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# Defining the Constitutional Rights of Federal Parolees: Must Warrants for the Revocation of Supervised Release Comply With the Fourth Amendment's "Oath or Affirmation" Requirement?

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*Defining the Constitutional Rights of Federal Parolees: Must Warrants for the Revocation of Supervised Release Comply With the Fourth Amendment's "Oath or Affirmation" Requirement?*

by

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Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
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Professor Mark Totten  
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**DEFINING THE CONSTITUTIONAL RIGHTS OF FEDERAL PAROLEES: MUST WARRANTS FOR THE REVOCATION OF SUPERVISED RELEASE COMPLY WITH THE FOURTH AMENDMENT'S "OATH OR AFFIRMATION" REQUIREMENT?**

*John Fillmore*

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## INTRODUCTION

Parolees and those on supervised release from prison do not retain all of the constitutional rights possessed by free citizens.<sup>1</sup> However, it is unclear precisely what portion of these rights they retain. Most cases dealing with the topic have dealt with the privacy interests of probationers and parolees. These cases have been analyzed along traditional 4<sup>th</sup> Amendment lines.<sup>2</sup>

Under 18 U.S.C. § 3606,<sup>3</sup> unless a parole officer makes a warrantless arrest of a potential parole violator himself, he must secure a warrant to have law enforcement officers make the arrest. The warrant, issued by the supervising court, must be based on probable cause.<sup>4</sup> Another statute requires that a warrant or summons be issued during the time of supervised release in order to retain jurisdiction over parolees for any violations that may have occurred during their period of parole.<sup>5</sup> This comment will demonstrate why such warrants should be required to comply with the Fourth Amendment's requirement that all judicial arrest warrants be issued for probable cause and be based on sworn or affirmed statements.<sup>6</sup>

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<sup>1</sup> *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). For the purpose of this paper, I will use the term “parolee” to designate former federal inmates who have been granted supervised release. In practical terms, there are ever-fewer federal “paroles” – the old system of federal parole has been gradually subsumed by the system of supervised release. *See infra* at Part I.D. As a legal matter, the distinction has made no difference to reviewing courts. *See, e.g.*, *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (“Our cases have not distinguished between parolees, probationers, [or] supervised releasees for Fourth Amendment purposes”); *United States v. Garcia-Avalino*, 444 F.3d 444, 446 n.5 (5th Cir. 2006).

<sup>2</sup> *See infra* notes 47 - 49 and accompanying text.

<sup>3</sup> Hereinafter “Section 3606.”

<sup>4</sup> *Id.*

<sup>5</sup> 18 U.S.C. § 3583(i). Hereinafter “Section 3583.”

<sup>6</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. (Emphasis added).

Federal circuit courts have come to divergent conclusions as to whether such warrants must comply with the oath or affirmation requirement. The different conclusions of the various courts are the result of different analytical starting points. The Ninth Circuit determined that a Fourth Amendment arrest warrant was required. The Court then analyzed whether the petitioner's status as a parolee abrogated traditional Fourth Amendment warrant requirements. The First and Fifth Circuits began their analyses with the proposition that parolees are afforded fewer rights. In that context, each court inquired whether arrest warrants for parolees must comply with the procedural demands of the Fourth Amendment.

The starting point is critical because of the shifting status of the rights of parolees historically. Constitutional doctrine establishes that parolees do not have the "full panoply" of constitutional rights and are only afforded conditional liberty dependent on their observance of certain specified conditions.<sup>7</sup> Under the old system of federal parole, administrative arrest warrants, dubbed "warden's warrants," were all that were required to seize a potential parole violator.<sup>8</sup> The issuance of such warrants is only subject to a general "reasonableness" review from courts.<sup>9</sup>

Although mere reasonableness is the constitutional minimum requirement for the issuance of parolee arrest warrants, the requirement of a judicial arrest warrant has changed the character of parolee warrants. General propositions regarding the nature of parolee rights should not change the clear nature of what is required when a warrant must be issued. The purpose of this comment is not to advocate for greater rights on behalf of parolees. The purpose is to expose and explain faulty legal reasoning that clouds the status of the oath or affirmation

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<sup>7</sup> See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *United States v. Sampson*, 547 U.S. 843, 850 (2006).

<sup>8</sup> See *infra* Section I.C.

<sup>9</sup> See *infra* Sections I.**Error! Reference source not found.**, I.C.

requirement and the rights of parolees. Strained constitutional and statutory interpretations serve only to muddy the waters of justice. These interpretations further complicate the issue of the balance of power between parolees and the government.

## I. THE HISTORY OF OATHS AND AMERICAN SYSTEMS OF SUPERVISED RELEASE

In order to properly frame the constitutional issue, it is important to understand the historical backdrop of the oath or affirmation clause, the changing conceptions of parolee rights in America, and of the evolving statutory regime for regulating parolees. The statutory federal parole scheme has been changed to require arrest warrants issued by judges that must be based on probable cause.<sup>10</sup> These are requirements incorporated from the Fourth Amendment and given to parolees.

### A. History of Oaths and Affirmations in American law

Scholars have interpreted the oath or affirmation requirement of the Fourth Amendment to the United States Constitution as little more than a procedural hurdle to obtaining a warrant.<sup>11</sup> But the concept of requiring an oath in American law did not originate as simply a way to define proper procedure. The Founding-era leaders included the requirement because the act of swearing an oath is a check on the veracity of declarants and ensures that a preliminary investigation properly equipped investigators to attest to the truth under threat of penalty.<sup>12</sup> The

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<sup>10</sup> See *infra* Section III.A.

