}

\textsuperscript{25} Id. at 629.
\textsuperscript{26} 333 U.S. 10, 14 (1948).
\textsuperscript{27} Id. at 13.
\textsuperscript{28} In fact, in \textit{Payton v. New York}, 445 U.S. 573, 584 n 21 (1980), the Court cites some of the most prominent
histories on the Fourth Amendment to support its original interpretation from Boyd, writing: “\textit{See also J. Landynski, Search and Seizure and the Supreme Court 19-48} (1966); \textit{N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution} 13-78 (1937); \textit{T. Taylor, Two Studies in Constitutional Interpretation} 19-44 (1969).”
\textsuperscript{29} Tracey Maclin, \textit{The Central Meaning of the Fourth Amendment}, 35 \textit{Wm. & Mary L. Rev.} 197, 213-14 (1994)
(quoting \textit{Lawrence H. Tribe, American Constitutional Law} 537 (2d ed. 1988) and Jacob W. Landynski, \textit{In Search of Justice Black’s Fourth Amendment}, 45 \textit{Fordham L. Rev.} 453, 462 (1976)).
\textsuperscript{30} \textit{Leonard W. Levy, Original Intent and the Framers’ Constitution} 230 (1988) (discussing \textit{Huckle v. Money}, a \textit{Wilkes} case described \textit{infra}, in which Court of King’s Bench’s Chief Justice Charles Pratt declared that the
Moreover, others note, the warrant served as a warning that the executive would employ whatever powers it possessed.\(^{31}\) Therefore, to create a more free society, the colonists determined that they needed to create external controls on the executive’s search and seizure powers. At the same time, Nelson B. Lasson, whose work has “been the pre-eminent history of the Fourth Amendment for more than half a century,”\(^ {32}\) describes that the colonists found comfort in the judiciary’s oversight of searches and seizures. Through a series of cases, including *Wilkes* and its sister case *Money v. Leach*, the colonists learned that “[t]he magistrate ought to judge; and should give certain directions to the officer.”\(^ {33}\) Accordingly, as put by David Steinberg, the Amendment was crafted to “effectively restrain law enforcement officers” through the courts.\(^ {34}\) The Amendment intends to prevent officers from relying on their own “arbitrary discretion” to search or seize and force them to act only after judges evaluate the merit of their evidence and determine whether such an action is warranted.\(^ {35}\) It is not understood as subjecting pre-search or -seizure investigations to any regulation whatsoever nor as using any authority

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\(^{34}\) David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 243 (2005). Steinberg’s ultimate conclusion, however, is that the Amendment was not intended to apply to many of the circumstances that it now affects, as the Framers had a narrower conception of what types of governmental actions would fall under the Amendment’s demands. *Id.* at 265 n 205.

\(^{35}\) Levy, *supra* note 30, at 234 (quoting Virginia judges in their refusal to issue the “writs of assistance,” general warrants, required by the Townshend Act, as representative of the sentiments of the time.); see also Lasson, *supra* note 31, at 103 (Lasson analyzes the text of the Amendment as: “The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequence to the issue of warrants without probable cause, etc.”).
besides judicial review. Thus, the oath is read as nothing more than a procedural step towards the Amendment’s judicial end.

Even the most prominent textualist analysis of the Amendment finds no meaning in “Oath or affirmation.” According to constitutional law professor Akhil Amar, that the Amendment declares “no warrant shall issue” is an indication that the colonists intended to limit the use of warrants entirely. Building off the historical analysis of Telford Taylor, Amar emphasizes that at common law, all warrants were objectionable because they freed investigators who performed unnecessary searches or seizures from ex post tort damages for trespass, unlawful detention, or the like. A warrant was an ex ante judicial declaration that the search or seizure was reasonable and thus insulated investigators against this penalty. To avoid this immunity, the Amendment, through its reasonableness requirement, meant to “privilege the perspective of

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36 The reader should note that this literature recognizes the Court has carved out exceptions from the warrant requirement. However, each author starts from the premise that the warrant requirement is the Amendment’s core demand and thus interprets the Amendment based upon a view that its intended purpose is best understood by analyzing what the Framers thought the warrant requirement would accomplish. This article starts from a similar premise.


38 Id. (“Virtually any search or seizure by a federal officer would involve a physical trespass under common-law principles. An aggrieved target could use the common law to bring suit for damages against the official—just as Wiles brought a trespass action in Wood. If the search or seizure were deemed lawful in court, the defendant would prevail; but if, as in Wood, the search were found unlawful the defendant government official would be held strictly liable.). See generally Telford Taylor, Two Studies in Constitutional Interpretation 40-41 (1969).

Unlike Amar, Taylor does not see the availability of tort damages as central to the colonists’ objections to general warrants. He does note that the specific warrants the colonists ultimately embraced tended to be used to uncover stolen goods, as opposed to illegal imports, and thus were “subject to the restrictions and safeguards that the common law had thrown around the stolen goods warrants.” Id. The search warrants used to enforce tariffs and duties, by contrast, were statutory in origin. As described above, Amar reads this history as suggesting that the Amendment should be interpreted as only enforing common law remedies for unreasonable searches and seizures. See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 764-66, 789-91 (1994). In actuality, it appears that Taylor’s point is more subtle, that the Amendment was meant to recreate the rights and remedies associated with a distinct form of warrant, the warrant for stolen goods, and to prevent altogether the issuance of more “overreaching” warrants, those associated with tariffs. Taylor, supra, at 39-49. While an interesting thesis, it is hard to prove, as neither the academic literature nor the historical sources on the Fourth Amendment consistently divide warrants by the type of conduct they were meant to address, and thus Taylor himself abandons this theme within a few pages. See id. at 45.

39 Amar, supra note 37, at 69 (“A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages.”).
The Amendment’s aim was to establish a different form of external review on warrant seekers: *ex post* jury trials wielding the threat of damages, to ensure officials would only search or seize when it would be proven reasonable. Amar finds no meaning in the Amendment’s demands on the warrant seeker.

To argue that the oath requirement was seen as a key component of the Amendment, this article begins by revisiting the social and legal commentary on general warrants. There it finds that the colonists objected to the warrants not simply because they empowered the executive to search or seize at its discretion, but also because of when the executive was seen as exercising that authority. General warrants were emblematic of slipshod investigations, instruments used by investigators to act as if they had solid evidence linking a person or place to a crime, when in fact they only had hunches. The colonists determined that the executive’s willingness to conduct its investigations in this manner had to be stopped.

Recognizing, however, that investigators would need some ability to search or seize, activists in the colonies and Britain pointed to the specific warrant as an alternative. They explained that what separated the specific warrant from the general was not only that the specific warrant was subject to judicial review, but also that specific warrant applicants were required to swear an oath in support of their application. An oath, which, as the literature above describes, acted an incentive, inducing prophylactic care and accuracy. Reviews of sixteenth and seventeenth century British and colonial legislation and common law reveal a similar emphasis on the oath as a primary means to constrain warrants’ excessive use. These sources also indicate that the judiciary was not only viewed as an administrator of the oath, but also as an enforcer of its intended effects. Judicial review was praised for its ability to ensure that assertions made under oath were in fact true, and to impose worldly, monetary, costs for falsehood. American

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40 Amar, *supra* note 38, at 781.
justice manuals, documents written for judges and legal practitioners in the wake of the Amendment’s ratification, similarly emphasize this dual function of the judiciary, that it was an administrator and enforcer of the oath. In this manner, this article shows that the oath requirement was not only viewed as central to the Amendment’s purpose, but its function was to alter how investigators approached their duties. The judiciary was used to facilitate the oath because it would assure that intended effect took hold.

This article concludes by confronting how to apply this originalist analysis to modern society. It argues that as the oath and its threat of religious damnation have lost much of their meaning, the Supreme Court must look for other ways to achieve those same ends. The Court must reinvigorate the incentives for accuracy and thoroughness it has already recognized; it must overrule recent exceptions to the warrant requirement and exclusionary rule as well as increase the potential for success of constitutional tort actions. Only by unabashedly heightening the risk that an unjustified search or seizure will be uncovered, and the consequences for such an action, can the Court begin to emulate the original intent of the Fourth Amendment and its oath requirement.

A. General Warrants: The Threat of Ill-Considered Searches and Seizures

This article’s new understanding of the oath requirement stems from a reconsideration of the inciting events for the Fourth Amendment. As discussed above, the literature demonstrates that colonial era cases and commentaries on general warrants highlighted the tyranny of the executive and suggested to the colonists that the new nation needed to turn the power to authorize searches and seizures over to another body. However, authors such as Steinberg also

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41 See, e.g., LEVY, supra note 30, at 224 (Levy describes that under colonial law to search or seize, “[o]fficers or their informants merely reported that an infraction of the law had occurred or that they had a suspicion.” However, in the new nation, “[t]he Fourth Amendment would not emerge from colonial precedents; rather, it would repudiate
acknowledge that what set general warrants apart from specific ones was that general warrants “typically lacked sufficient evidentiary support.”\textsuperscript{42} Even more dramatically, Taylor indicates that the colonists did not object to general warrants themselves, but to the “unsupported nature of the search(es) [that occurred under the warrants], and the sweeping, indiscriminate scope of the seizure[s].”\textsuperscript{43} Both authors fail to elaborate on the importance of these findings, Steinberg reaching the traditional conclusion that through the Amendment the colonists intended to established judicial review of searches and seizures\textsuperscript{44} and Taylor offering an alternative historical analysis, that the Amendment was intended to prohibit certain types of warrants altogether, to prevent the executive from “overreaching.”\textsuperscript{45} Yet, a review of the same cases and commentaries reveals that the normative concern, that the search and seizure power would be used in lieu of an investigation, rather than follow from its findings, ran deep. It could not be quelled through the requirement that each warrant receive a judicial stamp of approval. Rather, the colonists wanted investigations to take on a different structure, that the search or seizure power would only be used following a thorough and thoughtful preliminary investigation. Judicial review could be one form of insurance against searches or seizures’ potential abuse, but the Amendment also had to provide other protections, those directed at altering the conduct of warrant seekers themselves.

