

**Searches And The Misunderstood History  
Of Suspicion And Probable Cause: Part One**

By: Fabio Arcila, Jr.\*

[Article Length (body & footnote text, excluding headers): 24,981 words]

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\* Assistant Professor, Touro Law Center. Many thanks to Akhil Amar (Yale Law School), Thomas Davies (University of Tennessee Law School), David Sklansky (U.C. Berkeley Boalt Hall Law School), Tracey Maclin (Boston University Law School), George Thomas (Rutgers-Newark Law School), Andrew Taslitz (Howard Law School), Frank Rudy Cooper (Suffolk Law School), Alafair Burke (Hofstra Law School), and Richard Klein and Roger Citron (both from Touro Law Center), as well as to William Cuddihy, for their comments on this manuscript, and to the 2006 Northeast People Of Color Conference for giving me an opportunity to present this work, as well as to Derrick Carter (Valparaiso Law School), Cynthia Lee (George Washington Law School), and Radha Pathak (Whittier Law School), who provided me with helpful feedback there.

My sincere gratitude also extends to the many people at Touro Law Center who helped me with this project, starting at the top with Dean Larry Raful, who provided generous summer support, as well as writing time. Also included in this group are April Schwartz and her library staff, who provided me with truly superlative assistance and resources. Worthy of a special mention are librarians Veronica O’Keefe, Beth Mobley, Sarah Shik, Suzanne Smith, and particularly James Durham. I also appreciate the courtesy that the Fordham University Law School Library extended in making available to me a valuable digital library. *See infra* note 103.

I also am grateful to my research assistants who aided me on this project: Mark Fridman, Daniel Gomez-Sanchez, Jaime Lehrer, Christopher Miller, Matthew Moisan, and Gennaro Savastano.

One note about style: many of the quotations in this article come from eighteenth or early nineteenth century sources that use both a long “s” (also known as a medial, descending, or round “s”) and a short “s” (also known as a terminal “s”). The long “s” is easily mistaken for an “f” (for example, “fuspicion” rather than “suspicion”), particularly given that, depending on the typeface, a long “s” can have an f-like nub extending to the left from its vertical stroke. For ease of reading, I have altered every long “s” to a short “s” to conform to modern usage, but not indicated the alteration with brackets.

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*Abstract*

This article, the first of a two-part series, argues that during the Framers' era many if not most judges believed they could issue search warrants without independently assessing the adequacy of probable cause, and that this view persisted even after the Fourth Amendment became effective. This argument challenges the leading originalist account of the Fourth Amendment, which Professor Thomas Davies published in the *Michigan Law Review* in 1999.

The focus in this first article is upon an analysis of the common law and how it reflected the Fourth Amendment's restrictions. Learned treatises in particular, and to a lesser extent a few case decisions, had articulated a judicial duty to monitor probable cause. But it is a mistake to presume that the law was necessarily implemented in accordance with this elite guidance. This is because justices of the peace, the non-elite judges who actually issued search warrants, had reason to believe that judicial sentryship of probable cause was often optional. Evidence supporting this conclusion can be found in treatises, as well as manuals for justices of the peace, legal forms, civil search statutes, and case law, as well as the extended development of probable cause sentryship jurisprudence, which continued well past 1950. American justice of the peace manuals and legal forms play a particularly important role in this story, as it is likely they had a profound influence on search warrant procedure given the laxity in legal education and judicial training, as well as the limitations on legal research, during the Framers' era.

This article challenges our current understanding of the Fourth Amendment, including the relationship between its Reasonableness and Warrant clauses, raises questions about originalism, and contributes to our understanding of the sources and methods used by judges during the Framers' era, as well as by historians today. These topics will continue to be explored in the second part of this series, which will focus upon statutory law from the Framers' era.

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## INTRODUCTION

Probable cause is central to our understanding of the Fourth Amendment's search and seizure protections, but it is more of a stranger than we generally acknowledge. The Fourth Amendment tells us that probable cause plays a leading role in the issuance of warrants. Its command sounds simple: "no Warrants shall issue, but upon probable cause."<sup>1</sup> The apparent simplicity, however, is surprisingly misleading. It is clear that "probable cause" is different from "particularity," another separate requirement the Fourth Amendment imposes before warrants may issue.<sup>2</sup> "Probable cause" speaks to the circumstances justifying the request to search and whether they satisfy a required threshold of suspicion.<sup>3</sup> "Particularity" requires that the warrant specify the place to be search and the items sought.<sup>4</sup> Both serve to limit the searcher's discretion. Beyond that conceptual distinction, the exact import of "probable cause" is debatable.

The constitutional "probable cause" command could be interpreted as imposing different requirements, each of which would result in widely differing judicial roles. Does the probable cause mandate demand that judges act as vigilant sentries, aggressively inquiring into the merits of a probable cause assertion? Or, at the other extreme, is the command satisfied when a judge acts in a merely ministerial manner, engaging in no gate keeping at all? In this view, the mandate seems to impose only a duty to oversee the production of a record for a later motion to suppress. Or does the command represent a middle ground, essentially reflecting a presumption

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<sup>1</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

<sup>2</sup> *See id.*

<sup>3</sup> *See Dumbra v. United States*, 268 U.S. 435, 439, 441 (1925).

<sup>4</sup> *See supra* note 1; *Stanford v. Texas*, 379 U.S. 476 (1965); *Marron v. United States*, 275 U.S. 192, 196 (1927).

that a warrant should issue unless the application is obviously defective, meaning that a judge's sentryship role is satisfied by anything more than a mechanical, ministerial issuance of a warrant?<sup>5</sup>

Determining which definition is preferable is one issue; another is whether we share the same understanding of the probable cause concept as the Framers did. This historical inquiry has become crucially relevant today because, with the conservative ascendancy on the Supreme Court, originalism has become both a mission and a promise,<sup>6</sup> and this movement towards originalism has extended into Fourth Amendment jurisprudence. Since the 1990s the Court has occasionally suggested that original intent should be the first factor considered in modern Fourth Amendment cases.<sup>7</sup> In one sense, this development should not be surprising. The Fourth Amendment, with its dramatic and express limitation upon governmental power and its obviously implicit promise of individual privacy protection,<sup>8</sup> presents an attractive target to

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<sup>5</sup> My thanks to George Thomas for suggesting this tripartite framework during our discussions about this manuscript.

<sup>6</sup> The mission is to make it the dominant form of constitutional analysis. The promise is twofold. First, that by doing so we can achieve a level of jurisprudential coherence that previously has eluded us, or at least eluded us during the Warren and Burger Courts. Second, that embracing originalism will help avoid incorrect constitutional rulings (which usually, but not always, have resulted in pesky expansions of constitutional protections), a trend that originalists view as not only unjustified but actually dangerous. Justice Scalia's dissenting opinion in *County of Riverside v. McLaughlin*, 500 U.S. 44, 59-71 (1991), protesting the majority's expansion of what constitutes a "prompt" probable cause determination for warrantless arrests, is a prime example of this belief.

<sup>7</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-27 (2001); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Many commentators have been critical of the Court's interest in Fourth Amendment originalism. See *infra* note 193.

<sup>8</sup> For example, even the newly elevated Chief Justice Roberts and Justice Alito, both superheroes to the conservative movement, cited the Fourth Amendment during their confirmation hearings as one constitutional provision evincing an individual privacy right. Judge Samuel Alito, *Transcript Of United States Senate Judiciary Committee Hearing On Judge Samuel Alito's Nomination To Associate Justice Of The United States Supreme Court*, 109th Cong. (Jan. 10, 2006), available at <http://www.washingtonpost.com/wp->

originalists. This is particularly so given that Fourth Amendment jurisprudence, quite often until the 1990s but certainly between the late 1960s through the early 1990s (mostly the Warren and Burger Court years), so clearly followed paths other than originalism.<sup>9</sup>

Scholars have joined in the effort to gain a greater historical understanding of the Fourth Amendment.<sup>10</sup> One result has been dissonance concerning early judicial sentryship of probable cause. The leading originalist account, by law professor Thomas Davies, concludes that as a

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dyn/content/article/2006/01/10/AR2006011000781.html (“I do agree that the Constitution protects a right to privacy. And it protects the right to privacy in a number of ways. The Fourth Amendment certainly speaks to the right of privacy.”); Judge John G. Roberts, Jr., *Transcript Of United States Senate Judiciary Committee Hearing On Judge John G. Roberts, Jr.’s Nomination To Be Chief Justice Of The United States Supreme Court*, 109th Cong. (Sept. 13, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html> (“The right to privacy is protected under the Constitution in various ways. It’s protected by the Fourth Amendment which provides that the right of people to be secure in their persons, houses, effects and papers is protected.”).

<sup>9</sup> See David A. Sklansky, *The Fourth Amendment And Common Law*, 100 COLUM. L. REV. 1739, 1739-41 (2000) (showing that, to extent history played role in Supreme Court’s Fourth Amendment jurisprudence prior to 1990s, it was often in dissenting opinions); see also *id.* at 1762-70.

<sup>10</sup> E.g., Akhil Reed Amar, *Terry And Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097 (1998) [hereinafter Amar, *Terry & Fourth Amendment*]; Akhil Reed Amar, *The Fourth Amendment, Boston, And The Writs Of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *Writs Of Assistance*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment*]; 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 (2002) [hereinafter Davies, *Fictional Originalism*]; Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Original Fourth Amendment*]; Tracey Maclin, *The Complexity Of The Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 933 & n.36 (1997) [hereinafter Maclin, *Fourth Amendment Complexity*]; Sklansky, *supra* note 9; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure And Criminal Justice*, 107 YALE L.J. 1, 3 n.1 (1997); WILLIAM JOHN CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* (1990) (Ph. D. Dissertation at Claremont Graduate School) [hereinafter CUDDIHY DISSERTATION]. Cuddihy’s dissertation came to prominence after Justice O’Connor cited it in a dissenting opinion. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O’Connor, J., dissenting). Though unpublished, it is available through library holdings as well as Proquest Information & Learning, 777 East Eisenhower Parkway, P.O. Box 1346, Ann Arbor, Michigan 48106-1346, telephone (800) 521-3042, facsimile (800) 864-0019, email [info@il.proquest.com](mailto:info@il.proquest.com).

matter of legal doctrine judges in the Framers' era<sup>11</sup> were expected to act as vigilant probable cause sentries prior to issuing warrants.<sup>12</sup> Throughout this article, when I refer to judicial sentryship, I am referring to this aggressive variety unless otherwise indicated. By contrast, the leading historical account of the Fourth Amendment, by historian William Cuddihy, asserts that as a matter of legal practice judges in the Framers' era did not widely engage in aggressive sentryship of probable cause.<sup>13</sup> One point of this article is to more fully explore this dissonance. As will be explored in much greater detail below, I think Cuddihy is right.

Another, and more important, purpose of this article is to point out that the increased focus upon the Fourth Amendment's historical pedigree has not resulted in a sufficient reassessment of such fundamental concepts as suspicion or probable cause. I touched on this subject in a previous article,<sup>14</sup> and will continue to expand upon it in future articles. The failure to reassess the roles of suspicion and probable cause is unfortunate. The historical material amply supports the need for reexamining the Framers' understanding of these concepts because abundant reasons exist to believe that the Framers' views differed from our own.

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<sup>11</sup> I use the phrase "Framers' era," and others like it, to refer to the period roughly bounded by 1787 (when the Constitution was drafted) and 1825 (when a new generation was taking over for the Framers; for example, James Madison, who drafted the Fourth Amendment, died in 1836). Obviously, others may have differing opinions about the period that constitutes the "Framers' era," as well as about whether preceding periods are relevant to discerning the Framers' intent. (Indeed, I agree that earlier periods are relevant to understanding our Fourth Amendment history, as is implicit in my discussion in Part I below.) My definition is useful for the purposes of this article, one of which is to understand the state of actual search warrant practice (as opposed to doctrine) during this early part of our history. *See infra* note 13 and accompanying text. In making this attempt, I try to emphasize legal texts from "the Framers' era" as I have defined it, on the presumption that they are the most likely that were used.

<sup>12</sup> *See infra* notes 58-59 and accompanying text.

<sup>13</sup> *See, e.g., infra* notes 101-102, 145, 152 and accompanying text.

<sup>14</sup> *See* Fabio Arcila, Jr., *Special Needs And Special Deference: Suspicionless Civil Searches In The Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1235-46 (2004).

To properly understand history's lessons, it is necessary to appreciate the nature of search and seizure jurisprudence during the Framers' era. During this period, Fourth Amendment claims as we know them today did not exist. For about a century after the Constitution was adopted there was no constitutional search and seizure jurisprudence.<sup>15</sup> Instead, search and seizure claims were litigated through common law trespass or civil law forfeiture. This remedial division contributes to this article's designation as "Part One." It focuses upon the common law trespass part of the puzzle, and only briefly considers statutory law. The future article that will be "Part Two" will focus more deeply upon the statutory law applicable to civil law forfeiture claims, and explain what the intersection between the common and statutory law means for an originalist analysis of probable cause.

A central point of both articles is that abundant reasons exist for believing that in our early history the judiciary did not always monitor the adequacy of prior suspicion during the search warrant application process. In terms of the common law, the historical material is surprisingly equivocal. It shows that a probable cause sentryship role on the judiciary's part had been articulated, particularly in learned treatises, but at the same time suggests that such a role may not have fully developed at any point during the Framers' era. Given the concept's articulation in influential treatises, it may well be that the Framers and other members of the legal elite embraced the concept, as Professor Davies believes. The legal elite, after all, probably

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<sup>15</sup> The Supreme Court's first major Fourth Amendment decision was *Boyd v. United States*, 116 U.S. 616 (1886). The Court did not decide its next major constitutional search and seizure case until the next century.

There were some federal cases prior to *Boyd* in which the Fourth Amendment was invoked, often in the context of a challenged warrant, but it is not clear that the Fourth Amendment was dispositive. See Davies, *Original Fourth Amendment*, *supra* note 10, at 613 & n.174. In some early cases the Fourth Amendment sometimes is referred to as the Sixth Amendment as a result of two amendments having been dropped between when the Bill of Rights was proposed and as it was approved. See *id.* at 723 & n.503.

had (relatively) easy access to these treatises, and likely read and trained from them. But the legal elite did not implement and enforce search warrant procedures. Rather, it is much more likely that non-elite lawyers and non-elite judges, like justices of the peace, participated in the day-to-day process of applying for, and issuing or denying, search warrants. These non-elites probably did not have easy access to the leading treatises and sometimes had little meaningful legal training. As a result, it seems likely that, even after the Fourth Amendment's ratification, two conflicting legal worlds existed during the Framers' era: the legal elites' aspirational one and the non-elites' reality.<sup>16</sup>

This insight informs the most fundamental debate that exists in Fourth Amendment jurisprudence. This debate concerns the relationship between the Fourth Amendment's two clauses, the Reasonableness Clause and the Warrant Clause.<sup>17</sup> In contention is whether the initial determinant of constitutionality should be the Reasonableness Clause or the Warrant Clause and, if the latter, under what circumstances it is legitimate to turn to the Reasonableness Clause to justify the search. The tension between these approaches is evident in the Supreme Court's Fourth Amendment jurisprudence,<sup>18</sup> both in older cases<sup>19</sup> and in its trend of judging the

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<sup>16</sup> My thanks to Andrew Taslitz for helping me clarify my thinking about this issue during our exchanges about this manuscript.

<sup>17</sup> For the Fourth Amendment's language, see *supra* note 1.

<sup>18</sup> *Reasonableness Clause Preference*: See, e.g., *Samson v. California*, 126 S. Ct. 2193, 2201 n.4 (June 19, 2006); *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (May 22, 2006); *United States v. Knights*, 534 U.S. 112, 118 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979); *Carroll v. United States*, 267 U.S. 132, 147 (1925).

*Warrant Clause Preference*: See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); see also Thomas K. Clancy, *The Fourth Amendment's Concept Of Reasonableness*, 2004 UTAH L. REV. 977, 994.

<sup>19</sup> See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (exemplifying this debate,

constitutionality of civil searches under the Reasonableness Clause<sup>20</sup> and of criminal searches, in many but certainly not all instances, under the Warrant Clause.<sup>21</sup> This debate is also active among legal scholars. The strongest proponent of the Reasonableness Clause approach is Professor Akhil Amar, who in this respect has built upon the past work of Professor Telford Taylor.<sup>22</sup> Many commentators hotly contest arguments for giving prominence to the Reasonableness Clause. Among them are Professors Thomas Davies, Tracey Maclin, and George Thomas. Professor Davies denies that a Fourth Amendment reasonableness standard existed during the Framers' era.<sup>23</sup> Professors Maclin and Thomas have asserted that in many, perhaps most, cases the constitutionality of a search or seizure should be judged by reference to the Warrant Clause.<sup>24</sup>

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as seen through a comparison of the various opinions).

<sup>20</sup> Since the mid-1980s the Supreme Court has judged the constitutionality of all civil searches under the "special needs" principle, which exempts the government from complying with the Warrant Clause and applies constitutional balancing under the Reasonableness Clause. *See* Arcila, *supra* note 14, at 1228-29; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).

<sup>21</sup> *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *see also* cases listed *supra* note 18 under "Warrant Clause Preference."

<sup>22</sup> *See* TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43-44, 46-47 (1969); Amar, *Terry & Fourth Amendment*, *supra* note 10, at 1106-14, 1118-26; Amar, *Fourth Amendment*, *supra* note 10, at 761-71.

