

## PRETRIAL COMMITMENT AND THE FOURTH AMENDMENT

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*Today, the Fourth Amendment Warrant Clause governs arrest warrants and search warrants only. But in the founding era, the Warrant Clause governed a third type of warrant: the “warrant of commitment.” Judges issued these warrants to jail defendants pending trial.*

*This Article argues that the Fourth Amendment Warrant Clause, with its oath and probable cause standard, should be understood today to apply to this third type of warrant. That means the Warrant Clause would govern any initial appearance where a judge first commits a defendant—a process that currently falls far short of fulfilling its constitutional and historical function.*

*History supports this understanding. For example, in two Supreme Court cases in 1806 and 1807, lawyers and the Justices applied, either expressly or implicitly, the Fourth Amendment Warrant Clause to the warrant of commitment. Moreover, Chief Justice Marshall did so expressly in a different case, riding circuit, in 1807. Leading lawyers of that era, as well as nineteenth-century treatises, likewise understood that the Warrant Clause applied to the commitment warrant separate from any arrest warrant. The commitment warrant, often called a mittimus, therefore required its own probable cause supported by oath or affirmation.*

*Remarkably, this history has largely been lost. Neither courts nor scholars today recognize that the Fourth Amendment applies to this third, important type of warrant—even though judges still use such warrants to commit. But applying the Warrant Clause directly to commitment warrants would restore to defendants some of the surprisingly robust pretrial rights they enjoyed in the founding era and help reduce the mass incarceration of defendants pending trial.*

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## INTRODUCTION

In criminal cases today, the pretrial situation is grim. Each year, judges likely commit millions of defendants to jail pending trial.<sup>1</sup> These defendants, presumed innocent, can spend weeks or months in jail awaiting trial. Most scholars point to a broken system of bail as the culprit,<sup>2</sup> but another cause lies hidden: a faulty probable cause determination at the initial appearance.

When police arrest a suspect, they almost always bring him to a judge for an initial appearance, where the judge often sets bail.<sup>3</sup> But if the defendant cannot make bail, the judge may commit him to jail pending trial only if she finds probable cause<sup>4</sup>—otherwise, she must release him. Much therefore hinges on this determination.

But this probable cause determination has become a cynical, empty formality.<sup>5</sup> Judges rely on hearsay, or hearsay within hearsay, such as an officer affidavit.<sup>6</sup> No firsthand witnesses appear to accuse the defendant of the crime, and the defendant has no right to cross-examine them even if they do appear.<sup>7</sup> Defendants have no practical right to challenge the evidence or present their own evidence.<sup>8</sup> They have no constitutional right to counsel<sup>9</sup> and in many jurisdictions appear without counsel.<sup>10</sup>

Contrast today's process with the initial appearance in the founding era—more commonly called the preliminary examination. In

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1 Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017); see also ZHEN ZENG & TODD D. MINTON, U.S. DEP'T OF JUST., CENSUS OF JAILS, 2005–2019: STATISTICAL TABLES 20 (2021) (noting that at mid-year 2019, about 480,740 jail inmates were unconvicted, awaiting court action on a current charge or held for other reasons).

2 See, e.g., Heaton et al., *supra* note 1, at 711 & n.3.

3 See *Rothgery v. Gillespie County*, 554 U.S. 191, 195–96 (2008) (describing Texas law).

4 See *Gerstein v. Pugh*, 420 U.S. 103, 114, 126 (1975).

5 See *infra* Part VI. In some jurisdictions, judges do not even make a finding of probable cause on the record. They often simply receive the officer affidavit or complaint and docket that complaint. See *infra* Section VI.A.

6 See, e.g., *Rothgery*, 554 U.S. at 196.

7 See *Gerstein*, 420 U.S. at 119–20.

8 See *id.* at 121.

9 *Id.* at 122; see also John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-trial Release*, 69 FLA. L. REV. 831, 840–41 (2017) (arguing for a right to the presence of counsel for bail determination at an initial appearance).

10 Heaton et al., *supra* note 1, at 716, 730 (studying bail hearings, which in Texas are combined with probable cause hearings, in Houston); MALIA N. BRINK, JIACHENG YU & PAMELA R. METZGER, DEASON CRIM. JUST. REFORM CTR., GRADING INJUSTICE: INITIAL APPEARANCE REPORT CARDS 65 (2022).

determining probable cause,<sup>11</sup> or its rough equivalent, judges required the testimony of live prosecution witnesses with firsthand knowledge, under oath.<sup>12</sup> By the very early 1800s, and perhaps earlier, defendants in many jurisdictions had the right to be present at the preliminary examination and the right to confront and cross-examine prosecution witnesses.<sup>13</sup> These rights persisted through the early republic to the mid-twentieth century.<sup>14</sup>

Starting as late as the 1970s, however, courts and legislatures began to strip the initial appearance of nearly all these protections, including most particularly the requirement of live, firsthand accusatory testimony.<sup>15</sup> They did so believing that the Fourth Amendment either did not apply or that it provided no process rights for determining probable cause.<sup>16</sup> This Article shows why that belief was wrong. It argues that the Fourth Amendment should apply to the initial appearance process because it applies to the warrant of commitment that concludes that process.

But what is a warrant of commitment? If a judge decides to commit the defendant to jail pending trial, she issues a warrant of commitment, also sometimes called a *mittimus*, a detention order, a securing order, or simply a commitment.<sup>17</sup> This order authorizes the jailer to receive and imprison the defendant pending trial.<sup>18</sup> It tells the jailer when and how to release the defendant (either to freedom or simply for the next court appearance).<sup>19</sup> Despite its importance, this warrant of commitment today hides in the shadows, an afterthought and technicality, sometimes not even docketed, a constitutional nonentity.

But in the years leading to the founding era, and in that era itself through the nineteenth century, the warrant of commitment was a

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11 In the founding era, the “black-letter law . . . was highly protective of pretrial liberty,” but, in practice, “pretrial detention was routine.” Kellen Funk & Sandra G. Mayson, *Bail at the Founding*, HARV. L. REV. (forthcoming) (manuscript at 6).

12 See *infra* Section III.E.

13 See *infra* Section III.E.

14 See CODE OF CRIM. PROC. § 46 (AM. L. INST., Proposed Official Draft 1930) (“All witnesses shall be examined in the presence of the defendant and may be cross-examined.”); *id.* §§ 41, 42 (describing a right to counsel at preliminary examinations); see also *infra* Section VI.A.

15 See *infra* Part VI.

16 See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 118–20 (1975).

17 E.g., *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 535 (Mo. 1980) (using the term “warrant of commitment”); 18 U.S.C. § 3142(e) (2018) (using the term “order of detention”); TENN. CODE ANN. § 41-4-106 (2019) (using the term “mittimus”); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2009) (using the term “securing order”).

18 WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE: COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE IN THE COMMONWEALTH OF VIRGINIA* 126–32 (Richmond, T. Nicolson 1795); see also *infra* Section III.B.

19 See, e.g., *State ex rel. Thomas*, 603 S.W.2d at 535.

critical, operative document to which judges and commentators paid great heed.<sup>20</sup> Indeed, in the Stuart-era battles over individual liberty from arbitrary imprisonment, Edward Coke and others focused their arguments on the warrant of commitment.<sup>21</sup> It must exist, be in writing and certified, and state the charges against the defendant.<sup>22</sup> They rooted their arguments in Magna Carta.<sup>23</sup> Case after case quoted verbatim entire warrants of commitment and focused their arguments and holdings on its language and sufficiency,<sup>24</sup> a practice courts continued in the early republic.<sup>25</sup>

I argue that in the founding era, the Fourth Amendment Warrant Clause<sup>26</sup> applied to these warrants of commitment. It applied the oath and probable cause requirements (including live, firsthand witnesses) to this warrant and therefore to the initial appearance. And the Constitution, of course, required that there *be* a warrant of commitment to justify pretrial detention at all.<sup>27</sup> By contrast, today, courts and scholars wrongly believe the Warrant Clause applies to arrest and search warrants only<sup>28</sup>—leaving ungoverned the initial appearance and the commitment warrant. This difference may help to explain why the initial appearance has atrophied and how we can fix it.

The bulk of this Article will show that in the founding era, the Warrant Clause extended to this third type of warrant, the warrant of commitment, for several reasons: (i) the text of the Warrant Clause, (ii) the common-law history of the warrant of commitment, and (iii) most compelling, early-court precedent, including from the Supreme Court.

First, the text of the Warrant Clause extends beyond arrests, of course, and includes any seizure of the person.<sup>29</sup> It provides that “no Warrants shall issue, but upon probable cause, supported by Oath or

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20 See *infra* Parts III–IV.

21 See *infra* Section III.D.

22 See *infra* notes 112–14 and accompanying text.

23 4 EDW. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 177 (London, M. Flesher, W. Lee & D. Pakeman 1648).

24 *E.g.*, *The King v. Wilkes* (1763) 95 Eng. Rep. 737, 737–38, 741; 2 Wils. K.B. 151, 151–53, 157–58.

25 See *infra* Sections IV.A–C.

26 U.S. CONST. amend. IV.

27 See *infra* Section IV.D.

28 See *e.g.*, *Steagald v. United States*, 451 U.S. 204, 212–13 (1981) (“The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.” *Id.* at 212.); Pamela R. Metzger & Janet C. Hoefel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 419–20 (2020); Orin S. Kerr, *The Modest Role of the Warrant Clause in National Security Investigations*, 88 TEX. L. REV. 1669, 1671 (2010) (“There are two basic kinds of warrants: arrest warrants and search warrants.”).

29 U.S. CONST. amend. IV (protecting against unreasonable “seizures” and governing how a person can be “seized”).

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>30</sup> “Seize,” then and today, means to grab or take possession by force.<sup>31</sup> When a judge commits a defendant to jail, the court officers physically take him to jail. This is a seizure—ordered of course by what the founding era pervasively called a “warrant.”<sup>32</sup>

Second, the history of the warrant of commitment also supports my view. From the mid-sixteenth century to the founding era, that warrant developed in parallel with the arrest warrant to have almost identical requirements. Treatise writers and courts treated them as twins, distinct in function but practically identical.<sup>33</sup>

Third, court precedent provides the strongest support and the motivation for this Article. In two Supreme Court cases in 1806 and 1807, lawyers and the Justices applied, either expressly or implicitly, the Fourth Amendment Warrant Clause to the written warrant of commitment before them.<sup>34</sup> Moreover, Chief Justice Marshall did so expressly in a different case, riding circuit, in 1807.<sup>35</sup> Leading lawyers of that era, as well as nineteenth-century treatises, likewise understood that the Warrant Clause applied to the commitment warrant separate from any arrest warrant.<sup>36</sup> Indeed, several of these cases arose out of the celebrated treason trial of Aaron Burr in 1807.<sup>37</sup> This series of cases involved the leading judges of the era, most notably Chief Justice Marshall, as well as its leading lawyers, including sitting, former, and future U.S. Attorneys General, delegates to the federal and state constitutional conventions, and esteemed members of the bar.<sup>38</sup> Their view that the Warrant Clause applied to warrants of commitment and preliminary examinations thus opens a window onto its original meaning.

But some might point to the history that more particularly inspired the Fourth Amendment to argue that those cases involved “general warrants”—search warrants and arrest warrants only, especially the

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30 *Id.*

31 *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021); *id.* at 1006 (Gorsuch, J., dissenting) (collecting founding-era definitions).

32 *See infra* Part II.

33 *See* 2 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 105–24 (Sollom Emlyn ed., London, F. Gyles, C. Woodward & C. Davis 1736); *infra* Section III.B.

34 *See Ex parte Burford*, 7 U.S. (3 Cranch) 448, 451, 453 (1806); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 110, 130–31 (1807).

35 *United States v. Burr*, 25 F. Cas. 27, 29 (C.C.D. Va. 1807) (No. 14,692c).

36 *See infra* Part IV.

37 *See infra* Section IV.B.

38 *See infra* Section IV.B; *see also* R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* 73–81 (2012); Orin S. Kerr, *Decryption Originalism: The Lessons of Burr*, 134 *HARV. L. REV.* 905, 911–12 (2021).

series of *Wilkes* cases in 1763 England.<sup>39</sup> Indeed, it is true that the *Wilkes* cases had tremendous influence on the founding generation and the framing of the Fourth Amendment.<sup>40</sup>

But as this Article points out—perhaps for the first time—the very first case involving John Wilkes involved a warrant to commit rather than to arrest or search.<sup>41</sup> His counsel challenged that warrant for being general: for failing to state evidence under oath and for failing to state the crime with sufficient particularity.<sup>42</sup> Founding-era lawyers, judges, and ratifiers would certainly have been aware that warrants of commitment were vulnerable to abuse in the oppression of liberty and free speech as much as arrest warrants.<sup>43</sup> Indeed, some founding-era sources referred to warrants of commitment that failed to specify the offense as “general warrants” and therefore defective.<sup>44</sup>

Remarkably, this history has largely been lost. Neither courts nor scholars today recognize that the Warrant Clause applies to this third, important type of warrant.<sup>45</sup> When the Supreme Court addressed the Fourth Amendment and preliminary examinations in 1975 in *Gerstein v. Pugh*, it obtusely ignored the warrant of commitment in favor of applying the Fourth Amendment Unreasonableness Clause, doing so in a way that provided the defendant essentially no procedural rights.<sup>46</sup>

The primary goal of this Article will be to uncover this rich and fascinating history simply for its own sake. But I do also urge that we apply the Warrant Clause to initial appearances today, restore defendants’ pretrial rights, and reduce rates of incarcerations. I defend why an originalist approach particularly makes sense in this context below.<sup>47</sup>

This Article also seeks to renew attention to the Fourth Amendment Warrant Clause, as opposed to the Unreasonableness Clause, and forms a companion piece to my recent article, *The Broken Fourth*

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39 See, e.g., *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 490; Lofft. 1, 1–2; *Money v. Leach* (1765) 97 Eng. Rep. 1075, 1075–76; 3 Burr. 1742, 1742–43.

40 See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1196, 1199–1204, 1257–59 (2016); WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at 440–43, 458–64 (2009).

41 *The King v. Wilkes* (1763) 95 Eng. Rep. 737, 739–40; 2 Wils. K.B. 151, 155.

42 *Id.* at 739, 2 Wils. K.B. at 155.

43 See *infra* Section III.D (showing the wide press coverage in America of Wilkes’s challenge to the warrant of commitment).

44 1 HALE, *supra* note 33 at 577–78; *United States v. Bollman*, 24 F. Cas. 1189, 1194 (C.C.D.C. 1807) (No. 14,622) (opinion of Duckett, J.).

45 See *Manuel v. City of Joliet*, 137 S. Ct. 911, 917–20 (2017) (relying on the Fourth Amendment but ignoring the Warrant Clause in a commitment case); *Gerstein v. Pugh*, 420 U.S. 103, 114, 118–20 (1975).

46 See *Gerstein*, 420 U.S. at 119–23.

47 See *infra* Part VI.

*Amendment Oath*, which explored in depth the “oath” requirement in the founding era.<sup>48</sup> That article addressed search and arrest warrants. This Article focuses on the warrant of commitment and therefore upon a different and perhaps more critical institution: the initial appearance.

Once we apply the Warrant Clause to pretrial commitments and the preliminary examination, we will necessarily enhance the rights of defendants. The Warrant Clause requires warrants issue upon probable cause, “supported by Oath or affirmation.”<sup>49</sup> This oath, as originally understood, banned hearsay.<sup>50</sup> Indeed, from the sixteenth century to the mid-twentieth, an irreducible minimum of the preliminary examination in England and America was the live accusatory witness with firsthand knowledge of the crime—usually simply the alleged victim.<sup>51</sup>

This Article proceeds as follows. Part I sketches the contemporary scholarship. Part II shows how the text of the Warrant Clause, under its plain meaning, governs warrants of commitment. Part III surveys the history of the preliminary examination and the warrant of commitment.

Part IV considers three foundational cases in 1806 and 1807 in which the lawyers and judges applied the Fourth Amendment Warrant Clause to the warrant of commitment. For the skeptical reader, this section provides the most concrete evidence that the Warrant Clause requirements apply to the preliminary examination and the resulting warrant of commitment. Part IV also considers treatises from the early republic similarly treating the warrant of commitment as falling under the Warrant Clause or its state analogues.

Part V picks up in the twentieth century, when courts began to dispense with the probable cause determination at initial appearances. This development led to *Gerstein v. Pugh*, which applied the Fourth

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48 Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603 (2022).

49 U.S. CONST. amend. IV.

50 Sacharoff, *supra* note 48, at 606.

51 See *infra* Sections III.B, VI.A. Remarkably, many jurisdictions required live, firsthand witnesses at the initial appearance through the twentieth century even into the 1970s. See CODE OF CRIM. PROC. § 46 (AM. L. INST., Proposed Official Draft 1930) (requiring live witnesses in the presence of the defendant, and cross-examination); A MODEL CODE OF PRE-ARRAIGNMENT PROC. § 310.2(2) (AM. L. INST. 1975); A MODEL CODE OF PRE-ARRAIGNMENT PROC. 1–5 (AM. L. INST., Tentative Draft No. 5A, 1973) (eliminating requirement of live, firsthand witnesses and explaining in detail why but also noting that New York City retained the requirement); see also Floyd F. Feeney & James R. Woods, *A Comparative Description of the New York and California Criminal Justice Systems: Arrest Through Arraignment*, 26 VAND. L. REV. 973, 991, 1015 (1973).



Amendment Unreasonableness Clause to require probable cause but little else.<sup>52</sup>

Finally, Part VI argues that courts today should apply the Warrant Clause directly to preliminary examinations and commitments.

A note on terminology: I will use the founding-era term, preliminary examination, for most of the Article. But many jurisdictions today have split this proceeding in two, often calling the first one the initial appearance, first appearance, presentment, or arraignment, and the second one a preliminary hearing, arraignment, or some other term. As the Article steps into the twentieth century, I will switch to this latter terminology as dictated by the jurisdiction under consideration. Also, I will use “warrant of commitment” and *mittimus* interchangeably.

Finally, I will often use the term “alleged victim,” though today we would say, “complaining witness.” The term “alleged victim” clarifies that in the founding era, victims and alleged victims investigated and prosecuted crimes because there were no police or, for the most part, public prosecutors.

## I. CONTEMPORARY SCHOLARSHIP ON PRETRIAL COMMITMENT

Most scholarship about preliminary examinations and commitment focuses on bail.<sup>53</sup> After all, the primary purpose of today’s initial appearance, effectively, is to set bail. We likely jail millions of people per year pending trial; for the vast majority, judges set bail that defendants cannot afford.<sup>54</sup> These scholars show how this practice exacts tremendous costs on individuals and society.<sup>55</sup> These scholars and bail reform advocates therefore argue that few if any should be jailed pending trial<sup>56</sup> or, if they are, we should use far more reliable measures of whom to jail.<sup>57</sup>

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52 420 U.S. 103, 119–23 (1975).

53 See, e.g., Heaton et al., *supra* note 1, at 724–28 (collecting empirical literature); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019).

54 See Heaton et al., *supra* note 1, at 713.

55 See *id.* at 713, 715–16, 759–68; Funk, *supra* note 53, at 1102.

56 See ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 3–4, 14–15, 112–13, 157–58 (2019); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494 (2018); Mayson, *supra* note 53, at 1645; Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 713, 715–16 (2022).

57 See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2251–54, 2281–96 (2019) (surveying bail risk instruments and the difficulties in fairly and accurately predicting future harm); Shima Baradaran Baughman, *Taming Dangerousness*, 112 GEO. L.J. 215, 223–24, 227–28 (2023).

But these bail scholars focus less attention on the preliminary examination's role in establishing probable cause.<sup>58</sup> For example, Shima Baradaran Baughman has recently argued for a more robust recognition of a defendant's constitutional pretrial rights in liberty, rooted in Magna Carta, the Due Process Clause, and other constitutional provisions.<sup>59</sup> Nevertheless, her argument remains firmly grounded in the bail scholarship and caselaw rather than in probable cause and the Fourth Amendment.<sup>60</sup>

Beyond the bail scholarship, most doctrinal scholarship concerning initial appearances focuses on delays. Metzger and Hoeffel have catalogued cases of defendants jailed without a probable cause determination for weeks or months.<sup>61</sup> Contrary to my position (and *Gerstein v. Pugh*), however, they argue that the Fourth Amendment should not apply to preliminary examinations or commitments at all; rather, due process should apply.<sup>62</sup>

There are rich historical studies of the preliminary examination, both in England and America.<sup>63</sup> Langbein,<sup>64</sup> Herrup,<sup>65</sup> Beattie,<sup>66</sup> King,<sup>67</sup> and many others have detailed its workings in England; Langbein in particular has traced its history, arguing that it began as a prosecution instrument that slowly developed rights to protect the defendant's liberty.<sup>68</sup>

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58 *But see* Funk, *supra* note 53, at 1121 (discussing whether the limited rights *Gerstein* affords for a probable cause hearing also limit a defendant's rights at the simultaneous bail hearing).

59 *See* Baughman, *supra* note 57, at 225–26.

60 *See id.*

61 *See* Metzger & Hoeffel, *supra* note 28, at 393–94, 396–97; *see also* PAMELA R. METZGER, JANET C. HOEFFEL, KRISTIN M. MEEKS & SANDRA SIDI, DEASON CRIM. JUST. REFORM CTR., ENDING INJUSTICE: SOLVING THE INITIAL APPEARANCE CRISIS I (2021); BRINK ET AL., *supra* note 10, at 6.

62 *See* Metzger & Hoeffel, *supra* note 28, at 418–52.

63 *See* BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 148–83 (1991). Shapiro focuses on the development of the probable cause standard at the preliminary examination in England and America rather than oath, hearsay, or warrants. *Id.* at 173–83.

64 *See* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 63–97 (1974) [hereinafter LANGBEIN, PROSECUTING CRIME]; *see also* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 273–77 (2003) [hereinafter LANGBEIN, ORIGINS].

65 *See* CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 85–92 (1987).

66 *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 267–81 (1986).

67 *See* PETER KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740–1820, at 82–99 (2000).

68 *See* LANGBEIN, ORIGINS, *supra* note 64, at 276–77.

Other scholarship views preliminary examinations through the lens of the development of the right to counsel.<sup>69</sup> Allen Steinberg's detailed study of Philadelphia's preliminary examinations and trials from 1800 to 1880 traces the evolution from the alleged victim as prosecutor to government-paid lawyers as prosecutor.<sup>70</sup> Other work on preliminary examinations has considered the right against self-incrimination<sup>71</sup> and hearsay.<sup>72</sup>

These fascinating and deeply researched historical works do not touch on whether the Warrant Clause applies to commitments. This is not a critique: those topics did not fall under their goals and many of these studies concerned England.