To wit, Sir Edward Coke, a leading English legal commentator who “Americans regarded [\textsuperscript{46}] as the foremost authority on English law” and its proper implementation, wrote on the legal

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\item[\textsuperscript{42}] Steinberg, \textit{supra} note 34, at 243.
\item[\textsuperscript{43}] \textsc{Taylor}, \textit{supra} note 38, at 40.
\item[\textsuperscript{44}] Steinberg \textit{supra} note 34, at 244 (stating that “[u]nlike the minimal evidentiary showings required for a general warrant, the specific warrant required that law enforcement officers demonstrate ‘probable cause’ before a court would issue the warrant”).
\item[\textsuperscript{45}] \textsc{Taylor}, \textit{supra} note 38, at 39-40 (arguing that the Amendment was meant to recreate the rights and remedies associated with a specific form of warrant, the warrant for stolen goods, and prevent more “overreaching” warrants, those associated with tariffs).
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professions’ perception of and concerns with general warrants.\textsuperscript{46} He stated that general warrants should be illegal when they were invoked based upon the executive’s “mere surmise.”\textsuperscript{47} The right of the executive to order a search or seizure based upon its assessment of the facts was not illegal \textit{per se}. Only when executive officials sought to search or seize before fully obtaining and analyzing the evidence of a preliminary investigation did the Magna Carta outlaw the general warrant. This latter behavior, Coke stated, had to be stopped in order to secure the rights intended for all Englishmen.\textsuperscript{48}

A similar argument was advanced by a group of Pennsylvanians who were arrested under a general warrant a year after the Declaration of Independence. They wrote a manifesto declaring general warrants “subversive” to citizens’ rights, not only because of the “latitude given to the messengers who were to execute” them, but also because the warrants could be served without “substan[tive]” evidence supporting their charge.\textsuperscript{49} Thus, the Pennsylvanians argued that the states not only needed to circumscribe executive officers’ discretion to search or seize, but also alter when they would seek to exercise that discretion, ensuring that investigators only acted upon persuasive evidence.

As discussed above, the colonists’ views were also shaped by a number of cases disputing the Crown’s right to search or seize using general warrants. The best known, and possibly most influential, of these cases were the \textit{Wilkes} cases, a series of suits against the state stemming from the general warrant at issue in \textit{Wilkes v. Wood}. They “filled the columns of

\textsuperscript{46} \textit{LEVY, supra} note 30, at 223; \textit{see also LASSON, supra} note 31, at 21 (stating that “the veneration with which Coke’s learning was viewed secured the acceptance of his opinions as to exactly what was meant by more or less uncertain provisions” of the Magna Carta).

\textsuperscript{47} \textit{LEVY, supra} note 30, at 223 (describing \textit{4 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND} 176-177 (1644)).

\textsuperscript{48} \textit{See id.} (describing \textit{COKE, supra} note 47, at 176-177).

\textsuperscript{49} \textit{VICE PRESIDENT OF THE COUNCIL OF PA., AN ADDRESS TO THE INHABITANTS OF PENNSYLVANIA BY THOSE FREEMEN OF THE CITY OF PHILADELPHIA WHO ARE NOW CONFINED IN THE MASON’S LODGE BY VIRTUE OF A GENERAL WARRANT} 30 (1777).
American newspapers from Boston to Charleston.” 50 These cases held against general warrants for many of the same reasons Coke and the Pennsylvanians argued they were illegal; searches and seizures needed to follow from, not be a component of, a thorough investigation.

Specifically, in 1763, Wilkes v. Wood declared a search conducted under a general warrant illegal because the warrant allowed its bearers to search when “no offenders names are specified in the warrant . . . [and] wherever their suspicions may chance to fall.” 51 Similarly, in Money v. Leach, the Court of King’s Bench, the “highest common law court in England presided over by the reigning monarch,” 52 ruled for the plaintiff, against the legality of the general warrant because the warrant did not describe in “particular” terms who it authorized officials to search. 53 In Huckle v. Money, the same court yet again ruled against the legality of the search under the Wilkes warrant. While the ultimate verdict was left to the jury, the court’s charge declared, “to enter a man’s house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition, a law under which no Englishman would wish to live.” 54 That court also allowed the jury to impose tort damages against the officials who conducted the search, in recognition of the fact that the warrant did not entitle the officers to enter that specific home and with the hope of deterring similar conduct in the future. 55

Accordingly, the Wilkes cases, which informed the perspective on searches and seizures held by most literate citizens of the colonies, stated that the search or seizure power was properly used only after investigators had systematically narrowed their efforts to an identifiable

50 LEVY, supra note 30, at 230.  
51 Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 253, 254 (Neil H. Cogan ed., 1997). The court’s statement was technically only a charge to the jury and the jury declared the ultimate verdict. However, the court informed the jury how the law was to be interpreted and the jury was limited to finding whether or not those facts were proven. Id.  
52 BLACK’S LAW DICTIONARY 886 (8th ed. 2004).  
54 LEVY, supra note 30, at 230 (emphasis added).  
55 Id.
individual or place. The investigators’ ability to name a suspect in their warrant application to the court was presented as a proxy for a thorough pre-search or -seizure inquiry. Nonetheless, it was the executive’s preliminary investigatory method that was the ultimate concern. The officials’ underlying “inquisitional” attitude, that they should be permitted to use searches and seizures as a means to confirm their untested “suspicions,” made general warrants untenable. What is more, the cases suggested that the proper means to prevent such abuse is to use the legal system to incentivize officials to be more deliberative.

This is not to imply that the existing historical analyses are misleading. Wilkes decried the “discretionary power given to [the Crown’s] messengers,” indicating that discretion might be better left to another body. In fact, that court stated, the Crown’s existing authority “affect[s] the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.” Directly supporting the traditional historical interpretation of the Fourth Amendment, Leach stated: “It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officers. This is so, upon reason and convenience.” Therefore, the colonists would have been aware of the security the courts could provide through imposing their own judgment of when searches and seizures should occur.

Nevertheless, the concerns raised about when and why officials sought to search or seize suggest that the protections the Amendment created were more complex than replacing one governmental body’s judgment with that of another. Mandating judicial review of the warrant application recognizes the protective role the judiciary played in the colonies and ensures that searches or seizure cannot not go forward without a modicum of evidence. Yet, it also has some

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57 Id.
58 Money v. Leach, supra note 33, at 261.
negative effects on the warrant seeker. When judges act as adversarial gatekeepers, withholding authority until they complete an independent assessment of the evidence, the aim of the applicant becomes to produce the bare minimum showings necessary to satisfy judicial review. While providing one check against abuse, it encourages investigators to develop precisely the “means to an end” conception of the preliminary investigation that the colonists feared.

Instead, to create a mechanism by which to reorient investigators’ conduct, the Amendment must have combined judicial standards with other ways to incentivize new investigatory regulations and methods. Only if the strictures of the bureaucratic state were turned against the investigators, could the colonists feel assured that they would not continue to search or seize to substantiate their “mere surmise.” As only then would investigators be forced to adopt a new objective, rather than continuing to see themselves as engaged in a “competitive enterprise of ferreting out crime.”

B. The Oath As a Remedy for General Warrants’ Lack of Substance

The oath requirement appears to have been seen as the means to alter the executive’s investigatory methods, precisely because it induced new bureaucratic restrictions on officials’

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59 See Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 853-54 (1994) (Steiker states, “Police culture no doubt also plays a large role in creating incentives for perjury. The more the police see themselves as separate from the community—as an ‘us’ to be deployed against the ‘them’ of the policed population—the more the police may see perjury as an acceptable means to achieve the greater good.” She uses this point to argue that a strong warrant requirement, as opposed to Amar’s suggested reasonableness requirement, would help counteract the potential for abusive invasions of privacy stemming from this “police culture.” However, the point that the police would lie to most easily advance their ends also supports the principle that because judges are viewed as adversaries, the police see their role as attempting to evade judicial review to the greatest extent possible, rather than attempting to interpret judicial review’s requirements in the most robust manner possible.).

60 See, e.g., Daniel A. Mazmanian & David L. Morell, EPA: Coping with the New Political Economic Order, 21 ENVTL. L. 1477, 1479 (1991) (describing how “EPA’s usual actions seem[] driven by the organizational and bureaucratic imperatives of a command-and-control regulatory agency; its rules and requirements seemed largely” unresponsive to either its intended constituents or its own interests”); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 440-42 (1989) (describing how “process” can be used to control administrative agencies to make them conform their behaviors to those of political bodies).