<sup>23</sup> *See* Davies, *Fictional Originalism*, *supra* note 10, at 389-400; Davies, *Original Fourth Amendment*, *supra* note 10.

<sup>24</sup> *See* Maclin, *Fourth Amendment Complexity*, *supra* note 10; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) [hereinafter Maclin, *Central Meaning*]; George C. Thomas, III, *Remapping The Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1832-34 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) [hereinafter Thomas, *Remapping Criminal Procedure*]. Thomas has recently suggested a rewriting of the Fourth Amendment. George C. Thomas, III, *Time Travel, Hovercrafts, And The Framers: James Madison Sees The Future And Rewrites The Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1478 (2005) [hereinafter Thomas, *Madison Rewrites Fourth Amendment*].

At this point, I find the arguments in favor of the Reasonableness Clause approach more persuasive. I will wait until my concluding remarks to briefly expand upon the potentially significant implications that my historical analysis has on this debate, as well as on how it may actually harmonize our current practice with our history.

Evidence supporting my conclusion that probable cause sentryship during the Framers' era was at best inconsistent is found in the controversies that inspired the Fourth Amendment, and also in sources such as legal doctrine as represented in legal treatises,<sup>25</sup> as well as in American manuals for justices of the peace (commonly referred to as "justice manuals"),<sup>26</sup> American legal forms, civil search statutes and case law, and the extended development of sentryship jurisprudence that we actually experienced. With regard to the historical controversies and the lessons learned from them, Part I(A) will discuss colonial hostility to writs of assistance, and Part I(B) will examine the English litigation arising from a disputed search of Parliamentarian John Wilkes, which reverberated in the colonies. Each of those controversies focused upon particularity, and thus did not meaningfully engender or advance an understanding of probable cause.

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<sup>25</sup> For convenience, I use the phrase "legal treatise" or the word "treatise" loosely to refer to the secondary legal literature, excluding justice of the peace manuals, that was published in the Framers' era. Technically, this literature covered numerous genres, including but not limited to treatises, encyclopedias, commentaries, abridgments, and digests. *See generally* ERWIN C. SURRENCY, *HISTORY OF AMERICAN LAW PUBLISHING* (1990) [hereinafter SURRENCY, *AMERICAN LAW PUBLISHING*]. I separately address justice of the peace manuals because of their importance to my argument. *See infra* notes 80-88 and accompanying text.

<sup>26</sup> These justice manuals were aimed at particular colonies or states, or small groups of them. *See* John A. Conley, *Doing It By The Book: Justice Of The Peace Manuals And English Law In Eighteenth Century America*, 6 *J. LEGAL HIST.* 257, 264 (Figure I), 294-95 (Bibliography) (1985); Davies, *Fictional Originalism*, *supra* note 10, at 280 & n.122; *see also infra* notes 74, 104-105, 118 (citing numerous justice manuals and indicating their geographical coverage where not evident from title).

Part II contains an analysis of the common law, and explains that, even after the Fourth Amendment's adoption, judges could have felt empowered to issue search warrants without acting as probable cause sentries, a state of affairs that lasted throughout the Framers' era. This explanation consists of several parts. Part II(A) acknowledges that legal elites may have endorsed judicial sentryship given that the concept had been articulated, primarily as legal doctrine in learned treatises. This ethic also was advanced to a lesser extent through English case law, and through a bit of American case law as well.

A detailed study of guidance that likely influenced non-elite lawyers and non-elite judges as they actually engaged in search warrant practice follows in Part II(B). Crucially, both legal treatises and most importantly American justice manuals often and expressly stated that a judicial sentryship role was merely optional, as explained in Part II(B)(1). The evidence from justice manuals is especially significant because these legal publications likely exerted a dominant influence on day-to-day search warrant procedure. Part II(B)(2) scrutinizes American application forms used to obtain search warrants, as well as American search warrant forms themselves. The application forms often did not call for specifying the underlying facts supporting a probable cause claim, and the warrant forms were devoid of any meaningful evidence that judges monitored probable cause. Part II(B)(3) presents a plain text argument against a judicial sentryship duty during the Framers' era.

Part III turns to statutory law to show that judges often did not perceive the law as imposing a probable cause sentryship function upon them. Finally, Part IV notes that, if judicial vigilance with respect to probable cause had been understood and implemented during the Framers' era, it is difficult to explain why the Supreme Court found itself having to establish this judicial duty as late as 1958.

## I. THE PRE-REVOLUTIONARY FOCUS UPON PARTICULARITY, NOT PROBABLE CAUSE

As we seek to uncover the understanding of probable cause that prevailed during the Framers' era, it is instructive to recognize that aggressive judicial sentryship would have been a rather new, novel, and developing concept. As such, it is significant that, of two controversies that were central to fostering the Framers' desire for constitutional search and seizure protections, namely the colonial experience with writs of assistance and the famous John Wilkes controversy in England, neither would have engendered a widespread understanding of probable cause sentryship. This is because each of these controversies focused much more strongly upon particularity than probable cause.

### A. COLONIAL EXPERIENCE WITH WRITS OF ASSISTANCE

Colonial disputes with royal authorities over writs of assistance are widely accepted to have been a contributing cause to the Revolution and, in particular, to the Fourth Amendment's inclusion in the Bill of Rights.<sup>27</sup> Writs of assistance "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution," and were used to perform general searches with the aim of enforcing the customs laws.<sup>28</sup> The common law did

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<sup>27</sup> See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Boyd v. United States*, 116 U.S. 616, 624-27 (1886); Potter Stewart, *The Road To Mapp v. Ohio And Beyond: The Origins, Development And Future Of The Exclusionary Rule In Search-And-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369-71 (1983); Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 24, at 1488; O.M. Dickerson, *Writs Of Assistance As A Cause Of Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939) [hereinafter Dickerson, *Writs Of Assistance*]; see also Scott E. Sundby, *Protecting The Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" And General Warrants*, 74 MISS. L.J. 501, 507-08, 537-42 (2004).

<sup>28</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 53-54 (Leonard W. Levy, ed., Da Capo Press Reprints in

not authorize writs, which instead were statutorily created. Technically, writs did not provide any search authority (as opposed to warrants, which do).<sup>29</sup> Writs merely purported to require law enforcement officers and even bystanders to assist in a search.<sup>30</sup> Thus, the search authority that writs represented had to emanate from statutory sources. Both English and colonial customs officers claimed a right to search *ex officio* on the theory that the statutory search authority was incorporated into their commissions.<sup>31</sup> In the 1760s, however, colonial authorities increasingly sought to use writs of assistance to help validate these searches.<sup>32</sup> Continued colonial resistance to the writs, premised in part upon arguments that the English legislation authorizing writs in

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AMERICAN CONSTITUTIONAL AND LEGAL HISTORY (1970)); POLYVOIS G. POLYVIOU, *SEARCH & SEIZURE: CONSTITUTIONAL & COMMON LAW* 10 (1982); *see also* William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in *ENCYCLOPEDIA OF THE AM. CONST.* 761, 761 (Leonard W. Levy et al. eds., 1986) [hereinafter Cuddihy, *Fourth Amendment (Historical Origins)*]; Joseph J. Stengel, *The Background Of The Fourth Amendment To The Constitution Of The United States, Part One*, 3 U. RICH. L. REV. 278, 294 (1969).

<sup>29</sup> *See* Dickerson, *Writs Of Assistance*, *supra* note 27, at 45. Nonetheless, writs have been considered to be a type of general warrant. *See, e.g.*, POLYVIOU, *supra* note 28, at 10; Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 835 (1989); Davies, *Original Fourth Amendment*, *supra* note 10, at 561; Osmond Fraenkel, *Concerning Searches & Seizures*, 34 HARV. L. REV. 361, 364 (1920).

<sup>30</sup> *See* Dickerson, *Writs Of Assistance*, *supra* note 27, at 45.

<sup>31</sup> *See* 3 THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY* 67 (Lawrence S. Mayo ed., 1936); LASSON, *supra* note 28, at 55 & n.20; JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761-1772*, at 55 n.15 (1865); Cuddihy, *Fourth Amendment (Historical Origins)*, *supra* note 28, at 761; Dickerson, *Writs Of Assistance*, *supra* note 27, at 45; Maclin, *Central Meaning*, *supra* note 24, at 219-20.

<sup>32</sup> JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 31-32 (1966); LASSON, *supra* note 28, at 55; Maclin, *Central Meaning*, *supra* note 24, at 219-21.

I need to correct the record at this point. I previously claimed that colonial authorities also began using writs of assistance to take advantage of their immunizing effect; in doing so, I was equating the immunizing effect of writs and warrants. *See* Arcila, *supra* note 14, at 1237 & nn.69-70. My assertion was overly broad. Based upon numerous cases, Professor Amar suggests that writs and warrants offered differing levels of immunity to the searcher, with writs providing immunity only if a successful search had occurred, while warrants extended immunity even if a search had been unsuccessful. Amar, *Writs Of Assistance*, *supra* note 10, at 78-80. Given that his was the earlier publication, it is particularly unfortunate that I had overlooked Amar's position when I made my assertion.

England did not extend to the colonies, resulted in England promulgating the Townshend Act of 1767, which was intended to formally legalize the writs in the colonies.<sup>33</sup> The effort was largely unsuccessful, with most colonial judges continuing to resist issuing writs, especially unparticularized ones.<sup>34</sup>

The writs of assistance controversy probably did not meaningfully advance a judicial sentryship ethic regarding probable cause since the disputed issues concentrated on other concepts. Continued colonial resistance to the writs, even after the Townshend Act, was justified on several grounds, including objections that the writs were equivalent to general warrants that lacked particularity and therefore granted the searcher too much discretion,<sup>35</sup> as well as to the virtually perpetual nature of the writs.<sup>36</sup>

I am unaware of any clear evidence that a lack of probable cause was the animating reason behind the refusal to issue any writ. This point, however, is admittedly a bit fuzzy.<sup>37</sup> The

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<sup>33</sup> See LASSON, *supra* note 28, at 69-71; M.H. SMITH, THE WRITS OF ASSISTANCE CASE 1-2, 239 (1978).

<sup>34</sup> See 2 CUDDIHY DISSERTATION, *supra* note 10, at 1054-84; LASSON, *supra* note 28, at 72-76; Davies, *Original Fourth Amendment*, *supra* note 10, at 566-67 & n.26; Joseph R. Frese, *James Otis And Writs Of Assistance*, 30 NEW ENG. Q. 496, 506-07 (1957); Dickerson, *Writs Of Assistance*, *supra* note 27, at 48-74.

<sup>35</sup> See Davies, *Original Fourth Amendment*, *supra* note 10, at 566 & n.26, 581; David E. Steinberg, *An Original Misunderstanding: Akhil Amar And Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 243-44 (2005).

<sup>36</sup> See generally 2 CUDDIHY DISSERTATION, *supra* note 10, at 1054-84. The perpetual nature of the writs had been a sore point in the colonies even before the Townshend Act. See Sundby, *supra* note 27, at 540 (reprinting James Otis's famous 1761 argument against writs, which included this grievance).

<sup>37</sup> Colonial America certainly experienced, for instance, calls for a probable cause limitation upon searches. One famous incident involved the 1768 seizure of John Hancock's ship *Liberty*. See generally HERBERT S. ALLAN, JOHN HANCOCK: PATRIOT IN PURPLE 105-08 (1953); OLIVER M. DICKERSON, THE NAVIGATION ACTS & THE AMERICAN REVOLUTION 238 (1951); 11 LAWRENCE HENRY GIBSON, THE BRITISH EMPIRE BEFORE THE REVOLUTION—THE TRIUMPHANT EMPIRE: THE RUMBLING OF THE COMING STORM, 1766-1770 at 152-53 (1965); LASSON, *supra* note 28, at 72; Andrew P. Peabody, *Boston Mobs Before The Revolution*, 62 ATLANTIC MONTHLY 321, 326-27 (Sept. 1888). Hancock participated in a Boston town meeting,

reason is that probable cause and particularity are often closely related: generally, probable cause provides the knowledge that makes particularity possible. As Professor LaFave has explained, “the requirement of particularity is related to the probable cause requirement, in that—at least under some circumstances—the lack of a more specific description will make it apparent that there has not been a sufficient showing to the magistrate that the described items are to be found in a particular place.”<sup>38</sup> Thus, I must acknowledge that some of the refusals to issue writs could be perceived as hinging upon a lack of probable cause. For example, the historical record indicates a judicial willingness to issue writs, provided that they were requested on oath that reason existed for believing that uncustomed goods were located in a particular place.<sup>39</sup> It is difficult to parse this standard in relation to whether the primary objection was to a lack of particularity, probable cause, or some combined deficiency.

Nonetheless, the consistent and overarching theme in colonial judicial resistance to the writs was to their unparticularized nature, and to the unconstrained discretion they therefore afforded a searcher. A chief justice in Florida, for example, repeatedly refused to issue writs the customs house requested, explaining that “I do not think myself justified by Law to issue general

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which issued a declaration that the seizure was wrongful, in part because it had lacked “any probable cause of seizure that we know of, or indeed any cause that has yet been made known.” *Petition To Massachusetts Governor Bernard*, BOSTON GAZETTE, OR, COUNTRY JOURNAL, June 20, 1768; *Boston Town Meeting Report* (June 17, 1768), in A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE BOSTON TOWN RECORDS, 1758 TO 1769 at 257, 258 (1886); see also W.T. BAXTER, THE HOUSE OF HANCOCK: BUSINESS IN BOSTON 1724-1775 at 266-67 (1945).

Similarly, another well-known protest about search power in the colonies under writs of assistance complained about an insufficiently demanding suspicion threshold. A STATE OF THE RIGHTS OF THE COLONISTS (1772), in TRACTS OF THE AMERICAN REVOLUTION 1763-1776 at 233, 243-44 (Merrill Jensen ed., 1967). Samuel Adams generally is credited with authorship of this passage. See *id.* at 233; Davies, *Original Fourth Amendment*, *supra* note 10, at 602 n.139.

<sup>38</sup> 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.5 at 562-63 (4th ed. 2004) (citation omitted).

<sup>39</sup> See Dickerson, *Writs Of Assistance*, *supra* note 27, at 51, 60 (discussing experience in Rhode Island and Pennsylvania).

writs . . . to be lodged in the hands and to be used discretionally . . . at the will of subordinate officers.”<sup>40</sup> It is on this basis that I claim that the animating objection was to the lack of particularity, rather than to a lack of probable cause.

## B. THE WILKES CASES FROM ENGLAND

Moving from writs to warrants we see that the challenged warrants in the English cases involving the John Wilkes dispute<sup>41</sup> help explain my position. At the heart of that controversy were *unparticularized* general warrants. The principal warrant called for a “strict and diligent search for the authors printers and publishers of a seditious and treasonable paper intituled [sic] The North Briton No. 45. Saturday April 23. 1763. printed for G. Kearsley in Ludgate-Street London.”<sup>42</sup> With respect to the search of Wilkes’s home, the objection to this warrant was not really that probable cause was lacking. The court itself declared that probable cause had existed for believing that Wilkes was the author.<sup>43</sup> What was objectionable was the lack of particularity,

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<sup>40</sup> *Id.* at 64.

<sup>41</sup> In 1763, John Wilkes, “a flamboyant member of Parliament,” anonymously published a critique of King George III and his ministry in a pamphlet entitled *The North Briton Number 45*. Amar, *Fourth Amendment*, *supra* note 10, at 772 n.54. Asserting a seditious libel, the Secretary of State, Lord Halifax, issued a general warrant against the author and printer, and also against several other allegedly seditious publications. One warrant was specifically directed against John Entick as author of *The Monitor*. See *infra* note 48 and accompanying text. Between 1763 and 1769, Wilkes and about 50 other search targets lodged successful trespass actions, with English courts ruling such general warrants void and juries assessing significant damages. See generally LASSON, *supra* note 28, at 43-49; TAYLOR, *supra* note 22, at 29-35; Amar, *Fourth Amendment*, *supra* note 10, at 772 n.54; Davies, *Original Fourth Amendment*, *supra* note 10, at 562-63; Maclin, *Fourth Amendment Complexity*, *supra* note 10, at 933 & nn.36, 38-39. The Wilkes dispute was highly publicized in the colonies. See LASSON, *supra* note 28, at 45-46; Amar, *Fourth Amendment*, *supra* note 10, at 772 n.54; Akhil Reed Amar, *The Bill Of Rights As A Constitution*, 100 YALE L.J. 1131, 1176-77 (1991); Davies, *Original Fourth Amendment*, *supra* note 10, at 563.

<sup>42</sup> *Money v. Leach*, 3 Burrow 1742, 1747, 19 Howell’s State Trials 1001, 1008, 97 Eng. Rep. 1075, 1078 (K.B. 1765) (emphasis original to Burrow reporter).