## II. TEXT

The text of the Fourth Amendment provides surprising support for my proposition. Its text is not limited to search and arrest warrants. Rather, the text uses variations on the word “seize” rather than “arrest.”<sup>73</sup> In its first clause, it guards generally against “unreasonable . . . seizures.”<sup>74</sup> The Warrant Clause governs warrants that authorize a “person[] . . . to be seized.”<sup>75</sup> We must therefore determine the plain meaning or common-law meaning of a warrant to seize a person.<sup>76</sup>

### A. *Seize*

“Seize” means to capture, grab, take possession of, or to restrain freedom by force.<sup>77</sup> It had this meaning in the founding era as well

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69 Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1514 (2013).

70 See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989).

71 See LANGBEIN, *ORIGINS*, *supra* note 64, at 277–83; Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 779–80 (2007).

72 See Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107–08 (2005).

73 U.S. CONST. amend. IV. The Fourth Amendment applies to “seizures” and governs warrants relating to the persons to be “seized.” *Id.*

74 *Id.*

75 *Id.*

76 Jeffrey Bellin has collected arguments in favor of relying on the text of the Fourth Amendment, even when that text might deviate from current Fourth Amendment practice, caselaw, or one's desired outcome. Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238 n.24, 242–43, 242 n.58 (2019).

77 THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1588 (5th ed. 2011); *Seize*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/seize> [<https://perma.cc/L4LZ-ND9N>].

both in common parlance and in legal use.<sup>78</sup> Committing a person to jail meets this definition. In a typical case, a court officer or marshal grabs a person in the courtroom, or at least touches them to take custody, handcuffs them, and leads them to jail. The jail itself continues this restraint via bars and doors. In the founding era, a constable or sheriff, in response to the *mittimus*, similarly took “custody” of the defendant and conveyed him to the jail, where the jailer restrained the defendant’s freedom pursuant to the *mittimus*.<sup>79</sup>

One could object that a justice of the peace (JP) does not order a seizure because the person before him is already in custody—usually having been arrested by the police. And, the argument would continue, the plain meaning of “seize” denotes an initial bringing into custody, not a continuation of custody.<sup>80</sup> I will show this objection fails because the JP’s commitment is its own, fresh seizure.

First, in some instances, a defendant might appear before a JP voluntarily pursuant to a summons or otherwise than by arrest.<sup>81</sup> Defendants were often summoned rather than arrested for nonviolent misdemeanors, for example.<sup>82</sup> As we will see below in the *Burr* case, Aaron Burr was free on bail and appeared in court, not already in physical custody, for his second preliminary examination—which led to his custody in jail.<sup>83</sup> In this scenario, if the JP commits the defendant, for refusal or failure to find sureties or post bail, for example, he of course does so for the first time. This commitment, anyway, counts as a literal first capture and thus a seizure. This warrant of commitment must therefore fall under the Warrant Clause.

The second scenario involves a warrantless arrest by the alleged victim or other private person. When the JP commits this defendant, this is the first time the government has seized the person. For the first time the constable or sheriff takes possession of the defendant’s body to convey him to jail. After all, the Fourth Amendment did not and does not apply to an arrest by a private person;<sup>84</sup> the first time anyone determines probable cause under the Fourth Amendment is upon commitment.

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78 *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021); *id.* at 1006 (Gorsuch, J., dissenting) (collecting founding-era definitions).

79 2 HALE, *supra* note 33, at 120.

80 *But see* *Manuel v. City of Joliet*, 137 S. Ct. 911, 919–20 (2017) (asserting that even detention after initial imprisonment counts as Fourth Amendment seizure).

81 *See, e.g.*, HENING, *supra* note 18, at 334; *see also* *Sawin v. Martin*, 93 Mass. (11 Allen) 439, 440 (1865) (noting that the party appeared by citation).

82 *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 239–40, 274–75, 326–27 (2002).

83 *See* *United States v. Burr*, 25 F. Cas. 2, 11 (C.C.D. Va. 1807) (No. 14,692a).

84 *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

This second scenario is in some ways dispositive. After all, an arrest by a private person was, in the founding era, one of the paradigmatic types of arrest enjoying an older pedigree than arrests based on a warrant or by an officer.<sup>85</sup>

Finally, we can consider the case of an arrest by a constable, or, today, a police officer, with or without an arrest warrant. Here we might be tempted to say the warrant of commitment creates no new seizure. But even here it does. When the constable or police officer brings the suspect to court, the suspect remains under the custody of the arresting officer, until the JP issues his warrant of commitment. But once the warrant of commitment issues, and the officer transfers the suspect to the jailer, the jailer has now seized the defendant.<sup>86</sup>

Hale addressed this point expressly by saying the defendant is in the arresting constable's custody pursuant to the arrest warrant until "he be actually committed to the gaol by warrant of the justice."<sup>87</sup> In the twentieth century, for warrantless arrests, courts routinely issued "arrest warrants" at the initial appearance rather than calling them warrants of commitment—so much so they apparently considered them the same.<sup>88</sup>

More generally, the text of the Warrant Clause fits commitments and requires no contrivance and leaves no words superfluous. The text requires oath and probable cause of a crime,<sup>89</sup> and that requirement of course makes sense for commitments and was, as noted below, the common-law requirement. The text requires that the warrant identify the person to be seized,<sup>90</sup> a requirement that also makes sense. A warrant of commitment must, of course, name the person to be committed, and this too was already a common-law requirement.<sup>91</sup>

The most recent Supreme Court case interpreting the term "seizure" is the 2021 decision in *Torres v. Madrid*.<sup>92</sup> This case called arrest the "quintessential" seizure of the person, but it did not say arrest was

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85 See 2 HALE, *supra* note 33, at 121; 4 COKE, *supra* note 23, at 177.

86 2 HALE, *supra* note 33, at 120; CARROLL C. HINCKS, W. CALVIN CHESTNUT, JAMES ALGER FEE, GUNNAR H. NORDBYE, J. FOSTER SYMES & GEORGE C. TAYLOR, COMM. OF THE JUD. CONF. OF SENIOR CIR. JUDGES, MANUAL FOR UNITED STATES COMMISSIONERS 18 (1948) (noting that a *mittimus* must be directed to the federal marshal (i.e., the jailer) and not to any other officer such as an officer who arrested without a warrant (e.g., the FBI)).

87 2 HALE, *supra* note 33, at 120; Frost's Case (1599) 77 Eng. Rep. 190, 190; 5 Co. Rep. 89 a, 89 a.

88 See Wayne R. LaFare & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1000 (1965).

89 U.S. CONST. amend. IV.

90 *Id.*

91 HENING, *supra* note 18, at 128 ("It should contain the name and surname of the party committed . . .").

92 141 S. Ct. 989 (2021).

the only type of seizure of the person.<sup>93</sup> For its purposes, it was enough to show that all arrests are seizures, not the converse. Indeed, the *Torres* case otherwise noted that the plain meaning of seizure also includes taking possession.<sup>94</sup>

### B. Warrants

The plain meaning of warrant, as well as its common-law and founding-era usage, amply support its application to a *mittimus*. First, a *mittimus* was also very commonly referred to as a “warrant of commitment.”<sup>95</sup> As noted below, these warrants of commitment had almost identical requirements as arrest warrants, often in the same language.<sup>96</sup> They functioned the same and had almost identical remedies under habeas, false imprisonment, and other causes of action.<sup>97</sup> Courts and treatises treated them as twins. Finally, they were both issued by lower courts of limited jurisdiction unlike other legal process to arrest issued by higher courts further along in the criminal process such as after indictment, during trial, or after conviction.<sup>98</sup>

But of course, the Warrant Clause famously does not require warrants, it merely sets forth the requirements when they do issue.<sup>99</sup> Now in most jurisdictions, perhaps all, judges do issue some kind of warrant of commitment at the end of the initial appearance to commit a person pending trial. They can be called securing orders, detention orders, *mittimuses*, warrants of commitment, commitment orders, or simply commitments.<sup>100</sup> But suppose states simply eliminated this requirement. Could they evade the Warrant Clause requirements that way?

First, it is hard to imagine a practical method to incarcerate a person in jail pending trial without a judicial order. How could a jailer authorize the commitment in response to a habeas petition or a false imprisonment lawsuit? How would the jailer know when to release the defendant, under what circumstances, and to whom (such as to the court)?

In addition, the Constitution requires such warrants in the same manner as it requires arrest and search warrants in certain

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93 *Id.* at 995 (quoting *California v. Hodari D.*, 499 U.S. 621, 624 (1991)).

94 *Id.*

95 *See, e.g., Ex parte Burford*, 7 U.S. (3 Cranch) 448, 450 (1806); HENING, *supra* note 18, at 126.

96 *See infra* Section III.B.

97 *See infra* Section III.C.

98 *See* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 364–67, 386 (Albany, W.C. Little & Co. 1858).

99 U.S. CONST. amend. IV.

100 *See supra* note 17 and accompanying text.

circumstances. After all, one could make the same argument about arrest and search warrants, that the Fourth Amendment governs how they may issue, but not expressly that they must. Today, the Supreme Court has interpreted the Unreasonableness Clause of the Fourth Amendment as generally requiring warrants for arrests in and searches of the home.<sup>101</sup> Similarly, since a commitment to jail counts as a seizure,<sup>102</sup> the Unreasonableness Clause must similarly require a warrant to accomplish this seizure.

Historically, it was likely the Due Process Clause of the Fifth Amendment that imposed the requirement that judges issue a warrant to justify a search of the home.<sup>103</sup> Similarly, and perhaps with even greater force, the Due Process Clause historically required a warrant to justify commitment pending trial.<sup>104</sup> As discussed more below, the Stuart-era battles over pretrial commitment resulted in Coke's insistence that persons cannot be jailed merely upon the oral word of the King, but rather must be jailed pending trial based upon a warrant of commitment that stated the charges.<sup>105</sup> The "process" part of the Due Process Clause, at its core, refers to this warrant.<sup>106</sup> No one can be deprived of liberty without such legal process.

### III. HISTORY OF THE PRELIMINARY EXAMINATION AND THE *MITTIMUS* TO THE FOUNDING ERA

This Part surveys the development of the preliminary examination and commitments to show that the arrest warrant and the warrant of commitment were seen as twins with parallel requirements, purposes, and functions. The warrant of commitment was, in many ways, simply an arrest warrant in court directed to the jailer rather than simply the constable.<sup>107</sup> The two warrants were also similar in relation to remedies a person would enjoy when the warrants had defects. This pairing of the two warrants in common-law history explains why the founding generation understood that the Warrant Clause applied equally to each.

This Part also shows that the preliminary examination itself evolved significantly from the mid-sixteenth century to the founding era and the early republic. At first, the preliminary examination

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101 See *Kentucky v. King*, 563 U.S. 452, 459 (2011).

102 See *supra* Section II.A.

103 See *infra* notes 257–64 and accompanying text.

104 See *infra* note 259 and accompanying text.

105 See *infra* Section III.D.

106 See *infra* notes 257–59 and accompanying text.

107 See HENING, *supra* note 18, at 130. A typical *mittimus* ordered the constable or sheriff to take the defendants to jail and ordered the jailer to receive and keep him. *Id.*

avored the prosecution, but by the founding era, it had shifted to provide robust procedural protections for defendants. This cresting of rights for defendants at preliminary examinations more generally also suggests the founding generation sought to apply the enhanced rights of the Warrant Clause to commitments.

Throughout this period, in England and America, JPs issued warrants and conducted preliminary examinations; during the early republic and beyond, analogous judicial officers also performed these functions, including aldermen, mayors, commissioners, and magistrate judges.<sup>108</sup> For convenience, I will generally use either JP or magistrate judge.

### A. *Marian Statutes*

In 1554 and 1555, Parliament passed two statutes, the Marian Statutes, that viewed together created the framework for the preliminary examination.<sup>109</sup> These statutes mentioned neither arrest warrants nor warrants of commitment but furthered the development of both. They also became the rough template for the preliminary examination even today.<sup>110</sup>

The statutes applied to anyone arrested for a felony and brought before a JP to be bailed or committed pending trial.<sup>111</sup> Their framework soon applied to indictable misdemeanors as well.<sup>112</sup> They required that the JP examine the defendant, alleged victim, and other witnesses.<sup>113</sup> He was to write down this testimony and certify it to a higher court.<sup>114</sup> He was to bind over witnesses for trial.<sup>115</sup>

For our purposes, what the Marian Statutes omitted is perhaps more significant in the development of the warrant of commitment, especially as a twin of the arrest warrant. First, the statutes say nothing about how the defendant was to be arrested—whether by private person or officer. They do not mention arrest warrants or search warrants, much less authorize them. Nor do they mention warrants of

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108 See STEINBERG, *supra* note 70, at 5.

109 Criminal Law Act 1554, 1 & 2 Phil. & M. c. 13; Criminal Law Act 1555, 2 & 3 Phil. & M. c. 10.

110 See *infra* Part VI.

111 2 & 3 Phil. & M. c. 10.

112 MICHAEL DALTON, *THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 407 (London, Samuel Keble 1690); 1 J. CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 62 (Philadelphia, Edward Earle 1819); STEINBERG, *supra* note 70, at 39.

113 2 & 3 Phil. & M. c. 10.

114 *Id.*

115 Criminal Law Act 1554, 1 & 2 Phil. & M. c. 13; 2 & 3 Phil. & M. c. 10.



commitment. With respect to the preliminary examination, they do not say that the examination of witnesses should occur under oath.<sup>116</sup>

Finally, the statutes assume the case will move forward because they do not provide for dismissal for lack of probable cause or other legal cause.<sup>117</sup> They therefore govern bailing and committing pending trial only.

In other words, the purpose of these statutes is not what their language would later become: a code to govern pretrial procedure.<sup>118</sup> Instead, Parliament passed them because JPs were releasing too many defendants on bail, in their view.<sup>119</sup> The newly required depositions would allow a higher court to supervise and ensure that the JPs were releasing only those defendants eligible for release on bail.<sup>120</sup> For cases in which the JPs committed, the depositions likely could also be used to help the prosecution.<sup>121</sup> The statutes hurt defendants rather than afforded them protections to enhance liberty.

But JPs quickly filled in what the statutes failed expressly to provide for: including a requirement that any complaint seeking an arrest warrant be under oath, and any testimony leading to commitment pending trial be under oath.<sup>122</sup> They did so, at least according to the leading treatises, in a way that shows that the arrest warrant and the warrant of commitment evolved in tandem to have nearly the exact same requirements while still serving separate though related purposes.

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116 1 & 2 Phil. & M. c. 13; 2 & 3 Phil. & M. c. 10. Langbein has collected thirty-one statutes providing for preliminary examinations before the Marian Statutes, and most of these too did not require or mention that statements be under oath. LANGBEIN, PROSECUTING CRIME, *supra* note 64, at 64–77. In 1660, a statute for search warrants for customs agents (called writs of assistance) required an oath, Customs Act 1660, 12 Car. 2 c. 19, § 1, but in 1662 Parliament amended the statute to eliminate the oath requirement, Customs Act 1662, 14 Car. 2 c. 11, § 4 (repealed 1825).

117 1 & 2 Phil. & M. c. 13; 2 & 3 Phil. & M. c. 10.

118 *E.g.*, DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 90 (Boston, Cummings, Hilliard & Co. 1824).

119 1 & 2 Phil. & M. c. 13; LANGBEIN, PROSECUTING CRIME, *supra* note 64, at 55.

120 *See* LANGBEIN, PROSECUTING CRIME, *supra* note 64, at 11.

121 *See id.* at 45.

122 MICHAEL DALTON, THE COVNTREY IVSTICE, CONTEYNING THE PRACTISE OF THE IVSTICES OF THE PEACE OUT OF THEIR SESSIONS 264 (London, Societie of Stationers 1618) (recommending JPs take examinations under oath).

*B. The Common-Law View of Warrants to the Founding Era*

Four treatise writers, Edward Coke,<sup>123</sup> Matthew Hale,<sup>124</sup> William Hawkins,<sup>125</sup> and William Blackstone,<sup>126</sup> almost entirely shaped the common-law view of warrants, both arrest and commitment; American founding-era sources pervasively cited these writers concerning warrants,<sup>127</sup> far more even than the Fourth Amendment or its state analogues. The early republic sources similarly cited them,<sup>128</sup> along with Joseph Chitty<sup>129</sup>—though some colonies, states, and territories varied in certain particulars.<sup>130</sup>

These treatise writers further our narrative that the arrest warrant and the warrant of commitment were twins that evolved in tandem, in two main ways: first, in showing JPs had the power to issue such warrants before indictment at all, and second, in detailing their requirements. Those requirements are practically identical for arrest warrants and warrants of commitment.

As to JPs' power, in his *Institutes*, Coke at times had said JPs lacked the power to issue warrants before an indictment.<sup>131</sup> The later treatise writers, in rebuttal, justified the power of JPs to issue warrants by linking arrest warrants and warrants of commitment. We will focus on Hale as most illustrative, and on this topic, one of the most cited by American founding-era sources.

Hale first showed that JPs had the power to “convene and commit felons before indictment,” citing numerous statutes.<sup>132</sup> This power to conduct a preliminary examination and commit, Hale wrote, necessarily implied a power to arrest, and with it a power to issue an arrest

123 2 COKE, *supra* note 23.

124 2 HALE, *supra* note 33.

125 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (London, J. Walthoe & J. Walthoe, Jun. 1721).

126 4 WILLIAM BLACKSTONE, COMMENTARIES.

127 James Otis, in his influential argument in the *Writs of Assistance Case*, cited to Hawkins for the prohibition on general warrants. 2 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 522 (Boston, Charles C. Little & James Brown 1850); HENING, *supra* note 18, at 126–30 (citing extensively to Coke, Hale, Hawkins, and Blackstone for warrants of commitment); *see also* Donohue, *supra* note 40, at 1252–56 (cataloging the effect of these treatise writers on the founding generation and the Fourth Amendment more generally).

128 DAVIS, *supra* note 118, at 49–82; 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 529 (Boston, Cummings, Hilliard, & Co. 1824) (citing Hale for the *mittimus* requirements).

129 1 CHITTY, *supra* note 112, at 22–48.

130 *See infra* notes 163–74 and accompanying text.

131 2 COKE, *supra* note 23, at 50; 4 *id.* at 176–77.

132 2 HALE, *supra* note 33, at 109, 109–10. Dalton made a similar argument earlier. DALTON, *supra* note 122, at 289.

warrant.<sup>133</sup> The power to commit, Hale said, meant the JP “*à fortiori* may make a warrant [to arrest] to examine the cause of the suspicion.”<sup>134</sup>

Even the power to issue arrest warrants fell into two categories: crimes the JP witnessed and those reported to him by alleged victims or other witnesses. Hale treated the former as self-evident<sup>135</sup> but justified the latter with an interesting observation. Private persons had long enjoyed the right to arrest without a warrant for felonies in their view; this acknowledged and ancient power, along with the Marian Statutes, implicitly gave JPs the right to issue an arrest warrant to a private person based upon their sworn report of the crime.<sup>136</sup>

Hale thus harmonized in both directions. The power to commit implied the power to issue an arrest warrant. But conversely, the power of an individual or a constable to arrest without a warrant implied the power of a JP to issue a warrant for that arrest based upon the individual’s testimony. Arrest warrants and commitments thus rested upon the same footing.

Let us now turn to the requirements of each warrant to see how similarly they were treated. Hale detailed the requirements for arrest warrants in one section, warrants of commitment in another, each under its own heading. That is, each is its own type of warrant and yet the detailed requirements for each are practically the same.

As for their similarities, both must: (i) be in writing,<sup>137</sup> (ii) be under seal,<sup>138</sup> (iii) name the individual or describe him uniquely,<sup>139</sup> (iv) state the crime with specificity,<sup>140</sup> (v) have a legal conclusion or return,<sup>141</sup> and (vi) rest upon testimony under oath,<sup>142</sup> (vii) which itself has been committed to writing as a deposition separate from the warrant document.<sup>143</sup>

Of these requirements, we can focus on three as particularly instructive. First is the requirement of the specificity of charge. For both warrants, Hale wrote almost exactly the same way. For arrest warrants, it “ought to contain the cause specially.”<sup>144</sup> The reason, in large part, was so that a higher court on habeas review could determine whether

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133 2 HALE, *supra* note 33, at 110.

134 *Id.*

135 *Id.* at 109.

136 *Id.* at 108–09.

137 *Id.* at 111, 122.

138 *Id.*

139 *Id.* at 114; 1 *id.* at 577; HENING, *supra* note 18, at 128.

140 2 HALE, *supra* note 33, at 111, 122.

141 *Id.* at 112, 123.

142 *Id.* at 111, 120.

143 *Id.*

144 *Id.* at 111.

the person was eligible for bail.<sup>145</sup> And yet this failure, Hale added, would not make the arrest warrant void.<sup>146</sup>

Roughly a dozen pages later, Hale said the same things about the *mittimus*: “It must contain the certainty of the cause . . . .”<sup>147</sup> Simply stating “felony” was insufficient, but it should say something like “burglary.”<sup>148</sup> Here too, the reason was in part the same: to aid a court reviewing the commitment on habeas.<sup>149</sup> As with an arrest warrant, Hale also said that a failure to state the cause with certainty would not make the *mittimus* void.<sup>150</sup>

Second, both warrants must be in writing based upon sworn testimony, and that sworn testimony should result from the JP examining the alleged victim and witnesses rather than passively receiving their complaint.<sup>151</sup> Remember, the Marian Statutes did not require an oath for examinations nor for arrest warrants, the latter of which they do not even mention.<sup>152</sup> That both warrants came to require an oath<sup>153</sup> and testimony reduced to writing<sup>154</sup> again shows how the arrest warrant and warrant of commitment appear to have evolved in tandem.

I have shown elsewhere with respect to arrest warrants that this “oath” requirement, under both the common law and the Fourth Amendment, required live, firsthand witnesses.<sup>155</sup> This same requirement applies to preliminary examinations and therefore warrants of commitment—indeed with even stronger force, as I explore in subsequent Sections below.<sup>156</sup>

The final similarity to highlight between arrest warrants and warrants of commitment concerns the legal return or conclusion—to avoid secret or indefinite detentions. An arrest warrant must direct the constable to bring the prisoner to the JP who issued it, or sometimes

145 *Id.*

146 *Id.*

147 *Id.* at 122.

148 *Cf. id.*

149 *Id.* A second reason was to allow jailers to make a list of everyone in his jail and the cause of commitment for a higher court for trial—a difference from arrest warrants that reflected their differing functions. *Id.*

150 *Id.* at 123. *But see* FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 369 (London, Edward & Charles Dilly 2d ed. 1776) (stating that a *mittimus* “without the cause expressed, is a void one, and imprisonment on it illegal”).