61 Johnson, 333 U.S. at 14 (describing the outlook of “officers” that leads them “not [to] grasp[[]” “[t]he point of the Fourth Amendment,” resulting in the warrant requirement).
pre-search or -seizure actions. The same instigating cases and commentaries discussed above indicate that a primary distinction between oppressive general warrants and the colonists’ desired specific ones was the presence of the investigators’ oath as part of the warrant application. For instance, the *Petition of Lechmere*, a 1761 case from the colony of Massachusetts, depicted the oath as a central reason for and benefit of a specific warrant requirement. This case, which challenges the legality of a writ of assistance, a form of general warrant, is considered particularly formative for the Fourth Amendment.\(^\text{62}\) In *Boyd*, the Supreme Court called the arguments in this case “the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”\(^\text{63}\) James Otis, one of the leading advocates of the day, represented the defendant. Thus his statements were well publicized and influential.\(^\text{64}\) In addition, the proceedings were recorded by John Adams, who, beyond crafting the Declaration of Independence, was the draftsman of the Massachusetts State Constitution’s equivalent of the Fourth Amendment. It is generally agreed that James Madison sought to emulate Adams’ text in the Fourth Amendment.\(^\text{65}\)

During the trial, Otis, according to Adams’ notes, argued against general warrants by comparing them unfavorably to specific warrants. One of Otis’ central distinctions, which made specific warrants unique and legal, was the requirement that specific warrants be issued “upon oath made . . . by the person who asks [for the warrant], that he suspects such goods to be concealed in those very places he desires to search.”\(^\text{66}\) It was that “the complainant has

\(^{62}\) 116 U.S. at 625.

\(^{63}\) Id.

\(^{64}\) Id. (citing to Otis’ arguments as especially influential).

\(^{65}\) *LEVY*, supra note 30, at 244; see also *LASSON*, supra note 31, at 82. *But see AMAR*, supra note 37, at 66* (“The Boston writs of assistance case appears to have played very little role in the discussion leading up to the Fourth Amendment. Thus far, historians of the [A]mendment have uncovered only one reference to the writs of assistance.”).

before sworn he suspects his goods are concealed,” and what the taking of such an oath represented, which legitimized the specific warrants’ invasion of privacy and prevented it from becoming an “instrument of arbitrary power.” 67 Otis mentioned that another distinction between general and specific warrants was that “your Honours have no opportunity of judging” general warrants. 68 However, he did not suggest judicial review was relevant because it allowed judges to evaluate the evidence supporting the warrant seeker’s case, but rather because it enabled the court to review “the persons to whom this vast power is delegated.” 69 Otis was hoping to alert the court to the fact that a low class of people were allowed to search or seize under a general warrant; it was to prevent this violation of the class system that the court needed to “judge.” 70

According to Whitman, one of the most salient legal distinctions between the classes was the ability to swear an oath. People of low status were assumed to already have questionable characters and thus might be willing to further injure their souls in order to prove a fact to the court. Only those of the highest status were believed to be incentivized to speak the truth under oath, keeping their souls pure, and thus only they were able to swear. 71 With this understanding, it appears that Otis viewed judicial review as essential to assuring the legality of warrants because judges would not only administer the oath, but also ensure that the person taking it could be moved by its inducements.

Similarly, in Entick v. Carrington and Three Other King’s Messengers, a case building off the success of the Wilkes cases, 72 the Court of King’s Bench stated that warrants would only

67 Id. at 140, 141.
68 Id. at 143.
69 Id. at 143.
70 Id. at 142 (stating that under a general warrants “not only deputies, &c. but even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD IT OVER US”) (capitalization in original).
71 Whitman, supra note 4, at 62 (“Only persons of relatively high social standing and unimpeached reputation could clear themselves by oath. Like trial by battle, oath taking was fundamentally reserved to respectable, high-status persons.”).
72 LEVY, supra note 30, at 231.
be legal if “there [was] [] a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place.” Likewise, in a 1764 legal commentary from the American colonies, a writer using the *nom de plume* Father of Candor, declares that general warrants were “‘excruciating torture’” because they did not specify “persons, places and things” and were not “sworn under oath.” This book proved so popular that it went through seven editions.

*Frisbee v. Butler* demonstrates that the oath’s role in justifying the issuance of a warrant carried over into early United States search and seizure law. This 1787 case is one of the few search and seizure decisions from the States extant between independence and the passage of the Fourth Amendment. In it, the Connecticut Superior Court ruled against the legality of an arrest because it determined that warrants were illegal if the requesting individual only “aver[red]” to the possibility that the suspect was involved in a crime. The warrant seeker in this case had sworn an oath, but only asserted that he believed the suspect targeted by the warrant was connected to a theft, not that he had specific knowledge to support that surmise. By contrast, the court indicated that for a warrant to be issued the oath must contain a “direct charge” that the oath taker has reason to know that the subject of the warrant had committed or was associated with an illegal act. Thus, consistent with how Otis described the safeguards of specific warrants, these cases and commentaries also suggest that the key to a legal search or seizure was

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73 *Boyd*, 116 U.S. at 628 (quoting *Entick v. Carrington and Three of the King’s Messengers*, 19 How. St. Tr. 1029 (1765)).
74 *LEVY*, *supra* note 30, at 232.
75 *Id.*
77 *Id.* The court also noted that the case could have been decided on other grounds. The actual allegation was not of theft, the crime for which the warrant was issued, but “only of taking away of the plaintiff’s property,” which the court said could not have justified any sort of warrant in the first place. *Id.* The distinction between these two acts is unclear.
having the warrant seeker take an oath, swearing that he or she had gathered sufficient evidence supporting the need for the invasion of privacy.

Building off the understanding of oaths presented by Whitman, Silving, and Fisher, these documents demonstrate that the oath requirement was not only understood as important, but, as foreshadowed by the concerns raised around general warrants, was intended to induce investigators to approach the search or seizure in a different manner. The oath’s repeatedly declared centrality to protecting the right to privacy shows that it was not a mere formality.

Moreover, as discussed above, the function of the oath was to create significant social and spiritual consequences for falsehood. As *Entick* and *Frisbee* reveal, the oath justifying a warrant could not be circumvented by simply swearing to one’s general belief that another had committed a wrongdoing, but was only satisfied by swearing to a “full” or “direct” charge of a specific crime.78 Thus, if the Fourth Amendment’s warrant requirement is understood to be based upon the principles articulated in these cases, then its oath requirement should be seen as intended to induce investigators to use their pre-search or -seizure investigations to solidify their suspicions and cement their facts, to ensure that they would avoid the penalties for a false oath.

In addition, as shown by Otis’s argument in the *Petition of Lechmere*, a major function of the judiciary was to ensure that the oath was a consistent part of the warrant application process. Applying this intention to how the Fourth Amendment’s oath requirement was meant to operate, for those familiar with the warrant requirement’s demands, such as the executive, the incentivizing aspects of the oath were meant to direct their preliminary investigation procedures. Repeat players were to develop formal, bureaucratic, policies and regulations for how to proceed

78 See also Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 651-52 (1999) (describing how “a complainant [for a warrant] had to make [a] strong allegation[,]: for an arrest warrant, he had to swear to knowledge of a crime in fact and that he possessed probable cause of suspicion regarding the perpetrator’s identity; for a search warrant for stolen goods he had to swear that goods were stolen in fact and that he possessed probable cause of suspicion as to the location of the stolen property”).
with their investigations, forcing them to use the investigation as a means to confirm their theories, so they would never be faced with the potential to give a false oath.

Such procedural and attitudinal reform appears to be precisely how Adams understood the oath requirement to operate. In addition to his summary of the argument, cited above, Adams recorded minutes of the argument throughout the *Petition of Lechmere*. In his minutes, Adams notes only one passing reference by Otis concerning oaths. Yet, in his later prepared summary of the argument, Otis’ discussion of oaths and general warrants’ lack thereof becomes the framework that Adams uses to describe the plaintiff’s entire case. This suggests that Adams left the *Petition of Lechmere* with the belief that oaths were the pivotal protection provided by specific warrants, preventing the improper, hasty, use of the warrant authority that occurred under general warrants.

C. Oaths in Other British and Colonial Search and Seizure Law

In addition to being shaped by the immediate instigating events of the American Revolution, some literature and case law suggest that the Fourth Amendment was an attempt to codify the existing protections against excessive searches and seizures in British and colonial law, making them applicable to all investigations. For instance, Justice Story once declared that the Amendment was merely “an affirmation of a great constitutional doctrine of common law.” Accordingly, what follows is largely a review of documents from William Cuddihy’s unpublished dissertation, which is regarded as the most comprehensive collection of original research on the Fourth Amendment’s early legal and social background. These sources provide

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80 See Adams, *supra* note 66, at 139-44.
a sense of seventeenth and eighteenth century thinking on how best to limit the executive’s search and seizure power, preventing excessive invasions of privacy. The oath again emerges as a key constraint on this executive authority, again, because it was viewed as a means to change executive investigatory procedures.

For example, Cuddihy recounts how a 1760 London Magazine article argued against the rise of general warrants because the author of the article claimed warrants should “never [be] . . . granted without an information upon oath, that the person applying for it has reason to suspect that prohibited or unaccustomed goods are concealed in the house or place which [the requesting individual] desires a power to search.”83 To support the article’s assertion, its author pointed to the 1689 Excise Act, which conditioned a search warrant on the requesting official stating in an affidavit that he had “grounds of such knowledge or suspicion.”84 Cuddihy also notes that Parliament’s 1660 Fraud Act limited the issuance of warrants to circumstances where the warrant seeker would “swear an oath to the truth of his complaint.”85 In addition, a 1751 statute “against the clandestine retailing of excisable goods” only allowed for warrants “where such offence shall be sworn to be committed or in occupation of the person sworn to be guilty.”86 Thus, the article and surrounding sources indicate that the oath was both a feasible and recurring protection against excessive searches and seizures.

Of course, numerous other laws were passed providing for warrants. Some of these laws allowed for general warrants, certainly others failed to describe what sort of procedure they

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84 Id. at 554-57, 633 (quoting The History of the Last Session of Parliament, supra note 83, at 125-26).
85 Id. at 633.
86 Id. at 637.
demanded of warrant seekers, and likely others still provided for alternative procedures.