<sup>11</sup> See David S. Muraskin, *I Swear: The History and Implications of the Fourth Amendment's "Oath or affirmation" Requirement*, EXPRESSO, 2010, at 2, 6-10. Available at: [http://works.bepress.com/david\\_muraskin/1](http://works.bepress.com/david_muraskin/1) (noting that even America's foremost textualist Constitutional scholars give no "extraneous" importance to the clause).

<sup>12</sup> *Id.* at 1. Muraskin states:

It was viewed (by the Founders) as inducing investigators to take special care during their pre-search or -seizure inquiries, leading them to obtain factual confirmation and refuse to rely on insinuations, so that they could submit a warrant application to which God himself could attest to its accuracy. Because the judiciary could be relied upon to consistently administer the oath requirement, the knowledge that the oath was part of the warrant-seeking

concept of the “oath” originated in Anglo-Saxon law as an alternative to the “ordeals” of the Middle Ages.<sup>13</sup> A sworn statement was considered comparable proof of truth as surviving a tortuous ordeal.<sup>14</sup> The concept imbedded itself slowly within the common law as an independent check on the reliability of statements.<sup>15</sup>

Today, federal rules continue the long-standing requirement that witnesses must swear or affirm to tell the truth as a prerequisite for testifying at a trial.<sup>16</sup> The rule explains that the oath or affirmation requirement is designed to impress upon the witness’ conscience the duty to tell the truth.<sup>17</sup> “The purpose of the Rule is to promote the cause of truth, both by impressing upon the mind of the witness a duty to speak only the truth and by paving the way for punishment by way of perjury prosecution for deliberately false testimony.”<sup>18</sup> “What is required . . . is not merely a recognition on the part of the witness that there exists a legal requirement to be truthful, but an agreement or statement or commitment on the part of the witness personally to be truthful.”<sup>19</sup> Federal courts have long recognized the utility of an oath in the context of testimony. “An oath or affirmation ‘is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words.’”<sup>20</sup>

Despite scholarly indifference regarding the nature of the Fourth Amendment’s oath or affirmation requirement, American courts seem to recognize the obligation as a personal right

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process would overshadow the actions of repeat players, and thus it would lead them to develop internal regulations to satisfy the oath’s demands. *Id.*

<sup>13</sup> *Id.* at 2; *See generally* JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* (2008) (describing the “ordeals” of the medieval legal system).

<sup>14</sup> Muraskin, *supra* note 11, at 2.

<sup>15</sup> For a thorough examination of the history of oaths and their importance to the Founding era, see generally Muraskin, *supra* note 11.

<sup>16</sup> FED. R. EVID. 603.

<sup>17</sup> *Id.*

<sup>18</sup> 3 Federal Evidence § 6:7 (3d ed.)

<sup>19</sup> *Id.* at § 6:8.

<sup>20</sup> *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir.2002) (quoting *United States v. Turner*, 558 F.2d 46, 50 (2d Cir. 1977)).

held by individual citizens. For example, in the case of *Weeks v. United States*, the Second Circuit Court of Appeals stated: “[h]is right is to be protected against the issuance of a warrant for his arrest, except ‘upon probable cause supported by oath or affirmation,’ and naming the person against whom it is to issue.”<sup>21</sup> However, the oath or affirmation required at the time of a warrant application is not wholly a procedural right guaranteed to the subject of the warrant. The oath itself is properly viewed as an ever-present, independent check on governmental power that exists outside the individual to be searched or seized.<sup>22</sup> The requirement means that investigating officers must be sure of their allegations. They face the potential of perjury charges if they fail to diligently document and corroborate their assertions. Because of this, the requirement serves the dual purpose of ensuring procedural due process for individuals and investigatory diligence by the government.<sup>23</sup>

## B. Conceptions of Parolee Rights

A system of supervised release “presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements . . . . To a greater or lesser degree, [parolees] do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special restrictions.”<sup>24</sup> In prior times, the dominant theory was that parolees did not retain the rights of other free citizens because their conditional freedom was a “privilege” or “act of grace” on the part of the government.<sup>25</sup> Some cases went so far as to directly equate the rights of a parolee to those of an

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<sup>21</sup> 216 F. 292, 302 (2d Cir. 1914).

<sup>22</sup> See Muraskin, *supra* note 11, at 1-2.

<sup>23</sup> See Muraskin, *supra* note 11, at 1-2, 6-10.

<sup>24</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987).

<sup>25</sup> FED. R. CRIM. P. 32.1 Advisory Committee Notes, 1979 Amendment (refuting the rights/privileges distinction abolished by *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972)). See *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (stating that “probation or suspension of sentence comes as an act of grace to one convicted of a crime”). See also

escaped convict.<sup>26</sup> Older federal statutes provided that judicial warrants were unnecessary to obtain the help of law enforcement to arrest a suspected parole violator.<sup>27</sup> All that was required was an administrative “warden’s warrant.”<sup>28</sup> Such administrative warrants have not been held to the normal constitutional standards.<sup>29</sup>

This conception of federal parolee rights changed forever in 1972. The modern view is that a parolee’s interest in their personal liberty is very different from that of a regular prisoner.<sup>30</sup> “The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions.”<sup>31</sup> The Supreme Court in *Morrissey v. Brewer* marked a break from older notions of the rights of parolees.<sup>32</sup> The Court identified that:

. . . the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee’s liberty is a ‘right’ or a ‘privilege.’ By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.<sup>33</sup>

Ever since the *Morrissey* decision, the Federal Rules of Criminal Procedure have continually been amended to identify and protect an ever-increasing array of procedural rights

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William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV.L.REV. 1439, 1440-42 (1968) (outlining the fallacy of the rights/privileges distinction for parolees).