151 2 HALE, *supra* note 33, at 111, 120.

152 *See supra* note 116 and accompanying text.

153 The common law did not require that the warrant reflect on its face that it rested upon testimony under oath. *See infra* notes 222–24 and accompanying text.

154 A written complaint sworn before the magistrate would normally also suffice. *See infra* note 428 and accompanying text.

155 Sacharoff, *supra* note 48, at 639–41, 646–47.

156 *See infra* sub-subsection IV.B.5.b, Section VI.A.

to another JP.<sup>157</sup> A *mittimus* must state an end to the commitment, at least generally.<sup>158</sup> Like an arrest warrant, the *mittimus* was a significant, operative document.

Later writers such as Hawkins, Blackstone, and Chitty, as well as American treatise writers, echoed Hale.<sup>159</sup> First, in justifying the power of JPs to issue arrest warrants at all, they reasoned from the power to commit to the power to issue arrest warrants. Blackstone, for example, said that it would be “absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination.”<sup>160</sup> Second, they too listed the requirements for arrest warrants and, separately, a very similar list of requirements for warrants of commitment.<sup>161</sup> Michael Dalton, another influential, and earlier, English writer, provided more than a dozen sample “warrants of commitment,” which he also called the *mittimus* over six pages.<sup>162</sup>

The American colonies adopted the Marian Statute framework, with some variation and subsequent English interpretations, including specific requirements listed by Hale and others for the *mittimus*. Connecticut by statute in 1702 required a written “mittimus” stating the cause in order to commit.<sup>163</sup> Georgia adopted the Marian Statutes by its reception statute in 1784,<sup>164</sup> and required testimony under oath stating the crime,<sup>165</sup> as did Maryland.<sup>166</sup> Pennsylvania adopted the English system for JPs expressly in 1776.<sup>167</sup> The Mississippi Territory adopted a close version of the Marian Statutes and required testimony under

157 2 HALE, *supra* note 33, at 112.

158 *Id.* at 123. Warrants often concluded with the phrase, until “delivered by due course of law.” *Id.*

159 2 HAWKINS *supra* note 125; 4 BLACKSTONE, *supra* note 126; 1 CHITTY, *supra* note 112; *see also* SULLIVAN, *supra* note 150, at 368–69 (treating the two warrants in the same discussion without even distinguishing them).

160 4 BLACKSTONE, *supra* note 126, at \*287.

161 *See, e.g.*, 1 CHITTY, *supra* note 112, at 26–28 (describing arrest warrants); *id.* at 73–77 (describing warrant of commitment requirements).

162 DALTON, *supra* note 112, at 491–96.

163 An Act for Regulating Goals & Goalers, *in* ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 46, 47 (Boston, Bartholomew Green & John Allen 1702).

164 WILLIAM SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA, at ix, 208–10, 212–14 (Philadelphia, J. Maxwell 1826).

165 *See id.* at 210 n.h.; RHODOM A. GREENE & JOHN W. LUMPKIN, THE GEORGIA JUSTICE 99 (Milledgeville, P.L. & B.H. Robinson 1835).

166 JOHN H.B. LATROBE, THE JUSTICES’ PRACTICE UNDER THE LAWS OF MARYLAND, INCLUDING THE DUTIES OF A CONSTABLE 295 (Baltimore, Fielding Lucas, Jun’r 1826).

167 JOHN BINNS, BINNS’ JUSTICE, OR MAGISTRATE’S DAILY COMPANION: A TREATISE ON THE OFFICE AND DUTIES OF ALDERMEN AND JUSTICES OF THE PEACE, IN THE COMMONWEALTH OF PENNSYLVANIA 306 (Frederick C. Brightly ed., Philadelphia, James Kay, Jun., & Brother 5th ed. 1852).

oath to arrest and commit.<sup>168</sup> New York also adopted the Marian Statute regime, nearly verbatim, in 1787, with the reporter of later enactments citing to the Marian Statutes expressly, as well as to Coke, Hale, and Hawkins.<sup>169</sup> Edward Livingston, in his proposed, comprehensive code for Louisiana, from the 1820s, similarly would have required that the commitment state it rests upon evidence, under oath, stating the charge, along with Hale's other requirements.<sup>170</sup> Massachusetts did not adopt the Marian Statutes but did require JPs to examine firsthand witnesses under oath.<sup>171</sup> Virginia adopted the English system directly in 1662,<sup>172</sup> but later afforded defendants even more protections.<sup>173</sup>

American JP manuals in the founding era quoted the Marian Statutes as well as Coke, Hale, and Hawkins;<sup>174</sup> they often simply repeated Richard Burn, verbatim.<sup>175</sup> They provided details for two closely related concerns: the requirements for the preliminary examination process and the requirements for the *form* of the *mittimus* as a document.

168 An Act to Provide for the More Effectual Administration of Justice, in HARRY TOULMIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 219, 219 (Cahawba, Ginn & Curtis 1823) [hereinafter Miss. JP Act of 1807]; *An Act for the Appointment of Justices of the Peace, and the Establishment of County Courts*, in TOULMIN, *supra*, at 501, 502.

169 An Act Concerning Justices of the Peace, in 1 LAWS OF THE STATE OF NEW-YORK COMPRISING THE CONSTITUTION, AND THE ACTS OF THE LEGISLATURE SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION INCLUSIVE 297, 299–300 (New York, Thomas Greenleaf 1792); An Act Declaring the Powers and Duties of Justices of the Peace, in 2 LAWS OF THE STATE OF NEW-YORK, REVISED AND PASSED AT THE THIRTY-SIXTH SESSION OF THE LEGISLATURE 506, 507 (William P. Van Ness & John Woodworth eds., Albany, H.C. Southwick & Co. 1813); *see also* 2 THE REVISED STATUTES OF THE STATE OF NEW-YORK 708 (Albany, Packard & Van Benthuysen 1829).

170 2 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 240 (New York, Nat'l Prison Ass'n 1873). Livingston's proposed code, not enacted in Louisiana, gained great fame nationally and internationally, earning the approval of Thomas Jefferson and Jeremy Bentham and actual partial adoption in Guatemala. Salmon P. Chase, *Introduction to 1 id.* at v, vii.

171 DAVIS, *supra* note 118, at 90–93.

172 Act 31, 2 Va. Statutes at Large 69 (1661–62).

173 HENING, *supra* note 18, at 147 (explaining that JPs cannot examine the defendant and that Virginia's court of examination provides a minitrial with the power to acquit).

174 HENING, *supra* note 18, at 127–29 (listing the requirements of “[t]he form of the commitment,” *id.* at 127, with citations to Hale, Hawkins, and Coke); BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE; CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE 98 (Dover, Eliphalet Ladd 2d ed. 1792) [hereinafter BURN'S ABRIDGMENT]; A NEW CONDUCTOR GENERALIS 96 (Albany, D. & S. Whiting 1803) [hereinafter NEW CONDUCTOR GENERALIS].

175 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 209 (London, A. Millar 3d ed. 1756). For example, Hening's section on the form of the commitment simply copies that of Burn (without attribution) across two pages. *Compare id.* at 146–47, with HENING, *supra* note 18, at 128–29.

For both categories, they cited or quoted these earlier sources.<sup>176</sup> As Daniel Davis wrote in 1824, relying in part on the Massachusetts Constitution, the examination of witnesses for the commitment “constitutes one of the most important duties of the magistrate.”<sup>177</sup>

American lawyers attended to these details in ordinary cases. John Adams, as a young lawyer, participated in a tort case turning on the legality of an arrest warrant and, separately, the warrant of commitment. In his notes on his co-counsel’s argument, he summarized the challenges, including that the *mittimus* failed to specify how the person was to be conveyed to jail.<sup>178</sup>

Despite the similarities between arrest and commitment warrants, we must remember that the *mittimus* effected a new seizure. After all, when a JP issued an arrest warrant, and the constable arrested and returned the suspect, the JP was obligated to still conduct a preliminary examination and issue a *mittimus* that independently met the foregoing requirements. A JP could not simply commit the defendant using the previously issued arrest warrant.

### C. Remedies

England and the colonies had no Fourth Amendment to impose a particular requirement on warrants. Rather, both relied on remedies. For example, under the Marian Statutes, JPs who failed to take and certify depositions were subject to fine.<sup>179</sup>

For our purposes, many of the requirements for warrants, both arrest and commitment, grew in the shadow of remedies at the back end. These remedies applied almost identically to arrest warrants and warrants of commitment and show from another angle how they appeared to grow in tandem and, in any event, were certainly seen as twins.

First, habeas petitions for release from custody probably had the greatest influence on the requirements for arrest warrants and warrants of commitment. From the late 1500s through to 1800, the English King’s Bench exercised increasing review by way of habeas of

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176 HENING, *supra* note 18, at 126–32 (setting forth the requirements of a commitment warrant followed by five sample forms of a *mittimus*); DAVIS, *supra* note 118, at 82–113.

177 DAVIS, *supra* note 118, at 90; *see also* THE NEW YORK CIVIL AND CRIMINAL JUSTICE 578–79 (New York, N.C. Miller 2d ed. 1861) [hereinafter NEW YORK JUSTICE] (“Great care should be exercised by the Justice in drawing the process for the commitment of the prisoner, or as it is familiarly termed the *mittimus*.”).

178 1 LEGAL PAPERS OF JOHN ADAMS 93 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (describing the *Jerusha Mayhew vs. Robert Allen* case).

179 Criminal Law Act 1555, 2 & 3 Phil. & M. c. 10; Criminal Law Act 1554, 1 & 2 Phil. & M. c. 13.

pretrial arrests and commitments.<sup>180</sup> This increased review, and scrutiny of the merits of pretrial detention, meant that warrants of arrests and warrants of commitment each had to meet greater demands, for the same reason. The requirement that the warrant be in writing, of course, was important for a court reviewing on habeas.<sup>181</sup> That the offense be stated specifically (and under oath), for arrest or commitment warrant alike, rested particularly on the needs of the habeas court to more easily review the commitment.<sup>182</sup> Common-law and statutory habeas were not available if the “warrant of commitment” clearly expressed the felony charged.<sup>183</sup>

A companion remedy to habeas, which also linked the two types of warrants, was false imprisonment seeking money damages rather than release. If a person sued a constable for an alleged unlawful arrest, or a jailer for an unlawful commitment, he would sue in each case for false imprisonment. And in each case, constable or jailer would produce the warrant, either arrest warrant or warrant of commitment, as justification for the confinement.<sup>184</sup> The law for each was similar. If the warrant appeared valid on its face, and the JP had jurisdiction, that would usually immunize the constable or the jailer.<sup>185</sup>

The consequences of whether a person escaped custody, or helped another to escape, also rested upon the particulars of the warrant. Indeed, Hale and Coke largely linked the two scenarios, escape from arrest or from jail.<sup>186</sup> The crime of escape was when a felon, including an accused felon, escaped from prison, but escape from arrest counted. As Hale wrote, quoting Coke, a person “under lawful arrest is said to be in prison.”<sup>187</sup>

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180 See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 28–35 (2010).

181 BURN, *supra* note 175, at 145 (noting that after the Habeas Corpus Act 1679, it was best that the *mittimus* be in writing); cf. 1 HALE, *supra* note 33, at 610.

182 HURD, *supra* note 98, at 376–77; 2 HALE, *supra* note 33 at 111, 122; cf. *King v. Wilkes* (1763) 95 Eng. Rep. 737, 741; 2 Wils. K.B. 151, 157–58.

183 Common-law habeas and statutory habeas, under the Habeas Corpus Act 1679 and its colonial and state analogues, lived side by side. Act of Mar. 16, 1785, ch. 72, 1784–85 Mass. Acts 178; An Act Directing the Mode of Suing Out and Prosecuting Writs of Habeas Corpus, ch. 35, May 1784 Va. Acts 19 (1784). Statutory habeas refused relief for felony commitments if the “warrant of commitment” stated the charge. *Id.* Colonial and state habeas statutes treated commitments by arrest and by JP pending trial the same way. *Id.* (indicating that habeas reviews the “warrant of commitment”).

184 See 1 HALE, *supra* note 33, at 583.

185 For commitment, a warrant that was neither in writing nor under seal could not justify a jailer against false imprisonment, *id.*, but if it failed to state the charge or had a faulty conclusion, it would still justify the jailer, *id.* at 584.

186 *Id.* at 609 (citing 2 COKE, *supra* note 23, at 589).

187 *Id.* (quoting 2 COKE, *supra* note 23, at 589); cf. *id.* at 586 (summarizing his discussion about the *mittimus*es by referring to them as “arrests by warrant in writing”).



Whether the escape was a felony depended on whether the *mittimus* met certain requirements. An escape was not a felony, for example, if the *mittimus* was not in writing, under seal,<sup>188</sup> or if it omitted the specific cause,<sup>189</sup> but if its conclusion was faulty,<sup>190</sup> an escape would still be a felony. Hale apparently applied the same rough standards to an escape from an arrest pursuant to warrant.

#### D. The King v. Wilkes

I now turn to the 1763 case of *The King v. Wilkes* for two main reasons.<sup>191</sup> First, that case recapitulates many of the common-law principles just surveyed. Second, one objecting to my proposal might point to the entire series of *Wilkes*-related cases to argue that the motivation for the Fourth Amendment was searches and arrests only, and not commitments.<sup>192</sup> *The King v. Wilkes*, however, addressed a commitment only, not an arrest, and a challenge to the commitment warrant.<sup>193</sup> Later, in 1769, Wilkes sued and won over this imprisonment.<sup>194</sup> These cases therefore show, apparently for the first time, that the Framers of the Fourth Amendment could well have had in mind warrants of commitment as well.

John Wilkes was a pamphleteer, member of Parliament, and hero in the American colonies as an advocate for and symbol of liberty and free speech.<sup>195</sup> In 1763, he wrote and published a pamphlet, the *North Briton* no. 45, that criticized government policy—anonously.<sup>196</sup> The Crown took notice and the Secretary of State Lord Halifax opened an investigation.<sup>197</sup> He issued a general arrest warrant to officers to arrest anyone they determined was involved in the publication, search and seize their papers, and return everyone and everything back to Halifax

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188 *Id.* at 583.

189 *Id.* at 584.

190 *Id.* at 584, 595.

191 *The King v. Wilkes* (1763) 95 Eng. Rep. 737; 2 Wils. K.B. 151. A later reporter of this case called it *The Case of John Wilkes, Esq. on a Habeas Corpus*. (1763) 19 How. St. Tr. 981. That title appears to be a more accurate description of the proceeding. Nevertheless, I use *The King v. Wilkes* because that is how the *English Reports* labeled it, that is how the original source reporter, Serjeant Wilson, labeled it, 2 Wils. Rep. 151, and because it fell into the larger context of a criminal prosecution against Wilkes.

192 *See supra* note 28.

193 *Wilkes*, 95 Eng. Rep. at 739, 2 Wils. K.B. at 155.

194 *Wilkes v. Halifax* (1769) 19 How. St. Tr. 1406 (reproducing a magazine account of the trial, and a diarist's recollection of the judge's instruction to the jury).

195 ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 1–4 (2006).

196 CUDDIHY, *supra* note 40, at 440, 486.

197 *Wilkes*, 95 Eng. Rep. at 737, 2 Wils. K.B. at 151.

to conduct an examination.<sup>198</sup> The process roughly followed the process in an ordinary criminal case, a JP issuing a warrant and, upon return, conducting a preliminary examination.<sup>199</sup> The key difference was that the search, seizure, and arrest warrants were general—they did not name whom to arrest or which place to search—instead leaving all discretion to the officers, called King’s Messengers.<sup>200</sup>

Those searched or arrested, including Wilkes, later sued for trespass and won.<sup>201</sup> Presiding judges found the general warrants illegal and a threat to liberty.<sup>202</sup> Their opinions relied on the common-law limits on general warrants in language that elevated those strictures to fundamental, even (unwritten) constitutional law.<sup>203</sup> Juries awarded large damages, including exemplary (punitive) damages, reflecting their view of the grave violations and threats to liberty.<sup>204</sup>

These trespass cases directly influenced the founding generation’s understanding and demands for specific warrants naming with particularity the persons to be seized or the places to be searched. These tort cases involved searches and arrest,<sup>205</sup> and we can therefore conclude that the chief proximate cause for the Fourth Amendment involved those two types of warrants.

But the first Wilkes case was *The King v. Wilkes*, the inchoate criminal case immediately following Wilkes’s arrest and commitment to the Tower of London.<sup>206</sup> In this early case, Wilkes challenged the warrant of commitment by habeas,<sup>207</sup> and this case therefore expands our understanding of the breadth of the lessons the colonists absorbed.

In the days leading up to Wilkes’s arrest, in response to Halifax’s general arrest warrant, the King’s Messengers arrested numerous individuals and returned them to Halifax.<sup>208</sup> These witnesses pointed the finger at Wilkes.<sup>209</sup> The Messengers therefore arrested Wilkes, still pursuant to the general arrest warrant issued days earlier by Halifax.<sup>210</sup> They also searched and seized his papers.<sup>211</sup> Wilkes’s counsel rushed

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198 *Id.*

199 *Id.*

200 *See id.*; CUDDIHY, *supra* note 40, at 440–41.

201 *E.g.*, *Wilkes v. Wood* (1763) 98 Eng. Rep. 489; Lofft. 1; *Money v. Leach* (1765) 97 Eng. Rep. 1075; 3 Burr. 1742.

202 *Wood*, 98 Eng. Rep. at 499, Lofft. at 19; *Money*, 97 Eng. Rep. at 1086, 3 Burr. at 1763.

203 *Wood*, 98 Eng. Rep. at 499, Lofft. at 19.

204 *See id.*; CUDDIHY, *supra* note 40, at 452; Donohue, *supra* note 40, at 1204.

205 *E.g.*, Donohue, *supra* note 40, at 1199–1207.

206 (1763) 95 Eng. Rep. 737; 2 Wils. K.B. 151.

207 *Id.* at 739, 2 Wils. K.B. at 154–55.

208 CUDDIHY, *supra* note 40, at 441.

209 *Id.* at 441–42.

210 *Wilkes*, 95 Eng. Rep. at 737, 2 Wils. K.B. at 151.

211 CUDDIHY, *supra* note 40, at 441–42.

immediately to the Court of Common Pleas to seek Wilkes's release pursuant to habeas.<sup>212</sup> Judge Pratt orally issued the writ, but it took several hours for the written writ to reach the Messengers, who by then had turned Wilkes over to the Tower of London pursuant to a new warrant, a warrant of commitment, issued by Halifax and another Secretary of State, Charles, Earl of Egremont.<sup>213</sup>

Wilkes's counsel made a new motion for habeas now directed to the jailer of the Tower of London.<sup>214</sup> The Lieutenant of the Tower of London appeared before the court, bringing Wilkes under guard, with the warrant of commitment from the two Secretaries of State as his justification.<sup>215</sup> The reported opinion set forth verbatim both the arrest warrant and the warrant of commitment.<sup>216</sup> It noted, however, that the habeas argument concerned the warrant of commitment only, and not the arrest warrant, which was no longer relevant for habeas purposes.<sup>217</sup>

The court reporter also noted that the court in Westminster Hall was packed, "crowded to such a degree as I never saw it before."<sup>218</sup> Wilkes's counsel attacked the warrant of commitment on three grounds: (i) it did not state that it rested upon evidence under oath, (ii) it was general for not specifying the offense clearly enough, and (iii) Wilkes enjoyed parliamentary immunity.<sup>219</sup>

The first two objections most concern us. Counsel argued a warrant of commitment must rest upon "evidence or information upon oath" and that instead the Secretaries of State who issued the warrant committed "upon their own mere imagination or suspicion."<sup>220</sup> The Crown lawyer did not deny that the warrant of commitment must rest upon evidence under oath; rather, he argued that the warrant need not reflect that fact on its face.<sup>221</sup>

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212 *Id.* at 442; *Wilkes*, 95 Eng. Rep. at 737, 2 Wils. K.B. at 152.

213 *Wilkes*, 95 Eng. Rep. at 737–39, 2 Wils. K.B. at 152–54.

214 *Id.* at 739, 2 Wils. K.B. at 154.

215 *Id.*

216 *Id.* at 737–38, 2 Wils. K.B. at 151–52. The opinion states that it sets forth the "tenor" of these warrants, but a footnote shows that "tenor" here means verbatim, as opposed to "purport." *Id.* at 737 & n.\*, 2 Wils. K.B. at 151 & n.\*; *see also Tenor*, 17 THE OXFORD ENGLISH DICTIONARY 779 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "tenor" in law as "exact copy of a document, a transcript").

217 *Wilkes*, 95 Eng. Rep. at 739, 2 Wils. K.B. at 155. The court did hint that the arrest warrant might still be relevant under the strange timing of that case but mooted that question by granting release on the habeas directed to the warrant of commitment. *Id.* at 741, 2 Wils. K.B. at 158.

218 *Id.* at 739, 2 Wils. K.B. at 154.

219 *Id.* at 739–40, 2 Wils. K.B. at 155–56.

220 *Id.* at 739, 2 Wils. K.B. at 155.

221 *Id.* at 740, 2 Wils. K.B. at 156.

Wilkes himself then rose to emphasize that individual liberty was at stake: “My Lord! I am happy to appear before your Lordship and this Court, where liberty is so sure of finding protection and support . . . Liberty! [M]y Lord!”<sup>222</sup> Consistent with theories underlying the writ of habeas, he blamed not the King, who preserved liberty, but his ministers for the oppression.<sup>223</sup>

On the first two issues, the court agreed with the government. After first reading the contents of the “warrant of commitment,” the Court suggested that it must in fact rest upon evidence under oath, but that the warrant need not recite this fact.<sup>224</sup> Moreover, Halifax apparently did have before him firsthand witnesses who had accused Wilkes, witnesses who were likely sworn<sup>225</sup>—though the court did not mention this.

As for the second objection, the court agreed that the warrant of commitment must state the cause with sufficient specificity—“a warrant of commitment for felony must contain the species of felony briefly”—but that this one had.<sup>226</sup> In addressing these two issues, the court expressly relied upon Coke, Hale, and Hawkins as correct expounders of these common-law requirements.<sup>227</sup>

In the end, the court released Wilkes because he enjoyed parliamentary immunity.<sup>228</sup> Upon his release, “there was a loud huzza in Westminster-Hall.”<sup>229</sup> The supporting crowd, cheering, followed Wilkes to his home, where he bowed to the crowd.<sup>230</sup>

Americans closely followed the case as well, including in particular Wilkes’s initial arrest, commitment, and release. Colonial newspapers covered the commitment extensively.<sup>231</sup> The *Georgia Gazette* reported that Wilkes refused to be released on bail, insisting upon complete discharge, and that his lawyers challenged the validity of the warrant of commitment.<sup>232</sup> Other papers reported his planned lawsuit against Halifax for seizure of the papers and for “false [i]mprisonment.”<sup>233</sup>

222 *Id.* at 740, 2 Wils. K.B. at 157.