Moreover, Cuddihy suggests *The London Magazine* article exaggerated the import of the Excise Act. Cuddihy explains that in reality the Act was passed to extend the Crown’s existing authority to search stills using general warrants. Thus, it is best understood as an expansion of the general warrant power, not a limitation on the search or seizure power.\(^{87}\) However, Cuddihy also details that the Act became a prototypical example for advocates in favor of specific warrants. The Act’s demand that the investigator swear he had a basis to search the location named in the affidavit was characterized by these activists as an essential means to curtail excessive executive authority.\(^ {88}\) Therefore, regardless of the Act’s or article’s representative nature of the laws of the time, they indicate that requiring the warrant applicant to swear an oath in support of his or her accusation was seen as an important protection of early British and colonial search and seizure law.

Lest one think that the oath was solely a tool of elites, Cuddihy also recounts how his search of the records of the Town Council of Montrole, Scotland revealed that when the local magistrate was approached to issue a general warrant, he demanded that the officer “make an oath that he [s]uspected that some of the said [illegal] brandy was therein.”\(^ {89}\) While it is unclear what the court meant by “suspected,” as Whitman recounts, the oath was a testament to the “truthfulness” of one’s statements;\(^ {90}\) thus to give this oath, the officer would have likely needed reasonable confirmation that the clandestine goods were present where he claimed. Therefore, even where Parliament did not require it, common law judges turned to the oath as an assurance

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\(^{87}\) *Id.* at 554.

\(^{88}\) *See id.* at 555-56.

\(^{89}\) *Id.* at 550 (quoting *Proceeding of 11 Oct. 1729* (Montrose, Scotland), *in 6 MINUTE BOOK OF THE TOWN COUNCIL OF MONTROSE* (Town Council ed. 1710-33) (available in the unfoliated archives section, Angus District Library, County Buildings, Fofar, Bank Street, Brechin, Angus, Scotland, U.K.)).

\(^{90}\) WHITMAN, *supra* note 4, at 80 (emphasis in original).
that the search or seizure would not be a “breach of the privileges” of citizenship, such as the right to privacy.\textsuperscript{91}

Throughout the American colonies the oath was also used as a means to prevent excessive searches and seizures. The Massachusetts Excise Act of 1755-56, Desertion Act of 1758-59, and Poaching Act of 1763-64 each paralleled the language of the 1689 Excise Act, requiring the warrant seeker to “swear under oath that [he] knew of the probable illegality at the place alleged.”\textsuperscript{92} Similarly the Maryland Tobacco Act of 1751 stated, “information on oath facilitated specific warrants to search single locations.”\textsuperscript{93} In Virginia, a tariff law required a warrant only be issued in response to a complaint made “under oath.”\textsuperscript{94} Certainly, these laws are but some of the legislation passed in the colonial era. Other statutes allowed for general warrants and others still specified no particular method for a warrant seeker to obtain a warrant.\textsuperscript{95}

Nevertheless, the ruling and statutes quoted above indicate that under seventeenth and eighteenth century British and colonial search and seizure law the oath was viewed as a protection against general warrants and excessive invasions of privacy because it altered investigators’ pre-search or -seizure efforts. The oath was seen as a means to curtail unjustified searches and seizures because it demanded that the executive seek to search or seize only once an investigator was willing to swear he had “grounds” or the like. The Massachusetts and Maryland acts, with their requirements that the investigator swear to “knowledge” or “information,” can be read as making the oath’s incentive for thorough preliminary investigations even more explicit.

\textsuperscript{91} Cuddihy, \textit{supra} note 83, at 550 (statement of judge to “excise officers” in requesting the oath, quoting \textit{Proceeding of 11 Oct. 1729, supra} note 89).
\textsuperscript{92} \textit{Id.} at 687 & n 61 (emphasis added).
\textsuperscript{93} \textit{Id.} at 670 (emphasis added).
\textsuperscript{95} For example an excise act of 1723 allowed officers “to enter into all and every such place or places where they shall see suspect’ that taxable items were concealed. Cuddihy, \textit{supra} note 83, at 635 (quotations omitted). Other examples are too numerous to mention, but can be found throughout Cuddihy’s work.
One was required to attest to both the reasonableness of the accusation and a heightened level of understanding. Thus, under these statutes, one would only apply for a warrant once one was assured God would support both one’s claimed facts and personal level of awareness.

This is not to suggest British or colonial law viewed the oath as replacing judicial review. A number of acts demanded that the judiciary determine whether the evidence the warrant seeker produced was sufficient to justify a search. However, this does not diminish the indications that the oath was a means to reform executive investigatory practices. The incentivizing effects of the oath gain even more potency when judicial review creates an additional risk that one’s falsehood will be uncovered. Legal consequences for inaccuracy could then be added on top of social and spiritual ones, further pushing investigators to use their pre-search or -seizure investigations to solidify their accusations.

Indeed, some colonial era legal commentators suggested that one function of the judiciary was to add precisely this additional layer of incentive. At common law, if a search or seizure failed to produce evidence of a crime, indicating that there had been no basis upon which to search or seize, the courts subjected the investigator to tort damages. Consistent with the principles of modern tort law, legal thinkers of the time praised such remedies because they

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96 For instance, two acts passed in Massachusetts, one in 1646 and another in 1783, that stated a warrant should only issue if the complainant’s actions and evidence proved “satisfactory” to the court. Cuddihy, supra note 83, at 647, 1304. Similarly, a 1778 Pennsylvania statute forbade the search of any dwelling unless a judge first found due cause of suspicion.” Id. at 1315 (quotation omitted).

97 See Davies, supra note 78, at 652 (“Swearing out a search warrant was a serious undertaking because the complainant was accountable for the outcome of the search; if it did not produce the stolen property or contraband as alleged, the complainant was liable for trespass.”).

98 See, e.g., id: id. at 676 (describing how the Naval Office Law of 1682 “allowed any person whose goods or ships had been searched or seized on false information to sue the informant ‘by an action of cause,’ a form of trespass”); id. at 652 (stating that if no evidence was found in a search or seizure complainants could be sued for trespass); Wilson, supra note 81, at 165 (“When one turns to the case reports of the first three quarters of the nineteenth century, one finds that in cases alleging a wrongful search or seizure by a federal officer, traditional common-law forms of action associated with trespass were, indeed, without exception the modes of redress invoked.”).

99 See, e.g., Alexandra B. Klass & Elizabeth J. Wilson, Climate Change and Carbon Sequestration: Assessing a Liability Regime for Long-Term Storage of Carbon Dioxide, 58 EMORY L.J. 103, 155 (2008) (“It is important not to lose sight of the role tort and property law can continue to play, not only as the historic basis of regulation but
motivated investigators to develop procedures that would ensure more thorough and accurate preliminary investigations in the future. For instance, Oxenbridge Thatcher, one of Otis’ co-counsel in the Petition of Lechmere, declares in a published pamphlet, “it is a good law that all officers seizing goods seize at their peril, and if the goods they seize are not liable for forfeiture [e.g. illegal] they must pay the claimant his costs, and are liable to his action besides . . . [as this is a] proper check of exorbitant wanton power in the officer.” Otis himself stated that part of what made general warrants objectionable was that “no one can be called to account” for their errors, implying that judicially-enforced accountability would decrease these unsubstantiated invasions of privacy. A late seventeenth century legal treatise states that in requesting a warrant, “[t]he informer [was meant to] proceed with great caution . . . [because] if goods are not found” he will be subject to damages. Similarly, Chief Justice Pratt of the King’s Bench Court, wrote “[d]amages are designed not only as satisfaction of the injured person, but likewise as punishment to the guilty to deter from any such proceeding for the future.” In this manner, judicial review appears to have been desired because it served as a lever, which could be used alongside the oath, to alter the manner in which investigators approached their pre-search or -seizure efforts.

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100 As described infra, historian Bernard Bailyn explains that pamphlets such as these detailed the colonists’ views on the world and their rights, “reveal[ing] not merely positions taken but the reasons why positions were taken” and thus are informative of why those views may have been adopted by the states as a whole. BERNARD BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION: 1750-1776, at vii (1965).
102 Adams, supra note 66, at 143.
103 SAMSON EWER, A SYSTEM OF PLEADING 544 (Norma French trans., 1791).
104 Wilson, supra note 81, at 159 (emphasis added).
The purpose of *ex post* judicial review, described above, might be different than *ex ante* judicial review, as envisioned by the traditional judicial supremacy interpretation of the Amendment. However, it is not hard to reconcile these functions of judiciary. The Amendment could establish a standard for *ex ante* judicial review of searches and seizures, through the reasonableness and probable cause requirements; seek to reorient the warrant seeker’s objectives through the oath requirement; and subject warrant applicants to legal sanctions for error, through the common law background understood to underlie the Amendment. As this article has shown, the colonists believed that the oath was most effective when it was consistently administered by an independent and reliable body, the judiciary, and that the oath’s impact could be enhanced when warrant seekers were subject to damages. Thus, the oath requirement allowed for judicial involvement on both sides of the search or seizure process.

Nonetheless, Amar suggests that if one believes the Amendment established a warrant requirement, with judicial review of the warrant application, one cannot simultaneously interpret the Amendment as creating tort-like incentives. He argues that the purpose of investigators obtaining a warrant was to free themselves from liability; by having a judge sign off on one’s suspicions if the search or seizure failed to produce incriminating evidence, the requesting individual was not meant to be subject to further penalty. However, the claim that the Amendment could not and would not incorporate judicial review as well as other incentives is inconsistent with at least some historical commentary.