<sup>26</sup> *Anderson v. Corall*, 263 U.S. 193, 196 (1923); *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir. 1938). These cases were cited by the First Circuit to support their contention that warrants for the retaking of federal parolees need not comply with the oath or affirmation requirement of the 4<sup>th</sup> Amendment. *See infra* notes 121-122 and accompanying text.

<sup>27</sup> *See United States v. Collazo-Castro*, 660 F.3d 516, 521-22 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012); *United States v. Garcia-Avalino*, 444 F.3d 444, 445-46 (5th Cir. 2006).

<sup>28</sup> *See Collazo-Castro*, 660 F.3d at 521-22; *Garcia-Avalino*, 444 F.3d at 445-46.

<sup>29</sup> *See Griffin v. Wisconsin*, 483 U.S. 868, 877-78 (1987) (identifying that administrative search warrants as more constitutionally lenient than judicial search warrants).

<sup>30</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; FED. R. CRIM. P. 32.1 Advisory Committee Notes, 1979 Amendment (outlining how *Morrissey* represented a break from the past in terms of conceptualizing the rights of parolees).

<sup>33</sup> *Morrissey*, 408 U.S. at 481.

retained by parolees before their liberty can be revoked.<sup>34</sup> For example, federal parolees are now afforded the right to a preliminary hearing<sup>35</sup> where notice is given about the potential violation.<sup>36</sup> Parolees are informed of their right to be represented by counsel at these proceedings.<sup>37</sup> Final revocation hearings are now required to be held within “a reasonable time” of the preliminary hearing.<sup>38</sup> At the revocation, parolees are entitled expansive rights to confront all evidence against them.<sup>39</sup>

Federal rules outline that parolees are entitled to have counsel appointed when charged with a violation of their release.<sup>40</sup> Access to prior sworn statements made by witnesses against the parolee is provided for.<sup>41</sup> Parolees are provided allocution rights at revocation hearings consistent with regular criminal defendant’s right to be heard at sentencing.<sup>42</sup> It is evident that constitutional due process rights cannot be denied parolees on the theory that parolee is “an act of grace” by the government.<sup>43</sup>

Despite these guarantees, the constitutional rights of federal parolees are not equally as expansive as regular citizens. This notion was rejected by the leading Supreme Court case on the Fourth Amendment privacy expectations of parolees in *Sampson v. California*.<sup>44</sup> The Court stated unequivocally that “parolees are on the ‘continuum’ of state-imposed punishments” and

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<sup>34</sup> See generally FED. R. CRIM. P. 32.1 Committee notes for every amendment since 1979 (continually providing for enhanced procedural rights for parolees during revocation proceedings). The notes following the 1979 explicitly reject the notion that any freedom granted to parolees is a “privilege” rather than a “right.”

<sup>35</sup> *Id.* at Advisory Committee Notes, 1979 Amendment.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.* at Advisory Committee Notes, 1993 Amendments.

<sup>42</sup> *Id.* at Advisory Committee Notes, 2005 Amendments.

<sup>43</sup> *Id.* at Advisory Committee Notes, 1979 Amendments (refuting dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935)).

<sup>44</sup> 547 U.S. 843 (2006).

that “parolees have fewer expectation of privacy than probationers because parole is more akin to imprisonment than probation . . . .”<sup>45</sup> In ruling that suspicion-less searches of parolees who agreed to submit to suspicion-less searches as a condition of parole were reasonable, the Court noted that the state “has an ‘overwhelming interest’ in supervising parolees” because they “are more likely to commit future criminal offenses.”<sup>46</sup>

The *Sampson* holding is significant in several respects. First, the Court used a traditional Fourth Amendment analysis to examine the issue. They did not resort to finding that acquiescence to a parole condition by a parolee constituted automatic consent to any search of the parolee.<sup>47</sup> Nor did the Court cast aside Fourth Amendment protections simply because the petitioner was a parolee. Second, the court placed a heavy emphasis upon the fact that the parole condition of waiving privacy rights to a search was “clearly expressed” to the parolee and that he was “unambiguously aware” of it.<sup>48</sup> The Court reasoned that the lessened privacy expectations of parolees coupled with the high interest in public safety held by law enforcement justified such a search as reasonable.<sup>49</sup>

While the probable cause and warrant requirements for searches of parolees may be waived, there is no precedent that establishes parolees may waive their right to require probable cause before they are arrested.<sup>50</sup> In fact, Federal Rules require a preliminary hearing wherein it is the government’s burden to establish that probable cause existed for the arrest.<sup>51</sup> Even in the

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<sup>45</sup> *Id.* at 850.

<sup>46</sup> *Id.* at 853 (internal quotation omitted).

<sup>47</sup> *Id.* at 852 n.3 (arguing that the state court had not yet passed on the issue).

<sup>48</sup> *Id.* at 852.

<sup>49</sup> *Id.*

<sup>50</sup> *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004) (“[T]he general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause.”)

<sup>51</sup> FED. R. CRIM. P. 32.1(b)(1)(a).

absence of the Federal Rule, the holding of *Morrissey* required such a hearing in the name of due process to ensure probable cause to arrest and hold the parolee existed.<sup>52</sup>

### C. Administrative warrants

Administrative warrants have a distinct place within Constitutional law. “. . . [I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet ‘reasonable legislative or administrative standards.’”<sup>53</sup> The framework for reviewing such warrants is not to examine them for probable cause.<sup>54</sup> “Probable cause ‘in the criminal law sense’ is not required for issuance of an administrative warrant [], for in the administrative context probable cause ‘refer[s] not to a quantum of evidence, but merely to a requirement of reasonableness.’”<sup>55</sup>

The Ninth Circuit has recognized the Constitutional difference between administrative arrest warrants for parolees and modern federally mandated judicial arrest warrants. In *Sherman v. United States Parole Commission*, the Court dealt with the case of a serial parole absconder who was recaptured via a warrant issued under the old federal system of parole.<sup>56</sup> Even though the defendant in the case was arrested long after the watershed changes to the federal parole system, the date of his original crime subjected him to the old administrative warrant

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<sup>52</sup> *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972).