223 *Id.* at 740–41, 2 Wils. K.B. at 157.

224 *Id.* at 741, 2 Wils. K.B. at 157–58.

225 *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 494; Lofft. 1, 10 (noting that Halifax had before him the affidavit of one of Wilkes’s printers accusing Wilkes of having authored the *North Briton* no. 45).

226 *Wilkes*, 95 Eng. Rep. at 741, 741–42, 2 Wils. K.B. at 158, 158–59.

227 *Id.* at 741, 2 Wils. K.B. at 158.

228 *Id.* at 742, 2 Wils. K.B. at 159.

229 *Id.* at 742, 2 Wils. K.B. at 160.

230 BOS. EVENING-POST, June 27, 1763.

231 *E.g.*, MASS. GAZETTE & BOS. NEWS-LETTER, June 30, 1763; *see* Donohue *supra* note 40, at 1257–59 & nn.438–54 (collecting newspaper accounts).

232 *European Intelligence*, GA. GAZETTE, July 28, 1763.

233 NEW-LONDON SUMMARY, July 1, 1763.

It wasn't until 1769 that Wilkes's suit against Halifax finally came to trial—not only for the search but also for false imprisonment for the seven days commitment to the Tower of London.<sup>234</sup> The jury awarded punitive damages.<sup>235</sup> An account of this trial and result also appeared in America.<sup>236</sup>

What can we learn from *The King v. Wilkes* and the later trespass action, *Wilkes v. Halifax*? It remains true that the primary thrust of all the Wilkes cases was to further Americans' hostility to general arrest warrants and general search warrants—warrants that failed to identify the person to be arrested or the place to be searched. But *The King v. Wilkes* shows that warrants of commitment too would have been on American's minds, that these warrants too were potentially subject to abuse, and that the common law provided restrictions on them similar to those for arrest warrants.

After all, a warrant of commitment can be labelled “general” and therefore illegal in its own way that the Fourth Amendment Warrant Clause naturally addresses. A warrant of commitment counts as general not only for failure to name the person but also for failure to specify the offense. The common-law sources, including Hale, used the term “general warrant” for a commitment warrant, and when they did so, meant that the commitment did not state a specific cause or that it did not specify the length of detention.<sup>237</sup> Thus, the Warrant Clause bans general *arrest* warrants by requiring warrants “particularly describ[e] . . . the persons or things to be seized.”<sup>238</sup> By contrast, it bans general warrants of commitment by the requirement of “probable cause, supported by Oath or affirmation”—that is, probable cause of a specific offense.<sup>239</sup>

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234 *Wilkes v. Halifax* (1769) 19 How. St. Tr. 1406.

235 *Id.* at 1415.

236 PA. J. & WKLY. ADVERTISER, Feb. 8, 1770.

237 *E.g.*, 1 HALE, *supra* note 33, at 584 (implying a warrant of commitment that does not specify felony or the type of felony is a “general warrant”); 2 HALE, *supra* note 33, at 111 (same); *United States v. Bollman*, 24 F. Cas. 1189, 1194 (C.C.D.C. 1807) (No. 14,622) (opinion of Duckett, J.) (noting the Fourth Amendment banned “general warrants” that failed to allege the crime under oath); *Ex parte Burford*, 4 F. Cas. 723, 723 (C.C.D.C. 1805) (No. 2,148) (summarizing counsel's argument that a warrant of commitment that fails to specify the charge or have an end date is a “general warrant”); *Brice's Case* (1640) 79 Eng. Rep. 1109, 1109; *Cro. Car.* 593, 593 (“A general warrant, in which no special cause of commitment is shewn, is void.”); *Levy v. Moylan* (1850) 138 Eng. Rep. 78, 83; 10 C.B. 189, 202 (noting argument of counsel, citing Coke); *In re Leak* (1829) 148 Eng. Rep. 1087, 1090; 3 Y. & J. 46, 54–55; *Baldwin v. Blackmore* (1758) 97 Eng. Rep. 465, 469; 1 Burr. 595, 603 (describing warrant of commitment as “general” because it does not specify how long the detention should last).

238 U.S. CONST. amend. IV.

239 *Id.*

More generally, the founding era was keenly aware of the longer course of the English fight for liberty, the thrust of which related as much to imprisonment under warrants of commitment with no charge at all as to arrests—often for political or religious cases and often, as with Wilkes, to the Tower of London.<sup>240</sup> William Penn was committed there for nearly eight months without trial,<sup>241</sup> as was Edward Coke.<sup>242</sup> The founding era located this right in part upon Magna Carta<sup>243</sup> (and its numerous subsequent iterations and confirmations),<sup>244</sup> but they also recognized that the right to stated charges achieved fundamental and constitutional status in the Petition of Right of 1628.<sup>245</sup>

The Petition of Right expressly required that any warrant of commitment state the offense charged. It arose from the great battle between Parliament and Charles I over forced loans, culminating in the Five Knights' case (i.e., Darnel's case).<sup>246</sup> That case expressly asked whether the King can imprison a person without stating a particular offense in the warrant of commitment.<sup>247</sup> The King's (partial) victory led to a long debate in Parliament, including the views of Coke, and to the Petition of Right, which urged that freeman no longer be "imprisoned without any cause showed."<sup>248</sup> In his section on Magna Carta in his later *Institutes*, Coke set forth that a *mittimus* must state the charge in writing and under seal.<sup>249</sup> These, and other unjust commitments,

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240 See 5 DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 178, 187 (London, T. Cadwell 1778); Donohue, *supra* note 40, at 1211. John Adams and Thomas Jefferson (who criticized Hume's account) owned earlier editions of this history, and it appears to have been in the Library Company of Philadelphia's lending library. See Letter from Thomas Jefferson to John Adams (Nov. 25, 1816), in 10 *THE PAPERS OF THOMAS JEFFERSON* 549, 552–53 (J. Jefferson Looney et al. eds., 2013).

241 Andrew R. Murphy, *From Practice to Theory to Practice: William Penn from Prison to the Founding of Pennsylvania*, 43 *HIST. OF EUROPEAN IDEAS* 317, 320–21 (2017); WILLIAM PENN, *NO CROSS, NO CROWN*, at iv (London, Harvey & Darton new ed. 1842).

242 Donohue, *supra* note 40, at 1211–12; HUME, *supra* note 240, at 93.

243 See Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 *VA. L. REV.* 447, 470–76, 493 n.198, 494 n.201, 496–97 (2022).

244 1 *COMMONS DEBATES* 1628, at 128–35 (Robert C. Johnson et al. eds., 1977) (listing statutes comprising Magna Carta and its confirmations or additions); J.C. HOLT, *MAGNA CARTA* 39–42 (3d ed. 2015) (showing that the Petition of Right was the culmination of many small steps from the fourteenth century developing and interpreting Magna Carta).

245 See Crema & Solum, *supra* note 243, at 476–84.

246 1 *COMMONS DEBATES* 1628, *supra* note 244, at 44; *The Five Knights' Case* (1627) 3 *How. St. Tr.* 1; J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 *HIST. J.* 289, 291 (1982).

247 Guy, *supra* note 246, at 291–92; 1 *COMMONS DEBATES*, *supra* note 244, at 44.

248 *The Petition of Right* 1628, 3 *Car.*, c. 1.

249 2 COKE, *supra* note 23, at 52 ("The cause must to be contained in the warrant . . .").

particularly of the Stuart era,<sup>250</sup> set a general context<sup>251</sup> for including the warrant of commitment in the Fourth Amendment alongside its companion arrest warrant.

One could point to the foregoing history, however, to argue that it is the Due Process Clause, and not that Fourth Amendment, that governs warrants of commitment. Such warrants are, after all, “process” used to deprive one of her liberty before trial.<sup>252</sup> Indeed, due process *was* understood centrally to govern warrants of commitment and require that they state a cause. Coke wrote that no one could be arrested or “imprisoned but by due process[] of [l]aw.”<sup>253</sup> But he continued that a commitment warrant “is accounted in [l]aw due process[] or proceeding of [l]aw.”<sup>254</sup>

I argue as follows: The Due Process Clause of the Fifth Amendment (and later, the Fourteenth Amendment) requires a warrant to search the home, for example, or for certain arrests, or other situations in which the common law had required a warrant,<sup>255</sup> and the Fourth Amendment Warrant Clause spells out the requirements for such a warrant.<sup>256</sup> Similarly, the Due Process Clause requires a warrant of commitment for jailing pending trial, and the Warrant Clause provides its requirements. Those requirements, in fact, simply parallel those of the common-law notions of due process: a charge supported by oath that identifies the person to be arrested or jailed based on probable cause.<sup>257</sup>

In other words, there can be no debate that the Fourth Amendment Warrant Clause split off from due process one subset of writs—arrest warrants and search warrants. I merely argue that the Fourth

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250 See 5 HUME, *supra* note 240, at 179–200; 6 *id.* at 366–67.

251 See Crema & Solum, *supra* note 243, at 476–84.

252 *Id.* at 465. Scholars have debated whether the Due Process Clause originally protected legal process only, trial process rights as well, or even court review of certain laws. See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 262–72 (2021). For our purposes, it is sufficient that the Due Process Clause protected, at a minimum (and perhaps at its core) the requirement of a warrant before commitment.

253 2 COKE, *supra* note 23, at 52.

254 *Id.*

255 See Crema & Solum, *supra* note 243, at 451 (arguing that the Due Process Clause required appropriate legal process before arresting (in some circumstances) or jailing, such as a warrant).

256 Cf. Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 19–20 (2007). Davies hints that the Due Process Clause constitutionalized not only the requirements for a warrantless arrest, but also for when a warrant is required. *Id.* at 20.

257 The Fourth Amendment probable cause standard did alter the common-law standard, both for arrest and commitment, as discussed below.

Amendment also split off warrants of commitment, putting those warrants too under the Fourth Amendment Warrant Clause rather than, or at least in addition to, the Due Process Clause. As discussed above, the founding era and its antecedent sources treated the arrest warrant and warrant of commitment as two peas in a pod. For example, an early edition of the *Conductor Generalis* defined due process to include arrests by warrant and commitment by “[m]ittimus.”<sup>258</sup>

Today, the Court and many scholars have proceeded slightly differently in ways that do not alter the substance of what I have just argued. The Court has located the requirement that there be an arrest warrant or a search warrant not in the Due Process Clause, but rather in the Fourth Amendment’s Unreasonableness Clause.<sup>259</sup> The Court has held that certain searches, such as searches of the home, would be unreasonable under the Fourth Amendment without a warrant.<sup>260</sup> That reasoning includes arrests in the home as well.<sup>261</sup> Many scholars agree.<sup>262</sup> It is likely semantics whether it is the Due Process Clause or the Fourth Amendment Unreasonableness Clause that requires warrants; either way, they are required for searches of the home, arrests in the home, and, I argue, commitments to jail pretrial. And once required, of course, the Warrant Clause governs their particulars.

### *E. Robust Protections in the Founding Era*

The prosecution-friendly framework for preliminary examinations at the time of the Marian Statutes evolved into a far more defendant-friendly process by the founding era and early republic.<sup>263</sup> These robust protections created an almost minitrial, albeit an abbreviated one.<sup>264</sup> I point to this founding-era crest in defendant rights at the preliminary examination for two purposes: First, to show that it makes sense the founding era would have applied the Warrant Clause to preliminary examinations. Doing so was part of growing program of affording defendants enhanced rights at the preliminary

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258 CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 420 (New York, J. Parker 2d ed. 1749); see also Crema & Solum, *supra* note 243, at 467 (noting that Benjamin Franklin published this early edition); *id.* at 475 (noting that fourteenth century statutory elaborations on Magna Carta treated warrants for arrest and warrants for imprisonment together).

259 See, e.g., *Payton v. New York*, 445 U.S. 573, 586 (1980).

260 *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)) (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”).

261 *Id.* at 587–88.

262 See Donohue, *supra* note 40, at 1193; CUDDIHY, *supra* note 40, at 765.

263 See *supra* Sections III.A–B.

264 See *supra* note 173 and accompanying text.



examination. Second, I do so simply to hint that other constitutional rights might also apply to the preliminary examination without exploring that issue in any depth.

The clearest protection involved the right against self-incrimination. In the years after the Marian Statutes, JPs used the preliminary examination specifically to obtain confessions.<sup>265</sup> By the founding era, however, JPs were admonished to avoid coercing a confession.<sup>266</sup>

Also, by the founding era, and somewhat before, JPs had to rely upon live, firsthand witness testimony under oath.<sup>267</sup> This was the requirement of the colonial versions of the Marian Statutes, cited above, as well as the exhortation of treatise writers such as Hale.<sup>268</sup> The *Bollman* and *Burr* cases from 1807, discussed below, also confirm this requirement, albeit recognizing exceptions for live testimony.<sup>269</sup>

At some point before, during, or just after the founding era, defendants began to enjoy other rights, depending on the jurisdiction, including (i) the right to warnings,<sup>270</sup> (ii) the right to know the charged offense,<sup>271</sup> (iii) the right to be present,<sup>272</sup> (iv) the right to cross-examine,<sup>273</sup> and (v) the right to compel the attendance of witnesses.<sup>274</sup>

As Davis wrote under Massachusetts law in 1824: “The complainant and his witnesses must be ready to confront the prisoner, on the examination; in whose presence the evidence must always be given.”<sup>275</sup>

265 See, e.g., LANGBEIN, PROSECUTING CRIMES, *supra* note 64, at 63, 93–97; Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2654 (1996).

266 LANGBEIN, ORIGINS, *supra* note 64, at 218–33 (noting that trial courts excluded confessions gained by “hope of favor” by the 1760s, *id.* at 233); see also Oliver, *supra* note 71, at 779–80. Indeed, Virginia disallowed questioning the defendant at all at the preliminary hearing by the founding era and before. HENING, *supra* note 18, at 132. Massachusetts likewise modified the Marian Statutes to favor the defendant and guard against involuntary statements. See DAVIS, *supra* note 118, at 90–92; see also *id.* at 107 (stating that inducement, “however slight” will render a confession inadmissible).

267 See *supra* note 151 and accompanying text.

268 See *supra* notes 131–77 and accompanying text.

269 See *infra* Sections IV.A–B.

270 DAVIS, *supra* note 118, at 107.

271 *Id.* at 66–67.

272 See Miss. JP Act of 1807, *supra* note 168, at 220; 4 BLACKSTONE, *supra* note 126, at \*203.

273 DAVIS, *supra* note 118, at 92; Miss. JP Act of 1807, *supra* note 168, at 220.

274 See Act of Mar. 16, 1784, ch. 51, 1782–83 Mass. Acts 629; DAVIS, *supra* note 118, at 88–89; *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692d) (noting that the common law recognizes right to compel witnesses in part to challenge continuing commitment or recognizance pending trial).

275 DAVIS, *supra* note 118, at 92; LATROBE, *supra* note 166, at 296 (using nearly identical language). Both Davis and Latrobe appear to quote Chitty verbatim. See 1 CHITTY, *supra*

The Mississippi Territory afforded a right to cross-examine by statute in 1807.<sup>276</sup> New York, by 1829, provided the right to counsel.<sup>277</sup>

Of course, practice differs from theory. But even when we consider ordinary criminal cases, and not just famous ones like Burr's, a similar story emerges. Allan Steinberg carefully documented these hearings in early Philadelphia from 1800 forward,<sup>278</sup> as did Peter King during a similar period in England, and others in London, Surrey, Boston, and Virginia.<sup>279</sup> What emerges supports the foregoing: these preliminary examinations included the alleged victim and other witnesses, and sometimes involved the defendant and victim arguing<sup>280</sup> or negotiating a resolution.<sup>281</sup> It was quick, to be sure, often raucous and informal, perhaps simply in the home of a JP,<sup>282</sup> but this process included many of the above rights or at least practices: a defendant's right to be present, his right that live, firsthand witnesses accuse him under oath, the right to cross-examine those witnesses, and the right to present evidence. It might be odd to describe the defendant's presence as a right; after all, it was a demand and requirement to start the case and obtain jurisdiction.<sup>283</sup> Nevertheless, the requirement that the defendant appear had the secondary effect of creating a right in him to be present and face the accuser.

During the early republic, some argued that other constitutional trial rights beyond the Warrant Clause, such as the right to confront or the right to counsel, applied to the preliminary hearing and not just trial,<sup>284</sup> though others disagreed.<sup>285</sup> It is beyond the scope of this paper

note 112, at 52. Nevertheless, Davis also relied here upon the Massachusetts confrontation clause. See DAVIS, *supra* note 118, at 87–89.

276 See Miss. JP Act of 1807, *supra* note 168, at 220.

277 2 THE REVISED STATUTES OF THE STATE OF NEW-YORK 708 (Albany, Packard & Benthuysen 1829).

278 STEINBERG, *supra* note 70.

279 See KING, *supra* note 67, at 22 (describing the defendant and victim coming “face to face,” but emphasizing negotiation and settlement often superseded commitment and trial).

280 See Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790–1850*, 18 YALE J. OF L. & HUMANS. 29, 55 (noting that even when officials such as arresting constables testified, they did so with firsthand knowledge of recovering from the defendant the stolen goods).

281 KING, *supra* note 67, at 22.

282 *Id.* at 85.

283 4 BLACKSTONE, *supra* note 126, at \*286, \*293.

284 See *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806) (providing argument made by counsel regarding the Confrontation Clause); *United States v. Bollman*, 24 F. Cas. 1189, 1191 (C.C.D.C. 1807) (No. 14,622) (regarding the Sixth Amendment right to Counsel, one judge recognized it but two others doubted).

285 BINNS, *supra* note 167, at 573 (noting the courts in Pennsylvania had not decided, as of 1870, whether the constitutional right to counsel applied to the preliminary examination but opining it was “extremely doubtful”).

to answer the question. It is worth noting, however, that in 1930, the American Law Institute (ALI) cited a plurality of states that had applied their state constitutions to protect these rights at the preliminary examination.<sup>286</sup>

This cresting of common-law procedural rights seems to have had one exception, however: the standard to commit. This standard did not improve in favor of the defendant, at least on paper, until the Fourth Amendment itself.

#### F. *The Fourth Amendment's New Standard to Commit*

The Fourth Amendment largely codified the common law, but it did bring one important change, a new standard for commitment: probable cause.<sup>287</sup> The common-law standard to commit was worse for the defendant, at least as formulated.<sup>288</sup> This difference in standard—even if a difference more in language than in substance—will afford us a helpful tool below in determining whether a court has relied on the Fourth Amendment rather than the common law.

The common-law standard to commit was essentially a strong presumption of commitment, or at least bail, rather than discharge and dismissal. Hale wrote that a JP could not discharge at all if there is an express accusation under oath.<sup>289</sup> In a manslaughter case, for example, Hale said that even if a defendant showed he acted in self-defense, the JP still could not discharge.<sup>290</sup>

Hale's formula became one of the main standards in England and in founding-era colonies and the early republic. Richard Burn repeated the Hale formula verbatim in his 1755 treatise,<sup>291</sup> and from there it became the express, and again, verbatim standard in numerous American JP manuals.<sup>292</sup> Hening's 1795 Virginia manual is typical: "If

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286 CODE OF CRIM. PROC. § 39 cmt. at 271–76 (AM. L. INST., Proposed Official Draft 1930).

287 See U.S. CONST. amend. IV; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 110 (1807). Thomas Davies noted that the Fourth Amendment probable cause standard also deviates, at least in language, from the common-law standard for a search or arrest warrant. He concluded, however, that the change in language was not intended to effect a change in substance. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 703–06 (1999).

288 Davies, *supra* note 287, at 652; see also SHAPIRO, *supra* note 63, at 173 (calling the change to probable cause "murky").

289 2 HALE, *supra* note 33, at 121.

290 *Id.* But see 1 HALE, *supra* note 33, at 582–83 (providing a more defendant-friendly standard in his discussions of escapes, a standard rarely if ever cited by later American sources).

291 BURN, *supra* note 175, at 207.

292 BURN'S ABRIDGEMENT, *supra* note 174, at 98; NEW CONDUCTOR GENERALIS, *supra* note 174, at 96.

a prisoner be brought before a justice expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him.”<sup>293</sup>

Hale was not alone. Michael Dalton earlier wrote that even if “it shall appeare to the [J]ustice, that the prisoner is not guiltie . . . yet he may not set him at libertie, but so, as he may come to his triall.”<sup>294</sup> Dalton also wrote that if no one can testify at all against the prisoner at the preliminary examination, and the defendant does not confess, he should release him.<sup>295</sup>

Blackstone presented another variation, also widely cited in America, one better for defendants than Hale’s formula but one still worse for the defendant than probable cause. The JP could dismiss the case and discharge the defendant only if it “manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless.”<sup>296</sup>

In 1819, Chitty first recited both the Blackstone and Hale formulas before concluding that modern practice conformed to their view.<sup>297</sup> The JP must still commit, unless the charge be clearly malicious and groundless.<sup>298</sup> He must commit even if he thinks the defendant “to be altogether innocent.”<sup>299</sup> Davis in his treatise on Massachusetts law largely copied Chitty’s standard.<sup>300</sup>

As we will see below, however, the Burr cases primarily used a probable cause standard for commitment rather than these common-law formulas, showing they relied on the Fourth Amendment Warrant Clause. For our purposes, the point is not whether the two standards differ in substance but rather, that they differ in language.

#### IV. FOUNDING-ERA CASELAW AND TREATISES

A series of Supreme Court cases in 1806 and 1807, along with the celebrated Burr trial overseen by Supreme Court Chief Justice Marshall, also in 1807, motivate this Article. In those cases, the lawyers and

293 HENING, *supra* note 18, at 127. Virginia is a strange example, however. A JP must use the quoted standard, apparently, at the initial appearance, but he must then convene a four-JP court of examination within five to ten days to undertake a minitrial. *Id.* at 148; An Act for Establishing a General Court, *in* COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY AND ORDINANCES OF THE CONVENTIONS OF VIRGINIA 70, 74 (Richmond, Thomas Nicolson & William Prentis 1785).

294 DALTON, *supra* note 122, at 305.

295 *Id.* at 40.

296 4 BLACKSTONE, *supra* note 126, at \*293.

297 1 CHITTY, *supra* note 112, at 60.

298 *Id.*

299 *Id.*

300 DAVIS, *supra* note 118, at 112.

judges applied, either expressly or implicitly, the Fourth Amendment Warrant Clause to the warrant of commitment. In some ways, these cases are curiosities because few if any later cases applied the Warrant Clause to warrants of commitment so clearly. And yet they are foundational Fourth Amendment cases, cited by hundreds of later cases for propositions concerning arrest warrants and other Fourth Amendment standards.