<sup>43</sup> Lord Chief Justice Pratt indicated that “the evidence . . . plainly sh[o]w, that Mr. Wilkes was” the author. *Wilkes v. Wood*, 19 Howell’s State Trials 1153, 1166, 98 Eng. Rep.

which resulted in “a discretionary power given to messengers to search wherever their suspicions may chance to fall.”<sup>44</sup> This empowered the searchers to “rummage[] all the papers together they could find,” including all manuscripts and papers in drawers, after which they left with a sack they had filled with papers.<sup>45</sup> Adding to the insult of the affair was that “Mr. Wilkes’s private pocket-book filled up the mouth of the sack.”<sup>46</sup>

Similarly, though the probable cause concept is certainly addressed in *Money v. Leach* (which concerned the same warrant)<sup>47</sup> and *Entick v. Carrington* (which involved a different warrant that specifically named Entick and a publication entitled *The Monitor* but otherwise lacked particularity),<sup>48</sup> it does not appear to have been seriously in dispute. In the former case, the court noted that, after the general warrant had been issued but before the search, an official had been informed that Wilkes had been seen going into the house of Leach, who was a printer, and also that Leach had printed *The North Briton* No. 45.<sup>49</sup> In the latter case, the court recounted that the warrant had been issued upon a written statement from Jonathan Scott, a bookseller and publisher, that Entick had been involved in publishing *The Monitor*.<sup>50</sup>

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489, 498 (C.P. 1763).

<sup>44</sup> *Id.*, 19 Howell’s State Trials at 1167, 98 Eng. Rep. at 498.

<sup>45</sup> *Id.*, 19 Howell’s State Trials at 1156, 98 Eng. Rep. at 491.

<sup>46</sup> *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1065 (C.P. 1765). Different versions of this case do not report this same language. *Cf. id.*, 2 Wilson 275, 95 Eng. Rep. 807 (C.P. 1765).

<sup>47</sup> 3 Burrow 1742, 19 Howell’s State Trials 1001, 97 Eng. Rep. 1075 (K.B. 1765). The principal warrant against Wilkes, which also was at issue in *Money v. Leach*, is reprinted in reports of the latter case. *See supra* note 42 and accompanying text.

<sup>48</sup> The warrant against Entick is reproduced in the reports of that case. *Entick v. Carrington*, 2 Wilson 275, 278-79, 19 Howell’s State Trials 1029, 1034, 95 Eng. Rep. 807, 810 (C.P. 1765).

<sup>49</sup> *Money v. Leach*, 3 Burrow 1742, 1748, 19 Howell’s State Trials 1001, 1009, 97 Eng. Rep. 1075, 1079 (K.B. 1765).

<sup>50</sup> *Entick v. Carrington*, 2 Wilson 275, 277-78, 19 Howell’s State Trials 1029, 1033, 95 Eng. Rep. 807, 809 (C.P. 1765).

What was most objectionable about the warrants that were at issue in *Money v. Leach* and *Entick v. Carrington* was their lack of particularity. In *Money v. Leach*, a litigant focused upon particularity in arguing that the warrant was invalid.

[T]he WARRANT itself is *illegal*. 'Tis against the author, printer and publisher of the paper, *generally*, without naming or describing them; . . . it is also, "To seize his papers;" that is, *all* his papers.

. . . .  
IF "*Author, printer and publisher*," without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "To take up *the robber* or murderer of such a one." This is no description of the *person*; but only of the *offence*: it is making the *officer* to be judge of the matter, in the place of the person who *issues* the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

. . . .  
. . . And *this* is a warrant "To seize ALL a man's papers," without any particular relation even to the crime they would *suppose* him chargeable with.<sup>51</sup>

In *Entick v. Carrington*, the court criticized the warrant's generality, which required that "the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away."<sup>52</sup> A different reported version of the same case emphasizes the court's disapproval of the discretion that the warrant allowed the officers due to its lack of particularity—"they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed."<sup>53</sup>

In summary, and as Professor Amsterdam has explained, "the primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without *particularized* cause, the fact that they were—

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<sup>51</sup> 3 Burrow 1742, 1762-63, 19 Howell's State Trials 1001, 1023-24, 97 Eng. Rep. 1075, 1086, 1088 (K.B. 1765) (emphasis original to Burrow reporter).

<sup>52</sup> 19 Howell's State Trials 1029, 1064 (C.P. 1765).

<sup>53</sup> 2 Wilson 275, 291, 95 Eng. Rep. 807, 817 (C.P. 1765).

as Wilkes proclaimed Lord Halifax's warrant for the authors and publishers of No. 45 of the North Briton—‘a ridiculous warrant against the whole English nation.’”<sup>54</sup>

## II. POST-INDEPENDENCE IMPLEMENTATION OF THE COMMON LAW

A close examination of the historical material shows that it is surprisingly equivocal on the issue of whether judges consistently served as probable cause sentries prior to issuing search warrants. To assert that judges in the post-Independence era may not always have monitored probable cause is counterintuitive because early American statutes typically conditioned warrants upon prior suspicion.<sup>55</sup> Nonetheless, in terms of actual common law practice, Cuddihy and at least one other prominent scholar believe that the vast majority of judicial officers who issued search warrants often did not supervise the application process to ensure that prior suspicion validly existed.<sup>56</sup> Professor Davies has not opined on this specific issue, though as I will detail in a moment he believes that, as a matter of legal *doctrine*, judges in the Framers’ era were expected to fulfill this role. In terms of formal originalism, it may be that the Framers and other legal elites of the period intended for judges to serve as probable cause sentries. As I acknowledge below, major English treatises and a few case decisions certainly articulated a probable cause sentryship ethic prior to and during the Framers’ era. Legal elites of the era

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<sup>54</sup> Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974) (emphasis added and citations omitted). For the internal quotation, Amsterdam cites 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 247 (3d ed. 1889), but it was the ninth edition that was published in 1889. See 2 LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 238 (W. Harold Maxwell & Leslie F. Maxwell eds., John Rees 1989) (2d ed. 1957). Amsterdam may have intended to cite to the American edition published in 1864. See 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 247 (photo. reprint 1986) (1864) (published in Boston).

<sup>55</sup> See Arcila, *supra* note 14, at 1238 n.72.

<sup>56</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1525 (concluding that “judicial sentryship against unfounded warrants . . . was . . . the exception”); see also *id.* at 1192-94, 1199, 1351. Professor Sklansky has accepted Cuddihy’s conclusion. Sklansky, *supra* note 9, at 1798-99.

probably could have accessed and would have studied this material. But other indicia of common law *practice*, especially materials that non-elite lawyers and non-elite judges likely used as they engaged in search warrant procedure on a day-to-day basis, shows that this ethic probably was not consistently implemented during the period. In light of the ambiguity in the historical record, I am not yet prepared to take a position about the Framers' intent on this issue. But I do think that indicia concerning how the common law was actually carried out shows that Cuddihy is likely correct: it is quite likely that judges in the Framers' era often did not engage in probable cause sentryship.

**A. LEGAL ELITES AND THE CASE IN FAVOR OF JUDICIAL SENTRYSHIP: MAJOR TREATISES AND A FEW CASES DID ARTICULATE SUCH A DUTY**

It must be acknowledged that, in the treatises, the extent of guidance suggesting a probable cause sentryship role for the judiciary is impressive. A few cases also suggested such a duty. Professor Davies focuses upon this material in asserting that, as a matter of legal doctrine,<sup>57</sup> magistrates were “expected to assess the grounds for probable cause of suspicion respecting the person to be arrested or the place to be searched.”<sup>58</sup> He also asserts that, “like modern courts, the Framers understood that the magistrate’s review of the factual allegations offered as cause for a search could prevent an unjustified invasion of a house.”<sup>59</sup> In support of a

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<sup>57</sup> Davies’s analysis specifically focuses upon legal doctrine rather than practice. *See* Davies, *Fictional Originalism*, *supra* note 10, at 282 n.124.

<sup>58</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654.

<sup>59</sup> *Id.* at 589. If Davies means to argue that the Framers expected judges to perform a probable cause sentryship role, he does not provide any direct authority at this point. He does, however, provide a cross-reference to his argument that judges enjoyed discretion to reject warrant applications if they did not believe probable cause existed. *Id.* at 589 n.103. I think the evidence supporting a lack of judicial discretion, at least on occasion and particularly in the civil search context, is better than Davies acknowledges. *See infra* Part III.

Davies does not equate all aspects of originalist and modern warrant standards. To the contrary, he argues that the Framers’ warrant standards were more demanding than modern

sentryship role, Davies points to a passage in a dominant English treatise, *Hale's Pleas Of The Crown*,<sup>60</sup> which in the context of arrest warrants provided that a judicial officer is “a competent judge of those circumstances, that may induce the granting of a warrant” and that “[t]he party that demands it ought to be examin'd [sic] upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.”<sup>61</sup>

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standards. *See infra* note 101.

<sup>60</sup> Hale was probably the preeminent legal scholar of his day. *See* 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 580-81, 594-95 (1977). “Ever since its first publication,” *Hale's Pleas Of The Crown* was “regarded as a book of the highest authority.” *Id.* at 590.

*Hale's Pleas Of The Crown*, though generally not considered to be the most influential in the new nation, probably did play that role with regard to search warrant procedure. *See, e.g., infra* notes 76-77 and accompanying text. Blackstone's treatise is considered to have been the most influential in America during the Framers' era. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985); SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 132-33; Davies, *Original Fourth Amendment*, *supra* note 10, at 580 n.78; Sklansky, *supra* note 9, at 1778 & n.240; Edwin C. Surrency, *The Beginnings Of American Legal Literature*, 31 AM. J. LEGAL HIST. 207, 216 (1987) [hereinafter Surrency, *American Legal Literature*]. Blackstone's popularity, however, “began to cool” after the Revolution because he was considered to be “too ardent a Royalist.” Howard Schweber, *Before Langdell: The Roots Of American Legal Science*, in 2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 606, 612-13 (Steve Sheppard ed., 1999). More importantly, Blackstone's treatise did not include any discussion of search warrants (though it did discuss arrest warrants). Davies, *Original Fourth Amendment*, *supra* note 10, at 580 n.78. Hale's treatise, as well as Hawkins's, provided greater detail concerning criminal procedure in general, including of search warrants. *Id.*

<sup>61</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297 (citing 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 110-11 (photo. reprint 1971) (Sollom Emlyn ed., 1736) [hereinafter HALE'S PLEAS OF THE CROWN 1736]). Davies also has acknowledged Hale's instruction (again referring to arrest rather than search warrants) that “ ‘it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, [for the justice of the peace] to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion.’ ” Davies, *Original Fourth Amendment*, *supra* note 10, at 652 n.290 (citing 2 HALE'S PLEAS OF THE CROWN 1736, *supra*, at 110). Another passage from *Hale's Pleas Of The Crown* that makes a similar point, once again in the context of discussing arrests, is that:

justices of peace are made judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of their

Davies additionally relies upon other contemporary English sources that likewise give similar guidance in the context of discussing arrest rather than search warrants, including Blackstone's and Hawkins's treatises. Davies relies upon Blackstone's guidance that:

it is fitting [for the magistrate who hears a warrant application] to examine upon oath the party requiring a warrant [i.e., the complainant], as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.<sup>62</sup>

This language was reiterated in at least one American justice manual.<sup>63</sup> Davies also cites Hawkins's passage that:

a Justice of Peace cannot well be too tender in [issuing arrest warrants prior to indictment], and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant groundlessly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.<sup>64</sup>

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suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs.

2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 79 (Sollom Emlyn ed., 1800) [hereinafter HALE'S PLEAS OF THE CROWN 1800]; 2 HALE'S PLEAS OF THE CROWN 1736, *supra*, at 79.

<sup>62</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 287 (1769, reprinted facsimile The University of Chicago Press, 1979) [hereinafter BLACKSTONE]).

<sup>63</sup> 2 RICHARD BACHE, THE MANUAL OF A PENNSYLVANIA JUSTICE OF THE PEACE 138 (1810) (citing Blackstone).

<sup>64</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297 (citing 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 84-85 (1721) [hereinafter HAWKINS 1721]). Davies also cites to the same passage in a later edition. Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297 (citing 2 SERJEANT WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135-36 (Thomas Leach ed., 6th ed. 1787) [hereinafter HAWKINS 1787]). Davies describes Hawkins as "the leading eighteenth-century authority on criminal procedure." Davies, *Original Fourth Amendment*, *supra* note 10, at 579; *see also id.* at 579 n.76 (citing 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 361-62 (1938)).

Note that the passage quoted in the text actually suggests judicial liability for failing to engage in judicial sentryship. I address below the implications this has for my argument. *See infra* note 98.

In addition to English treatises, Davies also relies upon English cases that formed part of the Wilkes dispute, and which were well known in America.<sup>65</sup> As Davies points out,<sup>66</sup> Lord Camden stated in *Entick v. Carrington* that, before a search warrant is issued, “the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and a strong reason to believe they are concealed in such a place.”<sup>67</sup> Davies also notes<sup>68</sup> that, in *Money v. Leach*, Lord Mansfield said, “[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the *officer*. The *magistrate* ought to judge; and should *give certain directions* to the officer. This is so, upon reason and convenience.”<sup>69</sup>

Davies could have added more to all this evidence. The lesson that the author of the *Canadian Freeholder* took from *Wilkes v. Wood*<sup>70</sup> was that “the business of a judicial officer, or magistrate” is to “exercise an act of judgment of an high nature,” which “ought not” be done

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<sup>65</sup> Regarding the Wilkes dispute, see *supra* Part I(B).

<sup>66</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297.

<sup>67</sup> 2 Wilson 275, 291-92, 95 Eng. Rep. 807, 818 (C.P. 1765). A different, more detailed version of the case does not contain this specific language. The analogous passage in the more detailed reporter states: “[o]bserve too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the good are lodged in such a place.” 19 Howell’s State Trials 1029, 1067 (C.P. 1765).

<sup>68</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297.

<sup>69</sup> 3 Burrow 1742, 1766, 19 Howell’s State Trials 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765) (emphasis original to Burrow reporter).

Another major English case to the same effect was *Cooper v. Boot*, 4 Douglas 339, 99 Eng. Rep. 911 (K.B. 1785), though it may have had little influence during the Framers’ era. Lord Mansfield declared in dicta, but on behalf of the court, that “[a] duty is also imposed on such commissioner or magistrate to exercise his judgment on the grounds of suspicion so laid before him, and if he thinks them sufficient, and not otherwise, he is bound to grant a warrant to search.” *Cooper v. Boot*, 4 Douglas 339, 348, 99 Eng. Rep. 911, 916 (K.B. 1785); *accord* *Cooper v. Booth*, 3 Espinasse 135, 144, 170 Eng. Rep. 564, 568 (K.B. 1785) (different reported version of same case). Along the same lines, he also asserted that “[i]f the magistrate thinks there is sufficient ground, he is bound to grant the warrant; if insufficient, to refuse it.” 4 Douglas at 349, 99 Eng. Rep. at 916; *accord* 3 Espinasse at 147, 170 Eng. Rep. at 568. *Cooper*, however, may not have been widely known in America during the Framers’ era. See *infra* note 167 and accompanying text.

<sup>70</sup> 19 Howell’s State Trials 1153, 98 Eng. Rep. 489 (C.P. 1763).

“without having received an information upon oath from some credible witness.”<sup>71</sup> Additionally, in a pre-constitutional American case, Connecticut’s highest court declared in *Frisbie v. Butler* that “it is the duty of a Justice of the Peace granting a search warrant . . . to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect.”<sup>72</sup>

American legal publications followed the lead of the English treatises, and in particular *Hale’s Pleas Of The Crown*. Dane’s influential abridgment instructed that:

as to some facts the process and proceedings are upon suspicion, but this suspicion ought to be carefully examined and cautiously admitted by the magistrate, otherwise it may be made an engine of malice and ill will; but as search warrants are of public convenience they are admitted in the English and our law, under the following cautions and restrictions: 1. They ought to be made on oath that a felony is committed: 2. That the complainant has probable cause to suspect that they are in such a house or place: 3. That he doth suspect &c.: 4. *Sh[ow]s the reasons of such suspicion . . .*<sup>73</sup>

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<sup>71</sup> 19 Howell’s State Trials 1168, 1169-70 (1813).

<sup>72</sup> 1 Kirby 213, 215 (Conn. Super. Ct. 1787).

<sup>73</sup> 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 245 § 2 n.\* (1824) [hereinafter 7 DANE’S AMERICAN ABRIDGMENT 1824] (emphasis added); see also 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra* note 73, at 247 § 4 (explaining that “good and certain cause ought to be found in the complaint” submitted in support of warrant). Davies cites Dane’s abridgment in support of his position. Davies, *Original Fourth Amendment*, *supra* note 10, at 654 n.297 (citing 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra*, at 243). Though Davies cites to page 243 of Dane’s abridgment, there is no discussion there concerning the judicial role in monitoring probable cause. Most likely Davies meant to cite to pages 244-45, section two, note \*, where the topic is addressed.

Dane’s was the first influential American abridgment having a broad scope and “had a tremendous impact on American law judging from references to it.” SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 113; see also WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 35 (1994) (referring to Dane’s “great *Abridgment*”); A.W.B. Simpson, *The Rise And Fall Of The Legal Treatise: Legal Principles And The Forms Of Legal Literature*, 48 U. CHI. L. REV. 632, 669-70 (1981); Surrency, *American Legal Literature*, *supra* note 60, at 219; cf. SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 134-35 (noting that “[t]he work was extremely important, but failed to leave a lasting effect on American law,” but also that it was sufficiently successful that Dane used royalties from it “to found [a] professorship at Harvard Law School”). Dane’s abridgment was particularly important because it was apparently the only attempt during the Framers’ era to summarize *American* law. See SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 113.