For example, in the period leading up to American Revolution, political and social leaders produced numerous pamphlets, which became “the most important and characteristic

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105 *AMAR, supra* note 37, at 71-73. Similarly, Joseph Stengel notes that by 1783, the common law had developed an immunity, freeing officials from liability even if they acted without a warrant and the individual whom the officer searched or seized proved innocent. *Stengel, supra* note 94, at 290.
writing of the” era. In 1765, Stephen Hopkins, then the Governor of Rhode Island, published
the pamphlet *The Rights of Colonies Examined*, which was later “endorse[ed] [by] the Rhode
Island Assembly” and began a “polemical explosion[]” on the legality of English policies in the
colonies. His writings are particularly important as he would later serve as Providence’s
leader against the Stamp Act, a member of both Continental Congresses, a signatory of the
Declaration of Independence, and a drafter of the Articles of Confederation. In the pamphlet
Hopkins bemoans the current state of search and seizure law stating:

[I]f [in the past] seizures were made or informations exhibited without reason or
contrary to law, the informer or seizor was left to the justice of the common law,
there to pay for his follow or suffer for his temerity. But now this course is quite
altered, and a customhouse officer may make a seizure in Georgia of goods ever
so legal imported. . . . [But] [i]f a judge can be prevailed (which is very well
known may too easily be done) to certify there was only probable cause for
making the seizure the unhappy owner shall not maintain any action against the
illegal seizor for damages or obtain other satisfaction, but he may return to
Georgia quite ruined and undone in conformity to an act of Parliament. Such
unbounded encouragement and protection given to informer must call to
everyone’s remembrance Tacitus’ account of the miserable condition of the
Romans in the reign of Tiberius their emperor, who let loose and encouraged the
informers of that age.

While Hopkins’ work aligns with Amar’s in suggesting that judicial review could insulate an
investigating official from damages, it was far from an endorsement of such a policy. Instead,
Hopkins’ writing is intended as a warning to the colonists, not to put all of their trust in the
determinations of judges, as they can be turned to the designs of the executive. The colonists
were instructed to ensure that search and seizure law had other ways to regulate executive
officials’ investigations. Oxenbridge Thatcher’s pamphlet, cited above, follows a similar line

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106 Bailyn, *supra* note 100, at 3.
107 Id. at 500.
108 Id. at 504.
109 Stephen Hopkins, *The Rights of the Colonies Examined*, in *Pamphlets of the American Revolution: 1760-
1776*, at 515-16 (Bernard Bailyn ed. 1965) (emphasis in original).
110 Such an argument is consistent with how at least some legal historians have described the perception of the
judiciary at the time. Lawrence Friedman, for example, states that judges had grandiose self-perceptions,
of argument, stating that part of the degradation of liberty under the Crown is that “the judge of admiralty will certify that there was probable cause of seizure [and] no action shall be maintained by the claimant.” 111 As these authors formulated the objectives of the Revolution and the new nation’s laws, their writings provide a basis to believe the Fourth Amendment incorporated both the incentives and deterrents of colonial search and seizure doctrine as well as promoted judicial review. These pamphlets do not dismiss the importance of a judicial evaluation of the warrant application, but they also made the Framers aware of the need to incorporate into the Amendment extra-judicial checks on the executive to induce greater caution among investigators.

D. The Fourth Amendment’s Drafting and Legislative History

An interpretation of any Amendment would typically be shaped by the reports and commentary on its drafting and ratification. However, for the Fourth Amendment such sources largely do not exist. Similarly, related state and federal legislation can shed little light on the text’s intended meaning. Where these sources speak to the oath requirement, they indicate its importance and imply that it was designed to alter executive investigatory procedures. Yet, at no point do any of these documents provide a definitive interpretation of the Amendment.

In particular, there are no reliable transcripts of the House or Senate debates that occurred over the Fourth Amendment. 112 Although Congressmen submitted over 1300 letters making recommendations on the Bill of Rights, none address the hoped for meaning of the Amendment. 113 Each of the fourteen state legislatures that debated the Bill of Rights recorded

111 Thatcher, supra note 101, at 494-95.
112 Cuddihy, supra note 83, at 1481-82.
113 Id. at 1484.
important remarks during the ratification debates, but “[n]one of these journals preserves a single utterance by a state legislator on the right respecting search and seizure.”\(^{114}\) Although, as described above, Adams’ language on searches and seizures in the Massachusetts State Constitution is thought to be influential of Madison’s drafting of the Amendment, the actual wording of Madison’s text is not traceable to any specific source.\(^{115}\) Madison’s original Amendment was introduced without commentary.\(^{116}\)

During drafting, the Fourth Amendment was only altered in three respects. Representative Gerry or Representative Benson, it is unclear who, made a successful motion in the House to change the original phrase “the right of the people to be secured in their persons, their houses, their papers, and their other property from unreasonable searches and seizures” to “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”\(^{117}\) The moveant stated that he made the motion because he “presumed there was a mistake in the wording of the clause,” without providing any additional discussion of the change’s effect or intent.\(^{118}\) Four days later, the House read and debated a new version of the Amendment that replaced the beginning of the Amendment’s second half with “and no warrants shall issue” where it previously read “shall not be violated by warrants issued.”\(^{119}\) It is unclear why this change occurred as Representative Benson had earlier made a motion for exactly the same alteration and it “lost by a considerable majority.”\(^{120}\) Finally, the House Committee that reviewed the Amendment altered the conjunction following the comma in

\(^{114}\) Id. at 1444.

\(^{115}\) Id. at 1476.


\(^{118}\) Id.


\(^{120}\) 2 CONG. REGISTER, supra note 117, at 225.
the phrase “supported by oath or affirmation, or not particularly describing the places to be searched,” replacing the “or” with an “and.” The Committee did not explain the change.

To understand the Amendment’s intended effect on investigators the first two alterations are of no moment. The term “and effects” appears to clarify or widen the scope of the searches and seizures the Amendment was designed to cover, without changing how the Amendment regulated, if at all, the manner in which investigators approached such actions. Moreover, unless one believes Amar’s argument, the shift to “no warrants shall issue” does not appear to have altered the Amendment’s intended implications, as the prior phrase, “by warrants issued,” was a similar prohibition on warrants, making the issuance of warrants contingent on the other elements of the Amendment.

However, the last alteration, although hardly determinative of the Amendment’s intent, is suggestive that the Amendment should be read as a means to change investigators’ methods. For, it appears, the best reading of that alteration is that the Committee hoped to clarify that the “Oath or affirmation” requirement was not optional. It could not be subverted by investigators “particularly describing” their target. Instead, warrant seekers had to both accept the consequences and inducements of the oath, while also defining for the court what they understood the objectives of the warrant to be. Yet, without further commentary, it is impossible to form a conclusive interpretation based upon such a minor shift.

Available alternative legislative sources do not provide much additional information. In the years before the Amendment was crafted, the newly formed states also developed their own search and seizure doctrines. As the states had to ratify the terms of the Fourth Amendment, their legislation and Constitutions cast light on the types of regulations they would have

endorsed. Yet, the state laws, while they suggest that the Framers would have replicated the incentive altering aspects of colonial era search and seizure law, again are far from conclusive. Specifically, many of the state constitutions incorporated oath requirements for warrants. The Massachusetts and Pennsylvania Declaration of Rights and the New Hampshire Constitution each required an “oath or affirmation” before a warrant could issue. The Delaware Declaration of Rights called for a “sworn statement.” Maryland, New York, North Carolina, Rhode Island, and Virginia all submitted proposals to Congress for the Fourth Amendment that contained an oath requirement. That nine of the thirteen colonies drafted an oath requirement indicates it was understood as having significance. Building upon the understanding of oaths discussed above, these documents suggest that the states were attempting to induce, both internally and nationally, more thorough investigations prior to a search or seizure. However, none of the state laws indicate what the oath was intended to accomplish. Without such commentary, it is difficult to say conclusively what was its intended effect.

Federal legislation is also suggestive of the protections the Amendment created. The manner in which Congressmen protected individuals’ right to privacy through other legislation would reasonably indicate how they would seek to accomplish those same ends in the Amendment. However, federal law of the time is inconsistent. The first national law to address searches and seizures, passed before the Fourth Amendment was ratified, “required magistrates to issue the warrant on the basis of the officer’s suspicion, not on the magistrate’s independent

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124 Stengel, supra note 94, 70-71.
125 Amar, consistent with his overall interpretation of the Amendment, argues that these laws indicate that the states did not require a warrant, or oath, to “search houses, stores and buildings.” Amar, supra note 38, at 766. However, as with Amar’s overall thesis, this claim is not supported by a meaningful historical record. See id. at 763 (citing only four cases to support his claim, two from Massachusetts, one from New Hampshire, and one from Pennsylvania).
One reading of this law is that it made explicit this article’s argument, that a protection against excessive searches or seizures was to ensure that officers developed their case before they sought a warrant and that this law declared such a preliminary investigation a necessary and sufficient basis upon which to obtain a warrant. However, another reading would be that the law recreates general warrants, requiring judges to empower the executive to search or seize whenever it suspected a person or place could be involved with a crime. Further complicating matters, in 1791, the same year that the Amendment was ratified, Congress passed another law “empower[ing] magistrates to decide for themselves whether an officer had probable cause.”127 This would seem to support an interpretation of the Amendment as establishing ex ante judicial review, without the Amendment at all being directed towards reforming the executive’s conduct.