This Part will therefore examine these three cases in depth: *Ex parte Burford*,<sup>301</sup> *Ex parte Bollman*,<sup>302</sup> and *United States v. Burr*.<sup>303</sup> The *Burford* case came before the Supreme Court in 1806 concerning the commitment of a shopkeeper. The following year brought the Burr-related cases. First came the *Bollman* case involving Burr's alleged co-conspirators—eventually to the Supreme Court. Shortly after came the Burr trial before the lower court, where Chief Justice Marshall presided.

This Part will then discuss other early republic cases before concluding with treatises, which also applied the Warrant Clause to warrants of commitment.

Note that early sources sometimes refer to the Fourth Amendment as the “Sixth” Amendment or Article.<sup>304</sup> The Bill of Rights initially had twelve provisions, but the first two were not initially ratified.<sup>305</sup> Lawyers in the early republic still sometimes referred to their original numbering, however.

### A. Ex parte Burford

*Ex parte Burford* involved a warrant of commitment reviewed ultimately under the standards of the Fourth Amendment.<sup>306</sup> The case presents some confusion because it involves the odd category, at least to modern ears, of sureties for good behavior,<sup>307</sup> which I will first briefly explain. Those details will later prove important to my argument.

In the founding era and long before, a person could go to a JP and allege under oath that another person had, for example, threatened to kill him or burn down his house. Based on this complaint, the

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301 7 U.S. (3 Cranch) 448 (1806).

302 8 U.S. (4 Cranch) 75 (1807).

303 25 F. Cas. 2 (C.C.D. Va. 1807) (No. 14,692a). The official reports include several opinions arising out of the Burr trial with separate numbers that will be cited, as relevant, below.

304 E.g., *Burford*, 7 U.S. (3 Cranch) at 451.

305 See *The Bill of Rights: A Transcription*, NAT'L ARCHIVES (Apr. 21, 2023), <https://www.archives.gov/founding-docs/bill-of-rights-transcript> [<https://perma.cc/9ATV-2V5R>].

306 7 U.S. (3 Cranch) at 451, 453.

307 See Funk & Mayson, *supra* note 11 (manuscript at 62).

JP could require the other person find sureties to keep the peace.<sup>308</sup> This requirement rested not upon conviction for an offense<sup>309</sup> but upon a credible allegation under oath—very analogous to a complaint justifying commitment pending trial. Indeed, often these sureties lasted only until the next sitting of the full sessions of JPs before whom the defendant was to appear.<sup>310</sup> Similarly, if a witness alleged that a person was more generally a person of ill fame likely to commit some crime in the future, they could also swear a complaint. If this disturber of the peace or person of ill fame refused or failed to find sureties, the JP could commit them, orally or by written *mittimus*.<sup>311</sup>

Burford's case started when several local justices of the peace<sup>312</sup> issued an arrest warrant stating that credible witnesses informed them that Burford was an "evil doer and disturber of the peace," and that he would need to find sureties.<sup>313</sup> Upon his arrest and appearance, he refused or failed to secure those sureties. The JPs therefore issued a *mittimus* ordering that Burford be detained for failure to find sureties for his good behavior.<sup>314</sup> The *mittimus* did not say why he needed to find sureties in the first place, nor did it summarize the accusations, nor did it say that they were under oath.<sup>315</sup> It simply committed him until he found the required \$4,000 sureties.<sup>316</sup>

Burford began his challenge to this warrant of commitment before the Circuit Court of the District of Columbia, seeking release on

308 See 1 HAWKINS, *supra* note 125, at 126 (1716); HENING, *supra* note 18, at 430. Hawkins and Hening consider as distinct, but very related topics, surety for keeping the peace and surety for good behavior. The first relates to those who threaten harm to a particular person, such as threatening to kill them; the second, to a person generally of ill fame likely to commit some crime. See 1 HAWKINS, *supra* note 125, at 126–27, 132; HENING, *supra* note 18, at 429–30, 440. The *Burford* case focused on the second. 7 U.S. (3 Cranch) at 450.

309 See 1 HAWKINS, *supra* note 125, at 127–28; HENING, *supra* note 18, at 430. In the *Burford* case, Hiort does challenge the *mittimus* on the grounds that it does not rest upon a conviction. *Burford*, 7 U.S. (3 Cranch) at 452. This argument seems to be a brush clearing one: i.e., "of course this does not rest upon a conviction so we will consider it on its own terms as a sureties-for-the-peace type of case." But see Davies, *supra* note 287, at 613 n.174 (treating *Burford* as resting upon a failure to secure a conviction).

310 See HENING, *supra* note 18, at 435; Act of Mar. 16, 1784, ch. 51, 1782–83 Mass. Acts 629.

311 See HENING, *supra* note 18, at 438–39.

312 These were federal justices of the peace for Alexandria County, then part of the District of Columbia. See 1 WILLIAM CRANCH, REPORTS OF CASES CIVIL AND CRIMINAL IN THE UNITED STATES CIRCUIT COURT OF THE DISTRICT OF COLUMBIA, at vi–vii (Boston, Little, Brown & Co. 1852).

313 *Burford*, 7 U.S. (3 Cranch) at 450–51.

314 *Id.* at 449–50.

315 *Id.*

316 *Id.*

habeas.<sup>317</sup> During argument, Burford's counsel, Hiort, relied upon the Warrant Clause expressly: "The mittimus," Hiort argued, "ought to [be] . . . supported by oath of persons named . . ." <sup>318</sup> This *mittimus* was illegal because it was a "general warrant" that did not state the crime.<sup>319</sup> In support of these principles, he turned to the Fourth Amendment: "By the 6th amendment of the constitution of the United States 'no warrants shall issue but upon probable cause, supported by oath or affirmation' . . ." <sup>320</sup>

In response, even the government lawyer appeared to accept the premise that the Fourth Amendment applied to the warrant of commitment and required an oath. Rather, he simply argued that the warrant of commitment need not expressly *recite* that the charge was under oath.<sup>321</sup>

By a majority of 2–1, the circuit court rejected Burford's habeas petition<sup>322</sup> without giving reasons.<sup>323</sup>

Burford therefore petitioned the Supreme Court for habeas relief.<sup>324</sup> In his argument there, Hiort repeated his reliance on the Warrant Clause of the Fourth Amendment, arguing that "the commitment was illegal, both under the constitution of Virginia, and that of the United States."<sup>325</sup> As for the latter, he zeroed in on the Warrant Clause: "By the 6th article of the amendments to the constitution of the United States, it is declared, 'that [no] warrants shall issue but upon probable cause, supported by oath or affirmation.'" <sup>326</sup> Similarly, he quoted the portion of the Virginia Declaration of Rights that related to warrants for seizure of the person.<sup>327</sup> Such warrants must particularly describe

317 *Ex parte* Burford, 4 F. Cas. 723, 723 (C.C.D.C. 1805) (No. 2,148). The circuit court was a court of original and general jurisdiction for federal criminal cases. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. It also had the power to issue writs of habeas corpus. *Id.* at § 14, 1 Stat. at 81–82. The Circuit Court of the District of Columbia inherited these powers by later enactments. See 1 CRANCH, *supra* note 312, at v–vi.

318 *Burford*, 4 F. Cas. at 723.

319 *Id.*

320 *Id.* (quoting U.S. CONST. amend. IV).

321 *Id.* ("The justices were not bound to state the evidence which satisfied them . . .").

322 *Id.* at 724. It did, however, lower the dollar amount required for sureties. *Id.*

323 *Id.* at 723. If we assume it rested upon the government's argument, we can infer that it too accepted that the Fourth Amendment applied to warrants of commitment but merely that such warrants need not expressly recite the fact that the charge was under oath. Chief Judge Cranch, in dissent, agreed with Burford's counsel that the warrant of commitment must recite that the charge was under oath and that it must name the person making the accusation. *Id.* at 724.

324 *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

325 *Id.* at 451.

326 *Id.* (emphasis omitted) (quoting U.S. CONST. amend. IV).

327 *Id.* at 451.

the offense and be supported by evidence.<sup>328</sup> Under these standards, the “warrant of commitment” holding Burford was illegal because it “does not state a cause certain, supported by oath.”<sup>329</sup>

As he had done below, Hiort also made clear that Burford attacked the warrant of commitment, not the separate warrant of arrest. The arrest warrant, he argued, was “perfectly immaterial.”<sup>330</sup> After all, Burford “did not complain of that arrest, but of his commitment to prison.”<sup>331</sup> This argument shows that Burford and his counsel, and ultimately the Court, treated the warrant of commitment as its own warrant and seizure subject to the Warrant Clause.

The Supreme Court unanimously granted the writ and ordered that Burford be released.<sup>332</sup> The “warrant of commitment was illegal.”<sup>333</sup> Repeating Hiort’s language verbatim, it held that the warrant of commitment failed to state a particular cause “supported by oath.”<sup>334</sup>

Now the Court’s brief opinion does not mention the Fourth Amendment; one could therefore argue it imposed the dictates of the common law rather than the Fourth Amendment’s Warrant Clause. But several reasons show the Court relied upon the Fourth Amendment.

First, as already noted, Hiort framed the case primarily as a Fourth Amendment case.

Second, and perhaps more telling, the *mittimus* in Burford satisfied both the common law and Virginia law, which governed JPs sitting in Alexandria County.<sup>335</sup> A *mittimus* for failure to find sureties for good behavior did not require an allegation under oath or even a statement of the offense charged.<sup>336</sup> Hening’s 1795 Virginia JP manual provided

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328 *Id.* (citing the “10th article of the [Virginia] bill of rights” as the “constitution of Virginia”).

329 *Id.* (emphasis omitted).

330 *Id.* at 452.

331 *Id.* (emphasis omitted).

332 *Id.* at 453. Justice Johnson later wrote that he went along despite believing the court lacked jurisdiction to address such a habeas petition at all. *See Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 107 (1807). But he did not say he disagreed with the holding that the Fourth Amendment applies to warrants of commitment. *Id.*

333 *Burford*, 7 U.S. (3 Cranch) at 453.

334 *Id.* (emphasis omitted).

335 Alexandria County, at the time, was part of Washington, but federal law provided that courts and JPs sitting there must follow Virginia law. *See* 1 CRANCH, *supra* note 312, at vi–vii.

336 *See* 1 HAWKINS, *supra* note 125, at 127–28; HENING, *supra* note 18, at 438. Hawkins said that if the defendant be present in court (as Burford was), the JP may immediately commit him, even orally, for failure to find sureties. *See* 1 HAWKINS, *supra* note 125, at 127–28.



the form of a written *mittimus*.<sup>337</sup> It does not contain the underlying reason (e.g., being a person of ill fame), nor the underlying allegations, nor does it state that it rests upon evidence under oath.<sup>338</sup> It merely authorizes commitment based on failure to find sureties.<sup>339</sup>

Remarkably, when committing Burford, the JPs copied practically verbatim Hening's forms for both the arrest warrant and the *mittimus*.<sup>340</sup> The JPs thus appear to have conformed perfectly to the common law and Virginia law with respect to both the arrest warrant and the *mittimus* for failure to find sureties.<sup>341</sup>

Nevertheless, the Supreme Court held that Burford's *mittimus* was "illegal" because it failed to state the cause, specifically, and that it rested upon evidence under oath.<sup>342</sup> Since the common law and Virginia law did not require these assertions in the *mittimus*, the Court must have drawn them from the Fourth Amendment.

Third, a great many subsequent cases and commentators have treated *Burford* as a leading Fourth Amendment Warrant Clause case—as opposed to merely a recital of common-law requirements—including especially the Supreme Court.<sup>343</sup> For example, *Albrecht v. United States* involved an arrest warrant based upon a faulty oath.<sup>344</sup> The Court stated that the warrant therefore violated the "Fourth Amendment which declares that 'no warrants shall issue but upon probable cause, supported by oath or affirmation.'" See *Ex parte Burford*, 3 Cranch 448, 453 . . . .<sup>345</sup>

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337 See HENING, *supra* note 18, at 438–39.

338 *Id.*

339 See *id.* at 438.

340 Compare *id.* at 437–38, with *Ex parte Burford*, 4 F. Cas. 723, 723 (C.C.D.C. 1805) (No. 2,148), and *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449–50 (1806). The *mittimus* deviated by having no end date, but the circuit court repaired this potential problem by limiting it to one year. *Burford*, 4 F. Cas. at 724.

341 Even for an ordinary committal to jail pending trial for a past offense, the *mittimus* under the common law and Virginia law did not need to set forth the factual allegations nor that they rested upon evidence under oath. See *The King v. Wilkes* (1763) 95 Eng. Rep. 737, 741; 2 Wils. K.B. 151, 158; 1 HAWKINS, *supra* note 125, at 127–28; *Dominus R v. Wyndham* (1716) 93 Eng. Rep. 347, 347–48; 1 *Strange* 3, 3. Virginia law was the same. See HENING, *supra* note 18, at 128, 130; *Commonwealth v. Murray*, 4 Va. (2 Va. Cas.) 504, 507 (1826).

342 *Burford*, 7 U.S. (3 Cranch) at 453.

343 See *Aguilar v. Texas*, 378 U.S. 108, 112 n.3 (1964); *Giordenello v. United States*, 357 U.S. 480, 485–86 (1958); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 355 (1931); *Albrecht v. United States*, 273 U.S. 1, 5 (1927); see also *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *United States v. Watson*, 423 U.S. 411, 436–37 (1976) (Marshall, J., dissenting).

344 273 U.S. at 5.

345 *Id.*

In addition, scores of lower federal courts have cited *Burford* as a Fourth Amendment case from early days to the present,<sup>346</sup> as have state cases.<sup>347</sup> In 1970, the California Supreme Court wrote: “In interpreting the Fourth Amendment the United States Supreme Court has held that neither a search nor an arrest warrant may issue without probable cause based upon oath or affirmation (*Ex parte Burford* (1806) 7 U.S. (3 Cranch) 448, 451 . . .).”<sup>348</sup>

Joseph Story, in his influential *Commentaries on the Constitution* in 1833, treated it as a Fourth Amendment case<sup>349</sup>, as have other commentators,<sup>350</sup> though less frequently than the courts.

### B. *The Burr Cases*

The treason charges against Aaron Burr and two of his alleged co-conspirators, Erick Bollman and Samuel Swartwout, led to several related cases in 1807 that applied the Warrant Clause to warrants of commitment. Below I will show why these cases shed light on the original meaning of the Fourth Amendment before turning to the cases themselves.

#### I. A Spotlight on Original Meaning

The Burr-related cases afford a unique and detailed insight into the original understanding of the Fourth Amendment. First, of course, these cases came only fifteen years after the Fourth Amendment went into effect, and attracted tremendous attention from the public, careful scrutiny by judges, and the benefit of the leading

346 See *United States v. Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004); *United States v. Stephenson*, 490 F. Supp. 625, 627 n.8 (E.D. Mich. 1979); *Brown v. Patterson*, 275 F. Supp. 629, 632 (D. Colo. 1967), *aff'd sub nom. Patterson v. Brown*, 393 F.2d 733 (10th Cir. 1968); *United States v. Kennedy*, 5 F.R.D. 310, 312 (D. Colo. 1946); *United States v. Baumert*, 179 F. 735, 739 (N.D.N.Y. 1910); *United States v. Tureaud*, 20 F. 621, 623 (C.C.E.D. La. 1884); *Strigg v. Stump*, 8 F. 207, 213 (C.C.D. Or. 1881).

347 See *Commonwealth v. Murray*, 4 Va. (2 Va. Cas.) 504, 507 (1826); *Wallace v. State*, 157 N.E. 657, 660 (Ind. 1927); *Sanders v. State*, 2 Iowa 230, 262 (1855).

348 *People v. Cressey*, 471 P.2d 19, 23 (Cal. 1970).

349 See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750 (Boston, Hilliard, Gray & Co. 1833).

350 See Kerr, *supra* note 28, at 1671 n.12; Sameer Bajaj, Note, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 COLUM. L. REV. 309, 314 n.23 (2009); David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 25 n.83 (2017) (citing *Burford* as a Fourth Amendment warrant case); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 343 n.23 (1981); Davies, *supra* note 287, at 613 n.174, 662 n.313. Davies states the Court held the warrant of commitment invalid because it not based upon a conviction. *Id.* at 613 n.174. But the Court did not say that, and the parties argued it violated the Fourth Amendment, not that it failed to rest upon a conviction. See *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 448 (1806).

lawyers of the day. It produced lengthy, well-considered arguments and opinions.

The initial case, *Ex parte Bollman*,<sup>351</sup> for example, produced several circuit court opinions and a sixty-three-page Supreme Court opinion (including the argument of counsel). For the later Burr trial, two separate lawyers took verbatim stenographic notes; each published them in multivolume reports of several hundred pages.<sup>352</sup>

The participants included the leading judges and lawyers of the day. The key judges included those on the U.S. Supreme Court as well as the D.C. Circuit Court. First was Chief Justice Marshall. He wrote the opinion in the *Bollman* case that applied the Warrant Clause standards to the commitment warrant there. He also oversaw the trial of Aaron Burr and wrote several opinions expressly applying the Warrant Clause to Burr's commitment pending trial. Chief Justice Marshall, of course, was the leading judge of his time, and, earlier, an instrumental member of the Virginia ratifying convention for the U.S. Constitution.<sup>353</sup>

Chief Judge Cranch sat on the Circuit Court of the District of Columbia. He delivered the dissenting opinion in the *Burford* case discussed above,<sup>354</sup> as well as a dissenting opinion in the habeas petitions for *Bollman* and *Swartwout*, where he also applied the Fourth Amendment Warrant Clause to their commitment. He was a nephew of President John Adams, Chief Judge of the circuit court, and the reporter for the Supreme Court.<sup>355</sup> He also later became one of the first law professors of what later became the law school at George Washington University.<sup>356</sup> He was very well regarded for his "undisputed ability and integrity."<sup>357</sup>

The lawyers on the defense side, for both the *Bollman* and *Swartwout* cases and the *Burr* cases, were the leading lawyers of the time.<sup>358</sup> They were arguably "the finest legal talent assembled in any trial in the

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351 8 U.S. (4 Cranch) 75 (1807). This opinion combined *Ex parte Bollman* and *Ex parte Swartwout*. *Id.* at 75.

352 See generally DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR (Philadelphia, Hopkins & Earle 1808); THOMAS CARPENTER, THE TRIAL OF COL. AARON BURR (Washington, Westcott & Co. 1807).

353 William Draper Lewis, *John Marshall*, in 2 GREAT AMERICAN LAWYERS 311, 333–34 (William Draper Lewis ed., Philadelphia, John C. Winston Co. 1907).

354 See *supra* Section IV.A.

355 NEWMYER, *supra* note 38, at 53.

356 Helen Newman, *William Cranch, Judge, Law School Professor, and Reporter*, 26 L. LIBR. J. 74, 86 (1933).

357 NEWMYER, *supra* note 38, at 53.

358 *Id.* at 76–79; Kerr, *supra* note 38, at 911.

history of the young nation.”<sup>359</sup> Edmund Randolph was a former Governor of Virginia, a former U.S. Attorney General, and a leading figure in the constitutional convention, where he presented Madison’s frame of government as the “Virginia Plan.”<sup>360</sup> He also played a pivotal role in Virginia’s ratification of the Constitution.<sup>361</sup> Finally, he was “the most active of [the Supreme] Court’s early practitioners.”<sup>362</sup>

Defense counsel Charles Lee had also been a U.S. Attorney General.<sup>363</sup> He was a leading member of the Virginia and federal bar, counsel in *Marbury v. Madison*, as well as counsel for Justice Samuel Chase in his impeachment trial<sup>364</sup>—a case that saw issues similar to those in the *Burr* case relating to commitments of defendants.<sup>365</sup>

Other lawyers on the defense side included John Wickham, a leading Virginia lawyer with a rich knowledge of English precedent, and Luther Martin, a Maryland delegate to the federal constitutional convention, a former Maryland Attorney General, and co-counsel to Lee on the Chase impeachment trial.<sup>366</sup>

On the government side, Jefferson played an important role behind the scenes, almost daily instructing trial counsel on positions.<sup>367</sup> The main prosecutor was district attorney<sup>368</sup> Charles Hay, deemed a competent but not brilliant lawyer.<sup>369</sup> On the other hand, his co-counsel, William Wirt, was also one of the leading lawyers of the era, later becoming U.S. Attorney General.<sup>370</sup> Finally, Caesar Rodney, Jr., was the current Attorney General of the United States and made key

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359 Kerr, *supra* note 38, at 911 n.26 (quoting PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* 147 (2008)).

360 RALPH KETCHUM, *JAMES MADISON: A BIOGRAPHY* 196 (1990); NEWMYER, *supra* note 38, at 77.

361 Lewis, *supra* note 353, at 333.

362 Kerr, *supra* note 38, at 911 n.29 (alteration in original) (quoting *Proceedings in Commemoration of the 200th Anniversary of the First Session of the Supreme Court of the United States*, 493 U.S., at x (1990) [hereinafter *Proceedings in Commemoration*]).

363 NEWMYER, *supra* note 38, at 77–78.

364 *Id.*

365 14 ANNALS OF CONG. 86–87 (1804) (Impeachment Article V).

366 NEWMYER, *supra* note 38, at 78.

367 *Id.* at 39–45, 41 n.39.

368 The Judiciary Act of 1789 created a United States attorney for each district, ch. 20, § 35, 1 Stat. 73, 92, soon called “district attorney,” Act of Feb. 28, 1799, ch. 19, § 4, 1 Stat. 624, 626, now called “United States attorney,” 28 U.S.C. § 541 (2018).

369 NEWMYER, *supra* note 38, at 79.

370 Kerr, *supra* note 38, at 911 (describing Wirt as “one of the greatest Supreme Court advocates of all time”) (quoting *Proceedings in Commemoration*, *supra* note 362, at x); John Handy Hall, *William Wirt*, in 2 GREAT AMERICAN LAWYERS 261, 263 (William Draper Lewis ed., Philadelphia, John C. Winston Co. 1907).

arguments early in the Burr proceedings, expressly noting that the Fourth Amendment applied to warrants of commitment.<sup>371</sup>

I highlight the credentials of the foregoing lawyers and judges for a narrow purpose: their view that the Fourth Amendment governs preliminary examinations should hold great persuasive weight because they were the leading lawyers and judges of the founding era and the early republic. But it bears remembering: many of these men owned, bought, and sold other human beings; some of them had the time to pursue their legal studies and interests because of the forced labor of others.<sup>372</sup>

## 2. The Alleged Plot

Aaron Burr left the vice presidency in 1805 on a surprising high note. He had just overseen the impeachment trial of Supreme Court Justice Chase and had received glowing reviews for his conduct.<sup>373</sup> True, he remained under indictment for the murder of Alexander Hamilton in New York and New Jersey,<sup>374</sup> but his prospects and fame remained strong.