<sup>53</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)). The Court in *Griffin* cites the following additional cases as examples where administrative warrants have been upheld as constitutional, but not subject to regular constitutional demands: *New York v. Burger*, 482 U.S. 691, 702-703 (1987); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972).

<sup>54</sup> *Griffin*, 483 U.S. at 877; *United States v. Lucas*, 499 F.3d 769, 777 (8th Cir. 2007).

<sup>55</sup> *Griffin*, 483 U.S. at 877; *Lucas*, 499 F.3d at 777 (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320 (1978)).

<sup>56</sup> 502 F.3d 869, 870-71 (9th Cir. 2007).

requirements.<sup>57</sup> He challenged the warrant because it was not based on sworn facts as required by the Fourth Amendment.<sup>58</sup>

The Court recognized that courts “ordinarily require a search or seizure to be ‘accomplished pursuant to a judicial warrant issued upon probable cause.’”<sup>59</sup> However, because “searches and seizures of parolees are generally not subject to the requirements of the Warrant Clause,” the Court concluded that the otherwise reasonable administrative warrant issued was constitutionally sufficient.<sup>60</sup> “However,” the Court continued, “this doesn’t apply to *judicial warrants* – even the ninth circuit has recognized that it is that distinction that marks a demarcation.”<sup>61</sup> The Court looked to the modern federal system of parole as an example of where a requirement for judicial warrants engrafted traditional Fourth Amendment warrant requirements onto revocation warrants.<sup>62</sup> The distinction the Court drew was that they were “given a statute that requires ‘an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment.’”<sup>63</sup>

#### D. Federal Supervised Release After the Sentencing Reform Act

Sections 3606 and 3583 were enacted in 1984 as part of the Sentencing Reform Act that transformed the federal parole system into a system of supervised release system.<sup>64</sup> “Under the Sentencing Reform Act’s provisions for supervised release, the sentencing court, rather than the Parole Commission, would oversee the defendant’s postconfinement monitoring.”<sup>65</sup> Courts do

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 870.

<sup>59</sup> *Id.* at 883 (quoting *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602, 619 (1989)).

<sup>60</sup> *Id.* at 884.

<sup>61</sup> *Id.* at 885 (citing *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004)) (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (citing *Abel v. United States*, 362 U.S. 217, 232 (1960)).

<sup>64</sup> *United States v. Collazo-Castro*, 660 F.3d 516, 519 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012).

<sup>65</sup> *Gozlon-Peretz v. United States*, 498 U.S. 395, 400–01 (1991).

not distinguish between the constitutional rights of parolees and those who are in a form of post-incarceration supervised release.<sup>66</sup> However, the modern form of supervised release is significantly different from the old system of federal parole in one respect: “Supervised release is a form of government supervision after a term of imprisonment. Unlike parole, which has the effect of reducing the stated term of imprisonment, supervised release is a term of supervision in addition to, and following, a term of imprisonment imposed by a court.”<sup>67</sup> The archaic logic that parolees retain no rights because their freedom comes from an “act of grace” by the sovereign is meaningless under the modern federal system.<sup>68</sup> Each federal inmate is required to serve a term of supervised release after a period of incarceration.

Section 3606 provides that a parole officer may make a warrantless arrest of his parolee so long as probable cause exists to believe that he has violated a term of his release. If the parole officer does not make the arrest himself, “[t]he court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee . . . .”<sup>69</sup> Any parole officer or United States marshal may then execute the warrant.<sup>70</sup> Section 3583 provides that people who complete a term of supervised release may nonetheless be subject to revocation proceedings if: (1) they are arrested per a “warrant or summons,” (2) the warrant or summons is

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<sup>66</sup> See, e.g., *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (“Our cases have not distinguished between parolees, probationers, [or] supervised releasees for Fourth Amendment purposes”); *United States v. Garcia-Avalino*, 444 F.3d 444, 446 n.5 (5th Cir. 2006).

<sup>67</sup> Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 269-70 (1996).

<sup>68</sup> See *supra* note 25 and accompanying text.

<sup>69</sup> Section 3606.

<sup>70</sup> *Id.*

issued before expiration of a term of supervised release, and (3) on the basis of an allegation of a violation of supervised release.<sup>71</sup>

## II. FEDERAL APPELLATE CASES – DIVERGENT APPROACHES

Are the warrants authorized by the Sentencing Reform Act truly judicial warrants within the purview of the Fourth Amendment? After all, the Supreme Court has noted that administrative warrants “may but do not necessarily have to be issued by courts.”<sup>72</sup> Finding that such warrants are actually “administrative warrants dressed as judicial warrants” would be a plausible excuse for finding that such warrants need not comply with the Fourth Amendment. The federal parole system has historically been an administrative system.<sup>73</sup> As such, it historically operated in the shadow of, but not within the direct supervisory control of, the judiciary.<sup>74</sup>

However, the judiciary plays a much more active role in the supervision of parolees under the modern federal system.<sup>75</sup> Also, unlike other administrative warrant systems, the judiciary alone may issue the warrants.<sup>76</sup> There is no remainder left to an administrative agency. Tellingly, another federal circuit court analyzed these warrants as constitutionally prescribed judicial warrants years before the issue of the oath or affirmation requirement was raised.

The United States Court of Appeals for the Seventh Circuit was the first federal circuit court to discuss whether the modern federal system of supervised release required warrants that

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<sup>71</sup> Section 3583.