E. Oaths in American Justice Manuals

By contrast, commentary immediately following the Amendment’s passage decidedly points towards an interpretation of the warrant requirement through its demand that warrant seekers take an oath, as designed to induce more careful and detailed preliminary investigations. This commentary comes from early nineteenth century “American justice manuals.” These books were written to inform “non-elite members of the legal profession and [the] judiciary” of the practices and procedures of legal work in this new country, including warrant practice.128 This class of literature “constituted the most numerous law books published in the country through the first decades of the [n]ineteenth [c]entury.”129 It is sometimes restricted to state-

126 LEVY, supra note 30, at 245.
127 Id.
128 Arcila, supra note 53, at 24.
specific books, describing the law in those jurisdictions. However, for the purposes of this article, I have widened the category to include nationwide “digests,” such as Nathan Dane’s, which historians suggest were so well-known that local “justices of the peace were likely to have [also] consulted” them in their decision making. Because the manuals were used in this manner, they are some of the best sources to discover how relied upon legal scholars interpreted and local jurists, and thus the lawyers who practiced before them, implemented the warrant requirement. They proved so influential, in fact, that many manuals went through multiple editions. While the manuals do not dismiss the value of judicial review, they also highlight the importance of judicial administration and enforcement of the oath. Thereby, they indicate that at least some of the legal profession viewed the Amendment as intended to incentivize more thorough pre-search or -seizure investigations.

Many manuals emphasize the centrality of the oath to the warrant application process. Nathan Dane’s work was “the first influential” national manual as it was the “only attempt during the Framers’ era to summarize [general] American law.” Numerous citations can be

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130 Arcila, supra note 53, at 8 n 24. The reader should note that Arcila was one of the first scholars to work with these materials. He used these documents to argue that at the time the Amendment was passed most judges did not review the warrant application nor seek to ensure that the requesting official actually had probable cause. Id. Accordingly, he argues, in line with Taylor, Amar, and Steinberg that the warrant requirement is presently over-enforced. The Fourth Amendment was only meant to provide a guarantee of ex post judicial review for each search or seizure, to ensure its “reasonableness.” See id. at 8. For the reasons presented above, this interpretation appears to undervalue the role of judicial review in the warrant application process. The historical evidence and existing interpretations support the conclusion that the framers were concerned with the unbridled power of the executive and used the judiciary as a check on that authority.

131 Id. at 60.

132 SURRENCY, supra note 129, 132.

133 Arcila, supra note 53, at 21 n74; see also SURRENCY, supra note 129, 113 (“Nathan Dane made the sole attempt to supply an abridgement of American law in his work. . . . The collection of material was the work of a lifetime and had a tremendous impact on America law judging from references to it.”); A.W.B. Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. CHI. L. REV. 632, 669-70 (1981) (This article describes Dane’s work as “the first attempt to offer American lawyers an alternative to the English abridgements . . . on which they had previously been forced to rely. This work, on which Dane had labored for nearly half a century, was a deliberate attempt to supply the want of an American statement of post revolutionary law, and to prevent the fragmentation of the law. . . .”).
found to it throughout early American case law.\textsuperscript{134} It instructs that if there was not already established evidence of a crime, such as an indictment, “the justice ought to examine the complainant on oath” before issuing the warrant.\textsuperscript{135} Earlier, Dane explained, such a procedure was more than a recommendation, but essential, as “every [] warrant issued by a justice of the peace is illegal, unless it state some good cause \textit{certain and supported} by oath.”\textsuperscript{136} Similarly, an 1803 manual directed at judges in each of the states\textsuperscript{137} cites the classic English legal text, Sir Matthew Hale’s \textit{History of the Pleas of the Crown}, as grounds to instruct “the following rules should be observed, in respect to issuing of [a] warrant. First; they are not to be granted without oath made before the justice of a felony committed and that the party complaining hath probable cause to suspect they are in such a house or place. . . .”\textsuperscript{138} William Waller Hening, who authored the “most famous” collection of colonial laws and compiled one of the very first collections of Virginia statutes,\textsuperscript{139} in a manual for Virginia judge, endorses the same rule from Hale’s treatise.\textsuperscript{140} So does Daniel Davis in his manual on criminal procedure.\textsuperscript{141} A number of other manuals, including one by John Dunlap, a “well known” legal author and editor of the day,\textsuperscript{142} use similar language.\textsuperscript{143} What is more, although not technically an American justice manual, as it was published in England before the revolution, during the nineteenth century William

\begin{footnotesize}
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  \item \textsuperscript{134} \textit{Surrency, supra} note 129, at 113.
  \item \textsuperscript{135} \textit{7 Nathan Dane, A General Abridgement and Digest of American Law} 248 (1824).
  \item \textsuperscript{136} \textit{Id.} at 248 (emphasis added).
  \item \textsuperscript{137} As Surrency demonstrates many of the manuals were written by individuals whose name and backgrounds are not well known, but who nonetheless shaped the development of the legal profession through their works. See \textit{Surrency, supra} note 129, at 131-32 (describing but a few authors of these works, while also noting that the works were numerous).
  \item \textsuperscript{138} \textit{A New Conductor Generalis: Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace} 404 (1803) (citing \textit{Sir Matthew Hale, History of the Pleas of the Crown} (1736)).
  \item \textsuperscript{139} \textit{Surrency, supra} note 129, at 12, 20, 131.
  \item \textsuperscript{140} \textit{William Waller Hening, The New Virginia Justice} 621 (1820) (citing Hale, \textit{supra} note 138).
  \item \textsuperscript{141} \textit{Daniel Davis, A Practical Treatise Upon the Authority and Duty of Justice of the Peace in Criminal Prosecution} 45-46 (1824) (citing Hale, \textit{supra} note 138).
  \item \textsuperscript{142} \textit{Surrency, supra} note 129, at 5.
  \item \textsuperscript{143} See \textit{John A Dunlap, The New York Justice} 368 (1815) (stating warrant are “not to be granted without oath made”); \textit{James Parker, The Conductor Genealis: On the Office Duty and Authority of Justices of the Peace} 315 (1801) (saying warrants may only be granted “in the case of a complaint, and oath made”).
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Blackstone’s *Commentaries* remained one of “the most widely studied legal book[s] in America.”

It too paraphrases the same rule from Hale’s treatise, as well as referring its readers to Sir Edward Coke’s work. Nonetheless, it is important to acknowledge that at least one manual for judges in Pennsylvania indicates the oath was “fitting,” but not required. In addition, other manuals do not describe warrant practice or procedure, but rather provide model warrant applications and warrants.

Those manuals that do discuss the oath also indicate that the oath was valued because it incentivized warrant seekers’ accuracy through a more complete and considered pre-search or -seizure investigation. As the quotation from Dane above demonstrates, his treatise states that the oath is required because when warrant seekers are willing to support their accusations with an oath, judges can be “certain” of the facts the applicant claimed. Such certainty could only come if one believed the oath would only follow from a systematic preliminary investigation. Moreover, two of the manuals describe the same distinction presented by Coke’s treatise, discussed in Section A, that a warrant issued without an oath would be based upon “bare surmise,” which judges did “not [have] such authority [to] grant[.],” but when an “oath [was] made” the “justice may grant a warrant to search the those suspected places.”

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144 SURRENCY, supra note 129, at 133.
145 5 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 290 (St. George Tucker ed., 1803) (citing HALE, supra note 138) (describing how warrants should be issued for felonies). It is important to note that other portions of Blackstone’s work simply mention how other forms of warrants could be used, without discussing any procedure for their issuance. For instance, when discussing imprisonment, Blackstone simply states that the court can issue an arrest warrant. 4 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 71-72 (St. George Tucker ed., 1803). Similarly, when discussing the legal enforcement of payments, Blackstone writes that a warrant “may cause any house or tenement of the bankrupt [party] to be broke open, in order to enter and seize the same.” 3 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 485 (St. George Tucker ed., 1803). He does not describe how that warrant should be obtained. Id.
148 DANE, supra note 135, at 248.
149 PARKER, supra note 143, at 315 (emphasis in original); see also DUNLAP, supra note 143, at 368 (“Upon a bare surmise a justice cannot make a warrant to break any man’s house to search for a felon or for stolen goods. But in
indicated the warrant was based upon established fact and not theory. Lastly, at least some of the manuals state that warrant seekers should attest to their level of knowledge as part of the oath. Davis’ manual, for instance, states that warrant seekers must declare that they have “probable cause to suspect that the property stolen is in a particular place.” As suggested in the discussion of colonial era statutes, although the oath was meant to indicate the truth of one’s statement, by requiring one also swear to one’s level of knowledge, the goal seems to be to increase the inducements for thorough preparation.

The manuals do not ignore the role of ex ante judicial review. One declares, “warrants are judicial acts and must be granted upon examination of the facts.” Another says “the justice ought to examine the complainant . . . to ascertain there is a crime actually committed.” Still others require that the warrant seeker “show[] the cause of his suspicion” to the judge. Thus, the manuals imply, as suggested above, that judicial evaluation of the merits of a warrant application was meant to be an additional protection operating alongside the oath’s incentivizing effects.

However, at least two manuals suggest that the judiciary’s primary role is to act as administrators and enforcers of the warrant applications’ incentives for a thorough investigation. Richard Bache, in a manual for Pennsylvanian jurists, declares that “a Justice of the Peace, is required upon [a proper] application made to him” to issue the warrant. Thus, according to Bache, evidence that the warrant seeker had properly approached the warrant application is all

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150 DAVIS, supra note 141, at 46.
151 A NEW CONDUCTOR GENERALIS, supra note 138, at 404.
152 DANE, supra note 135, at 247; see also BACHE, supra note 146, at 138 (“It is fitting to examine . . . the party requiring a warrant, as well as to ascertain that there is a felony, or other crime actually committed, without which no warrant should be granted.”).
153 DUNLAP, supra note 143, at 368; PARKER, supra note 143, at 315; see also HENING, supra note 140, at 621 (stating a warrant seeker need “dowth shew his reasons for such suspicions” (citing HALE, supra note 138)).
154 BACHE, supra note 146, at 140 (emphasis in original).
that the judiciary should seek prior to issuing the warrant. (Although it is unclear whether Bache believed the indicia of thoroughness a judge was looking for included an oath, as he suggests the oath is only recommended.) Davis’ manual suggests monetary damages are an appropriate penalty for a breached oath. He declares that if a search or seizure failed to produce evidence of the crime claimed “the party that made the suggestion is punishable” by the damages associated with trespass. Thus, Davis, whose manual promotes a particularly strong version of the oath requirement, picks up on the common law tradition of using monetary damages to further induce accuracy. Accordingly his work indicates, as argued above, that the courts were not only intended to act as ex ante administrators of the oaths’ inducements, but also ex post enforcers. Taken together, both manuals suggest that, at least according to some commentary contemporary with the Amendment, incentivizing different investigatory practices is the primary goal of the judiciary in fulfilling the Amendment’s demands.