He travelled west in search of his next project. In the latter half of 1806, he enlisted followers, lieutenants, equipment, boats, and some arms for aims that were unclear, perhaps even to himself.<sup>375</sup> For our purposes, we can rely upon the criminal charges to guide us, since we are chiefly concerned with the various preliminary examinations and commitments pending trial. Burr was charged with treason and a high misdemeanor, violating the Neutrality Act of 1794.<sup>376</sup> The treason

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371 NEWMYER, *supra* note 38, at 79–80; *infra* sub-subsection IV.B.5.a.

372 See PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* 46–48 (2018) (showing that Chief Justice Marshall enslaved more than 150 people, including by “aggressively” buying them, *id.* at 48). George Hay was an enslaver and “radical” advocate of slavery. John Craig Hammond, *President, Planter, Politician: James Monroe, the Missouri Crisis, and the Politics of Slavery*, 105 J. AM. HIST. 843, 855, 852–56 (2019). Defense counsel Wickham owned slaves. DeWayne Wickham, *Aaron Burr's Lawyer Owned My Family. It Has Been a Long, Tragic, Journey from Slavery.*, USA TODAY (Aug. 22, 2019, 2:13 PM), <https://www.usatoday.com/story/opinion/voices/2019/08/22/1619-make-racial-equality-reality-400-years-after-slavery-began-column/2070954001/> [<https://perma.cc/4JCM-BSAF>]. Even Burr owned at least one slave. *More than 1,800 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation.*, WASH. POST (Dec. 11, 2023, 2:34 PM), <https://www.washingtonpost.com/history/interactive/2022/congress-slaveowners-names-list/> [<https://perma.cc/SP2P-JDLU>].

373 *United States v. Burr*, 25 F. Cas. 2, note, at 16 (C.C.D. Va. 1807) (No. 14,692a).

374 *Id.* at 15–16.

375 NEWMYER, *supra* note 38, at 11; *United States v. Burr*, 25 F. Cas. 1, 1 (C.C.D. Ky. 1806) (No. 14,692).

376 Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381, 384.

charge alleged that he planned to seize New Orleans, perhaps conquer Spanish territories, and split the western states from the union.<sup>377</sup>

Two of Burr's alleged co-conspirators, Erick Bollman and Samuel Swartwout, sought to enlist General James Wilkinson to join the group.<sup>378</sup> General Wilkinson was, at the time, the U.S. military leader in command of much of the Louisiana Territory.<sup>379</sup> But he was also an old friend of Burr's<sup>380</sup> who appeared as likely to join his camp as Jefferson's.<sup>381</sup>

Bollman and Swartwout each independently reached Wilkinson to deliver him a letter, in code.<sup>382</sup> Wilkinson also cross-examined Swartwout as to the plan.<sup>383</sup> Wilkinson soon reported the letter to Jefferson, misrepresenting its contents<sup>384</sup> and claiming, inaccurately, that Burr had written it.<sup>385</sup> Wilkinson also swore an affidavit before a JP in New Orleans accusing Bollman and Swartwout of treason<sup>386</sup>—affidavits that would later play an important role in the court cases.

Meanwhile, Jefferson made a statement to Congress on January 22, 1807, declaring Burr a traitor and setting forth his evidence, particularly the information he had received from Wilkinson.<sup>387</sup> The admissibility of Jefferson's address also became an issue in later court proceedings.<sup>388</sup>

Bollman and Swartwout were arrested and brought under military custody to Washington for trial. The government charged them with treason and sought their commitment pending trial.<sup>389</sup> Burr was arrested about a month later and brought to Richmond for his preliminary hearing and, later, trial.<sup>390</sup> At that time, the federal circuit court was the trial level court of general jurisdiction for federal criminal cases.<sup>391</sup> The Circuit Court of the District of Columbia initially heard the case for Bollman and Swartwout, and the circuit court for Virginia did for Burr's trial.

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377 *Burr*, 25 F. Cas., note, at 16.

378 *Id.* at 4–5; NEWMYER, *supra* note 38, at 7–8.

379 *Burr*, 25 F. Cas., note, at 16.

380 *Id.*

381 NEWMYER, *supra* note 38, at 28–31.

382 *Id.* at 4–5.

383 *Id.* at 6.

384 NEWMYER, *supra* note 38, at 8.

385 *Id.* at 7–8. Modern scholarship has shown Burr did not write it. *Id.* at 34.

386 *United States v. Burr*, 25 F. Cas. 2, 4–7 (C.C.D. Va. 1807) (No. 14,692a).

387 NEWMYER, *supra* note 38, at 8, 22.

388 *See infra* subsection IV.B.3.

389 *United States v. Bollman*, 24 F. Cas. 1189, 1189–90 (C.C.D.C. 1807) (No. 14,622).

390 NEWMYER, *supra* note 38, at 9.

391 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

### 3. *Ex parte Bollman*—Circuit Court

After *Bollman* and *Swartwout* were brought before the Circuit Court, the government moved for a warrant of commitment.<sup>392</sup> The Court held a preliminary examination to hear the arguments of counsel, who debated two main issues: first, whether Jefferson's address was admissible even though it was not given under a judicial oath, and second, whether there was probable cause of treason.<sup>393</sup> The court granted the warrant of commitment, by a vote of two to one.<sup>394</sup> Though the judges disagreed on the outcome, they agreed that the Warrant Clause applied to warrants of commitment.

In his opinion in favor of the commitment, Circuit Judge Duckett applied the Warrant Clause standard when considering the admissibility of Jefferson's address to Congress. Judge Duckett said that "even admitting that the 6th article of the amendments to the constitution . . . may require an oath or affirmation, before any warrant can issue," Jefferson's statement should at least be considered.<sup>395</sup> That is, the Warrant Clause applies to commitment warrants, even if there might be some question whether the "oath" requirement requires a judicial oath, or whether Jefferson's presidential oath sufficed. He said, in effect, that even if it requires a judicial oath, one can still consider the statement as corroboration of the other evidence submitted.<sup>396</sup>

Judge Fitzhugh delivered his opinion in support of issuing the warrant of commitment. He too said that the Warrant Clause standard applied equally to arrest warrants as it did to warrants of commitment. "A warrant goes forth to apprehend and afterwards to commit, on the suggestion of an individual, supported by oath, that a crime has been committed."<sup>397</sup> In response to the argument that even commitment requires two witnesses, as would a trial for treason, he said that all that is required is "probable cause, supported by oath or affirmation."<sup>398</sup>

As for Jefferson's statement to Congress, Judge Fitzhugh argued that it did satisfy the "oath" requirement.<sup>399</sup> Judge Fitzhugh was expressly responding to the argument of counsel that the Warrant Clause must exclude the address, and we may therefore infer that by "oath"

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392 *Bollman*, 24 F. Cas. at 1189.

393 *Id.* at 1190–91.

394 *Id.* at 1192; NEWMYER, *supra* note 38, at 8.

395 *Bollman*, 24 F. Cas. at 1194 (opinion of Duckett, J.).

396 *Id.*

397 *Id.* (opinion of Fitzhugh, J.).

398 *Id.*

399 *Id.* at 1195.

requirement, Judge Fitzhugh meant the Warrant Clause oath requirement.

Chief Judge Cranch agreed that the Fourth Amendment Warrant Clause supplied the standard for issuing a warrant to commit, but he disagreed on the result.<sup>400</sup> He quoted the entirety of the Fourth Amendment and concluded that this court is “as much bound as any individual magistrate to obey its command.”<sup>401</sup> Chief Judge Cranch then said he would have excluded President Jefferson’s statement to Congress as not under oath: “I can never agree that executive communications not on oath or affirmation, can, *under the words of our constitution*, be received as sufficient evidence in a court of justice, to charge a man with treason, *much less to commit him for trial*,” he wrote.<sup>402</sup>

#### 4. *Ex parte Bollman*—Supreme Court

Bollman and Swartwout appealed the circuit court denial to the Supreme Court.<sup>403</sup> As a threshold matter, it was clear that the Supreme Court was reviewing the written warrant of commitment only. First, the habeas statute only allowed review of the “cause of commitment”<sup>404</sup>—here, the warrant of commitment and not the warrant of arrest. Second, the Court repeatedly emphasized that it was reviewing the lower-court decision to commit.<sup>405</sup> Third, the Supreme Court opinion started by quoting the warrant of commitment, whereas the earlier arrest warrant was relegated to a footnote.<sup>406</sup> Finally, counsel too made clear they were debating the warrant of commitment.<sup>407</sup> Thus framed—that the debate concerned the warrant of commitment—we can first see that counsel for defendant and government alike agreed that the Fourth Amendment Warrant Clause governed warrants of commitment.

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400 *Id.* at 1192 (opinion of Cranch, C.J.).

401 *Id.*

402 *Id.* at 1193 (emphasis added).

403 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

404 *Id.* at 94 (quoting section 14 of Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82).

405 *Id.* at 96 (concluding that of the various forms of common-law habeas, it was granting the type most analogous to the form used to review the “cause of commitment”); *id.* at 100 (explaining that the writ is to inquire “into the cause of commitment”); *id.* at 101 (explaining that the Court was to revise a decision by a lower court to “imprison[ ]”); *id.* at 114.

406 *Id.* at 75–76. The arrest warrant was styled as a bench warrant in the decision below. *Bollman*, 24 F. Cas. at 1189.

407 *E.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) at 109 (debating the “warrant of commitment” in Charles Lee’s argument). Lee’s other arguments such as trial venue only make sense as attacks on the warrant of commitment. Government counsel, Jones, was equally clear that they were debating the warrant of commitment. *See id.* at 117 (“[I]f their commitment be irregular, this court will say how they ought to be committed.”). Jones does discuss the bench warrant’s legality, in response to Key’s argument. *Id.* at 116–19.



With respect to this warrant of commitment, counsel for both sides applied the Fourth Amendment. Charles Lee, counsel for Bollman, quoted the entire Fourth Amendment verbatim, highlighting the Warrant Clause.<sup>408</sup> Its language, he continued, meant that all “facts” that support probable cause must not only be sworn under oath but must also “appear” under oath—that is, the warrant of commitment must state that the witness swore to the facts.<sup>409</sup> He then said that this Fourth Amendment oath requirement banned hearsay as a basis for probable cause for a warrant of commitment.<sup>410</sup>

Lee also hammered the probable cause standard directly after emphasizing it in the text of the Fourth Amendment, rather than the Blackstone standard for commitment.<sup>411</sup> He said that the affidavits must add up to probable cause of treason, probable cause cannot be established by hearsay, and probable cause must be determined by the magistrate before whom the affidavit is sworn.<sup>412</sup>

Lee then applied this Warrant Clause standard, and its oath requirement, to argue that the Wilkinson affidavit was inadmissible.<sup>413</sup> It was hearsay itself—sworn in New Orleans and not before the committing court below—and it repeated further hearsay.<sup>414</sup> Once this hearsay was swept away, he concluded, the remaining facts did not add up to probable cause for treason.<sup>415</sup>

The Attorney General of the United States, Caesar Rodney, argued for the government.<sup>416</sup> He agreed that the Fourth Amendment Warrant Clause governed.<sup>417</sup> He merely disagreed that the “oath” requirement barred an affidavit taken before a different magistrate from the one who commits.<sup>418</sup> “The constitution is silent on the subject,” he said, but concluded that as long as the affidavit is taken before a magistrate competent to take oaths, “it satisfies . . . the constitution.”<sup>419</sup>

Rodney also agreed with defense counsel that the standard was “probable cause.”<sup>420</sup> He addressed this standard just after pointing to

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408 *Id.* at 110. The reported case uses capital letters and italics to emphasize the Warrant Clause, presumably capturing Lee’s intonation. *Id.*

409 *Id.*

410 *Id.*

411 *Id.* at 110–11.

412 *Id.*

413 *Id.*

414 *Id.* at 111.

415 *Id.*

416 *Id.* at 114.

417 *See id.* at 114–15.

418 *Id.*

419 *Id.* at 115.

420 *Id.*

the Fourth Amendment as the standard for affidavits.<sup>421</sup> In other words, like defense counsel, he drew the probable cause standard from the Fourth Amendment. Indeed, between them, counsel mentioned “probable cause” eight times.<sup>422</sup> Recall as noted above that the common-law standard to commit had not been probable cause before the Fourth Amendment.

As for Jefferson’s address, the government implicitly conceded that the Warrant Clause standard, with its judicial oath requirement banning hearsay, governed. Rather, it argued for a hearsay exception.<sup>423</sup> It introduced the address not for the truth of the matter but to establish, as a matter of notoriety, Burr’s troop movements and that a state of war existed, a fact that only the President could determine.<sup>424</sup> Burr’s counsel responded by again invoking the Fourth Amendment. Even the fact of notoriety was a fact that the government must prove without hearsay; instead, the government attempted to rely upon hearsay in order to “commit[] . . . a citizen.”<sup>425</sup> The fact of notoriety amounted to “testimony;” to prove it by hearsay “is a direct violation of the constitution.”<sup>426</sup>

The Court did not address the admissibility of Jefferson’s address.<sup>427</sup> It admitted portions of the Wilkinson affidavit, ruling that an affidavit sworn before one magistrate may be relied upon by another to commit—at least when the witness is very distant.<sup>428</sup> But the Court split two to two on admitting other portions.<sup>429</sup>

In the end, the Court discharged Bollman and Swartwout.<sup>430</sup> The government had failed to provide sufficient evidence of treason—even if the Court were to consider the entire Wilkinson affidavit.<sup>431</sup> The evidence pointed to an expedition against Spain, not the United States,<sup>432</sup> and it failed to show an actual assembly of troops necessary to show “levying war.”<sup>433</sup>

In discharging the defendants, the Court did not mention the Fourth Amendment,<sup>434</sup> but we can infer it relied upon it for a few

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421 *Id.*

422 *Id.* at 109–15.

423 *Id.* at 116–19.

424 *Id.* at 118–19.

425 *Id.* at 119.

426 *Id.*

427 *Id.* at 125–37.

428 *Id.* at 129.

429 *Id.* at 130–31.

430 *Id.* at 136.

431 *Id.* at 135.

432 *Id.* at 131–33.

433 *Id.* at 134, 133–35.

434 *Id.* at 125–37.

reasons. First, counsel for both the defense and the government expressly and repeatedly relied upon the Warrant Clause. Second, the Court ultimately used a probable cause standard rather than the different, common-law standard, or the ordinary habeas standard that also put the burden on the defendant. True, the opinion began with the Blackstone standard to commit,<sup>435</sup> but when it came time to apply a standard to the facts, it used “probable cause” instead on several occasions.<sup>436</sup>

And this choice of standard probably mattered. The Court opinion in *Bollman* considered the evidence very carefully and tended to draw inferences in the defendants’ favor. Probable cause imposed some burden on the government. Under the Blackstone standard, *Bollman* and *Swartwout* would have to have shown that the charges were “wholly groundless.”<sup>437</sup> The facts alleged and even the way the Court sifted through them would have made it much harder to find that the charge of treason was “wholly groundless.”

Both *Burford* and *Ex parte Bollman* have their limits because in neither case was the Court asked to decide whether the Warrant Clause applied to warrants of commitment. Everyone seemed to agree it did. The *Burr* trial provides a more express decision by a court to consciously apply the Warrant Clause to the commitment question.

## 5. The Burr Trial

The Burr trial provides the strongest, most express application of the Fourth Amendment Warrant Clause to a preliminary hearing by a court, i.e., by Chief Justice Marshall sitting as an examining magistrate.<sup>438</sup>

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435 *Id.* at 125.

436 *Id.* at 130 (assessing admissibility of Wilkinson affidavit); *id.* at 136 (assessing the uncharged high misdemeanor offense).

437 *Id.* at 125.

438 *United States v. Burr*, 25 F. Cas. 2, 2 n.1 (C.C.D. Va. 1807) (No. 14,692a). Federal law provided that the court that tried a criminal case would include two judges, a district court judge and a Supreme Court Justice riding circuit. See NEWMYER, *supra* note 38, at 5. For the trial of Burr in Richmond, in the District of Virginia, that meant the court was composed of District Court Judge Cyrus Griffin and Chief Justice Marshall. *Id.* During the trial, Chief Justice Marshall completely dominated the proceedings in his questions, rulings, and opinions. See *Burr*, 25 F. Cas. 2; *United States v. Burr*, 25 F. Cas. 25 (C.C.D. Va. 1807) (No. 14,692b); *United States v. Burr*, 25 F. Cas. 27 (C.C.D. Va. 1807) (No. 14,692c); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d); *United States v. Burr*, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e); *United States v. Burr*, 25 F. Cas. 41 (C.C.D. Va. 1807) (No. 14,692f); *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g); *United States v. Burr*, 25 F. Cas. 52 (C.C.D. Va. 1807) (No. 14,692h); *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693); *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694); *United States v. Burr*, 25 F. Cas. 201 (C.C.D. Va. 1807) (No. 14,694a); NEWMYER,

### a. Initial Civil Commitment Decision

Burr's first preliminary examination started March 30, 1807, in Richmond.<sup>439</sup> The government lawyer moved to commit Burr pending trial.<sup>440</sup> Among other evidence, he relied chiefly on the Wilkinson affidavit previously submitted in the *Bollman* case.<sup>441</sup>

In arguing for the commitment warrant, the United States Attorney General, Caesar Rodney, said there was probable cause for treason, a standard he expressly drew from the Fourth Amendment—as he had in *Bollman*.<sup>442</sup> Here, he wanted to demonstrate that the standard to commit, probable cause, was lower than proof required to convict at trial.<sup>443</sup> In doing so, he said that the Warrant Clause supplied the probable cause standard, this lower standard, not only for arrest but also for commitment: “the sixth article of the amendments to the constitution, rendered probable cause only necessary to justify the issuing a warrant to take a man into custody, *and of course to commit him for trial*.”<sup>444</sup>

The other counsel and the court agreed that the standard was probable cause. For example, Burr's counsel, Wickham, argued there was no “probable ground to believe him guilty.”<sup>445</sup> Government lawyer Hay argued that there was “probable cause to suspect him of having committed this offense.”<sup>446</sup>

In his opinion, Chief Justice Marshall began with the standard: probable cause. He did not mention the Fourth Amendment directly but used language that tracked that from the Warrant Clause: “I hold myself bound to consider how far those charges are *supported by probable cause*.”<sup>447</sup> Chief Justice Marshall also expanded upon the meaning of probable cause as less than proof at trial and merely “good reason to believe.”<sup>448</sup>

More telling, Chief Justice Marshall directly tackled the inconsistency between the probable cause standard and the common-law standard as announced by Blackstone. Probable cause, he wrote, was

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*supra* note 38, at 5. But when it considered commitment, the court had to act as a committing magistrate, essentially, and on these occasions, Chief Justice Marshall sat by himself. *Burr*, 25 F. Cas. at 11.

439 *Burr*, 25 F. Cas. at 3.

440 *See id.* at 11.

441 *Id.*

442 ROBERTSON, *supra* note 352, at 8–9.

443 *Id.* at 8.

444 *Id.* at 9 (emphasis added).

445 *Id.* at 4.

446 *Id.*

447 *United States v. Burr*, 25 F. Cas. 2, 12 (C.C.D. Va. 1807) (No. 14,692a) (emphasis added).

448 *Id.*

“reconcilable” with the Blackstone standard.<sup>449</sup> His attempted reconciliation reads as unpersuasive and even a bit incomprehensible.<sup>450</sup> But for our purposes, the point is that Chief Justice Marshall felt he *had* to reconcile them because he was ultimately “bound” to a probable cause standard.<sup>451</sup> Why bound to a standard at variance with the common law and Virginia law?<sup>452</sup> Because the Fourth Amendment, which is superior law, requires that standard.

Using this probable cause standard, Chief Justice Marshall found the government had failed to establish probable cause for treason.<sup>453</sup> He did find probable cause for the high misdemeanor violating the Neutrality Act, and said that would be the only charge, therefore, that he would list in the “warrant of commitment.”<sup>454</sup> But that was unnecessary because he released Burr on bail pending trial on the misdemeanor.<sup>455</sup> (The grand jury would later indict Burr on both charges.)<sup>456</sup>

#### b. The Jacob Dunbaugh Affidavit

Chief Justice Marshall’s most express application of the Warrant Clause to commitments came two months later when the government moved to revoke bail and commit Burr based on new evidence of treason—an affidavit by Jacob Dunbaugh.<sup>457</sup> This motion triggered a new preliminary examination with Chief Justice Marshall again called upon to act as a committing magistrate deciding whether to issue a warrant of commitment.

The Dunbaugh affidavit was taken before a *purported* JP in New Orleans, but the government could not establish that this person was actually a judicial officer.<sup>458</sup> The government argued that it was

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449 *Id.*

450 Chief Justice Marshall wrote that a “total failure of proof” would, for Blackstone, defeat probable cause. *Id.* True, but Blackstone offered that example as a necessary condition to discharge, not merely a sufficient one. See 4 BLACKSTONE, *supra* note 126, at \*293.

451 *Burr*, 25 F. Cas. at 12.

452 HENING, *supra* note 18, at 37 (reciting the Hale standard for commitment in Virginia). The Judiciary Act of 1789 made Virginia law applicable, ch. 20, § 33, 1 Stat. 73, 91, and at other phases of the trial, counsel relied upon Virginia law, 1 CARPENTER, *supra* note 352, at 2, 4, 5, 17, 70, 142, but for the standard to commit, Chief Justice Marshall spoke of Blackstone and then probable cause. *Burr*, 25 F. Cas. at 12.

453 *Burr*, 25 F. Cas. at 15.

454 *Id.* at 13, 15.

455 *Id.* at 15.

456 NEWMYER, *supra* note 38, at 9.

457 *United States v. Burr*, 25 F. Cas. 27 (C.C.D. Va. 1807) (No. 14,692c); 1 CARPENTER, *supra* note 352, at 51.

458 *Burr*, 25 F. Cas. at 28–29.

“probable” that the official was a justice of the peace.<sup>459</sup> In rejecting this argument, Chief Justice Marshall roused himself to deliver a powerful opinion rooted not in the common law, but in the Fourth Amendment, an opinion that forcefully described the meaning and purposes of that provision, especially in connection with a treason case.<sup>460</sup>

Chief Justice Marshall first said, in response again to the government argument, “This point seems to have been decided by the constitution.”<sup>461</sup> He then quoted the entirety of the Fourth Amendment.<sup>462</sup> But because this issue involved the commitment of Burr, and therefore a seizure, Chief Justice Marshall immediately focused on the Warrant Clause, seizures, and the oath. “The cause of seizing is not to be supported by a probable oath, or an oath that was probably taken, but by oath absolutely taken.”<sup>463</sup> In other words, the Warrant Clause oath requirement applies to commitments and must be scrupulously adhered to.