<sup>72</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987).

<sup>73</sup> *See supra* Sections **Error! Reference source not found.**B-I.C.

<sup>74</sup> *See supra* Part **Error! Reference source not found.**

<sup>75</sup> *See Gozlon-Peretz v. United States*, 498 U.S. 395, 400–01 (1991) (“Under the Sentencing Reform Act’s provisions for supervised release, the sentencing court, rather than the Parole Commission, would oversee the defendant’s postconfinement monitoring”).

<sup>76</sup> *See* Section 3606. No federal circuit court has explicitly relied on this rationale in finding that such warrants need not comply with the oath or affirmation clause of the Fourth Amendment.

were subject to Fourth Amendment requirements. In *United States v. Hondras*, the question presented was whether the arrest warrant issued for the parolee was sufficient when it was issued upon the order of a judge, but actually signed by one of his clerks.<sup>77</sup> The Court stated: “The statute makes no mention of who must sign the warrant. We first note that no constitutional concern exists here. The Fourth Amendment provides that [n]o warrant shall issue, but upon probable cause, supported by oath or affirmation.”<sup>78</sup> As a part of their analysis, the Court looked to the Federal Rules of Criminal Procedure rules 4 and 9 – the same rules that outline the technical requirements for all other judicially issued arrest warrants – for support.<sup>79</sup>

The *Hondras* decision is likely the first federal appellate decision to conceptualize the technical requirements for the new kind of arrest warrants required by the system of supervised release. The decision implicitly affirmed that the probable cause required by Section 3606 was the probable cause standard recognized for regular judicial warrants. The Court certainly did not regard the warrants authorized by Section 3606 as administrative warrants whose “probable cause” standard has been transformed by the Supreme Court into merely a requirement of reasonableness.<sup>80</sup> This reasoning was never challenged directly by either of the circuit courts who held that these warrants need not comply with the oath or affirmation requirement.<sup>81</sup>

#### A. The Ninth Circuit: *United States v. Vargas-Amaya*

The one circuit that has recognized that arrest warrants for parolees under Section 3606 include a sworn facts requirement is the United States Court of Appeals for the Ninth Circuit. In

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<sup>77</sup> 296 F.3d 601, 602-03 (7th Cir. 2002).

<sup>78</sup> *Id.* at 602 (internal quotation omitted).

<sup>79</sup> *Id.* at 602-03.

<sup>80</sup> See *supra* Subsections I.**Error! Reference source not found.**-I.C.

<sup>81</sup> See *infra* Subsections II.B-C.

*United States v. Vargas–Amaya*,<sup>82</sup> the court addressed the requirements of a warrant by applying Section 3583, the jurisdictional statute.<sup>83</sup> The Ninth Circuit was the first federal circuit to address the issue.

Instead of relying upon a dictionary definition of the term “warrant,” the Ninth Circuit initially acknowledged that Congress intended the word “warrant” to be a term of art.<sup>84</sup> As such, “unless Congress affirmatively indicates otherwise, we presume Congress intended to incorporate the common definition of that term.”<sup>85</sup> The court then detailed how the oath or affirmation clause of the Fourth Amendment had been used by courts since the beginning of the republic to invalidate warrants that had not been issued properly.<sup>86</sup> The court identified that other tribunals have characterized the protection against having a warrant issued against you but for probable cause established by sworn facts as a “personal right.”<sup>87</sup>

The court noted that “[t]he government does not cite to any other statute where Congress expressly dispensed with the probable cause or oath requirements with regard to the issuance of

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<sup>82</sup> 389 F.3d 901 (9th Cir. 2004).

<sup>83</sup> In both *Vargas-Amaya* and *Collazo-Castro*, the petitioner was challenging the jurisdiction of the court to hold a revocation hearing in the first place because the warrant issued for the hearing was defective. The fact that a warrant is needed for such a situation is provided for in § 3606. As such, the question when analyzing the case under either statute is the same: must the warrant required comply with the oath or affirmation requirement?

<sup>84</sup> *Vargas-Amaya*, 389 F.3d at 904:

“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them” (citing *Carter v. United States*, 530 U.S. 255, 264 (2000)).  
*Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (citing *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806) (“warrant of commitment was illegal, for want of stating some good cause certain, supported by oath”).

<sup>87</sup> *Id.* (citing *United States v. Pickard*, 207 F.2d 472, 475 (9th Cir.1953)).

warrants.”<sup>88</sup> The court then analyzed why, by comparing Section 3583 with Section 3606, Congress intended for traditional Fourth Amendment protections to apply to judicial warrants for the arrest of parolees.<sup>89</sup> They noted that Section 3606, which governs the arrest of current parolees, requires probable cause for an arrest warrant to be issued.<sup>90</sup> They asserted that it would be “counter-intuitive” to thus absolve the government of a reciprocal probable cause standard for those who have actually completed their terms of supervised release and must be arrested under Section 3583.<sup>91</sup> The Court then tied the two together:

The only reasonable inference is that Congress was aware of the Fourth Amendment and incorporated its requirement that a warrant be based “upon probable cause” in both statutes. By extension, if Congress intended to incorporate the “probable cause” portion of the Warrant Clause in each statute, it must have also intended to incorporate the “Oath or affirmation” portion of the Clause.<sup>92</sup>

The court then identified the truism that no statute may purport to undercut the Fourth Amendment’s requirements that warrants must be based on probable cause and include an oath or affirmation.<sup>93</sup> The Ninth Circuit used this maxim to transition to the government’s argument that the petitioner, because he was a parolee, was subject to “lesser or no Fourth Amendment protections.”<sup>94</sup> Even though it is clear that parolees retain *some* Fourth Amendment protections, the court conceded that the available case law did not address “whether a warrant for violation of the terms of release must comply with the Warrant Clause.”<sup>95</sup>

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<sup>88</sup> *Id.* It is evident that the government did not even attempt to argue that the warrants contemplated by Sections 3583 and § 3606 were administrative warrants.