Dane's formulation, that a search warrant applicant should "show the reasons of his suspicion," is the most commonly used in American legal literature during the Framers' era.<sup>74</sup> Also regularly used in American justice manuals was that the applicant should "assign[]" before a judge his "suspicion, and the probable cause thereof" because search warrants should be granted only "upon the examination of the fact."<sup>75</sup>

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<sup>74</sup> American legal literature commonly stated that a judge "may grant a warrant to search" if an applicant "shows the reasons" or "shows the cause" of his suspicions, or some other similar formulation. *E.g.*, RICHARD BURN, BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE 357 (Eliphath Ladd ed., 1792) (printed in New Hampshire) [hereinafter BURN'S AMERICAN JUSTICE ABRIDGMENT 1792]; RICHARD BURN, AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER 323 (Joseph Greenleaf ed., 1773) [hereinafter BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773] (printed in Boston); DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 46 (1824) [hereinafter DAVIS, TREATISE FOR JUSTICES 1824] (printed in Massachusetts); JOHN A. DUNLAP, THE NEW-YORK JUSTICE 368 (1815) [hereinafter DUNLAP, THE NEW-YORK JUSTICE 1815]; JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 505 (1805) [hereinafter EWING, TREATISE ON JUSTICE OF THE PEACE 1805] (adopted to New Jersey law); JOHN FAUCHERAUD GRIMKE, THE SOUTH CAROLINA JUSTICE OF PEACE 398 (3d ed. 1810) [hereinafter GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810]; WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 621 (3d ed. 1820) [hereinafter HENING, NEW VIRGINIA JUSTICE 1820]; WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 413 (1799) [hereinafter HENING, NEW VIRGINIA JUSTICE 1799]; WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 402 (1795) [hereinafter HENING, NEW VIRGINIA JUSTICE 1795]; HENRY HITCHCOCK, THE ALABAMA JUSTICE OF THE PEACE 407 (1822) [hereinafter HITCHCOCK, THE ALABAMA JUSTICE 1822]; A NEW CONDUCTOR GENERALIS: BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE 404 (1803) [hereinafter NEW CONDUCTOR GENERALIS FOR JUSTICES 1803] (adopted to New York law); JAMES PARKER, THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 315 (Mathew Carey ed., 1801) [hereinafter PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801] (printed in Philadelphia); HENRY POTTER, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 273 (1816) [hereinafter POTTER, THE NORTH CAROLINA JUSTICE 1816] (adopted to North Carolina law).

<sup>75</sup> *E.g.*, BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 323; GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 74, at 398; HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 74, at 621; HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 74, at 413; HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 74, at 402; HITCHCOCK, THE ALABAMA JUSTICE 1822, *supra* note 74, at 407; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 315.

Other substantively similar formulations also appeared. *E.g.*, BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 74, at 417 ("It is necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is

In support of these propositions, these American works uniformly relied upon *Hale's Pleas Of The Crown*, which evidences how influential that English work was on American search warrant procedure.<sup>76</sup> *Hale's Pleas Of The Crown* indeed stated that search warrants for stolen goods were “not to be granted” unless “the party complaining hath probable cause to suspect they are in such a house or place, and do sh[o]w his reasons of such suspicion.”<sup>77</sup> It also similarly instructed that the only legal search warrants were those “where the party assigns before the justice his suspicion and the probable cause thereof,”<sup>78</sup> and emphasized that search warrants were “judicial acts” and therefore “must be granted upon examination of the fact.”<sup>79</sup>

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demanded.”); HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 74, at 462 (“warrants for felony, may be granted by a justice of the peace on probable grounds of suspicion:—Yet that they should be well satisfied of the reasonableness of the accusation”).

<sup>76</sup> For a brief discussion of Hale’s influence in American law, see *supra* note 60.

<sup>77</sup> 2 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 150; 2 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 150; accord 2 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 113; 2 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 113. The full passage from *Hale’s Pleas Of The Crown* is presented *infra* note 126. Of the 13 American justice manuals cited *supra* notes 74-75, every one of them cited to Hale’s volume 2, page 150 in support, and sometimes to page 113 as well.

<sup>78</sup> 2 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 150; 2 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 150.

Davies himself recites Hale’s passage that a complainant must “show the reasons of his suspicion,” though he does so while addressing issues other than whether judges served as probable cause sentries. See Davies, *Original Fourth Amendment*, *supra* note 10, at 651 n.289, 703 n.447.

<sup>79</sup> 2 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 150; 2 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 150.

Additionally, a few American justice manuals repeated Hale’s arrest guidance suggesting that justices were to examine the accusing party because justices “are . . . judges of the reasonableness of the suspicion.” *E.g.*, BURN’S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 74, at 418; BURN’S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 372; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 360; *cf. supra* note 61 (citing 2 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 79, and 2 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 79, and reciting relevant language). A few also repeated Hawkins’s guidance that justices “cannot well be too tender” in issuing arrest warrants lest they be held liable for granting “any such warrant groundlessly and maliciously, without . . . probable cause.” *E.g.*, BURN’S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 74, at 419; BURN’S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 373; PARKER, CONDUCTOR

The authorities discussed above undeniably constitute an impressive litany of doctrinal evidence in favor of judicial sentryship of probable cause. Yet, as I will explain below, there are numerous reasons to question whether the non-elite judges who were actually charged with issuing search warrants would have followed this guidance.

## **B. NON-ELITE JUSTICES OF THE PEACE AND THE CASE AGAINST JUDICIAL SENTRYSHIP**

In spite of the guidance emanating from many elite legal sources, abundant reasons exist to believe that the non-elite legal workhorses who actually engaged in search warrant practice may not have followed it. Most importantly, treatises and American justice manuals often and explicitly stated that judicial sentryship of probable cause during the warrant application process was merely optional. Additionally, the legal forms that non-elite members of the legal profession and judiciary quite likely would have used as guides for search warrant procedure provide reasons for doubting that non-elite judges engaged in probable cause sentryship. Lastly, a plain text analysis of the weak language used to describe the duty, as well as consideration of the changes that have occurred in language since the Framers' era, also call into doubt whether the judiciary consistently monitored probable cause.

### **1. Treatises And American Justice Manuals Explicitly Stated That Judicial Sentryship Was Merely Optional**

Treatises and American justice manuals from the Framers' era easily could have led justices of the peace to believe that a sentryship role was *at most optional*. This is because some guidance in these authorities clearly supports the view that, during the pre-issuance process,

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GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 360; *cf. supra* note 64 and accompanying text (citing and reciting Hawkins's language).

judicial vigilance in monitoring the adequacy of probable cause *was not obligatory*. At least seven American justice manuals from the Framers' era stated, in sections devoted to arrests, that it was *convenient but not always necessary* for judges to engage in the probable cause sentryship role.<sup>80</sup> Six of these included this guidance at the same time as they elsewhere suggested a sentryship role.<sup>81</sup> Inclusion of these apparently contradictory guidelines in the same works is significant because the most ready means to reconcile them is to treat the sentryship role as

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<sup>80</sup> BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 372 (“*It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing.*”) (emphasis added); GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 74, at 479 (same); HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 74, at 699 (same); HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 74, at 462 (same); HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 74, at 450 (same); PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 359-60 (same); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 351 (1774) [hereinafter STARKE, JUSTICE OF PEACE 1774] (printed in Virginia) (“*It is convenient, though not always necessary, that the Party demanding a warrant be first examined on Oath.*”) (emphasis added).

Obviously, I believe the natural, plain text meaning of these words amounts to an optional sentryship role. I am sure there is room for others to disagree, though I have not yet seen evidence that would persuade me that I am wrong in my interpretation. Importantly, I think any disagreement would probably be only a matter of degree. I do not see how this language could be interpreted as anything other than authorization for Framing-era judges to avoid a sentryship role. Even if one applied a more restrictive interpretation than I do—for example, that this was an exception limited to rare cases—this is still an acknowledgement that warrants could issue in the Framers' era without judges independently assessing probable cause, which is still a significant departure from modern search warrant practice.

<sup>81</sup> The discrepancy existed both between the search warrant and arrest sections of the same work, *compare supra* note 80 *with supra* notes 74-75 and accompanying text (STARKE, JUSTICE OF PEACE 1774, *supra* note 80, is the one exception that appears to have included the convenient-but-not-necessary guidance without elsewhere suggesting a sentryship role), as well as *within* the arrest sections of the same work, with contradictory guidance (such as “justices are judges of the reasonableness of the suspicion” or that justices “should be well satisfied of the reasonableness of the accusation” before granting “warrants for felony . . . on probable grounds of suspicion”) often appearing a mere paragraph or two away, and sometimes on the very same page, *cf.* BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 372; GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 74, at 480; HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 74, at 700; HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 74, at 462; HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 74, at 450; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 360.

*optional*—consistent with a plain text analysis below<sup>82</sup>—rather than mandatory. Additionally, all six of these American justice manuals relied upon *Hale’s Pleas Of The Crown*. It also contained the convenient-but-not-necessary language, including in a version published about a decade after the Fourth Amendment’s adoption, as well as in the first American edition published in 1847!<sup>83</sup> The highly influential *Hale’s Pleas Of The Crown*<sup>84</sup> thereby similarly indicated that a sentryship role was optional. So did other English treatises.<sup>85</sup> All of this is extremely significant given limitations at the time on legal research<sup>86</sup> and American judicial

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<sup>82</sup> See *infra* Part II(B)(3).

<sup>83</sup> 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 582 (1st Am. ed., 1847) (“It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know *J. S.* to be the felon; and if suspected, then to set down the causes of his suspicion.”); 1 HALE’S PLEAS OF THE CROWN 1800, *supra* note 61, at 582 (same); 1 HALE’S PLEAS OF THE CROWN 1736, *supra* note 61, at 582 (same).

<sup>84</sup> For a discussion of the influence that *Hale’s Pleas Of The Crown* had in America, see *supra* notes 60, 76-77 and accompanying text.

<sup>85</sup> This guidance repeatedly appeared in the English version of Richard Burn’s justice manual, both before the Fourth Amendment’s adoption and after it. *E.g.*, 2 RICHARD BURN & JOHN BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 389 (18th ed. 1793); 2 RICHARD BURN & JOHN BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 389 (16th ed. 1788); 4 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 367 (15th ed. 1785); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 381 (14th ed. 1780); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 340 (13th ed. 1776); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 332 (12th ed. 1772); 4 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 329 (11th ed. 1770); 4 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 272 (10th ed. 1766); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 553 (8th ed. 1764); 3 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 444 (7th ed. 1762); 3 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 427 (6th ed. 1758); RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 725 (3d ed. 1756); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 547 (2d ed. 1756); 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 508 (1755). It also appeared in another English treatise. THOMAS PEARCE, *THE COMPLEAT JUSTICE OF THE PEACE, AND PARISH OFFICER* 219 (1756).

<sup>86</sup> See FRIEDMAN, *supra* note 60, at 33, 102; J.L. High, *What Shall Be Done With The Reports?*, 16 AM. L. REV. 429, 430 (1882); Craig Joyce, *The Rise Of The Supreme Court Reporter: An Institutional Perspective On Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1297 (1985). In the Framers’ era there was a “relative paucity of books,” publication of case

training.<sup>87</sup> In light of these limitations, American justices of the peace probably relied heavily upon these American justice manuals,<sup>88</sup> and to a lesser extent upon English treatises,<sup>89</sup> when looking into something like search warrant procedure in the new nation. *Judges who followed this convenient-but-not-necessary guidance often would have felt justified in not monitoring probable cause at all prior to issuing warrants.*

One possible objection to my argument is that I have not been careful enough in my reading of the American justice manuals or *Hale's Pleas Of The Crown*. This objection emphasizes that the American justice manuals that include the convenient-but-not-necessary guidance do so only while discussing warrants in the *arrest* context. In doing so, these American

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reports was modest, and no really effective organizing system for them existed until West's key number system was devised in the last quarter of the 1800s. Robert C. Berring, *Collapse Of The Structure Of The Legal Research Universe: The Imperative Of Digital Information*, 69 WASH. L. REV. 9, 20-22 (1994); Thomas A. Woxland, "Forever Associated With The Practice Of Law": *The Early Years Of The West Publishing Company*, 5 LEGAL REF. SERVS. Q. 115, 116, 118-20 (Spring 1985).

<sup>87</sup> See FRIEDMAN, *supra* note 60, at 125-26; ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 113 (1921); *see also infra* notes 106-107 and accompanying text (regarding lax legal training and low barriers to entry into legal profession).

<sup>88</sup> See SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 131; Davies, *Fictional Originalism*, *supra* note 10, at 280; *see generally* Conley, *supra* note 26. Conley opines that "unlike their English counterparts who had access to a multitude of different law books on a variety of topics for reference, the American justices [of the peace] relied on their manual as their primary source of legal reference." Conley, *supra* note 26, at 265.

The importance of these justice manuals and the guidance they provided on warrant procedure can also be demonstrated by comparison to commonplace books and their consistent lack of guidance on the subject. In the Framers' era, legal training, combined with the difficulty of conducting legal research, encouraged the personal production and use of "commonplace books." These were notebooks into which lawyers-in-training, as well as lawyers and even judges, entered "points of law found in any source," including from first-hand courtroom observation. See PAUL M. PRUITT, JR. & DAVID I. DURHAM, COMMONPLACE BOOKS OF LAW: A SELECTION OF LAW-RELATED NOTEBOOKS FROM THE SEVENTEENTH CENTURY TO THE MID-TWENTIETH CENTURY 5-10 (2005); Surrency, *American Legal Literature*, *supra* note 60, at 214. I have examined numerous commonplace books, and have yet to find any addressing arrest or search and seizure law in general, or warrant procedures specifically.

<sup>89</sup> See SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 165; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 299 n.66 (1969); Joyce, *supra* note 86, at 1297.

works were following the same convention used in *Hale's Pleas Of The Crown*, which also included the convenient-but-not-necessary guidance only in a chapter devoted to arrests. The more directly applicable *search warrant* sections of all these works *did* indicate a sentryship role.<sup>90</sup> This objection asserts that judges presented with a search warrant application would have sought guidance from the *search warrant* sections of these works, and followed the instructions therein that suggested a probable cause sentryship role, while ignoring the contrary guidance from the arrest sections. The premise of this objection is that a sharp distinction would have been made during the Framers' era between the law applicable to arrest warrants versus search warrants.

This objection falters because its premise is flawed. It is certainly true that some differences existed in the common law applicable to arrests versus searches. But, with respect to the probable cause sentryship issue, I can discern no reason why the law applicable to warrants would have differed depending upon whether an arrest or search was at issue. After all, the Fourth Amendment's Warrant Clause imposes the same probable cause requirement upon both arrest and search warrants.<sup>91</sup> This suggests that during the Framers' era no sentryship distinction would have been drawn between the procedural guidance applicable to warrants irrespective of whether it originated in the arrest or search portions of a legal text.<sup>92</sup>

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<sup>90</sup> See *supra* notes 73-79 and accompanying text.

<sup>91</sup> I make this point at a high level of abstraction, while cognizant that in specific circumstances probable cause is not always treated similarly in the arrest versus search warrant context. See, e.g., *United States v. Watson*, 423 U.S. 411, 432 n.5 (1976) (Powell, J., concurring) (“The probable cause to support issuance of an arrest warrant normally would not grow stale as easily as that which supports a warrant to search a particular place for particular objects.”).

<sup>92</sup> Commentators on this manuscript raised several reasons why probable cause sentryship may have differed in arrest and search warrant procedure, but I find these reasons unconvincing.

One suggestion was that delay was a concern in the arrest context because felons could flee prior to being apprehended, but not a concern in the search context since contraband cannot

A litigant's argument in *Money v. Leach*<sup>93</sup> provides some support for this view. It was part of the famous Wilkes dispute, and as such was very well known.<sup>94</sup> The plaintiff challenged a search and seizure (not an arrest), arguing in part that no oath supported the warrant.

Defendants' answer to the charge was that "there was no occasion . . . for it [i.e., the oath]."<sup>95</sup>

What was the authority for this defense of the *search*? The defendants supported their argument with the same convenient-but-not-necessary guidance from an *arrest* chapter in *Hale's Pleas Of The Crown*, arguing "it is laid down, that 'it is convenient, though not always necessary to take an information upon oath of the person that desires the warrant.'"<sup>96</sup> At a minimum, this

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run away. This suggestion fails to account for the consistent governmental concern, both in the Framers' era and in more contemporary cases, that contraband might be removed prior to execution of a warrant. *See infra* notes 186-187 and accompanying text. My position might be criticized as failing to draw a necessary distinction between customs and regulatory searches (where delay was a noted concern in the Framers' era) and searches for stolen goods. But I doubt this is a sufficient distinction upon which to justify categorically different sentryship duties in arrest versus search warrant procedure, particularly given that customs search warrants were issued in the same manner as warrants for stolen goods. *See infra* note 118.

Another suggestion was that in the Framers' time the popular concern was with the government's search power, whereas the government's arrest power was generally not controversial, thus justifying more stringent sentryship in search warrant procedures than in the arrest context. I cannot fully discount this suggestion, though the argument I make immediately below regarding *Money v. Leach* offers some evidence against it. *See infra* notes 93-97 and accompanying text.

<sup>93</sup> 3 Burrow 1742, 19 Howell's State Trials 1001, 97 Eng. Rep. 1075 (K.B. 1765).