This Fourth Amendment oath, he continued, must be a “legal oath” in the sense of being legal evidence.<sup>464</sup> He then responded to the government argument that the rules of evidence concerning oaths, and their strictness, apply to trials only, not to pretrial proceedings. With keen incision, he noted that the Warrant Clause, i.e., “[t]his provision,” is directed precisely to this question: commitment, and not trial.<sup>465</sup> In full, he wrote, “[t]his provision is not made for a final trial; it is made for the very case now under consideration.”<sup>466</sup> The provision was directed against the “oppression” of “commitment” made in the “whirlwind of passion” such as follows “accusations of treason.”<sup>467</sup> He continued that the “oath” requirement was one of the “barriers which the nation has deemed it proper to erect,” again showing that he means the Fourth Amendment.<sup>468</sup>

Finally, he concluded that the Fourth Amendment “oath” had to be taken before a judicial officer.<sup>469</sup> The government failed to show that the person before whom the affidavit was sworn was a judicial officer.<sup>470</sup> Chief Justice Marshall therefore rejected the affidavit.<sup>471</sup> He

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459 *Id.* at 29.

460 *Id.*

461 *Id.*

462 *Id.*

463 *Id.*

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

468 *Id.*

469 *Id.* at 29–30.

470 *Id.*

471 *Id.* at 30.

refused to commit Burr on the treason charge because there was no additional admissible evidence as promised.<sup>472</sup>

We can draw a couple conclusions from this passage. First, Chief Justice Marshall gave the matter considerable thought—in part because the court adjourned until the following day. Moreover, he had already had occasion to consider the Warrant Clause requirements with respect to the commitments of Bollman and Swartwout along with his colleagues on the Supreme Court. In that *Bollman* opinion, Chief Justice Marshall reported that the Supreme Court Justices thoroughly discussed among themselves the oath requirement.<sup>473</sup> We also know that Chief Justice Marshall periodically consulted his colleagues even during the *Burr* case.<sup>474</sup>

Second, Chief Justice Marshall likely considered the question to be straightforward. That is, he did not think there could be any dispute but that the Fourth Amendment Warrant Clause applied to commitments. Counsel for the government, of course, expressly so stated. In addition, at the very end of the *Burr* case, Chief Justice Marshall stated that as an examining magistrate, he would avoid making any constitutional rulings concerning criminal procedure or commitments where the issue not already well settled or if he were not sure.<sup>475</sup> The fact that when it came to the application of the Warrant Clause to commitments, he proceeded to apply it shows he had no doubt or considered the matter well settled.

### C. Other Early Caselaw

Few other cases expressly applied the Fourth Amendment Warrant Clause, or its state analogues, to commitments.<sup>476</sup> It appears

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472 *See id.*

473 *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 130 (1807).

474 NEWMYER, *supra* note 38, at 156.

475 *United States v. Burr*, 25 F. Cas. 201, 202 (C.C.D. Va. 1807) (No. 14,694a). That is, at the end of the proceedings, after Burr's acquittal, Chief Justice Marshall was asked to commit Burr for trial in Ohio. Burr argued double jeopardy. *Id.* Chief Justice Marshall refused to rule on that question because it would require him, as a magistrate judge, to interpret the constitution on a new question about which he had some doubts. *Id.*

476 In *Ex parte Burnham*, a Colorado court applied Colorado's analogue to the Fourth Amendment to a warrant of commitment, albeit one based upon a conviction upon a void ordinance. 4 Colo. 795 (Colo. Dist. Ct. 1884). In *Ex parte Harvell*, a federal agent arrested petitioner and he was imprisoned pursuant to a form *mittimus* (actually one for sentence after trial) that did not include a charge, evidence, or oath of evidence, but simply included the oath of another agent. 267 F. 997 (E.D.N.C. 1920). The court granted the writ and released the defendant. *Id.* at 1003. Even if the arrest were lawful without a warrant as a felony, the imprisonment was unlawful, as the *mittimus* was defective. *Id.* at 1001. The court relied upon statute and the Fourth Amendment, citing and discussing it at length, to reach this conclusion. *Id.* at 999–1003.

courts went about applying the ordinary, common-law rules requiring oath, firsthand knowledge, and an offense recited particularly in the *mittimus*. Since these requirements paralleled those of the Fourth Amendment and state analogues, JPs would rarely have had reason to deviate, and higher courts would rarely have needed the Fourth Amendment to correct an errant lower court. Only in extraordinary cases such as the *Burr* treason cases did the government and lower courts attempt to sidestep these requirements.

But one case stands out, *Commonwealth v. Murray*.<sup>477</sup> In 1826, Virginia's highest court wrote that the Fourth Amendment Warrant Clause did not apply to warrants of commitment; it applied to searches and arrests only. The Virginia court spoke quite directly: "It appears clear to us, that this article applies to Search Warrants and Warrants of Arrest, and not to Warrants of Commitment."<sup>478</sup> Of course, that court had no binding power to construe the Fourth Amendment, and it also held the Fourth Amendment did not apply to the states.<sup>479</sup> Nevertheless, it did hold that Virginia's parallel constitutional provision also did not apply to commitment warrants.<sup>480</sup>

It gave little reason why. It relied upon the *Wilkes* cases in England.<sup>481</sup> It also said that the Founders left warrants of commitment to the common law.<sup>482</sup> But even for searches and arrests, the Founders vigorously argued that the common law already banned general warrants and yet felt moved to constitutionalize that requirement.

But *Murray* should intrigue us for another reason. It acknowledged that the Supreme Court *had* held in *Burford* that the Fourth Amendment Warrant Clause applied to warrants of commitment.<sup>483</sup> In fact, it recognized that the prevailing opinion, apparently in 1826, was that a warrant of commitment must satisfy the Fourth Amendment standards: "The Court is aware, that an opinion has lately prevailed, that a *Mittimus*" must show that it is supported by oath.<sup>484</sup> *Burford*, according to the court, endorsed this prevailing opinion.

#### D. Treatises

Nineteenth-century treatises sometimes expressly stated that the Fourth Amendment and its requirements applied to commitment

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477 *Commonwealth v. Murray*, 4 Va. (2 Va. Cas.) 504 (1826).

478 *Id.* at 507.

479 *Id.*

480 *Id.* at 508.

481 *Id.* at 508.

482 *See id.*

483 *See id.* at 507.

484 *Id.*



warrants. Others simply grouped together arrest warrants and commitment warrants under one heading. Each warrant had to meet the Fourth Amendment requirement. Still others did not mention the Fourth Amendment in connection with warrants of commitment at all.

### 1. Early Treatises

Thomas Sergeant's 1822 treatise on constitutional law applied the Fourth Amendment to commitment warrants.<sup>485</sup> Chapter 25 was entitled "Proceedings in Criminal Cases" and began by quoting the Fourth Amendment in its entirety.<sup>486</sup> It immediately moved to the topic of "Commitment and Bail," first summarizing federal statute law (which contained unrelated requirements) and then moving to the requirements of commitment.<sup>487</sup>

The treatise listed as requirements of commitment, among others, a specific charge based upon probable cause and "supported by oath."<sup>488</sup> The language and placement indicate Sergeant's view that it is the Warrant Clause just quoted that imposed these requirements on warrants of commitment. This section goes on to detail the portion of *Burr* concerning the affidavit of Jacob Dunbaugh,<sup>489</sup> which, as noted above, Chief Justice Marshall rejected expressly on Fourth Amendment grounds.<sup>490</sup> Finally, Sergeant stated in the preface that the purpose of the book was to trace federal practice and principles to "their constitutional source."<sup>491</sup>

Other earlier treatises similarly drew a close connection between the Fourth Amendment and warrants of commitment, without expressly saying that the Fourth Amendment applied to them. Rather, they expressly applied the Fourth Amendment to criminal complaints, and then noted that warrants of commitment must rest upon a valid complaint to be valid themselves.

For example, Daniel Davis's influential 1824 treatise drew a series of links from the Massachusetts constitutional provision, through complaints under oath, to the *mittimus* that must rely upon that complaint and therefore satisfy the state constitution.<sup>492</sup> He pointed out what I noted earlier in my discussion of *Burford*: the common law did not

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485 THOMAS SERGEANT, CONSTITUTIONAL LAW 240–46 (Philadelphia, Abraham Small 1822).

486 *Id.* at 240.

487 *Id.* at 240–46.

488 *Id.* at 244, 243–44.

489 *Id.* at 243.

490 *See supra* sub-subsection IV.B.5.b.

491 *Id.* at i.

492 DAVIS, *supra* note 118, at 17–18.

require that the *mittimus* state the allegations, but Massachusetts did, because of its constitutional search and seizure provision.<sup>493</sup>

Dane's *Abridgement* from 1824 similarly states that a complaint must satisfy the Fourth Amendment,<sup>494</sup> and that this complaint is the "main foundation" of all later proceedings,<sup>495</sup> including the "warrant of commitment."<sup>496</sup> Indeed, this *mittimus* must recite the complaint<sup>497</sup>—again showing the deviation from the common-law requirement.

## 2. Later Treatises

Rollin Hurd's comprehensive treatise from 1858 contained some of the clearest declarations that the Warrant Clause applies to commitment warrants.<sup>498</sup> First, when he discussed the oath requirement, he wrote that the Warrant Clause applies to "commitments."<sup>499</sup> He relied upon *Burford* for this proposition, writing that the Court in *Burford* "held the provision in the federal constitution on the subject of warrants included commitments."<sup>500</sup> He also noted that even if there was once some question under the common law whether a warrant of commitment had to be supported by evidence under oath, the Fourth Amendment made clear that such warrants must rest upon an oath.<sup>501</sup>

Second, when he separately discussed probable cause, he quoted the Warrant Clause and then applied its probable cause standard to commitments as a standard for the "committing magistrate."<sup>502</sup>

Third, Hurd also tackled head-on any supposed distinction under the Fourth Amendment between an arrest warrant and a warrant of commitment. Both fall under its ambit, he wrote. "There does not appear sufficient ground for the distinction taken between warrants to arrest and warrants to commit . . ."<sup>503</sup> In doing so, Hurd expressly rejected the Virginia *Murray* case discussed above.<sup>504</sup>

493 *Id.* at 159–61. Davis also emphasized that the *mittimus* must quote, verbatim if possible, the complaint. *Id.* at 169.

494 6 DANE, *supra* note 128, at 527–28.

495 7 *id.* at 247.

496 *Id.* at 246.

497 *Id.*

498 See HURD, *supra* note 98, at 384–85 (treating arrest warrants and commitment warrants as equally governed by the Fourth Amendment and requiring personal knowledge under the oath requirement for both, citing cases).

499 *Id.* at 384.

500 *Id.*

501 *Id.*

502 *Id.* at 378.

503 *Id.* at 385.

504 *Id.*

William Church in his treatise on habeas similarly suggested that the Fourth Amendment Warrant Clause governs commitments and commitment warrants.<sup>505</sup> The Fourth Amendment did not, of course, apply to the states,<sup>506</sup> and Church wrote primarily with respect to the state constitutional analogues to the Fourth Amendment. But these state analogues almost always contained the same “oath” requirement that either led<sup>507</sup> to the Fourth Amendment or were later drawn directly from it.<sup>508</sup> In particular, he wrote that, in some jurisdictions, commitment warrants ought to be “supported by oath or affirmation” because arrest warrants must be.<sup>509</sup> Arrest warrants must be, in turn, because of the “constitutions.”<sup>510</sup>

Other later nineteenth-century treatises such as that of Joel Prentiss Bishop and William Sutherland treated warrants of commitment and warrants for arrest as essentially the same and drew some link by context and logic to the Warrant Clause.<sup>511</sup>

On the other hand, some treatises did not mention the Fourth Amendment in connection with commitments or even, sometimes, with arrest warrants.<sup>512</sup> They relied instead on the common law to come to the same conclusion: that the magistrate can commit only upon oath.<sup>513</sup> Thus, we cannot draw too much of a conclusion from those treatises that discuss warrants of commitment without reference to the Fourth Amendment. It appears that their references to the

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505 WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS INCLUDING JURISDICTION, FALSE IMPRISONMENT, WRIT OF ERROR, EXTRADITION, MANDAMUS, CERTIORARI, JUDGMENTS, ETC. § 285 (S.F., A.L. Bancroft & Co. 1884).

506 Cf. *Barron v. City of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833).

507 E.g., PA. CONST. of 1776, ch. I, § X (“oaths or affirmations”).

508 E.g., N.Y. CONST. art. I, § 12 (using the same language as the Fourth Amendment).

509 CHURCH, *supra* note 504, § 285.

510 *Id.*

511 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 713 (Boston, Little, Brown, & Co. 1st ed. 1866); JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 228 (Boston, Little, Brown & Co. 3d ed. 1880) (“The warrant, whether of arrest or commitment (called a *mittimus*) must state for what offence the arrest or commitment is made.” (footnotes omitted)); WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 625 (1904) (quoting the Warrant Clause and immediately stating that the “warrant of commitment” must state a “good cause certain”).

512 E.g., NEW YORK JUSTICE, *supra* note 177, at 532–41, 558–84 (no mention of the Fourth Amendment in the sections covering arrest warrants and commitment); S.R. PERRY, *Commitments*, in 4 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 566, 566–84 (William M. McKinney ed., Northport, Edward Thompson Co. 1896); Charles H. Street, *Warrants*, in 22 *id.* at 1071, 1071–91 (1902); BURN’S ABRIDGEMENT, *supra* note 174, at 357–59 (citing one New Hampshire prohibition on general warrants but then citing the common law).

513 BINNS, *supra* note 167, at 573. The discussion on arrest warrants requires oath and probable cause without reference to the Constitution. *Id.* at 570. However, a transcript of a typical magistrate’s hearing for an arrest warrant does refer to the Constitution. *Id.* at 574.

common-law requirements, as for arrest and search warrants, also satisfy the constitutional requirements.

### *E. Due Process Under the Fourteenth Amendment*

The Fourteenth Amendment applies the Fourth Amendment Warrant Clause to the states. Some scholars<sup>514</sup> and courts<sup>515</sup> therefore also look to how it was interpreted in 1868, when the Fourteenth Amendment passed.

By 1868, defendants enjoyed, at least formally, robust rights at the preliminary examination under state statutes and constitutions, as well as in the view of treatise writers. As discussed above, Hurd and Church both suggested that the Fourth Amendment Warrant Clause applied to the preliminary examination and warrants of commitment precisely in this era. Incidentally, the discussion above shows that in addition to rights protected by the Warrant Clause, defendants began to enjoy other rights at the preliminary examination such as the right to cross-examine—rights that may have come just after the founding era but had ripened by 1868.

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After *Bollman* and *Burr*, courts had few occasions to declare that the Fourth Amendment Warrant Clause applied to warrants of commitment. This silence follows, I argue, in part because committing magistrates satisfied its demands, committing on probable cause based on sworn testimony. But in the decades leading to *Gerstein*, some jurisdictions stopped determining probable cause at the initial appearance before commitment.

## V. GERSTEIN

### A. Prelude to Gerstein

In the decades preceding *Gerstein*, preliminary examinations evolved away from the Fourth Amendment and common-law dictates. Statutes increasingly split the preliminary examination in two: first, an initial appearance, and second, a preliminary hearing.<sup>516</sup> Many of the

<sup>514</sup> *E.g.*, MICHAEL J.Z. MANNHEIMER, THE FOURTH AMENDMENT: ORIGINAL UNDERSTANDINGS AND MODERN POLICING 162–63, 167–76 (2023). *See generally* BARNETT & BERNICK, *supra* note 252.

<sup>515</sup> *E.g.*, *Torres v. Madrid*, 141 S. Ct. 989, 996–97 (2021); *Lange v. California*, 141 S. Ct. 2011, 2026 (2021) (Thomas, J., concurring in part and concurring in judgment); *see also* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022) (Second Amendment).

<sup>516</sup> *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(g) (4th ed. 2004) (detailing this history); LaFave & Remington, *supra*

robust rights such as a firsthand accusatory witness, cross-examination, and defense counsel were moved from this first appearance to the second, preliminary hearing.<sup>517</sup>

As to probable cause, the statutes also said that magistrates were to determine probable cause at this second hearing, and, significantly, the statutes no longer said a magistrate must determine probable cause at the initial appearance.<sup>518</sup> Following this language, magistrates stopped finding probable cause at the initial appearance before committing the defendant.<sup>519</sup> Instead, judges set bail, possibly appointed counsel, and scheduled further proceedings.

Now this shift was likely intended in part to benefit defendants by affording them time to prepare for the more robust hearing to challenge probable cause.<sup>520</sup> But in reality, the second preliminary hearing never occurred, or only occurred weeks or months later. Either the defendant waived it, or it was superseded by an indictment, criminal information, or plea deal. That meant that the defendant often spent weeks in jail without a judge ever determining probable cause.<sup>521</sup>

In a second, but substantially earlier, development, the Supreme Court held that states did not need to use a grand jury<sup>522</sup> and, later, in *Beck v. Washington*, held that they also need not provide a preliminary hearing or other judicial determination of probable cause as a prerequisite to trial.<sup>523</sup>

Florida was one of the states that had adopted the above framework by statute and practice.<sup>524</sup> It did not determine probable cause at the initial hearing prior to commitment, and when the prosecutor filed an information—i.e., a criminal complaint—that filing superseded the defendant's right to the later preliminary hearing where probable cause would otherwise have been determined.<sup>525</sup> In addition, misdemeanants never received a preliminary hearing regardless.<sup>526</sup>

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note 88, at 997–98; A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310 cmt. at 577–83 (AM. L. INST. 1975) (creating three hearings, summarizing the bifurcation in many states); see also George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1029 (2000) (noting the rise of the preliminary hearing as a substitute for the grand jury).

517 *Gerstein v. Pugh*, 420 U.S. 103, 105–06 (1975) (describing Florida law and practice).

518 *E.g.*, KAN. STAT. ANN. §§ 22-2901, -2902 (2023); 1975 Ala. Laws 2396.

519 LAFAVE, *supra* note 516, at § 5.1(g)(2); *Gerstein*, 420 U.S. at 105–06.

520 See LaFave & Remington, *supra* note 88, at 997–98; A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310 cmt. at 577–78 (AM. L. INST. 1975).

521 See LaFave & Remington, *supra* note 88, at 998 n.55.

522 See *Lem Woom v. Oregon*, 229 U.S. 586, 590 (1913).

523 See 369 U.S. 541, 545 (1962); see also *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (citing *Beck*, 369 U.S. at 545).

524 *Gerstein*, 420 U.S. at 105–06.

525 *Id.*

526 Brief for Petitioner at 7, *Gerstein*, 420 U.S. 103 (No. 73-477).

Two defendants committed pending trial without a probable cause finding brought a class action challenging this practice.<sup>527</sup>

In its argument before the Supreme Court, Florida admitted that magistrates did not determine probable cause at the initial appearance but argued that the Constitution did not require them to.<sup>528</sup> It argued that *Beck* meant Florida could bring a case to trial without a judicial determination of probable cause.<sup>529</sup> The prosecutor was a “one man grand jury.”<sup>530</sup>

The Supreme Court rejected Florida’s argument. True, it said, no judge or grand jury must find probable cause for a case to move to trial.<sup>531</sup> And if the defendant is not incarcerated, the government can unilaterally determine probable cause and take the case to trial.<sup>532</sup> But the issue before the Court was whether the government could arrest and commit pending trial without a judge ever finding probable cause for either. The answer was no.<sup>533</sup>

### B. *Gerstein Holding and Reasoning*

The Court in *Gerstein* held that the Fourth Amendment Unreasonableness Clause required a probable cause determination by a judge before commitment for warrantless arrests.<sup>534</sup> It asserted that the Fourth Amendment has a “preference” for warrants.<sup>535</sup> But officers may arrest without a warrant on the street because there is often no time to get a warrant.<sup>536</sup> The exigency that generally exists justifies arrest without a warrant.<sup>537</sup>

But once the officer brings the suspect to court to be committed pending trial, that exigency evaporates.<sup>538</sup> Therefore, the court should determine probable cause at that initial appearance as if it were issuing an arrest warrant.<sup>539</sup> The prompt probable cause determination, by a judge, cures, in a sense, the failure to have done so before the arrest.

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527 *Gerstein*, 420 U.S. at 106–07.

528 Brief for Petitioner, *supra* note 526, at 11–18.

529 *Id.* at 12–14.

530 *Id.* at 10.

531 *Gerstein*, 420 U.S. at 119.

532 *Id.* at 118–19.

533 *Id.* at 114, 117–19.

534 *Id.*

535 *See id.* at 113.

536 *See id.* at 113–14.

537 *See id.*

538 *See id.* at 114.

539 *See id.*

The Court did not identify what counts as the relevant seizure: the arrest, the commitment, or some combination.<sup>540</sup> It avoided this precision by relying on the Unreasonableness Clause of the Fourth Amendment.<sup>541</sup> By the time the person has been committed, it would be unreasonable under that provision to continue his custody with no judge having found probable cause anywhere along the process.<sup>542</sup>

Nevertheless, inquiring minds would like to identify the seizure. The seizure does not appear to be the commitment; the Court never speaks of the commitment as a seizure, nor does it mention a warrant of commitment or *mittimus*. Plus, its holding did not apply to arrests undertaken with a warrant<sup>543</sup>—meaning that the commitment did not, in its view, represent an additional or fresh seizure. The chief focus seems to be the arrest as the relevant seizure.<sup>544</sup>

And yet the arrest cannot be the relevant seizure because the *Gerstein* hearing is not supposed to determine whether the arrest rested on probable cause. The *Gerstein* hearing is to determine whether there is probable cause at the time of commitment, including using any evidence developed after the arrest.<sup>545</sup> Even more dramatic, if the person is arrested but released immediately, the suspect does not get a *Gerstein* hearing.<sup>546</sup>

The seizure, in the view of the *Gerstein* Court, is therefore neither the arrest nor the commitment but rather the continuation of the arrest with a commitment, apparently. But if the continuation of the arrest by the commitment counts as the seizure, why not simply say the commitment is the relevant seizure? In other words, why not use my approach: that the commitment is the seizure, it is pursuant to a warrant, and the Warrant Clause therefore governs directly?

In any event, once it determined the Fourth Amendment Unreasonableness Clause required a probable cause hearing after arrest but

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540 *Id.*; see also Funk, *supra* note 53, at 1121 (“[T]he Court incautiously switched from speaking about probable cause *for the arrest* to probable cause *for the detention* . . .”).