<sup>89</sup> *Id.* at 904-05 n.2.

<sup>90</sup> *Id.* at 905 n.2.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* This assertion would later become a point of contention between the Ninth Circuit and the First and Fifth Circuits that analyzed the issue.

<sup>93</sup> *Id.* at 906. *But see* *Sherman v. U.S. Parole Comm.*, 502 F.3d 869, 884-85 (9th Cir. 2007) (coming to the opposite conclusion for statutorily defined “administrative warrants” as opposed to “judicial warrants”).

<sup>94</sup> *Vargas-Amaya*, 389 F.3d at 906.

<sup>95</sup> *Id.* at 907.

This is where the Ninth Circuit distinguished the “reasonableness” and “probable cause” portions of the Fourth Amendment with the oath or affirmation requirement. The Ninth Circuit stated that “while certain searches may be permissible when there is less than probable cause, under the Fourth Amendment, no warrant is valid unless there is probable cause supported by sworn facts.”<sup>96</sup> Thus, the oath or affirmation guarantee is fundamentally different from the “malleable restriction on unreasonable searches and seizures” that forms the vast majority of case law regarding the Fourth Amendment protections of parolees.<sup>97</sup>

#### B. The Fifth Circuit: *United States v. Garcia-Avalino*

The Fifth Circuit addressed this issue in *United States v. Garcia-Avalino*.<sup>98</sup> The petitioner was arrested in March of 2003 for violating a term of his supervised release by pleading guilty to a felony hit-and-run offense.<sup>99</sup> Seven months later, his probation officer submitted an unsworn application for the revocation of his supervised release.<sup>100</sup> The court issued the arrest warrant, and then subsequently re-issued the warrant two months later when the probation officer submitted an amended application that included a “sworn statement” section.<sup>101</sup> The petitioner challenged his arrest based on the holding in *Vargas-Amaya*.<sup>102</sup>

The Fifth Circuit found that there was nothing inherent within the term “warrant” that required sworn facts:

Explicit oath or affirmation requirements, however, are not proof that there is an implicit sworn-facts requirement embedded in the very meaning of the word ‘warrant’ as a legal term. If anything, such examples suggest the converse, i.e. that a valid warrant need

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 444 F.3d 444 (5th Cir. 2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 444-45.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 445.

not be supported by sworn facts unless a specific statutory provision requires such support.”<sup>103</sup>

The court then cited two statutes that purportedly authorize warrants without the need for sworn facts: 18 U.S.C. § 3148(b) and the predecessor statute to the modern Section 3606.<sup>104</sup> The Fifth circuit noted that the predecessor statute to the modern Section 3606 allowed for a “warden’s warrant.”<sup>105</sup> As such, these were administrative warrants, not judicial warrants. Nevertheless, the Court utilized a 1937 case analyzing the administrative warrant to support the conclusion that no sworn facts requirement existed for the modern judicial arrest warrants.<sup>106</sup> The court used the case to support the blanket proposition that such warrants do not need to comply with Fourth Amendment requirements.<sup>107</sup>

Finally, the court listed an array of holdings that demonstrated the reduced constitutional rights of parolees and those on supervised release.<sup>108</sup> This smattering of cases (most of which dealing with Sixth Amendment rights) led the court to their conclusion: “Given the relaxed constitutional norms that apply in revocation hearings, a warrant for the arrest of a supervised releasee need not comply with the Oath or affirmation clause of the Fourth Amendment.”<sup>109</sup>

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<sup>103</sup> *Id.* But see U.S. CONST. amend. IV.

<sup>104</sup> *Garcia-Avalino*, 444 F.3d at 445-46. 18 U.S.C. § 3148(b) states, in pertinent part: “The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release . . . .” For a detailed explanation as to why these statutes are unpersuasive for the cited assertion, see *infra* notes 133-141 and accompanying text.

<sup>105</sup> *Id.* at 446 n.4.

<sup>106</sup> *Id.* at 446 (citing *Jarman v. United States*, 92 F.2d 309, 310-311 (4th Cir. 1937)).

<sup>107</sup> *Id.* (“The *Jarman* court, for example, held that warrants for the retaking of parolees are not true arrest warrants that must comport with the Fourth Amendment”).

<sup>108</sup> *Id.* at 446-47.

<sup>109</sup> *Id.* at 447.

C. The First Circuit: *United States v. Collazo-Castro*

The First Circuit recently tackled the issue in *United States v. Collazo-Castro*.<sup>110</sup> Like in *Vargas-Amaya*, the petitioner brought a claim challenging the constitutionality of his arrest warrant through Section 3583.<sup>111</sup> The First Circuit began their analysis by asserting that they would look at the plain meaning of the term “warrant” to determine if the warrant defined under Section 3606 must comply with the oath or affirmation requirement of the Fourth Amendment.<sup>112</sup>

The court opined:

Under settled principles of statutory construction, we first look to whether the statutory text is plain and unambiguous . . . . In conducting this analysis, we begin with the ordinary meaning of the terms as of the time when the statutory provision was enacted. To determine ordinary meaning, we may consult dictionary definitions, interpretations given to the same terms by judicial construction, and the statutory context in which the words are used.<sup>113</sup>

The court found that “[t]he standard dictionary definition of the term ‘warrant’ does not include a requirement that a warrant be supported by an oath or affirmation.”<sup>114</sup> They asserted that the Oxford English Dictionary definition for the term, rather than the Fourth Amendment, “likely served as the definitional backdrop” for Congress at the time they drafted the statute.<sup>115</sup>

The government argued that the term “warrant” meant something different for those who were under some form of “supervision of the court.”<sup>116</sup> In accepting this proposition, the First Circuit acknowledged the same two statutes that the Fifth Circuit identified in *Garcia*–

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<sup>110</sup> 660 F.3d 516 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012).