<sup>94</sup> *See supra* notes 41, 47. The Burrow reporter published *Money v. Leach* in 1771. *See* 1 LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 294, entry 20 (W. Harold Maxwell & Leslie F. Maxwell eds., John Rees 1989) (2d ed. 1955). Blackstone and Hawkins briefly referred to the case in their treatises. *See* 4 BLACKSTONE, *supra* note 62, at 288 n.i; 2 HAWKINS 1787, *supra* note 64, at 131 n.2, 138 n.7. The case also was discussed and cited in American cases and treatises. *E.g.*, *Wells v. Jackson*, 17 Va. (3 Munf.) 458 (1811); DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 74, at 47. Additionally, and as Professor Davies has noted, a portion of the case was reported in English and colonial newspapers. Davies, *Original Fourth Amendment*, *supra* note 10, at 564 n.22 (citing BOSTON GAZETTE, OR, COUNTRY JOURNAL, Mar. 26, 1764, at 2, cols. 2-3, and LONDON CHRON., Dec. 10-13, 1763 (no. 1084), at 562, col. 2). As such, chances are high that the legal community during the Framers' era would have been familiar with this decision.

<sup>95</sup> 19 Howell's State Trials at 1025, 97 Eng. Rep. at 1087.

<sup>96</sup> 19 Howell's State Trials at 1025 (citing "1 Hale P.C. 582"), 97 Eng. Rep. at 1087

represents an instance in which a lawyer *did not* draw a distinction concerning warrant procedures depending upon whether an arrest or search power was at issue.<sup>97</sup> My guess is that it would not have been much of a stretch for a justice of the peace to similarly equate the sentryship duty in the search and arrest contexts and, after finding the convenient-but-not-necessary language in an American justice manual (or even in *Hale's Pleas Of The Crown* itself, though that would have been less likely), to conclude that a probable cause sentryship role was at most optional in the search context, rather than mandatory.<sup>98</sup>

## 2. Legal Forms Often Implied That Judicial Sentryship Was Optional

Continuing to focus upon justices of the peace, the legal workhorses who actually issued search warrants, rather than upon legal elites like the Framers leads to more reasons for doubting that aggressive sentryship of probable cause was the norm. Justices of the peace may not have had ready access to major treatises. Rather, it is much more likely that they heavily relied upon

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(quoting “1 Hale H. P.C. 582”); *cf. supra* note 83 (quoting convenient-but-not-necessary guidance from same citation to *Hale's Pleas Of The Crown*).

<sup>97</sup> One commentator on this manuscript questioned the importance of this point, asserting that it was more important that the court ruled against the defendants. This objection does not persuade me because it is overbroad. There was no ruling on the specific issue I am addressing here, and the nature of the case was such that the court could have ruled against the defendants while at the same time agreeing with defense counsel that no sentryship distinction existed between search and arrest warrant procedures.

<sup>98</sup> Some who are resistant to my view about lax judicial sentryship during the Framers' era may rely upon Hawkins's suggestion that judges could be held liable for issuing warrants upon less than probable cause. *See supra* note 64 and accompanying text; *see also* 2 HAWKINS 1787, *supra* note 64, at 132 (“however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone be answerable for it”). I agree that Hawkins's guidance is potentially troublesome. It does not, however, carry the day with me for several reasons. First, it does not appear to be included in other major leading treatises of the era. Second, I am not aware of any evidence that judges ever had such an action brought against them, much less that such an action had ever been successful. As such, I doubt the validity of Hawkins's guidance on this point.

justice of the peace manuals.<sup>99</sup> Two types of legal forms in these manuals provide reasons for believing that, during the Framers' era, justice of the peace did not necessarily engage in probable cause sentryship as part of established search warrant procedure. The first are the forms that applicants provided to the court in support of requests for the issuance of a search warrant. The second are the search warrants themselves.

#### a. **Application Forms For Search Warrants**

According to Cuddihy, in the time period around 1789, when the Constitution was adopted and two years before the Fourth Amendment became effective:<sup>100</sup>

[l]egal treatises, pamphlets, and statutes explicated the usual protocol in detail. In that protocol, the magistrate issued a warrant upon sworn complaint by an informant that he had grounds to suspect, not believe, that an infraction had occurred. *That the magistrate should intrude as a civil libertarian overseer was not widely assumed.*<sup>101</sup>

Cuddihy believes that the application forms that were used to request search warrants usually required only a general, sworn assertion of suspicion, without requiring that the applicant specify

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<sup>99</sup> See *supra* note 88 and accompanying text.

<sup>100</sup> The Constitution was written in 1787 but did not become effective until 1789. See 1 U.S.C. at lvii n.1 (2000 ed.) (2001). The process of adopting the Bill of Rights was completed on December 15, 1791 with Virginia's ratification. COMM'N ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE BILL OF RIGHTS AND BEYOND, 1791-1991 at 7 (Herbert M. Atherton & J. Jackson Barlow eds., 1991); see also 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1201-02 (1971).

<sup>101</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1525 (emphasis added); see also *id.* at 1187, 1192 (addressing the earlier period of 1762-1775, Cuddihy similarly concluded that "[t]he general rule was that magistrates neither examined complaints independently to determine their adequacy for warrants nor withheld warrants if the assessment was negative").

Professor Davies disagrees with Cuddihy's apparent assertion in the quoted passage that suspicion was sufficient to obtain a warrant under the common law in the Framers' time. Davies has explained that, as a matter of legal doctrine, arrest and search warrants were to issue under the common law only upon (1) a sworn allegation that a crime actually had been committed "in fact," rather than upon mere probable cause to believe one had been committed, and (2) probable cause of suspicion as to either who committed the crime or where the stolen property was located. See Davies, *Fictional Originalism*, *supra* note 10, at 368-73.

the factual grounds supporting the claimed suspicion.<sup>102</sup> Improved research resources since Cuddihy's study indicate that the evidence is more equivocal than he recognized, though his conclusion appears generally correct.<sup>103</sup>

In the Framers' era, American search warrant request forms typically called upon the applicant to affirm, in general terms, that he had suspicion. Though sometimes they also called upon the applicant to specify the underlying factual grounds supporting such suspicion,<sup>104</sup> just as often (if not more often) they did not.<sup>105</sup>

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<sup>102</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1525-27; *see also id.* at 1192-94 (citing numerous pre-Revolutionary sources).

<sup>103</sup> In conducting research for this article, I benefited from an advantage that Cuddihy did not enjoy: text-searchable digitized databases of historic legal texts. Two such databases, which the publisher Thomson-Gale offers on a subscription basis, greatly aided my research. One is the *Eighteenth Century Collections Online* database, which makes available significant legal titles from the eighteenth century. *See* <http://www.gale.com/EighteenthCentury>. Another is the *Making Of Modern Law* database, which covers legal titles from 1800-1926. *See* <http://www.gale.com/ModernLaw>. These databases are available through some law libraries, such as those of Touro Law Center (which recently began subscribing to the latter) and Fordham University Law School (which subscribes to both).

<sup>104</sup> *See, e.g., Form Of A Complaint To Obtain A Search Warrant, in THE ATTORNEY'S COMPANION* 435 (1818) [hereinafter ATTORNEY'S COMPANION: NEW-YORK 1818] (adopted to New York law) (calling upon applicant to "set forth the grounds of suspicion, that they may appear to be reasonable"); *Form Of A Complaint To Obtain A Search Warrant, in THE CLERK'S ASSISTANT* 236 (1805) [hereinafter CLERK'S ASSISTANT 1805] ("Calculated For The Use Of The Citizens Of The United States") (same); *Form Of A Complaint To Obtain A Search Warrant, in DAVIS, TREATISE FOR JUSTICES* 1824, *supra* note 74, at 239 (same); *Form Of A Complaint In Order To Obtain A Search Warrant, in EWING, TREATISE ON JUSTICE OF THE PEACE* 1805, *supra* note 74, at 506-07 (same); *Form Of A Complaint In Order To Obtain A Search Warrant, in NEW CONDUCTOR GENERALIS FOR JUSTICES* 1803, *supra* note 74, at 405-06 (same).

<sup>105</sup> *See, e.g., A Search Warrant, With The C[om]plaint, in BURN'S AMERICAN JUSTICE ABRIDGMENT* 1792, *supra* note 74, at 468-69 (requiring of applicant only general declaration that he "hath probable cause to suspect, and doth suspect," without calling for specification of underlying factual grounds supporting suspicion); *Complaint For A Search Warrant, in 7 DANE'S AMERICAN ABRIDGMENT* 1824, *supra* note 73, at 244 § 2 n.\* (same); *Complaint On Theft, And Request For A Warrant To Search, in SAMUEL FREEMAN, THE MASSACHUSETTS JUSTICE* 167 (1802) [hereinafter FREEMAN, MASSACHUSETTS JUSTICE 1802] (same); *Complaint On Theft, And Request For A Warrant To Search, in SAMUEL FREEMAN, THE MASSACHUSETTS JUSTICE* 153 (1795) [hereinafter FREEMAN, MASSACHUSETTS JUSTICE 1795] (same); *Complaint That Property Has Been Stolen, And Prayer For A Warrant To Search Therefor, in JEREMIAH*

The prevalence of legal forms that failed to demand the details underlying a probable cause claim is crucial because legal forms likely dominated search warrant practice. Given the often rudimentary legal training lawyers received in the period,<sup>106</sup> and the low barriers to entry into the profession,<sup>107</sup> there is every reason to believe that lawyers heavily relied upon these legal forms.<sup>108</sup> Extensive judicial reliance is also likely given the restricted nature of legal research in the decades following Independence,<sup>109</sup> and that American judges from the period could often lack meaningful legal training.<sup>110</sup> These are important points because it is likely that all those who would have been engaged in the quotidian legal machinery of search warrant application and issuance—the lawyers and others who might have applied for search warrants, as well as the justices of the peace to whom they applied—would not have been the elites of the legal profession.<sup>111</sup>

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PERLEY, THE MAINE JUSTICE 264 (1823) [hereinafter PERLEY, MAINE JUSTICE 1823] (same); *see also Form Of A Complaint And Search Warrant, To Search For Counterfeit Money And Securities*, in DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 74, at 217-18 (“has reasonable cause to suspect and doth suspect”); *A Complaint And Warrant To Search For Stolen Goods*, in THOMAS G. FESSENDEN, THE AMERICAN CLERK’S COMPANION, AND ATTORNEY’S PROMPTER 284 (1815) [hereinafter FESSENDEN, AMERICAN CLERK’S COMPANION 1815] (printed in Vermont) (“hath good reason to suspect, and doth suspect”).

It is quite striking that these application forms apparently were considered adequate though others of that period, cited *supra* note 104, called for specifying the underlying facts. It is also remarkable that the conclusory formulation these forms used (“hath probable cause to suspect, and doth suspect”), which called for mere assertions that probable cause existed, remained acceptable well into the last century. *See infra* note 180 and accompanying text; *see also infra* notes 182-183 and accompanying text.

<sup>106</sup> *See* FRIEDMAN, *supra* note 60, at 318-19; LAPIANA, *supra* note 73, at 38.

<sup>107</sup> *See* FRIEDMAN, *supra* note 60, at 304-09, 315-18.

<sup>108</sup> *See* SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 25, at 138 (lawyers found it convenient to use legal forms); Surrency, *American Legal Literature*, *supra* note 60, 207 (noting that “[t]he sale of . . . legal forms was a large part of the printer’s business”).

<sup>109</sup> *See supra* notes 86, 88.

<sup>110</sup> *See supra* note 87.

<sup>111</sup> Professor LaPiana hints at this point when he writes, in the context of discussing early efforts to limit entry into the legal profession, that:

In trying to identify the state of common law legal practice (as opposed to doctrine) in the Framers' time, it is important to acknowledge that legal publications from the era often contained contradictions. One volume called for specifying the underlying facts supporting a probable cause assertion in one suggested application form, but not in another.<sup>112</sup> And it is common to find application forms that did *not* require the specification of underlying facts in volumes that elsewhere suggested a judicial sentryship role.<sup>113</sup> This is in addition to other discrepancies.<sup>114</sup> These discrepancies leave us in a state of ambiguity that I doubt can be conclusively resolved. But, as I have already suggested, a likely result is that the non-elite lawyers and justices of the peace who directly engaged in warrant procedure would have resolved these uncertainties by treating sentryship as optional rather than mandatory.<sup>115</sup>

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[t]he desire to distinguish trained advocates who were worthy to appear before the highest courts from mere attorneys, or, more disparagingly, *pettifoggers*, whose *mechanical knowledge of forms and pleading fitted them, at most, for appearances before lay justices of the peace*, burned brightly in the hearts of trained lawyers throughout the Revolutionary and antebellum periods. John Adams carried on a personal crusade against the lowly tribe.

LAPIANA, *supra* note 73, at 44 (emphasis added and citation omitted). LaPiana helpfully reprints a young law school graduate's personal "definition of a pettifogger":

"Pettyfoggers are those who without any preparatory study enter our lower courts with a few snatches of what they call *law* picked up at the Corners of Streets. These they rant & rave—quibble upon words—stammer & quarrel & raise often not a petty fog, but a great one—to the total eclipse of Common Sense & the discomfiture of justice."

*Id.* at 44-45 (citation omitted) (quoting Diary of Aaron Barlow Olmstead, p. 211. New-York Historical Society (Misc. Microfilms, reel 14)).

<sup>112</sup> Compare the citations to DAVIS, TREATISE FOR JUSTICES 1824 in notes 74 versus 75, *supra*.

<sup>113</sup> Compare the citations to 7 DANE'S AMERICAN ABRIDGMENT 1824 in notes 105 and 123 versus 73, 120-121 and accompanying text, *supra*, or the citations to BURN'S AMERICAN JUSTICE ABRIDGMENT 1792 in notes 105 versus 74-75, *supra*.

<sup>114</sup> See, e.g., *supra* notes 80-81 and accompanying text, and *infra* note 166.

<sup>115</sup> See *supra* note 82 and accompanying text.

## b. Search Warrant Forms

As is true today, the content of search warrants during the Framers' era did not allow for meaningful verification that the issuing judge had inquired into the specific facts supporting a probable cause assertion. Warrants today are not required to say anything about probable cause.<sup>116</sup> They tend at most to declare only that probable exists, without specifying the underlying facts supporting it.<sup>117</sup> Similarly, the practice in the Framers' era was that American search warrants at most asserted the general existence of adequate suspicion. A common formulation in these warrants was to state that the applicant "hath probable cause to suspect, and doth suspect," while uniformly failing to detail the supporting facts.<sup>118</sup>

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<sup>116</sup> See FED. R. CRIM. P. 41(e)(2) (omitting any mention of probable cause from required contents of a warrant). This was not always the case. The original version of Rule 41 required each warrant to "state the grounds or probable cause for its issuance." FED. R. CRIM. P. 41(c) (1946), *reprinted in* 18 U.S.C. ch. 21A at 1979-80 (1946 ed.) (1947). This requirement had replaced an identical statutory mandate. See 18 U.S.C. § 616 (1940 ed.) (1941); *see also* 18 U.S.C. §§ 611-616 (1946 ed.) (1947) (indicating withdrawal of § 616 because its contents "are now covered by Rule 41 of the Federal Rules Of Criminal Procedure"). The requirement was eliminated on the basis that it constituted "unnecessary paper work" because "[a] person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued." FED. R. CRIM. P. 41 advisory committee's notes 1972 amendments.

<sup>117</sup> See, e.g., *Petition for a Writ of Certiorari, Groh v. Ramirez*, No. 02-811, 2002 WL 32101201 at 26a (S. Ct. Nov. 22, 2002) (pincite accessible through pdf link).