Throughout the events and legal developments leading up to the Fourth Amendment, and in the writings of those best situated to understand its original intent, the oath is not only depicted as having greater import than a mere formality, but also as a catalyst for securing the right to privacy. Those active in search and seizure law and the Framers themselves understood that swearing an oath tapped into a deep religious fervor held throughout the society. Those beliefs meant that the request that one swear to the specifics of one’s warrant application kept the procedure from being dismissed as having little meaning. Instead, a consistent oath requirement pushed those knowledgeable about the law’s demands to reform their pre-search or -seizure behaviors and procedures, so that they could be sure those processes would provide them the information and evidence necessary to give a statement to which God himself was a confederate.

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155 *DAVIS, supra* note 141, at 48.
F. Contemporary Implications

To make this new historical understanding of the oath requirement relevant, it is necessary to determine how to translate the weightiness of the 1700s oath for a culture, which although religious, no longer fears the false invocation of the lord’s name. This challenge is made even more complex because the Supreme Court’s recent Fourth Amendment jurisprudence has taken on a subservient tone. Seeing the warrant requirement as entirely a declaration of judicial supremacy over searches and seizures, the Court has moved to limit its own authority. Afraid that its power might impede executive actions, the Court has carved out numerous exceptions to its regulation of searches and seizures. It has also suggested that, at times, any kind of judicial regulation is inapposite because police conduct is simply too difficult to control. Although not a strict originalist interpretation, this section argues that a historical understanding of the oath requirement, at the very least, calls for the overruling of these trends and case law. The principle underlying the oath requirement is that judges are meant to facilitate the tools at their disposal to change investigators’ attitudes, so that executive officers no longer see themselves as engaged in a “competitive enterprise of fettering out crime.” The point of including the oath requirement in the text of the Amendment was to ensure that the judiciary did not cede this field. Thus, this section presents that an originalist interpretation of the oath requirement applied to the modern world requires the Court to re-develop a stringent warrant requirement and robust exclusionary rule and increase the availability of constitutional tort damages.

To see why this article argues that a proper understanding of the oath requirement cannot be fit within existing Supreme Court jurisprudence, one needs to recognize the obsequious nature of current Fourth Amendment law. To do this, one need look no further than three cases from

156 Johnson, 333 U.S. at 14.
the 2008-2009 Supreme Court term. In *Arizona v. Johnson*, the Court expands the already large exigent circumstances exception to the warrant requirement, by allowing an officer to search the body of a passenger in a stopped car because the defendant was associated with an object (the car) that was associated with a crime (the acts of the driver) and the defendant’s clothes and attitude, somehow, suggested that “he might have a weapon on him.”157 The Court stated that any procedural demands on the officer might cause evidence to “get behind” him or her.158 In other words the requirement of judicial review of warrants, when balanced against the societal need for law enforcement—even when the citizen committed no known crime—favored the desires of the executive to search or seize over the rules of the judiciary and rights of the public.

Similarly, in *Herring v. United States*, the Court moved to further limit the exclusionary rule. In 1914, the Court recognized that if one’s Fourth Amendment rights are violated, one can demand the return of articles seized and prohibit the introduction of that evidence at trial.159 However, *Herring* widens the already established “good faith” exception,160 stating that courts should only enforce the exclusionary rule against systemic police department errors if the defendant can show the department had been “reckless” or “knowingly” allowed the error to

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158 Id. at 788.
159 *Weeks v. United States*, 232 U.S. 383, 398 (1914) (“We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant. . . . The court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.”).
160 See *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995) (“There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record [which was maintained by the judicial department]. Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees’ that lead the police to unlawfully search and seize someone’s property or person.); *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984) (“Having already decided that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. There is no dispute that the officers believed that the warrant authorized the search that they conducted. Thus, the only question is whether there was an objectively reasonable basis for the officers' mistaken belief. Both the trial court and a majority of the Supreme Judicial Court concluded that there was. We agree.”); *United States v. Leon*, 468 U.S. 897, 920 (1984) (“[W]hen an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope” suppression is an inappropriate remedy.).
This holding too was motivated by the Court’s belief that successful law enforcement was more important than its own rules. The Court stated that the Fourth Amendment’s requirements must “be weighted against [the exclusionary rule’s] substantial social costs” of letting a discovered guilty person go free, and such a balance favored arrest and conviction.  

Finally, although not directly a Fourth Amendment ruling, in 2009 the Court also greatly reduced plaintiffs’ potential to receive damages through 42 U.S.C. § 1983 constitutional tort actions, particularly for Fourth Amendment violations. The Court has long provided police officers with qualified immunity for their conduct: Officers are immune from damages for unconstitutional actions if the contours of law at the time of the conduct would not have allowed a reasonable officer to understand that his or her behavior was illegal. However, where before courts were required to determine whether the underlying conduct was constitutional prior to reaching the question of immunity, in *Pearson v. Calahan*, the Court makes that “first prong of the *Saucier* procedure” optional. The Court justified this reversal by citing two Fourth Amendment § 1983 cases. It explained that in such instances, where the “question is so fact-bound,” it is simply too complicated for lower courts to decide what the Constitution demands. Thus, through *Pearson*, the Court indicated it was better to avoid the risk of poor precedent, which could hamper officers’ future decision-making, than attempt to define individual rights so as to allow citizens to enforce those protections through suits.

These decisions parallel earlier dicta, in which the Court suggested any effort at “judicial control” of police officers may be senseless. In *Terry v. Ohio*, the Court determined that the

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162 *Id.* at 700 (quotation marks and alteration omitted).
165 *Id.*
166 See *Terry v. Ohio*, 392 U.S. 1, 13 (1968).
exclusionary rule did not apply to a search where a police officer to “stopped” and “frisked” suspects based upon reasonable suspicion, but without a warrant. This was not because the officer acted in good faith, but because the Court found its rules may be “powerless to deter invasions of constitutionally guaranteed rights.”\footnote{Id. at 14.} Similarly, \textit{Whren v. United States}, upholds the constitutionality of a traffic stop even in light of a claim that the officer used the violation merely as a pretext to uncover proof of another crime, with no intention to prosecute the traffic infraction.\footnote{517 U.S. 806 (1996).} The Court found its Fourth Amendment jurisprudence “foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved,” because the Court could not and would not be involved in regulating officers’ “[s]ubjective intentions.”\footnote{Id. at 813.}

Understanding the events and principles that motivated the oath requirement demands the Court reorient its jurisprudential aims and that each of the cases described above be reversed. If the oath is more than a cumbersome formality, then it is best understood as an expression of certain social mores and objectives. Therefore, to be true to the Amendment’s intent, the Court must look to how 1700s society viewed the oath’s implications and attempt to replicate that original function. As described above, the social and legal commentary on the oath indicates it was nothing less than a command that each investigator change his or her perspective. Through the oath, officials were to be induced to ensure the accuracy of their investigations and accusations before seeking to search or seize. Judicial administration was meant to enforce this norm.

The Supreme Court has already described how it thinks the judiciary could accomplish such an end in the modern world. In developing the exclusionary rule, the Court determined that
officers were motivated to act by the convictions that follow from their arrests. Thus, it held, courts should exclude evidence illegally obtained because the resulting loss at trial is a way to “compel [officers’] respect for the constitutional guaranty” of the Fourth Amendment. 170 Moreover, in the context of § 1983 actions, the Court developed immunities specifically because it determined that the threat of damages inhibits officers’ tendency to enforce the law aggressively. 171 Therefore, it implied monetary damages are a means to promote a deliberative attitude among executive officials. Such conclusions are empirically challengeable. Daryl Levinson, for one, argues that the ability of monetary damages to alter behavior, particularly in criminal matters, is limited, as society and officers are willing to suffer some financial losses to increase incarceration. 172 However, as long as these are the operative understandings of how police officers act, then a pure historical interpretation of the Fourth Amendment and its oath requirement demand that these incentives be put into effect—that police officers risk the loss of the fruits of their labor, convictions, and potentially subject themselves to monetary damages, if they act outside the bounds of the Fourth Amendment. If the Court is correct, such rules should force officers to adopt new norms of care and deliberation before seeking to search or seize.

Moreover, as shown by the history discussed above, the effects of the oath’s incentives were understood to be most potent when they were consistently applied, forcing repeat players to develop regulations to respond to the oath’s demands. Expectations to the warrant requirement were seen to undermine one of the Amendment’s primary objectives, to use the bureaucracy to alter investigators’ natural attitudes. Consequently, as with the lines of cases establishing the

171 See Anderson, 483 U.S. 662 & n 18.
“good faith” exception and limiting § 1983 litigation, this article’s findings indicate that, when solely considering the philosophical foundations of the oath requirement, the Court must reverse its exceptions to the warrant requirement.