<sup>111</sup> *Id.* at 516-17.

<sup>112</sup> *Id.* at 519-20.

<sup>113</sup> *Id.* at 520 (internal citations omitted).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* The First Circuit did not cite any authority for this assertion.

<sup>116</sup> *Id.*

*Avalino*.<sup>117</sup> The court noted that while federal rules outline that a sworn facts statement is necessary to issue an arrest warrant, Section 3583 provides for an alternative initiation mechanism to revoke pretrial release – a summons.<sup>118</sup> A summons has never been held to require a sworn-facts statement to be issued.<sup>119</sup>

Additionally, the First Circuit cited to the predecessor statute to the modern Section 3606 as support, even though they noted that the revoked statute authorized administrative warrants instead of judicial ones.<sup>120</sup> The court cited older cases for the propositions that “the violation of a condition of parole as being, in legal effect, on the same plane as an escape from the custody of the warden”<sup>121</sup> and that the rights of a potential parole violator “were analogous to those of an escaped convict.”<sup>122</sup> The court continued, remarking that the “requirements contained in the Federal Rules of Criminal Procedure that impose procedures for taking someone into custody do not necessarily apply to people who . . . are under court supervision as part of a criminal sentence” because they are already in “constructive custody.”<sup>123</sup> Drawing on these conclusions, the First Circuit presumed that Congress *knew* that their use of the term “warrant” in the statute

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<sup>117</sup> *Id.* at 520-522. For an explanation of why such an argument is flawed, see *infra* notes 133-141 and accompanying text.

<sup>118</sup> *Id.* at 520-21.

<sup>119</sup> *Id.* at 521. This is a fair point. However, a summons is not a warrant. The Court failed to recognize the distinct differences between the intrusions upon liberty interests created by a summons and those created by an arrest warrant. A summons is not operative unless it is properly served. Also, a summons merely requires the subject to appear in court at a specified time or face the issuance of a bench warrant. On the other hand, an arrest warrant allows authorizes authorities to immediately detain the subject of the warrant and restrict their liberty. It is these distinctions that may have prompted the concern of the Founding era leaders to craft the Fourth Amendment the way that they did. In either case, the Constitutional demands of a warrant are inapposite when discussing judicial summons. As such, the persuasive power of twinning the technical requirements of the two is *de minimus*.

<sup>120</sup> *Id.* at 521-22.

<sup>121</sup> *Id.* at 521 (quoting *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir. 1938)).

<sup>122</sup> *Id.* (quoting *Anderson v. Corall*, 263 U.S. 193, 196 (1923)).

<sup>123</sup> *Id.* (quoting *United States v. Presley*, 487 F.3d 1346, 1349 (2007)). A discussion of why the authority the First Circuit relies upon is unpersuasive is contained *infra* at notes 166-171 and accompanying text.

did not import by reference the Fourth Amendment's requirements, and that "its failure to engraft such a requirement onto section 3606 speaks volumes."<sup>124</sup>

After coming to the conclusion that such a warrant was not a "Fourth Amendment" warrant, the court quickly disposed of the petitioner's additional claim: that the Fourth Amendment itself rendered whatever warrant was issued invalid. After noting that parolees are not subject to the "full panoply" of rights, the First Circuit found this right was not one of the remainder retained by those on supervised release.<sup>125</sup> The court figured that such a sworn-facts requirement shouldn't be necessary "[b]ecause a probation officer's credibility is typically known by the district court, and because she is an officer of the court, an oath or affirmation is not required either to ensure credibility or to impress the officer with the consequences of failing to tell the truth."<sup>126</sup>

### III. WHY ARREST WARRANTS FOR FEDERAL PAROLEES MUST COMPLY WITH THE FOURTH AMENDMENT'S OATH OR AFFIRMATION CLAUSE

Until the Fifth Circuit's decision in *Garcia-Avalino*, every federal circuit court that analyzed federal parolee arrest warrants required after the Sentencing Reform Act found traditional Fourth Amendment requirements were applicable.<sup>127</sup> However, the Fifth and First United States Federal Circuit Courts of Appeal have found that the general nature of the rights of parolees abrogates the constitutional oath or affirmation guarantee even when a warrant is required. The legal reasoning of the Fifth and First Circuits is circuitous and flawed. The Ninth Circuit's approach is superior.

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<sup>124</sup> *Id.* at 522.

<sup>125</sup> *Id.* at 523.

<sup>126</sup> *Id.*

<sup>127</sup> *See supra* Sections II-II.A.

#### A. Warrants for Parolees are Subject to Fourth Amendment Requirements

The *Vargas-Amaya* decision, being handed down first and interpreted by the other circuit courts, laid out an analytical framework for determining whether warrants issued under the Sentencing Reform Act must comply with the Fourth Amendment's oath or affirmation clause.<sup>128</sup> The court ruled that they did, stating:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.<sup>129</sup>

Implicit in the court's reasoning is that the analysis begins with a determination of what kind of warrant is required. Unlike the other circuit courts, the *Vargas-Amaya* court did not begin the analysis by inquiring what is required of a *parolee* warrant. The *Vargas-Amaya* court began their inquiry by asking what kind of warrant is required in the first place. Beginning with the outdated notion that parolee warrants are inherently different than other warrants makes the entire analytical process artificial. By starting their analysis at a different place, the other circuit courts ensured that their analysis would lead them to at a different conclusion. But it is the *Vargas-Amaya* court that started by asking, essentially, what the Constitution demands of judicial warrants generally.