<sup>118</sup> E.g., *Search Warrant On The Above Complaint*, in ATTORNEY'S COMPANION: NEW-YORK 1818, *supra* note 104, at 436; *Form Of A Search Warrant*, in BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 74, at 324; *Search Warrant On The Above Complaint*, in CLERK'S ASSISTANT 1805, *supra* note 104, at 237; *Forms, &c. For Search Warrants*, in DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 74, at 215-16; *Search Warrant On The Above Complaint*, in *id.* at 239-40; *Form Of A Search Warrant On The Above Complaint*, in EWING, TREATISE ON JUSTICE OF THE PEACE 1805, *supra* note 104, at 507; *A Complaint And Warrant To Search For Stolen Goods*, in FESSENDEN, AMERICAN CLERK'S COMPANION 1815, *supra* note 105, at 284-85; *Search Warrant Forms*, in FREEMAN, MASSACHUSETTS JUSTICE 1802, *supra* note 105, at 296-97; *Search Warrant Forms*, in FREEMAN, MASSACHUSETTS JUSTICE 1795, *supra* note 105, at 269-70; *Form Of A Search-Warrant*, in GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 74, at 400; *Form Of A Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 74, at 623-24; *Form Of A Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 74, at 416 (general warrant); *Form Of A Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 74, at 405; *Form Of A Search Warrant*, in HITCHCOCK, THE ALABAMA JUSTICE 1822, *supra* note 74, at 409; *Form Of A [S]earch Warrant*, in FRANCOIS-XAVIER

One difference in modern versus Framing-era search warrant procedural standards provides an important reason for doubting that judges during the earlier period served as probable cause sentries. Modern procedures provide a reliable mechanism for determining whether a judge independently and appropriately assessed probable cause prior to issuing a warrant, but no comparably reliable procedure existed during the Framers' era. Modern practice requires the preservation of the detailed facts provided to the judge in support of a probable cause claim (commonly in the form of an affidavit or recorded testimony), which in conjunction with the warrant provides the mechanism through which a search target can assess whether the search was properly allowed and conducted.<sup>119</sup> Though there is a bit of authority that a comparable procedure was available during the Framers' era, it is likely that in many cases only a less reliable, wholly post hoc inquiry was available. Dane's abridgment indicates that

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MARTIN, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 281 (1791) (adopted to North Carolina law); *Form Of A Search Warrant On The Above Complaint*, in NEW CONDUCTOR GENERALIS FOR JUSTICES 1803, *supra* note 74, at 406; *Form Of A Search Warrant*, in PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 316-17; *Warrant*, in PERLEY, MAINE JUSTICE 1823, *supra* note 105, at 264-65; *Search Warrant*, in PRECEDENTS FOR THE USE OF JUSTICES OF THE PEACE 10 (1822) (adopted to Pennsylvania law); *Search Warrant*, in STARKE, JUSTICE OF PEACE 1774, *supra* note 80, at 160; *Form Of The Warrant For Entering Suspected Houses*, in *id.* at 337-38 (regulatory search warrant concerning tobacco); *Form Of The Warrant To Go On Board A Ship, &c. In Search Of Uninspected Tobacco*, in *id.* at 338; *Form Of A Search Warrant*, in *id.* at 352; *Warrant To Search For Stolen Goods, And Apprehend The Felon*, in A COLLECTION OF ENGLISH PRECEDENTS, RELATING TO THE OFFICE OF A JUSTICE OF PEACE 36, in THE YOUNG CLERK'S VADE MECUM: OR, COMPLEAT LAW-TUTOR (1776) [hereinafter VADE MECUM] (printed in New York); *see also A Search Warrant, With The Complaint*, in BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 74, at 468-69; *Warrant To Search For Stolen Goods*, in A COLLECTION OF ENGLISH PRECEDENTS, RELATING TO THE OFFICE OF A JUSTICE OF PEACE 34, in VADE MECUM, *supra* (general warrant stating that complainant "hath informed me"). The vast majority of these examples, which relate to warrants for stolen goods, are applicable to the regulatory context as well because customs search warrants were issued in the same manner as warrants for stolen goods. *See* PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 74, at 374.

<sup>119</sup> *See* FED. R. CRIM. P. 41(d); *Franks v. Delaware*, 438 U.S. 154, 165 (1978); *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). This preservation requirement helps justify the repeal of a previous mandate that the warrant specify the facts supporting probable cause. *See supra* note 116.

applications were “usually annexed” to the warrant,<sup>120</sup> and that the “good and certain cause” supporting the search “ought to be found in” the application.<sup>121</sup> But, as discussed above, very often these application forms did not call for the underlying facts to be specified.<sup>122</sup> Even the suggested application form found in Dane’s abridgment itself omits these specifics!<sup>123</sup> Thus, justices of the peace reviewing these search warrant applications often lacked the necessary information to scrutinize probable cause unless they took the initiative to obtain it orally from the applicant prior to issuing the requested warrant.

Whether judges did so is open to more debate than has generally been recognized. This point is easy to miss because of the instinctive tendency to locate in historical material that which we are predisposed to finding. It is natural for us to presume that in the Framers’ era judges meaningfully assessed probable cause, including in the civil search arena. After all, civil search legislation from this period often required warrants, and conditioned the issuance of those warrants upon suspicion.<sup>124</sup> And, of course, the Fourth Amendment explicitly requires probable cause before a warrant can issue. Given the Fourth Amendment jurisprudence with which we are most familiar, in which judges have played a probable cause sentryship role since at least the mid-1900s,<sup>125</sup> it is tempting to presume that judges have occupied this role since the nation’s founding. This is particularly so if one believes that, during the earlier era, only complainants having personal information could apply for and obtain warrants (a proposition about which I

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<sup>120</sup> 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra* note 73, at 245 § 2 n.\*.

<sup>121</sup> *Id.* at 247 § 4.

<sup>122</sup> *See supra* note 105 and accompanying text.

<sup>123</sup> See the citation to 7 DANE’S AMERICAN ABRIDGMENT 1824 in note 105, *supra*.

<sup>124</sup> *See supra* note 55.

<sup>125</sup> *See infra* notes 180-183 and accompanying text.

have doubts),<sup>126</sup> which should have made it easy for judges to orally inquire into the facts underlying a probable cause claim.

A supposition that judges would have orally inquired is premised upon a belief that judges understood and accepted that the law imposed a probable cause sentryship role upon them. Only if so would they have felt compelled to orally question an applicant who had not otherwise provided details supporting a probable cause claim. But, for reasons I have already

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<sup>126</sup> Professor Davies adheres to this proposition. See Davies, *Original Fourth Amendment*, *supra* note 10, at 650-51. His support for this assertion comes from a brief passage in *Hale's Pleas Of The Crown*. Davies, *Original Fourth Amendment*, *supra* note 10, at 651 n.289. The passage states that warrants to search for stolen goods:

are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do sh[o]w his reasons of such suspicion.

2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 61, at 150; accord 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 61, at 150. American treatises and justice manuals, often citing Hale, commonly reiterated this same or similar language. See *supra* notes 73-77 and accompanying text. I am not persuaded that these passages offer sufficient support for Davies's conclusion, for several reasons.

Although Davies's conclusion is plausible, it is not clear to me that during the Framers' era one could have "probable cause to suspect" only from personal knowledge. Davies's conclusion presumes that "probable cause" was given the same interpretation during the Framers' era as we give it today. However, there is reason to doubt this. Evidence indicates that during this earlier period "probable cause" was given a much laxer interpretation, under which it more closely correlated to a mere hunch or belief than to its generally more demanding modern interpretation. Compare *infra* notes 145-151 and accompanying text, with *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (rejecting "mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances" as basis for issuing customs warrant) and *Byars v. United States*, 273 U.S. 28, 29 (1927) (holding inadequate assertion that warrant applicant "has good reason to believe and does believe" that defendant possessed contraband). Thus, there is reason to believe that in the Framers' era a complainant validly could have sworn an "oath" that he had "probable cause" while at the same time lacking the sort of supporting facts that we would expect today. This would have enabled a complainant to obtain a search warrant while lacking any meaningful personal knowledge. If this is correct, it suggests that Davies might be mistaken in claiming that only direct personal knowledge was sufficient during the Framers' era (while hearsay evidence can be sufficient today). Davies, *Original Fourth Amendment*, *supra* note 10, at 650-51.

explained,<sup>127</sup> and others I will set forth below, justices of the peace presented with search warrant applications easily could have concluded that they did not have an absolute duty to engage in probable cause sentryship.

### 3. Plain Text

A plain text analysis provides reason for doubting the sentryship thesis. From this perspective, the strongest evidence that judges monitored probable cause in the context of searches derives from the passages indicating that a search warrant applicant had to “show” or “assign” his reasons for suspicion.<sup>128</sup> But for sentryship adherents there is room for discomfort here. Is it really clear that these sources are *mandating* that judges adopt a sentryship role, as opposed to *implying* that such a role is proper, or perhaps merely *suggesting* such a role? It is somewhat odd that an affirmative judicial duty to inquire into the facts underlying probable cause was never expressly and cleanly stated.

Also, focus upon the soft language that dominates this material. The weak language used, dominated by the subjunctive tense of words like “ought,”<sup>129</sup> or merely suggestive language like “it is fitting”<sup>130</sup> or “cannot well be too tender,”<sup>131</sup> easily (and perhaps naturally) may have caused judges to believe that probable cause sentryship was an *optional* rather than mandatory role for them to play. Much like today, these words and phrases may have merely suggested a course of action rather than conveying a mandatory imperative. For example, though it is possible to attribute a mandatory meaning to “ought,” a more natural interpretation is

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<sup>127</sup> See *supra* Part II(B)(1).

<sup>128</sup> See *supra* notes 73-78 and accompanying text.

<sup>129</sup> See *supra* notes 61, 69, 71, 73 and accompanying text.

<sup>130</sup> See *supra* notes 61-62, 69 and accompanying text.

<sup>131</sup> See *supra* notes 64, 79 and accompanying text.

to treat it as equivalent to the merely suggestive “should.”<sup>132</sup> In terms of usage during the Framers’ era, there is good reason to believe that, like today, neither “ought” nor phrases like “it is fitting” normally expressed compulsion.<sup>133</sup>

We can have some confidence that during the Framers’ era “ought” was not necessarily interpreted as conveying a compulsory or mandatory meaning because the Framers do not appear

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<sup>132</sup> It is possible for “ought” to be used in a mandatory sense, but this is not its most natural meaning, which is that “ought” is more equivalent to “should.” *Compare* WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1020 (1989) [hereinafter WEBSTER’S DICTIONARY 1989] (under the entry for “ought,” listing only “must” as a synonym), *with id.* at 944 (stating, under definition of “must,” that “ought” is “weaker than MUST”); *see also* Hannon v. Myrick, 111 A.2d 729, 731 (Vt. 1955). Given these various shades of meaning, it is best to interpret “ought” as mandatory only when an unusual context so demands. *See* Life Ass’n of Am. v. St. Louis County Bd. of Assessors, 49 Mo. 512, 519 (1872). I further acknowledge, however, that the mandatory usage has not always been so limited. *See* Jackson v. State, 22 S.W. 831, 839 (Tex. Crim. App. 1893).

<sup>133</sup> Today, “ought” is commonly “used to express duty,” “obligation,” “propriety,” or “appropriateness.” WEBSTER’S DICTIONARY 1989, *supra* note 132, at 1020. This is consistent with its meaning during the Framers’ era. One source indicates that “ought” expresses “duty or obligation of any kind,” including “weaker shades of meaning” such as “expressing what is befitting, proper, correct, advisable, or naturally expected,” as well as that one is “bound or under obligation” or “duty . . . to do it.” 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2018 (1988) (fifth definition at micropage 236). This source provides numerous examples of such usage from the Framers’ era, including examples from 1749, 1812, and 1818, including a 1771 example, “The precedent ought to be followed.” *Id.* If judges during the Framers’ era were instructed that they “ought” to serve as probable cause sentries to the same extent they “ought” to follow precedent, then the sentryship role was not compulsory, but instead merely suggestive, as is the judicial duty to follow precedent. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see generally* Michael J. Gerhardt, *The Role Of Precedent In Constitutional Decisionmaking And Theory*, 60 GEO. WASH. L. REV. 68 (1991); Henry P. Monaghan, *Stare Decisis And Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

Dictionaries from the Framers’ era confirm this usage. They define “ought” as being obliged by duty, as well as to “be fit” or “be necessary.” *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1792) (unpaginated; see alphabetical listing for “ought”) [hereinafter JOHNSON DICTIONARY 1792]; NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 224 (1817) [hereinafter WEBSTER DICTIONARY 1817]. “Fit,” as in “it is fitting,” *cf. supra* note 130 and accompanying text, meant “proper” or “convenient,” while “fitly” meant “properly,” “justly,” “reasonably,” and “conveniently.” JOHNSON DICTIONARY 1792, *supra* (unpaginated; see alphabetical listings for “fit” and “fitly”); WEBSTER DICTIONARY 1817, *supra*, at 128-29. If something is “convenient,” then it is not, of course, compulsory, a point that fits nicely with another part of my argument. *See supra* notes 80-85 and accompanying text.

to have ascribed such a meaning to it. They went out of their way to replace the phrase “ought to” with “shall” when drafting the Full Faith and Credit Clause.<sup>134</sup> The Bill of Rights also gives us abundant reasons for believing that the Framers preferred “shall” over “ought” when seeking to express an absolute obligation. Over and over again, state conventions used “ought” in proposed amendments they suggested for inclusion in a Bill of Rights, and “ought” also predominated in existing provisions that may have served as models for the amendments, but the Framers consistently chose to use “shall.” This evidence is found not only in relation to the Fourth Amendment itself,<sup>135</sup> but also in relation to the First Amendment’s Establishment and Free Exercise Clauses,<sup>136</sup> its Free Speech and Free Press Clauses,<sup>137</sup> and its Assembly and

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<sup>134</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 486, 489 (Max Farrand ed., 1911); *see generally* Kurt H. Nadelmann, *Full Faith And Credit To Judgments And Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 58-59 (1957).

<sup>135</sup> For example, of the six states that proposed amendments concerning search and seizure, four used “ought” (Maryland, New York, North Carolina, and Virginia), only one used “shall” (Pennsylvania), and the sixth (Massachusetts) used an inapposite formulation. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 232-33 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS]. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 236. Of nine colonial and state search and seizure provisions that preceded the Fourth Amendment and may have served as models for it, eight used “ought” while only one used “shall.” *Id.* at 234-35. Despite the pervasiveness of “ought,” the Framers chose to use “shall” in the Fourth Amendment. *See supra* note 1.

<sup>136</sup> Of the eight states that proposed amendments speaking to these issues, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), two used “shall” (New Hampshire and Pennsylvania), and the remaining two proposals (by Maryland and Massachusetts) used inapposite formulations. COMPLETE BILL OF RIGHTS, *supra* note 135, at 11-13. Nonetheless, the Framers chose to use “shall” in the First Amendment. *See* U.S. CONST. amend. I.

<sup>137</sup> Of the seven states that proposed amendments speaking to these issues, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), only one used “shall” (Pennsylvania), and the remaining two proposals (by Maryland and Massachusetts) used inapposite formulations. COMPLETE BILL OF RIGHTS, *supra* note 135, 92-93. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 96. Of seventeen colonial, state, and English free speech and free press provisions that preceded the First Amendment and may have served as models for it, eight used “ought,” four used “shall,” and another five used inapposite formulations. *Id.* at 93-96. In spite of the pervasiveness of

Petition Clauses;<sup>138</sup> the Third Amendment;<sup>139</sup> the Seventh Amendment;<sup>140</sup> and the Eight Amendment.<sup>141</sup>

Undoubtedly, whether “ought” was perceived to have a different meaning than “shall” during the Framers’ era will be subject to disagreement. Though some commentators agree with

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“ought,” the Framers chose to use “shall” in the First Amendment. *See* U.S. CONST. amend. I.

<sup>138</sup> Of the six states that proposed amendments relating to these issues (Maryland, Massachusetts, New York, North Carolina, Rhode Island, and Virginia), none used “shall.” Instead, they used formulations such as “every man hath” or “the people have” a “right” to assemble or petition. COMPLETE BILL OF RIGHTS, *supra* note 135, at 139-40. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 143. Of fifteen colonial, state, and English assembly and petition provisions that preceded the First Amendment and may have served as models for it, nearly all used “hath” or “have” formulations that were similar to the state proposals. *Id.* at 140-43. Only two (Massachusetts’s Body Of Liberties and England’s Tumultuous Petition Act of 1661) used “shall.” *Id.* at 140, 142. Nonetheless, the Framers chose to use “shall” in the First Amendment. *See* U.S. CONST. amend. I.

<sup>139</sup> Of the six states that proposed amendments relating to quartering of soldiers, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), only one used “shall” (New Hampshire), and the remaining proposal (by Maryland) used an inapposite formulation. COMPLETE BILL OF RIGHTS, *supra* note 135, at 215-216. Of eleven colonial, state, and English provisions relating to this issue that preceded the Third Amendment and may have served as models for it, three used “ought,” four used “shall,” and four used inapposite formulations. *Id.* at 216-18. The Framers chose to use “shall” in the Third Amendment. *See* U.S. CONST. amend. III.

<sup>140</sup> Of the eight states that proposed amendments relating to civil jury trials, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), and the other four used “shall” (Maryland, Massachusetts, New Hampshire, Pennsylvania). COMPLETE BILL OF RIGHTS, *supra* note 135, at 506-08. However, of the many colonial, state, and English provisions relating to this issue that preceded the Seventh Amendment and may have served as models for it, the vast majority used “shall,” while only a handful used “ought.” *See id.* at 508-18. The Framers chose to use “shall” in the Seventh Amendment. *See* U.S. CONST. amend. VII.

<sup>141</sup> Of the five states that proposed amendments relating to excessive bail or fines, and cruel or unusual punishments, all of them (New York, North Carolina, Pennsylvania, Rhode Island, and Virginia) used “ought.” COMPLETE BILL OF RIGHTS, *supra* note 135, at 613. “Ought” and “shall” were both widely used in the many colonial, state, and English provisions relating to this issue that preceded the Eighth Amendment and may have served as models for it. *See id.* at 613-17; *see also* Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969). The Framers chose to use “shall” in the Eighth Amendment. *See* U.S. CONST. amend. VIII.

my position, Professor Davies strongly disagrees.<sup>142</sup> He argues that any “asserted difference is illusory and the different usages were only stylistic, rather than substantive,” and concludes that “[t]he evidence does not support the assertion that the framers understood ‘ought’ to be less binding or imperative than ‘shall.’ ”<sup>143</sup> In any case, linguistic arguments do not hinge solely on the correct historical interpretation of “ought” versus “shall.”

Consider too the changes that have occurred in the meaning of words and phrases in our language. There is reason to believe that the phrase “probable cause” did not mean the same thing during the Framers’ era that it does now. In the period from 1776 through around 1790, when the colonies declared independence and the Framers drafted the Constitution and Bill of Rights,<sup>144</sup> “probable” had widely varying meanings. As Cuddihy points out,<sup>145</sup> it could mean “likely,”<sup>146</sup> “credible,”<sup>147</sup> or even “possible.”<sup>148</sup> From today’s perspective, this last definition is remarkable. In legal usage today, “possible” and “probable” are nearly antonyms. When considering, for example, the preponderance of the evidence standard of proof, “possible” means nothing, or virtually nothing. But “probable” means a great deal. It is, indeed, the whole

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<sup>142</sup> Professor Davies has quite thoroughly described the disagreement among commentators. *See* Davies, *Original Fourth Amendment*, *supra* note 10, at 676 n.350.