Of course, in actuality, the demands of the oath requirement will need to be balanced against the other societal interests the Court has declared it must consider. For instance, as Terry recognized, the police need “flexibility” to search and seize suspects to address “unfolding and often dangerous situations on city streets.”173 Similarly, the Court should be able to consider concerns of officer safety, potentially allowing warrantless searches incident to an arrest.174 The Court may also need to impose some limits on § 1983 actions as it has warned that if it allows officers to face too great a risk of monetary damages there will be under-enforcement of the laws, not more careful enforcement of the laws.175

Nevertheless, the oath requirement’s history shows that the judiciary was chosen to be the oath’s administrator because of its ability to promote the oath’s inducements. Thus, rather than feeling stymied by the intricacy of officers’ subjective decision-making, and fearful of over asserting its authority, the Court must reorient its jurisprudence to recognize that its rights-protective role is not only to evaluate evidence but also to review and motivate investigators’ conduct. Part of this is determining how to implement appropriate incentives wherever possible.

Some might say such jurisprudence would be inconsistent with the Constitution’s structure. It calls upon courts to develop rules that are outcome determinative of how the law is applied.176 Instead, as articulated by the Political Process School, the implementation of the law

173 392 U.S. at 10.
176 See Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 100 (1988) (stating that the Fourth Amendment’s warrant requirement “simply reflects the judgments of judges—judgments based on their own values and their own assessments about whether people like themselves will suffer privacy losses.”).
most consistent with the nation’s democratic framework would be to develop rules through coalition building and lobbying of representatives.¹⁷⁷

One response to such an argument is that the doctrinal developments suggested above are no less democratic than the traditional reading of the Amendment, as containing a warrant requirement preferencing a search or seizure following the judicial evaluation and approval of the investigator’s evidence. A more interesting retort, that this article can only outline, is that using the Fourth Amendment to install incentives to induce investigators to be more thorough before seeking to search or seize is the most democratic interpretation of the Amendment possible. This response would begin by demonstrating that the Fourth Amendment presents an area of law where there is almost assured political lock-out—where one or more groups are prevented from fully developing and voicing their views on the law. Typical searches and seizures are targeted against individuals in private places and thus almost certainly will not be a product of open, fully informed political dialogue. Similarly, as Pearson recognized, the decision to search or seize is highly fact-bound. Thus, it is unlikely that those unfamiliar with the nuances of each search or seizure will be able to evaluate whether their views of “reasonableness” sustain a particular invasion of privacy. In addition, social biases dictate that those who are searched or seized, because they are thereby labeled part of the criminal underworld, will be shunned from “mainstream” society.¹⁷⁸ Consequently, it is improbable that those who have lived experiences that might counsel against certain search and seizure practices

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¹⁷⁷ See Craig Lerner, Judges Policing Hunches, 4 J.L. ECON. & POL’Y 25, 63-64 (2007); see also Richard C. Worf, The Case for Rational Basis Review of General Suspicionless Searches and Seizures, 23 TOURO L. REV. 93, 189 (2007); Erik G. Luna, Sovereignty and Suspicion, 48 DUKE L.J. 787, 817 (1999) (“If all members of a community had an opportunity to air their views and their interests were factored into the decision-making processes, a diffusely felt suspicionless search practice [c]ould be presumed constitutional.”).

¹⁷⁸ See William J. Stuntz, Unequal Justice, 121 HARV. L. REV. 1969, 2031 (2008) (explaining that existing laws have led to an “unequal justice system” in America because they have failed to define crimes or design criminal institutions with any “moderation” and the best way to counteract this developed is to “[p]lace more power in the hands of residents of those neighborhoods where the most criminals and crime victims live,” who are presently stripped of such influence).
will be able to rally public support to their cause. Even if they were able to create coalitions, it is unlikely that their voices would be given proper weight, as those with political power have already formulated their own groups based upon “tough-on-crime” stands.\textsuperscript{179}

In instances such as these, where one wants to prevent the tyranny of the judiciary but the political process appears intractably clogged, some democratic legal theory suggests that the function of the courts is to develop incentive structures to prevent undemocratic rules or interpretations from taking hold. In \textit{Democracy and Distrust}, John Hart Ely describes circumstances of institutionalized political lock-out and proposes that the response should be to alter decision-makers’ incentives, through judicially created background rules. One such example is in Ely’s analysis of how to remedy states’ protectionist taxation in violation of the Commerce Clause. Ely argues that the proper democratic doctrine is to “bind[] the interest of out-of-state manufacturers to those of local manufacturers represented in the legislature.”\textsuperscript{180} In other words, when faced with the inherent bias for in-state concerns over out-of-state concerns, the courts’ best option is to create rules that force the legislature to operate under different incentives. Rather than allowing state legislatures the opportunity to avoid in-state political backlash by taxing only out-of-state interests, by requiring the legislature to equally tax local and foreign entities, and thereby respond to in-state political pressures, the courts can ensure that no party would be taxed at an “unreasonable,” e.g. undemocratic and thereby unconstitutional, level.\textsuperscript{181} Ely argues that \textit{McCulloch v. Maryland} operates similarly. Recognizing that the interests of the national bank could never receive their due consideration from state legislatures, Ely claims the Court appropriately dictated that national banks could only be taxed to the same


\textsuperscript{180} JOHN HART ELY, DEMOCRACY AND DISTRUST 84 (1980).

\textsuperscript{181} Id.
extent as local real estate. As with the Commerce Clause, the Court came to a pro-democratic ruling by forcing the state to respond to different incentives, those created by local interests.\footnote{Id.}

The jurisprudence this article proposes in response to the oath requirement’s history is analogous to Ely’s proposals. The Framers recognized that an executive, unchecked by the citizenry’s interests in its right to privacy, is likely to abuse the search or seizure authority, just as a state will likely abuse its tax power to further its interest in obtaining revenue when unchecked by in-state interests. Thus, with the oath requirement, the Framers created a new judicially-enforceable incentive structure, like the judicially-enforced demand that state legislatures always tax as if they were responding to in-state lobbies. This structure forced investigators to respond to the incentives of their spiritual beliefs and thereby prevented officials from conducting “unreasonable,” e.g. undemocratic and thereby unconstitutional, searches and seizures.\footnote{Interestingly this reading of Ely’s response to inevitable political lock-out parallels how Positive Political Theory conceptualizes the relationship between Congress and the Executive agencies. Barry McNollgast, in a comprehensive review of the existing Positive Political Theory literature states that this theory is built around the claim that “elected officials design the structure and process of agency decision-making and judicial review to make bureaucratic and judicial decisions accountable to legislative and executive authority.” Barry McNollgast, \textit{The Political Economy of Law: Decision-Making By Judicial, Legislative, Executive and Administrative Agencies, in LAW AND ECONOMICS HANDBOOK} (A. Mitchell Polinsky & Stephen Shavel eds., forthcoming). The democratically-elected branches use a series of background rules and internal regulations to ensure that the agencies, which are potentially at risk of being captured by biased decision-making due to the authority that myopic bureaucrats have over their administration, do not act upon those biases.} The warrant requirement, exclusionary rule and tort damages are simply means to maintain this established inducement.

Unfortunately, even if one accepts that the doctrinal developments advocated in this article could be understood as democratic, some literature argues that the procedural enforcement of rights, such as the use of the exclusionary rule to enforce the essence of the oath requirement, harms criminal defendants. William Stuntz suggests that the ability of defendants to raise procedural defenses results in a backlash; the public and politicians believe that criminals go free.
on technicalities and thus pass “overbroad criminal statutes” with higher mandatory minimum sentences and “underfund defense counsel.”

This produces a destructive cycle where, with fewer options for winning a trial and fewer resources for their defense, defendants pursue a greater number of procedural claims, which encourages the legislature to criminalize even more conduct. At the same time, prosecutors use the broad criminal laws to extract guilty pleas by threatening a greater number of indictments and more jail time. Accordingly, appellate courts do not recognize the questionable protections that the procedures provide, because in the borderline cases defendants plead guilty, waving their appeals.

The reader can take some cold comfort in the fact that Stuntz’s work examines trial procedures. Trial procedures are more likely to produce the cycle of legislative backlash, as they overturn existing charges. The incentive structure argued for in this article is less likely to cause a public or legislative outcry, because it focuses on changing how officials arrive at the decision to search and seize. (Although the more such enforcement occurs through the exclusionary rule, the more the public may perceive that individuals who should be convicted based upon the facts available, are not). Moreover, pre-arrest procedures have no clear statutory counterweight. Accordingly, the criminal code is less likely to be used as a weapon against those who invoke pre-arrest protections. Nevertheless, such potential “benefits” of pre-arrest criminal procedures are cold comfort indeed. It is important to acknowledge that the seemingly pro-civil rights and civil-liberties interpretation of the Fourth Amendment advanced in this article could have counterintuitive effects, based upon the public’s fear of criminal activity and the under-enforcement of criminal laws.

185 Id. at 59.
186 Id. at 60-61.
Nonetheless, it is rare that a constitutional clause or phrase can be given new meaning, particularly based upon its original intent. The “Oath or affirmation” requirement, although appearing merely procedural on its face, has broad implications for our understanding of the Fourth Amendment when viewed from the social and cultural background out of which it developed. While not contrary to doctrine or literature requiring judicial review of and judicial supremacy over the warrant process and search and seizure determinations, it suggests an additional perspective from which the judiciary should approach its role to protect the right to privacy. Such a perspective would create a less confrontational relationship between the judiciary and executive over the search and seizure power, as the judiciary would not be attempting to smoke out police departments’ constitutional errors, but rather prompt the departments’ self-regulation. The judiciary would act as check and balance through changing the executive’s incentives, rather than through an assertion of control. Accordingly, this reading of the Amendment encourages and in fact demands that the judiciary not fear the deterrent effect of its decisions. Important steps in that direction include the Court developing a more robust warrant requirement and exclusionary rule and greater access to monetary damages for constitutional torts.