541 See *Gerstein*, 420 U.S. at 111–12 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). We can infer that *Gerstein* relies upon the Unreasonableness Clause for a few reasons. First, it manifestly does not rely upon the Warrant Clause—that leaves only the Unreasonableness Clause. Second, it performs a balancing between the incursion upon liberty versus law enforcement needs, a classic approach under reasonableness. Third, it conducts this balance based on the balance for justifying a warrantless arrest, which itself of course relies upon the Unreasonableness Clause.

542 See *id.* at 114.

543 See *id.* at 105.

544 For example, the Court allowed hearsay at the preliminary examination because an arrest, even a warrantless one, could be based on hearsay. *Id.* at 120. It required officers to bring the suspect to the magistrate promptly, suggesting that extending the *arrest* would violate the Fourth Amendment. *Id.* at 125.

545 See *id.* at 120.

546 See *id.* at 125 & n.26.

before commitment, the Court in *Gerstein* drew the standards for this hearing partly from the Warrant Clause, partly from founding-era precedent, and partly from its own policy preferences.

### C. *Ambit of the Gerstein Holding*

After it required a probable cause hearing, the Court in *Gerstein* announced the standards for this hearing, affording practically no procedural protections for defendants.<sup>547</sup> The magistrate judge could exclude the defendant and the hearing could be conducted *ex parte*.<sup>548</sup> The judge need not hear live witnesses and could rely upon hearsay.<sup>549</sup> The magistrate need not afford the defendant counsel nor the right to cross-examine witnesses.<sup>550</sup>

In creating these limits, the Court relied in part on its premise: the purpose of this hearing was basically to reproduce the issuing of an arrest warrant, just after the fact. In issuing an arrest warrant, the magistrate acted *ex parte*, and could rely on hearsay.<sup>551</sup> The Court also relied on common-law precedent<sup>552</sup> but seemed to have badly misread that precedent when compared to the outline in Part III above. For example, defendants in the founding era were very often present at the preliminary examination and sometimes played an active role.<sup>553</sup>

Finally, the Court did not address the question whether probable cause must be established by evidence under “oath.”<sup>554</sup> One might expect yes, since the Court drew the standard of reasonableness from the Warrant Clause, but the Court may also have intended to draw only the probable cause standard from the Warrant Clause. After all, in an open-ended reasonableness inquiry, one can imagine the Court jettisoning the “oath” as an obsolete formality. Later caselaw has simply noted that *Gerstein* failed to determine this question but is in conflict as to whether an oath is required.<sup>555</sup>

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547 *See id.* at 119–23.

548 *See id.*

549 *See id.*

550 *Id.* at 122.

551 *Id.* at 120.

552 *See id.* at 120–21 (quoting *Brinegar v. United States*, 338 U.S. 160, 174–75 (1949)).

553 *See supra* Section III.E.

554 *See Gerstein*, 420 U.S. 103.

555 *Compare* *Haywood v. City of Chicago*, 378 F.3d 714, 718 (7th Cir. 2004) (holding that an oath is not required), *with* *United States v. Bueno-Vargas*, 383 F.3d 1104, 1109 (9th Cir. 2004) (holding that an oath is required).



## VI. LESSONS FOR TODAY

In this Part, I briefly argue that we should apply the Warrant Clause of the Fourth Amendment to warrants of commitment. I then show how that application would change today's procedure.

Parts III and IV showed that the Warrant Clause, as originally understood, applied to warrants of commitment based on common-law history, text, and early republic precedent. The question is why we should look to those sources in interpreting the Warrant Clause today. The answer is, first, when it comes to the Fourth Amendment, both the Supreme Court and current scholarship heavily draw upon textualism and originalism.<sup>556</sup>

Second, drawing on history in this arena—initial appearances—makes particular sense because the institutions and interests remain almost entirely the same across the two eras. Both then and today, a magistrate judge determines whether to commit pending trial. The competing interests are also similar: the need to ensure the appearance of a defendant at trial versus the defendant's interests in liberty. Founding-era courts and commentators worried about the hardships of jail<sup>557</sup> and emphasized that defendants should be released on bail whenever possible for noncapital offenses.<sup>558</sup>

Instead, it is the current state of the preliminary examination that represents the worst aspects of mindlessly relying on the past. We have continued the formal framework of the founding-era preliminary examination but have drained it of any rights or value, leaving a shell that commits millions to jail without the protections that originally accompanied the institution. My proposal thus does not impose an originalist institution upon today but rather seeks to restore to this shell its full value and original, protective rights.

As for particulars, when applied today, the Warrant Clause will bring several changes, such as clarifying Fourth Amendment doctrine. But below I will focus on the "oath" requirement of the Warrant Clause, which will require that magistrate judges hear from live

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556 See e.g., *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021); *Donohue*, *supra* note 40 (collecting cases); *Bellin*, *supra* note 76; cf. *Kerr*, *supra* note 38, at 907–08.

557 E.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130 (1807) (describing pretrial commitment as potentially "long and painful imprisonment" and therefore insisting on "legal" evidence to commit).

558 See 1 ROBERTSON, *supra* note 352, at 18 (reporting Chief Justice Marshall's statement that, in *Burr's* case, bail should not be so high that the defendant won't be released); *DAVIS*, *supra* note 118, at 122; *People v. Portoreal*, 116 N.Y.S.3d 514, 520 (N.Y. Sup. Ct. 2019) (stating that New York's bail reform law requiring release or the least restrictive conditions to assure attendance "does little more than codify and restate a fundamental constitutional command that has been part of our law since the founding of the American republic"); *Funk & Mason*, *supra* note 11 (manuscript at 10).

witnesses with firsthand knowledge. This advance alone should help reduce mass, pretrial incarceration and, indirectly, postconviction incarceration.

### A. *The Oath and Firsthand Witnesses*

The Warrant Clause requires probable cause be supported by evidence under “oath.”<sup>559</sup> *Gerstein* relied on the Unreasonableness Clause and could thus sidestep the oath requirement.<sup>560</sup> Under my view, the oath requirement will apply to preliminary examinations directly.

Once in place, the oath requirement would generally require witnesses with firsthand knowledge testify live in court. “Oath” means witness and witness means firsthand knowledge presented as live testimony. I will discuss below first the requirement of firsthand knowledge and then, second, the requirement of live testimony as opposed to providing that firsthand testimony via sworn affidavit.

With respect to arrest warrants and search warrants, as I have shown elsewhere, the Fourth Amendment oath banned hearsay and required witnesses with firsthand knowledge from the founding era to the twentieth century.<sup>561</sup> Only in 1960 did the Supreme Court hold, incorrectly, to the contrary.<sup>562</sup> In that 1960 case, *Jones v. United States*, the Court held that an officer could obtain a warrant by repeating the hearsay of an unnamed informant,<sup>563</sup> and later cases permitted hearsay even from anonymous informants.<sup>564</sup> I have shown elsewhere why the *Jones* case was wrong based on text, original meaning, precedent, and even on its own terms.<sup>565</sup>

In 1975, *Gerstein* applied this Fourth Amendment principle from *Jones* to initial appearances, expressly permitting magistrate judges to rely upon hearsay in committing defendants.<sup>566</sup> As noted above, the required probable cause hearing, in the Court’s view, essentially accomplished, ex post, the issuing of an arrest warrant. Numerous lower courts have held that other constitutional provisions such as the

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559 U.S. CONST. amend. IV.

560 See *supra* Section V.B.

561 Sacharoff, *supra* note 48, at 606–07.

562 *Id.* at 607–08.

563 362 U.S. 257, 271 (1960); see also *Aguilar v. Texas*, 378 U.S. 108, 114–16 (1964) (noting reliable informants could establish probable cause but rejecting the application in that case).

564 *Illinois v. Gates*, 462 U.S. 213, 246 (1983).

565 Sacharoff, *supra* note 48, 674–77.

566 See *supra* Sections V.B–C.

Confrontation Clause or the Due Process Clause also do not prohibit a judge from relying on hearsay at the initial appearance.<sup>567</sup>

But this Article argues that *Gerstein* is wrong in two ways. First, it ignored the direct application of the Warrant Clause to initial appearances; that hearing does not simply cure the lack of an arrest warrant but requires application of the Warrant Clause to the warrant of commitment. Second, *Gerstein* relied on faulty precedent that the “oath” requirement doesn’t require firsthand witnesses.

Indeed, the historical support for firsthand witnesses at preliminary hearings is even stronger than for obtaining a search or arrest warrant, as discussed above.<sup>568</sup> First, the Burr-related cases involved preliminary examinations and warrants of commitment.<sup>569</sup> The Justices in *Bollman* appeared to agree that probable cause must rest upon personal knowledge sworn before a judge.<sup>570</sup> In *Burr*, Chief Justice Marshall expressly said that the Fourth Amendment oath for a preliminary examination to commit must be a judicial oath—thus requiring firsthand knowledge.<sup>571</sup> Counsel in both *Burford* and *Bollman* similarly argued that “oath” to commit required personal knowledge and banned hearsay, assertions the government did not dispute.<sup>572</sup>

Second, common-law sources from at least Michael Dalton in 1618 urged and soon required the person swearing the oath at the preliminary hearing be competent under the ordinary rules of evidence that applied to trials, a requirement treatise writers continued through the early republic.<sup>573</sup> In other words, the common-law era viewed a witness at the preliminary hearing the same as a witness at trial, and the latter, of course, required firsthand testimony.<sup>574</sup>

The requirement that this firsthand testimony be live before the committing magistrate, and in the defendant’s presence, presents a more complex picture. On the one hand, the Court in *Bollman* accepted portions of the Wilkinson affidavit rather than his live

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567 See, e.g., *State v. O’Brien*, 836 N.W.2d 840, 844–47 (Wis. Ct. App. 2013), *aff’d*, 850 N.W.2d 8 (Wis. 2014).

568 See *supra* Section III.B.

569 See *supra* sub-subsection IV.B.5.a.

570 See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 129–30 (1807). The Justices disagreed on whether to admit the coded letter that Wilkinson said he had received and claimed to have translated. *Id.* at 130.

571 *United States v. Burr*, 25 F. Cas. 27, 29–30 (C.C.D. Va. 1807) (No. 14,692c).

572 See *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806) (arguing that the JPs rested neither upon their own personal knowledge nor “upon the oath of any person whomsoever”); *Bollman*, 8 U.S. (4 Cranch) at 110, 117–18.

573 See DALTON, *supra* note 122, at 261; see also DAVIS, *supra* note 118, at 94–95 (setting forth the evidentiary requirements for a person to testify at a preliminary hearing that paralleled those for testifying at trial).

574 Sacharoff, *supra* note 48, at 640–41.

testimony, not solely because he was distant but also because all pretrial criminal proceedings are *ex parte*.<sup>575</sup> This remark suggests firsthand affidavits, as long as they are sworn before some judge, should always suffice in lieu of live testimony.

On the other hand, Chief Justice Marshall's opinion in *Burr* said that a commitment should rest upon in-person testimony, with certain exceptions.<sup>576</sup> Chief Justice Marshall wrote in *Burr* that live testimony "ought to be obtained" unless too difficult.<sup>577</sup> "The presence of the witness, to be examined by the committing justice, confronted with the accused, is certainly to be desired, and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance."<sup>578</sup>

The exception—"considerable inconvenience and difficulty"—there referred to travel from New Orleans to Richmond in 1807.<sup>579</sup>

More telling, founding-era statutes and practice certainly envisioned live testimony from firsthand witnesses. The Marian Statutes required that JPs examine the alleged victim and any other witnesses, and all the colonies adopted or received this aspect of the statute.<sup>580</sup> Hale, Hawkins, Burn, and American founding-era JP manuals all required the committing JP to examine the witnesses under oath, of necessity in person.<sup>581</sup> Even states such as Massachusetts and Virginia that did not adopt the Marian Statutes still required examination, under oath, of firsthand witnesses; indeed, these two states afforded the defendant the right to be present and confront his accusers at least by the early republic.<sup>582</sup> Notes or transcripts of preliminary examinations from the founding era also reflect live, firsthand testimony.<sup>583</sup>

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575 See *Bollman*, 8 U.S. (4 Cranch) at 130. But the remark does not make too much sense. First, grand jury proceedings were *ex parte* but certainly required live witnesses. Indeed, the proceedings in the *Burr* trial were long delayed while the government waited for Wilkinson to arrive to testify in person.

576 *Burr*, 25 F. Cas. at 28.

577 *Id.*

578 *Id.*

579 *Id.*

580 See *supra* notes 159–69 and accompanying text.

581 See *supra* Section III.B.

582 See *supra* notes 171–73 and accompanying text.

583 See, e.g., DEPOSITION BOOK OF RICHARD WYATT, JP, 1767–1776 (Elizabeth Silverthorne ed., 1978); DANIEL HORSMANDEN, THE NEW-YORK CONSPIRACY, OR A HISTORY OF THE NEGRO PLOT 18–22 (New York, Southwick & Pelsue 2d ed. 1810) (detailing preliminary examination testimony during the 1741 series of criminal cases); FAIRFAX COUNTY, VIRGINIA, ORDER BOOK, 1749–1754, at 170, 175 (n.d.), *microformed on* Court Order Books and Minute Books, 1749–1867, Film 31321 (Genealogical Soc'y of Utah), <https://www.familysearch.org/ark:/61903/3:1:3Q9M-CS4V-B9Y4-V> [hereinafter FAIRFAX ORDER BOOK] (stating that five witnesses, earlier summoned, testified that the defendant stole a horse; court committed defendant pending trial).

These statutes also required that, if the JP advanced the case to trial at the preliminary hearing, he was to bind over the witnesses.<sup>584</sup> Such a recognizance only makes sense if the witness can actually testify at trial, i.e., that his testimony is firsthand.<sup>585</sup> And of course the JP can only bind over the witness if that witness is present before him at the preliminary examination. Third, treatise writers emphasized that the magistrate issuing either an arrest warrant or committing a defendant was to probe whether the witness was lying, acting maliciously, or perhaps even just mistaken.<sup>586</sup> The JP could accomplish this goal only if the accuser himself were testifying in person.

This requirement of live, firsthand witnesses persisted until the mid-twentieth century. In 1930, the ALI collected voluminous state statutes and constitutions that imposed the requirement.<sup>587</sup> Alabama's 1940 code, for example, required the magistrate to "examine the complainant and the witnesses for the prosecution on oath, in the presence of the defendant."<sup>588</sup> Only in 1973 did the ALI expressly recommend eliminating the requirement, with a somewhat defensive explanation.<sup>589</sup> It noted that New York City still imposed the requirement that civilian and police officer witnesses testify in person, and that a proposal there to eliminate the requirement had met resistance.<sup>590</sup> A commentator described the process in Manhattan in 1975 as follows: "usually the same day as the arrest, the officer and the witness go to the municipal court where . . . [t]he complaining witness swears to the complaint in open court" in the defendant's presence.<sup>591</sup> Even in 1982, Ronald Reagan's victims task force recommended that hearsay be

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584 *E.g.*, FAIRFAX ORDER BOOK, *supra* note 583, at 175 (binding five witnesses over for horse-stealing trial, noting one might be too sick and her testimony should be taken in advance); Record Book of Ebenezer Ferguson, Justice of the Peace, Philadelphia, Pennsylvania, December 1799–July 1800, <https://catalog.archives.gov/id/155501037> [<https://perma.cc/7BWS-UUYL>] (recording *Commonwealth v. Duffy* and noting that two defendants for keeping a disorderly house on oath of witnesses, binding over two witnesses to "give [e]vidence" at trial).

585 2 HALE, *supra* note 33, at 120–21. JPs were required to bind over witnesses for trial expressly under the Marian Statutes. Hale, in addition to repeating this requirement, also urged JPs to bind over complainants who sought arrest warrants to testify at trial. *Id.* at 111.

586 *Id.* at 111 (noting that JP ought to examine under oath the complainant seeking the arrest warrant "touching the whole matter"); *id.* at 120 (discussing preliminary examination).

587 CODE OF CRIM PROC. § 46 cmt. at 287–89 (AM. L. INST., Official Draft 1930).

588 ALA. CODE § 15-133 (1940).

589 A MODEL CODE OF PRE-ARRAIGNMENT PROC. § 310 cmt. at 1–3 (AM. L. INST., Tentative Draft No. 5A 1973).

590 *Id.* at § 310 cmt. at 2–4; *see also* Feeney & Woods, *supra* note 51, at 998–99.

591 Norman Abrams, *Prosecutorial Charge Decision Systems*, 23 UCLA L. REV. 1, 5 (1975).

permitted at the preliminary hearing, suggesting that in many jurisdictions victims were still required to testify in person.<sup>592</sup>

In sum, founding-era sources, including Supreme Court precedent, strongly support a requirement that firsthand witnesses testify under oath before *some* judge, either live or by way of affidavit. Those same sources also support a requirement that the committing JP examine the witness live whenever possible. The defendant's presence seemed at least assumed, ripening into a right at some point before, during, or just after the founding era.<sup>593</sup>

Today, committing judges almost never hear from live, firsthand witnesses. They receive officer affidavits that may contain firsthand information but that often simply repeat hearsay. Officers who do not swear their allegations in open court before a judge are less likely to take care that their allegations are truthful and accurate. When they repeat hearsay, they of course increase the chance for mistake. Judges who simply receive affidavits are far less likely to truly determine probable cause compared to examining firsthand witnesses under oath.

A reader might object that a requirement of live, firsthand witnesses would impose needless inefficiency. But when states stopped requiring live witnesses in the 1970s, they shifted to a far more efficient system that likely facilitated the explosion in pretrial commitment as well as incarcerations post-conviction.

In other words, this restored “inefficiency” under my proposal will force the government to decide which cases merit commitment before trial and expend the resources to get witnesses to court for those cases. For other cases, it can advance them to trial, or resolve them by plea, without jailing the defendant. Some readers will disagree, but I suggest that the cost of jailing a person pending trial outweighs the inconvenience imposed on a firsthand witness required to testify in person.

Also consider that under today's typical process, the government need *never* produce its evidence or witnesses. It obtains commitment based on hearsay in an affidavit, and then almost always resolves the case by plea.<sup>594</sup> Firsthand witnesses therefore rarely testify before trial.

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592 PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 17 (1982) (the context suggests the writers meant initial appearances as well as perhaps later preliminary hearings).

593 See DAVIS, *supra* note 118, at 92. But see 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 225–28 (London, MacMillan & Co. 1883) (providing examples of examining judges excluding defendants up to the 1800s, but these cases appear to be high-profile political cases with their own idiosyncrasies and likely not representative of ordinary criminal cases).

594 See *People v. Jones*, 991 N.W.2d 587, 587 (Mich. 2023) (Cavanaugh, J., concurring) (72% in Michigan in 2022); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (97% of federal and 94% of state convictions result from guilty pleas).

Those witnesses, in extreme cases, might not even exist.<sup>595</sup> The Warrant Clause would require that the government, at least once, produce its accuser, at the initial appearance.

Once we require firsthand witnesses, the probable cause determination itself will more fully perform its function. Naturally, if no firsthand witness appears, the judge must dismiss the case, or at least free the defendant. The lack of an accuser would have been, in the founding era, the chief reason to dismiss a case for lack of cause.

But when a firsthand witness does appear and testify, the court will benefit in two ways. First, a firsthand accusation under oath will be entitled to significant credit, often allowing the judge to find probable cause somewhat easily—as long as the facts do establish the elements of a crime. On the other hand, the judge will be obligated, as in the founding era, to carefully examine the witness to guard against abuse and false accusations. A judge can far more easily assess the credibility of a civilian witness or police officer testifying before her than a carefully crafted affidavit.

Now as a practical matter, it is unlikely defendants will testify; but when they do, a court can take that testimony into account as well. The judge will be able to weigh it against the live testimony of the accuser much more easily than against an affidavit, especially one that simply repeats, in a terse fashion, hearsay.

Today, despite *Gerstein*, many statutes and rules on the state and federal level continue to obscure the need for a judge to find probable cause to commit at the initial appearance.<sup>596</sup> Judges sometimes continue to defer the probable cause determination from the initial appearance to the later, preliminary hearing, which in many jurisdictions never happens.<sup>597</sup> Rather, at the initial appearance, judges receive and file an officer affidavit that itself states there is probable cause.<sup>598</sup>

My proposal will help fix this problem. It will redirect the attention of magistrates to the commitment and the warrant of commitment

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595 See Sacharoff, *supra* note 48, at 616 (describing the officer who obtained a search warrant of Breonna Taylor's home based upon an invented witness, a nonexistent postal inspector).

596 See FED. R. CRIM. P. 3–5(a); LAWRENCE K. MARKS, ROBERT S. DEAN, MARK DWYER, ANTHONY J. GIRESE, JAMES A. YATES & PAUL McDONNELL, NEW YORK PRETRIAL CRIMINAL PROCEDURE § 3:24 (2d ed. 2007 & Supp. 2023) (noting that the statute does not require a finding of probable cause at the initial appearance—called an “arraignment” in New York).

597 E.g., JAMES E. MORRIS, ROBERT G. BOGLE, THOMAS F. LIOTTI & MARYRITA DOBIEL, VILLAGE, TOWN AND DISTRICT COURTS IN NEW YORK § 4:36 (2023–2024 ed.). (“In New York City, preliminary (felony) exams are almost never held.”).

598 E.g., FED. R. CRIM. P. 5(b); see also *Manuel v. City of Joliet*, 137 S. Ct. 911, 915 (2017). Typically, the officer affidavit will be stamped with a jurat from the judge that says, “Witnessed before me this day.” This jurat of course does not reflect that the judge read the affidavit and independently found probable cause.

as its own thing. It will require them to examine the evidence. It will require them to state, on the record, “I find the facts establish probable cause.”

Finally, the requirement of a firsthand, accusatory witness will help inform the bail determination. The strength of the case will depend upon the strength of the witnesses’ testimony. An affidavit or hearsay can appear far stronger, misleadingly so, than when the same testimony is presented live and subject to some degree of scrutiny.

#### CONCLUSION

The chief aim of this Article has been to demonstrate that the Fourth Amendment Warrant Clause originally applied to a third type of warrant—the warrant of commitment. It sought to uncover and illuminate this rich and interesting history for its own sake. The Article also argued that we apply this original meaning today.

I do urge the reader to separate the two foregoing points. One can accept and agree that the Warrant Clause once applied to pretrial commitment without agreeing to apply that principle today—whether because of a general antipathy to originalism or because the policy costs would be too high.

The costs would be high. Returning to a requirement of live, firsthand witnesses would upend the efficiency of our criminal justice system. Different readers will simply disagree whether this disruption would be a meaningless obstacle or a salutary return to a balance between prosecution and defense that had persisted until surprisingly recently. In an age of mass incarceration, I have advocated the latter proposition as warranted not only by original meaning but also as a deeply needed policy antidote.