<sup>143</sup> *Id.*

<sup>144</sup> *See supra* note 100.

<sup>145</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1527 & n.332.

<sup>146</sup> N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1721) [hereinafter BAILEY DICTIONARY 1721] (unpaginated; see alphabetical listing for “probable”); WILLIAM CRAKELT, ENTICK’S NEW SPELLING DICTIONARY 294 (1791); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (3d ed. 1740) [hereinafter DYCHE DICTIONARY 1740] (unpaginated; see alphabetical listing for “probable”); JOHNSON DICTIONARY 1792, *supra* note 133 (unpaginated; see alphabetical listing for “probable”); WEBSTER DICTIONARY 1817, *supra* note 133, at 251.

<sup>147</sup> DYCHE DICTIONARY 1740, *supra* note 146 (unpaginated; see alphabetical listing for “probable”).

<sup>148</sup> *Id.*

ballgame. The two words, therefore, are defined completely differently.<sup>149</sup> Certainly they are not used to define each other, as they were during the Framers' era. Recognizing these changes in language, Cuddihy concluded that "the Fourth Amendment assumed the least restrictive understanding of 'probable cause' then available, what might now be termed, 'plausible cause' or 'possible cause.'" <sup>150</sup> It seems likely, then, that during the Framers' era the phrase "probable cause" could easily have been equated with a mere unreasoned "hunch," rather than with a reasoned basis for belief grounded in an articulable set of underlying facts. Those resistant to this conclusion should consider the centuries of history that confronted justices of the peace in the Framers' era, in which non-existent or low levels of suspicion had been sufficient to justify governmental searches, as well as often lax interpretations given to "probable cause" both during the Framers' era and well into the 1900s.<sup>151</sup>

### III. POST-INDEPENDENCE CIVIL SEARCH STATUTES: UNCERTAINTY REGARDING SENTRYSHIP

In the Framers' era, some civil search statutes either required, or were perceived to require, judges to issue warrants upon information on oath, depriving the judiciary of any

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<sup>149</sup> See BLACK'S LAW DICTIONARY 1166, 1201 (6th ed. 1990); WEBSTER'S DICTIONARY 1989, *supra* note 132, at 1122, 1146. *Black's Law Dictionary* underwent a substantial revision after the 6th edition. See generally Peter Tiersma, *The New Blacks's*, 55 J. LEGAL EDUC. 386 (2005). More recent editions have dropped the definitions of "probable" and "possible."

<sup>150</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1527.

<sup>151</sup> See Joseph D. Grano, *Probable Cause And Common Sense: A Reply To The Critics Of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 479-93 (1984). In addition to providing extensive historical coverage, Grano discusses *Carroll v. United States*, 267 U.S. 132 (1925), and *Brinegar v. United States*, 338 U.S. 160 (1949), both of which involved warrantless searches, as more recent cases in which probable cause was given a relaxed interpretation. In each of those cases, though law enforcement agents had some knowledge that might arouse suspicion, it was months old and probable cause for the specific searches and seizures was found to exist based upon little more than observation of the defendants driving on roadways.

discretion with which to monitor prior suspicion.<sup>152</sup> At least with regard to one prominent early federal civil search statute, the 1789 Collection Act, Professor Davies believes that such a reading is incorrect.<sup>153</sup> Nevertheless, solid grounds exist for believing that he is wrong,<sup>154</sup> and even if he is right there is abundant evidence for believing that some statutes were perceived as depriving judges of discretion (even if mistakenly), resulting in the same outcome.

According to Cuddihy, Americans viewed a 1773 English excise case, *Bostock v. Saunders*,<sup>155</sup> as “the controlling British precedent on probable cause.”<sup>156</sup> Professor Davies appears to agree because he correctly notes that Dane’s important 1824 Framing-era abridgment

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<sup>152</sup> Cuddihy believes that some statutes required the judiciary to issue warrants upon application. 3 CUDDIHY DISSERTATION, *supra* note 10, at 1193-94, 1351. Professors Maclin and Sklansky agree. See Maclin, *Fourth Amendment Complexity*, *supra* note 10, at 952 n.166; Sklansky, *supra* note 9, at 1798-99 & n.359.

<sup>153</sup> See Davies, *Original Fourth Amendment*, *supra* note 10, at 711 n.470.

<sup>154</sup> The relevant 1789 Collection Act provision states:

if [the officer] shall have cause to suspect a concealment [of uncustomed goods], in any particular dwelling-house, store, building, or other place, [he] shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods . . . .

Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1861). A plain text argument, emphasizing the mandatory language “shall . . . be entitled to a warrant,” supports the lack-of-judicial-discretion view. Davies takes issue with this approach, arguing that it gives too little attention to the word “if” in the opening phrase “if [the officer] shall have cause.” Davies, *Original Fourth Amendment*, *supra* note 10, at 711 n.470.

Though plausible, there are several weaknesses in Davies’s position. First, it takes a restrictive view of the implications of explicit discretion-granting language the Framers used a mere two years later in Hamilton’s Excise Act of 1791. See Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207 (1861) (limiting issuance of search warrants to instances of “reasonable cause of suspicion, to be made out to the satisfaction of [the] judge or justice”). A defender of this Excise Act, in an address to the public, emphasized the discretion it gave to judges. John Neville, *An Address To The Citizens Of Westmoreland, Fayette, And Alleghany Counties On The Revenue Law*, 3 GAZETTE OF THE UNITED STATES 284 (Dec 31, 1791). Second, it mistakenly discounts various reasons, discussed in the text both before and after this note, for believing that judges at the time often may not have actively monitored probable cause prior to issuing search warrants.

<sup>155</sup> 3 Wilson 434, 95 Eng. Rep. 1141 (K.B. 1773).

<sup>156</sup> 3 CUDDIHY DISSERTATION, *supra* note 10, at 1195.

“treated *Bostock* as the American doctrine.”<sup>157</sup> *Bostock* supports the no-discretion thesis because the lead opinion declared that excise commissioners had no discretion to refuse a search warrant that an excise officer requested upon oath:

*I think the commissioners were bound to grant the warrant upon the oath of [the excise officer], and could not form any judgment upon the matter, the commissioners have no power to summon the suspected party or any witnesses, they cannot examine on both sides, so it was impossible for them to judge; if the commissioners had such power it would be nugatory, for the goods would be removed before such examination could be had.—I think the [statute] is compulsive upon the commissioners to grant the warrant to the officer to enter and search, upon his oath of suspicion that teas, &c. are fraudulently concealed . . . .*<sup>158</sup>

Davies acknowledges that “Framing-era American lawyers were probably familiar with *Bostock*.”<sup>159</sup> This would have further undermined any judicial inclination to scrutinize probable cause claims prior to issuing a requested warrant.

Since Americans viewed *Bostock* as controlling, it was probably more important that the lead opinion declared its no-discretion thesis than whether it was correct on this point. Certainly, there is ample basis to dispute the lead opinion’s view regarding discretion. Two other justices did not opine on the matter, but a fourth disagreed with the lead opinion, writing that “the commissioners . . . have a discretionary power to grant such warrant.”<sup>160</sup> His analysis seems more in keeping with the statute’s plain language, which provides that upon oath “setting forth

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<sup>157</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 652 n.294; *cf.* 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 559 § 11 (1824) [hereinafter 5 DANE’S AMERICAN ABRIDGMENT 1824] (discussing that *Bostock* jury granted £200 verdict against customs officers who conducted an unsuccessful search under warrant that officers themselves swore out); 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra* note 73, at 244-46 § 2 (same); *but see infra* notes 166-167 and accompanying text (explaining that *Bostock* had been overruled in 1785, and citing one 1801 American treatise that correctly noted this development). For the importance of Dane’s abridgment, see *supra* note 73.

<sup>158</sup> 3 Wilson at 440, 95 Eng. Rep. at 1145 (de Grey, Lord Chief Justice) (emphasis added).

<sup>159</sup> Davies, *Original Fourth Amendment*, *supra* note 10, at 652 n.294.

<sup>160</sup> 3 Wilson at 442, 95 Eng. Rep. at 1146 (Nares, J.).

the ground of . . . suspicion, *it shall and may be lawful*” for the commissioners or justices to issue a search warrant.<sup>161</sup> Though this language is arguably ambiguous on the discretion issue, it adequately supports the *Bostock* description of the statute, made at least twice in the opinion, as providing that excise commissioners “may” grant a warrant.<sup>162</sup> Further, a later English case, *Cooper v. Boot*,<sup>163</sup> clearly disagreed with the *Bostock* lead opinion on the discretion issue. Both *Bostock* and *Cooper* reviewed the validity of a warrant-based excise search conducted under the same statute.<sup>164</sup> In complete opposition to the earlier *Bostock* lead opinion, the *Cooper* court declared in dicta that a judicial sentryship duty existed.<sup>165</sup>

Nevertheless, because the lead opinion fell in the no-discretion camp, *Bostock* is a powerful indicator that even American judges who took some care to research the issue may have concluded they lacked discretion to monitor probable cause. Importantly, *Bostock* appears to have been considered controlling in America throughout the Framers’ era because Dane was citing to it as late as 1824, in spite of *Cooper* having overruled *Bostock* on a separate immunity issue in 1785.<sup>166</sup> Moreover, Professor Davies has identified this, as well as other reasons, for

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<sup>161</sup> 10 Geo. I, ch. 10, § 13 (1723) (Eng.) (emphasis added).

<sup>162</sup> 3 Wilson at 435, 95 Eng. Rep. at 1142; 3 Wilson at 441, 95 Eng. Rep. at 1145 (Gould, J.).

<sup>163</sup> 4 Douglas 339, 99 Eng. Rep. 911 (K.B. 1785).

<sup>164</sup> The statute at issue in both *Bostock* and *Cooper* was 10 Geo. I, chapter 10, section 13 (see *supra* note 161 for complete citation). *Cooper*, 4 Douglas at 340, 348, 99 Eng. Rep. at 912, 916; *Bostock*, 3 Wilson at 439, 95 Eng. Rep. at 1144 (de Grey, Lord Chief Justice).

<sup>165</sup> See *supra* note 69.

<sup>166</sup> *Cooper* overruled *Bostock* on the issue of whether an excise officer could be held liable for trespass when acting pursuant to a search warrant issued under the officer’s own oath (as opposed to a separate informer’s oath). *Bostock* allowed liability. See 3 Wilson at 440-42, 95 Eng. Rep. at 1145-46. *Bostock* therefore limited the immunizing effect of a warrant. In *Cooper*, the court acknowledged that its case “appears to be exactly the same with that of *Bostock v. Saunders*.” *Cooper*, 4 Douglas at 347, 99 Eng. Rep. at 916. Yet, the court rejected liability, stating that “we cannot bring ourselves to coincide in the [*Bostock*] judgment.” *Cooper*, 4 Douglas at 348-50, 99 Eng. Rep. at 916-17.

Nonetheless, Dane cited *Bostock* as controlling. See *supra* note 157 and accompanying

believing that *Cooper* may not have been well known in the United States until after 1831,<sup>167</sup> thus calling into doubt the impact it had in establishing a judicial sentryship duty regarding probable cause during the Framers' era.

#### IV. IMPLAUSIBILITY OF EARLY SENTRYSHIP IN LIGHT OF SLOW DEVELOPMENT OF SENTRYSHIP JURISPRUDENCE

One potentially powerful objection to my assertion that judges during the Framers' era often may not have monitored probable cause prior to issuing warrants is that I am giving insufficient attention to the Fourth Amendment itself. This argument would assert that, even if I am correct about the lack of judicial sentryship of probable cause under the *common law*, a fundamental point of the Fourth Amendment was to abrogate this portion of the common law through *constitutional* mandate. And the Fourth Amendment explicitly states that "no Warrants shall issue, but upon probable cause."<sup>168</sup> So, this objection would continue, how could the Framers have been any clearer about *requiring* judicial sentryship of probable cause, as well as their intent to *abrogate* the common law to the extent it had allowed judges to issue warrants without scrutinizing probable cause? Further, numerous colonial and state declarations of rights and constitutional provisions that preceded the Fourth Amendment also implied a probable cause

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text. This is surprising given that Dane briefly cited and discussed *Cooper* at least twice in other volumes of his abridgment. *See* 2 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 728 § 8 (1823); 5 DANE'S AMERICAN ABRIDGMENT 1824, *supra* note 157, at 580 §§ 5-6.

<sup>167</sup> Davies has identified reasons for believing that *Cooper*'s first publication was likely no earlier than 1801, and that it was not more widely published until 1831. *See* Davies, *Original Fourth Amendment*, *supra* note 10, at 561 n.19, 652 n.294.

It must be noted, however, that not only had Dane briefly cited and discussed *Cooper* near the end of the Framers' era (*see supra* note 166), but at least one American treatise during the Framers' era correctly noted in 1801, decades before the publication of Dane's abridgment, that *Cooper* had overruled *Bostock*. 1 ISAAC 'ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 395 (2d Am. ed., 1801). Further, at least one court during the Framers' era noted the overruling. *Simpson v. Smith*, 2 Del. Cas. 285, (\*4) (Del. 1817).

<sup>168</sup> *See supra* note 1.

sentryship duty, such as by requiring that “cause,” “foundation,” or “evidence” be presented before a warrant could issue.<sup>169</sup> Moreover, all of this is in addition to other compelling evidence supporting that, even before the Fourth Amendment, the common law imposed upon judges a duty to be probable cause sentries.<sup>170</sup>

My answer to this objection is that the language in the Fourth Amendment, as well as in the colonial and state fundamental rights provisions, is not actually particularly clear on this point. To say that no warrant shall issue but upon “probable cause,” “cause,” “foundation,” or “evidence” leaves several important questions unanswered. These formulations do not, for example, cleanly establish *how* probable cause is to be assured. They also do not necessarily clarify *who* is supposed to assure the existence of probable cause. These omissions are particularly troublesome in light of prevailing practice during the Framers’ era. Was probable cause sufficiently “assured” if the requesting officer was willing to swear, on oath, that it existed, and risk personal trespass liability? Or did an issuing judge have to be independently satisfied that probable cause had been established? Or was it enough that a jury, after an *ex post* examination, thought probable cause had existed at the time the search warrant had issued?

I do not want to overstate this case, as I do share the opinion that the most natural reading of the Warrant Clause is that it called for judicial sentryship of probable cause. But the point I am making is that it is not clear to me that the same reading would necessarily have prevailed during the Framers’ era. To those whose initial impression is to find my uncertainty farfetched, I point to those Framing-era justice manuals (all of them American) and treatises that continued to assert, well after the Fourth Amendment’s adoption, that probable-cause-sentryship was

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<sup>169</sup> These predecessors to the Fourth Amendment are helpfully compiled in COMPLETE BILL OF RIGHTS, *supra* note 135, at 234-35.

<sup>170</sup> See *supra* Part II(A).

convenient but not necessary.<sup>171</sup> If the Fourth Amendment was immediately and clearly understood to impose a judicial sentryship duty regarding probable cause, one would expect all these justice manuals and treatises to have taken note of this development and omitted the convenient-but-not-necessary guidance as soon as the Fourth Amendment came into effect. But we know that this did not occur. The Fourth Amendment became effective in December 1791.<sup>172</sup> Yet, American justice manuals continued to include the convenient-but-not-necessary guidance as late as 1810<sup>173</sup> and 1820,<sup>174</sup> and even the first American edition of the highly influential *Hale's Pleas Of The Crown* continued to include this guidance when it was published much later in 1847.<sup>175</sup>

The question then becomes whether the judicial sentryship adherents can adequately explain this discrepancy. The answer is that they might. But then again, they might not. A possible, but inadequate, explanation for the discrepancy might be simple editorial incompetence. It could be that the Fourth Amendment was meant to codify a judicial sentryship duty, but the treatises and American justice manuals improperly failed to account for that development and, as a result, did not modify their guidance about common law requirements. The difficulty with this explanation is that it fails to account for the impact of this oversight. The guidance the treatises and American justice manuals provided may have been wrong, but the readers probably depended upon, and applied, that guidance. This is particularly so given the educational, training, and research limitations during the Framers' era.<sup>176</sup> If justices of the peace

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<sup>171</sup> See *supra* notes 80-85 and accompanying text.

<sup>172</sup> See *supra* note 100.

<sup>173</sup> GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 74, at 479.

<sup>174</sup> HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 74, at 699.

<sup>175</sup> See *supra* note 83 and accompanying text; *supra* notes 60, 76-77 and accompanying text (regarding how influential *Hale's Pleas Of The Crown* was in the new nation).

<sup>176</sup> See *supra* notes 86-88, 106-111 and accompanying text.

were following the guidance available in American justice manuals, for example, and noticed the convenient-but-not-necessary language, they quite likely would have applied it. If so, one cannot say that judges operated under a universal sentryship duty during the Framers' era because no such duty would have been implemented in practice.

A different, though also probably insufficient, basis for justifying the discrepancy might be that the federal Constitution was deemed inapplicable to state common law, which was what the justice manuals discussed.<sup>177</sup> This explanation is attractive from a formalistic standpoint. If federal versus state search and seizure jurisprudence were treated as distinct, then the discrepancy would be justified and not represent a contradiction. The problem with this explanation is that search and seizure jurisprudence during the Framers' era often was not formalistic. For instance, it was common for litigants and judges in state search and seizure decisions from the era to discuss the Fourth Amendment as if it were applicable outside its federal purview.<sup>178</sup> Thus, whether the discrepancy can be adequately explained is far from clear.

Another, and perhaps more troublesome, problem for those who believe that a sentryship ethic was implemented in early practice is that it ignores not only the evolution of probable cause jurisprudence, but also how slowly sentryship jurisprudence developed. If judicial sentryship of probable cause had been as well established upon the Fourth Amendment's adoption as often seems to be supposed, one would not expect to see an abundant and lengthy development of

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<sup>177</sup> The Fourth Amendment was not deemed applicable to the states until *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), and did not become more fully applicable until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (overruling *Wolf*).

<sup>178</sup> See, e.g., *Patterson v. Blackiston*, 1 Del. Cas. 571, 572 (Del. 1818); *Dale v. Hamilton*, 2 Del. Cas. 216, 219 (Del. C.P. 1804); *Connor v. Commonwealth*, 3 Binn. 38, 40 (Pa. 1810); *Wells v. Jackson*, 17 Va. (3 Munf.) 458, 474-75 (1811) (Roane, J.). Some of these decisions refer to the Fourth Amendment as the Sixth Amendment due to an anomaly explained *supra* note 15.

probable cause jurisprudence related to the sentryship issue. Yet, that is exactly what our law books show.

Probable cause jurisprudence evolved over a long period, slowly at first but then accelerating through the mid-1900s. It was not until over 20 years after the Fourth Amendment was adopted that the Supreme Court attempted to clarify what “probable cause” means, defining it as “less than evidence which would justify condemnation.”<sup>179</sup> Fast-forward into the next century, and it is evident that probable cause jurisprudence was still developing. Within a six-year period around 1930 the Court twice had to demand that warrant applications contain sufficient underlying factual detail to allow the judge to independently assess probable cause. In the first case the Court held invalid a warrant that had issued only upon the applicant’s averment that he “has good reason to believe and does believe” that defendant possessed contraband.<sup>180</sup> This is substantively similar to the “hath probable cause to suspect, and doth suspect” formulation that was often found in search warrant application forms from way back in the

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<sup>179</sup> *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). This suggests the possibility that, during the more than 20 intervening years, judges who may have opted to serve as probable cause sentries were applying a less stringent standard, raising the prospect that they may not have acted as meaningful probable cause sentries at all.

It is worth noting that *Locke*, a forfeiture case, defined “probable cause” as it was used in a statute. Technically, *Locke* was not a Fourth Amendment case.

<sup>180</sup> *Byars v. United States*, 273 U.S. 28, 29 (1927). Even after *Byars*, this type of formulation continued to remain valid until the 1960s in cases where authorities premised probable cause upon an informant. It was not until *Aguilar v. Texas* that the Supreme Court rejected a police affidavit that had merely asserted the existence of “reliable information from a credible person.” 378 U.S. 108, 109, 113-14 & n.4 (1964). *Aguilar* ruled that an affiant relying upon an informant’s tip must (1) indicate the informant’s basis of knowledge, and (2) provide information permitting the judge to decide whether or not the informant was trustworthy. *Id.* at 114, *overruled by* *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (adopting totality-of-the-circumstances test). “[T]he government,” however, “need never divulge the identity of the informant.” Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 24, at 1491 (citing *McCray v. Illinois*, 386 U.S. 300 (1967)). For findings regarding the use of confidential informants, some troubling and others more reassuring, see Laurence A. Benner & Charles T. Samarkos, *Searching For Narcotics In San Diego: Preliminary Findings From The San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221 239-44 (2000).

Framers' era.<sup>181</sup> In the second case the Court rejected a warrant that had been issued “upon mere affirmance of suspicion or belief.”<sup>182</sup> The issuance of these warrants, about 140 years after the Fourth Amendment's adoption, hardly seems consistent with an understood and applied judicial ethic of probable cause sentryship. Even more notably, it was not until 1958 that the Court confirmed that the magistrate confronted with a warrant application “must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.”<sup>183</sup> If the Fourth Amendment made it so clear that judges were to act as probable cause sentries, why was the Court still having to define this role over 165 years after the amendment's adoption?

One way to explain why the Court was still answering these questions is to acknowledge that the law confronted judges with conflicting imperatives. To the extent that specific warrants were valued in part because they immunized searchers,<sup>184</sup> judges had an incentive to generously issue such warrants, which would have disinclined them from aggressively gate-keeping during the application process. Additionally, regulatory (not criminal) searches were probably the most common type of governmental search that occurred during the Framers' era.<sup>185</sup> Often the dynamics in the regulatory context would have discouraged judicial sentryship, as all governmental officials involved, including judges, would have worried about delay undermining the warrant application process. Like today, judges were sensitive to such delay, which could

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<sup>181</sup> See *supra* note 105.

<sup>182</sup> *Nathanson v. United States*, 290 U.S. 41, 47 (1933).

<sup>183</sup> *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

<sup>184</sup> See Amar, *Writs Of Assistance*, *supra* note 10, at 79-80; Amar, *Fourth Amendment*, *supra* note 10, at 771-72, 774, 779; Bradley, *supra* note 29, at 833-38.

<sup>185</sup> See Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 24, at 1459 n.36 (“When the Framers thought ‘search and seizure,’ they almost certainly thought ‘customs.’”).

easily have been taken advantage of to abscond with contraband.<sup>186</sup> A prime concern was with the mobility of search targets, such as the risk of a ship sailing away before a search warrant could be successfully obtained.<sup>187</sup> Thus, regardless of elite legal doctrine, justices of the peace may have succumbed to disincentives to monitoring probable cause that they encountered as they actually engaged in search warrant practice.

### CONCLUSION

Search and seizure law in the Framers' era differed markedly from ours today. Probable cause is central to our conception of the Fourth Amendment and the protections it provides against overweening governmental searches. Perhaps the Framers shared this conception of the Fourth Amendment. Nevertheless, whether it actually played that role during the Framers' era, at least in a similar way as it does today, is certainly debatable. Undoubtedly, rhetoric existed regarding judicial sentryship of probable cause, and this rhetoric may have significantly influenced the Framers and other elites of the legal profession. But evidence suggests that probable cause sentryship was treated quite differently in the lower courts, where non-elites implemented search and seizure law on a daily basis. In the Framers' world, non-elite justices of

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<sup>186</sup> See, e.g., *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Cooper v. Boot*, 4 Douglas 339, 349, 99 Eng. Rep. 911, 916 (K.B. 1785) (“Suppose goods were actually in the house, and that they were taken out just before the warrant was executed. Can it be said that the officer in that case would be a trespasser?”); *Cooper v. Booth*, 3 Espinasse 135, 146, 170 Eng. Rep. 564, 568 (K.B. 1785) (different reported version of same case) (“[S]uppose the goods actually in the house when the information was given, and taken out of it just before the warrant was executed, is it possible to say that the excise-officer . . . can be a trespasser?”); *Bostock v. Saunders*, 3 Wilson 434, 440, 95 Eng. Rep. 1141, 1145 (de Grey, Lord Chief Justice) (opining that excise commissioners should not examine requesting party before issuing warrants because “the goods would be removed before such examination could be had”); *id.*, 2 Blackstone 912, 914-15, 96 Eng. Rep. 539, 540 (different reported version of same case) (making similar point).

<sup>187</sup> See 3 CUDDIHY DISSERTATION, *supra* note 10, at 1549.

the peace may not have consistently acted as aggressive probable cause sentries prior to issuing search warrants.

This conclusion is defensible regardless of one's views on the debate regarding the nature of the judicial function in early America. One side of the debate claims that the judicial function in early America was haphazard, undisciplined, and subject to the vagaries of "frontier justice."<sup>188</sup> Roscoe Pound believed that the "[s]cientific development of American law was retarded and even warped by the frontier spirit surviving the frontier," and that "opposition to an educated well-trained bar and to an independent, experienced, permanent judiciary" resulted from a "lack of interest in universality and fostering of local peculiarities."<sup>189</sup> I cannot imagine how members of this school could believe in a unified and applied judicial sentryship ethic with regard to probable cause. By definition, they believe in a judiciary that often lacked legal training and certainly lacked infrastructure, each of which are fundamental requisites to unified and consistently applied law.

The other side of the debate asserts that, while far from mature, the judicial function during this period sought coherence and rigor by incorporating English common law and adjusting it over time to local realities and in light of the American creed.<sup>190</sup> Given that limitations certainly did exist in legal training and legal research, it is quite likely that American justice manuals played an influential role.<sup>191</sup> For the reasons already discussed in detail above, these justice manuals easily could have undermined any inclination to engage in probable cause sentryship.

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<sup>188</sup> Conley, *supra* note 26, at 257 & n.1.

<sup>189</sup> POUND, *supra* note 87, at 118.

<sup>190</sup> See Conley, *supra* note 26, at 257 & n.4.

<sup>191</sup> See *supra* notes 86-87, 106-111 and accompanying text, and in particular note 88.

The conclusion that judges in the Framers' era may not have consistently acted as probable cause sentries has potentially significant implications for our search and seizure jurisprudence today. These implications concern both Fourth Amendment originalism and the Reasonableness-versus-Warrant Clause debate.

As for originalism, the implications differ depending upon one's views as to the current state of constitutional search and seizure law. For those like Davies who believe that judges during the Framers' era were expected to act as aggressive probable cause sentries,<sup>192</sup> the presentation here challenges the relevance of legal doctrine. By contrast, originalists who believe that the probable cause requirement should be lax may take comfort in my analysis. But I suspect it will put many originalists to the test of their faith. Abundant reasons exist to believe that, at least in practice, search warrants could be obtained in the Framers' era upon a mere, unexamined assertion that probable cause existed. If so, many originalists will have to confront the possibility that their favored analytical method may not lead to the results they prefer. Further, if we are to take the Supreme Court's interest in Fourth Amendment originalism seriously,<sup>193</sup> the historical understanding of suspicion and probable cause presented here raises fundamental issues. Would the Court really be willing to return to a world in which constitutional search and seizure jurisprudence differed so radically from the system we have erected? Returning to such a meaning of probable cause would constitute a revolutionary change in today's Warrant Clause jurisprudence, testing the mettle of the originalists.

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<sup>192</sup> See *supra* notes 58-59 and accompanying text.

<sup>193</sup> Numerous commentators have questioned the usefulness of this endeavor, as well as whether the Court is sincere about it. See, e.g., Davies, *Fictional Originalism*, *supra* note 10; Davies, *Original Fourth Amendment*, *supra* note 10; Tracey Maclin, *Let Sleeping Dogs Lie: Why The Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002); Sklansky, *supra* note 9.

My historical analysis can also be interpreted as harmonizing what many believe is current practice with our history. Numerous commentators on the manuscript to this article believe that current Warrant Clause jurisprudence is, at most, comprised of demanding rhetoric that affords little protection in reality. These commentators take the position that, while contemporary Warrant Clause jurisprudence may have occasionally mouthed a duty of aggressive judicial sentryship, in the trenches magistrates practice the moderate or lax versions of sentryship.<sup>194</sup> If these commentators are correct, my analysis shows that the state of search

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<sup>194</sup> It is certainly possible to discern tension between some of the Supreme Court's pronouncements concerning an aggressive sentryship requirement and indicators that judges might or might not be following this guidance. An example of such a pronouncement is that magistrates must exercise independent judgment and not simply accept a warrant applicant's conclusions. *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

Some indicators could be interpreted as showing that judges are embracing this role. For instance, one report concluded that "[t]he exclusionary rule affects only a relatively small percentage of arrests and searches," and quoted an Assistant Prosecutor's opinion that "[v]ery few" motions to suppress are granted. SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS 8, 16 (Nov. 1988). The report also concluded that "[a]dding together data on each of the stages of felony processing . . . we find that the cumulative loss resulting from illegal searches is in the range of 0.6% and 0.8% to 2.35% of all adult felony arrests," and recounted a survey finding that "roughly three[-]quarters of the judges and defense lawyers polled claim that 10% or less of the suppression motions filed are successful." *Id.* at 17. Another study in San Diego found a zero percent success rate for motions to suppress over a given period. Benner & Samarkos, *supra* note 180, at 264. Low success rates on motions to suppress could be consistent with judges engaging in aggressive sentryship during the warrant application process since the higher level of scrutiny early in the process could help avoid constitutional infringements.

On the other hand, the San Diego study resulted in findings consistent with a high degree of judge-shopping when police applied for search warrants, *id.* at 226-28, which raises the prospect that police favor judges who engage in lax sentryship. Another report found that magistrates in one locale spent an average of "two minutes and forty[-]eight seconds" per warrant application, with the median being "two minutes and twelve seconds." RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 26 (1985) (edition of 1984 report having same title by National Center for State Courts). Though it is possible for judges to engage in aggressive sentryship so quickly, the short time period does provide some reason for doubting that this is occurring.

One commentator voiced another, but related, criticism that even if judges today exercise aggressive sentryship the end result is that the public still lacks sufficient protections due to the excessive deference to law enforcement interests that is evident in Fourth Amendment

and seizure law today can be seen as consistent with what it was during the Framers' era: at best a rhetorical flourish that often can have little substance, with warrants commonly issuing upon something more akin to "possible cause" rather than "probable cause."

If probable cause sentryship during the Framers' era often took this weak form, this has implications for how originalism informs the Reasonableness-versus-Warrant Clause debate today. Advocates for greater Fourth Amendment protections often focus upon suspicion and probable cause,<sup>195</sup> especially as the Supreme Court expands the scope of allowable warrantless and even suspicionless searches.<sup>196</sup> In doing so, these advocates are usually favoring the Warrant Clause approach. One problem with these efforts is that they often are at odds with the Fourth Amendment's text, which is actually quite enigmatic when it comes to suspicion and probable cause.<sup>197</sup> Nowhere does the text even mention suspicion. The Reasonableness Clause contains no reference to suspicion of any kind. Instead, the concept is only implicitly addressed through

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jurisprudence. Prime examples of such deference include exceptions to the warrant requirement, such as the good faith doctrine that was recognized in *United States v. Leon*, 468 U.S. 897 (1984), the search incident to arrest doctrine as applied in *United States v. Santana*, 427 U.S. 38 (1976) (exception justified officers' seizure of heroin that spilled out of bag as result of struggle with defendant after warrantless entry into home), and the plain view doctrine as applied in *Ker v. California*, 374 U.S. 23 (1963) (exception justified officers' seizure of marijuana after warrantless entry into home to conduct warrantless arrest).

Davies makes a somewhat similar point in arguing that modern decisions have gone a long way towards emasculating the Framers' Warrant Clause. He argues, for example, that *Illinois v. Gates*, 462 U.S. 213 (1983), significantly relaxed the Framers' probable cause standard, see Davies, *Fictional Originalism*, *supra* note 10, at 379-82, and would probably take similar aim at *United States v. Leon*. See also *supra* note 59.

<sup>195</sup> E.g., Maclin, *Central Meaning*, *supra* note 24; Thomas, *Remapping Criminal Procedure*, *supra* note 24.

<sup>196</sup> E.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Co. v. United States*, 392 U.S. 72 (1970).

<sup>197</sup> See *supra* note 1.

probable cause, which is explicitly mentioned only in the Warrant Clause. But, at least from an historical perspective, probable cause appears to be a much weaker protection than Warrant Clause adherents have previously acknowledged. As this article explains, the probable cause protections that Warrant Clause adherents prefer, which are grounded in aggressive judicial sentryship, appear at odds with an historical understanding of probable cause, in which it is likely that sentryship took an aggressive form only inconsistently at best, and more likely ranged from lax to essentially non-existent.

Another problem with continuing to emphasize probable cause or suspicion is that they are anachronistic prescriptions. It is true that they are consistent with the common law, and constitutional, development of search and seizure law. The Framers lived in an extremely limited regulatory world. Emphasizing probable cause or suspicion for the most part worked well in this context. The state's limited regulatory reach continued to exist to a great degree until the New Deal. But, after the advent of the modern regulatory state, the old prescription no longer works. This approach was designed for a common law world of limited government that no longer exists. We now live in a nation with pervasive regulation, both statutory and regulatory, which permeates most aspects of our daily lives. To impose a probable cause or prior suspicion requirement in this context would emasculate many desirable regulatory regimes.<sup>198</sup> Professor Amar avers to this point when he writes that a “ ‘probable cause’ test for stolen goods cannot be a *global* test for all searches and seizures” because “often government will properly want to search for or seize such things with advance notice—inspecting restaurant food for contamination, or wires for electrical safety, or cars for emissions, or in a thousand other

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<sup>198</sup> See Arcila, *supra* note 14, at 1240-46.

cases.”<sup>199</sup> This demonstrates one of the gravest flaws of a Warrant Clause preference rule: it cannot work in a regulatory world confronting diverse civil search needs. This is a topic I will continue to explore in the article that will be “Part Two” of this series.

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<sup>199</sup> Amar, *Writs Of Assistance*, *supra* note 10, at 64; *see also* Amar, *Terry & Fourth Amendment*, *supra* note 10, at 1105 (“surely persons who pass through metal detectors at airports . . . are Fourth Amendment ‘persons’ . . . but this should not trigger an inflexible rule of warrants or probable cause, or even individualized suspicion”).