In *Garcia-Avalino*, the United States Court of Appeals for the Fifth Circuit managed to reach the opposite conclusion. They pointed out that expressed statutory requirements for warrants to include a sworn-facts requirements tend to demonstrate that, in general, warrants

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<sup>128</sup> United States v. *Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004).

<sup>129</sup> *Id.* (citing *Carter v. United States*, 530 U.S. 255, 264 (2000)).

need no sworn facts requirement.<sup>130</sup> Such an analysis completely ignores that the Fourth Amendment explicitly requires that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”<sup>131</sup> This is certainly true of judicial warrants. The Fifth Circuit does not adequately explain why the traditional rule should not initially apply to this situation.

Instead of relying only on a parsing of the term “warrant” to refute the contention of the *Vargas-Amaya* court, the Fifth Circuit identified two statutes that authorize the issuance of warrants that do not require sworn facts.<sup>132</sup> The court believed that this would distinguish their cases because no examples were provided by the government in *Vargas-Amaya* that abrogated such requirements for judicial warrants.<sup>133</sup> However, statutes cited by the Fifth Circuit are easily distinguishable from the case at hand.

The first statute cited by the Fifth Circuit, 18 U.S.C. § 3148(b), deals with the revocation of pre-trial release based on a possible violation of a condition of pretrial release. It reads, in pertinent part, “[t]he attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release . . . .”<sup>134</sup> The cited statute does not identify whether or not a sworn-facts requirement exists at all. The statute does not explicitly relieve government attorneys from their duty to attest to the truthfulness of statements they make to the court.<sup>135</sup> There is no indication whether the government attorney may thereafter be required to swear as a part of the process for the issuance of the warrant. Nor does the statute

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<sup>130</sup> *United States v. Garcia-Avalino*, 444 F.3d 444, 445 (5th Cir. 2006).

<sup>131</sup> U.S. CONST. amend. IV.

<sup>132</sup> *Garcia-Avalino*, 444 F.3d at 445-46.

<sup>133</sup> *Vargas-Amaya*, 389 F.3d at 904.

<sup>134</sup> 18 U.S.C. § 3148(b).

<sup>135</sup> *Id.*

bind the Court's discretion to issue the warrant.<sup>136</sup> In fact, the statute does not squarely deal with the issuance of a warrant at all. It merely regulates the initiation of proceedings for pre-trial release.<sup>137</sup> As such, this statutory scheme simply recognizes the court's inherent power to set and determine conditions of bond and pre-trial release. Motion practice, rather than the warrant process, is generally the vehicle used to initiate such proceedings.

The second statute cited by the Fifth Circuit was the prior version of today's Section 3606.<sup>138</sup> The court then used the old version of the statute, and cases interpreting it, to argue against the express terms of Section 3606.<sup>139</sup> Most egregiously, the court's rationale ignored the most critical difference between the old and new statutes: that the legislature changed a statute requiring merely an administrative warrant to a statute requiring a judicial warrant. The same kind of constitutional distinction that is drawn between administrative and judicial search warrants applies to arrest warrants as well.<sup>140</sup> If any inference is to be drawn from this change, it is that Congress chose to abrogate administrative warrants in this situation in favor of judicial ones. The analysis of the older cases also ignores the watershed change in how the rights of parolees are conceived after 1972.<sup>141</sup>

The First Circuit reached their conclusion using an alternative form of analysis to avoid the problem created by a judicial arrest warrant that failed to comply with Fourth Amendment

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<sup>136</sup> *Id.* ("A judicial officer *may* issue a warrant for the arrest of a person charged with violating a condition of release . . .") (emphasis added).

<sup>137</sup> *Id.*

<sup>138</sup> *United States v. Garcia-Avalino*, 444 F.3d 444, 445 (5th Cir. 2006). This statute, the now repealed 18 U.S.C. § 717 (1934), stated in pertinent part:

If the warden of the prison . . . from which the prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence may issue his warrant to any officer hereinafter authorized to execute the same for retaking of such prisoner.

<sup>139</sup> *Garcia-Avalino*, 444 F.3d at 445-46.

<sup>140</sup> *Giordenello v. United States*, 357 U.S. 480, 485-86 (1958).

<sup>141</sup> *See supra* Section I.B.

standards. The court’s initial proposition is questionable – that Congress, in drafting Section 3606, relied on the dictionary definition of the term “warrant” rather than “the meaning its use will convey to the judicial mind unless otherwise instructed.”<sup>142</sup> But to do so ignores that, as the *Vargas-Amaya* court stated:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.<sup>143</sup>

The accumulated legal tradition of the term warrant clearly requires something more than the dictionary definition. Nobody doubts the proposition that, as a general matter, judicial arrest warrants must comply with the Fourth Amendment. As such, it is simply doubtful that the dictionary definition of warrant “likely served as the definitional backdrop” when Congress drafted the Sentencing Reform Act.<sup>144</sup>

In support of this proposition, the First Circuit identified cases interpreting administrative warrants for the arrest of parolees.<sup>145</sup> The court used the language of older cases to support the notion that the meaning of the term “warrant” stayed the same despite the significant revisions to the applicable statute, the federal system of supervised release, and judicial recognition of the rights of federal parolees.<sup>146</sup> This position is unsupportable for the same reasons it was improper

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<sup>142</sup> *United States v. Collazo-Castro*, 660 F.3d 516, 520 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012).

<sup>143</sup> *United States v. Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004).

<sup>144</sup> *Collazo-Castro*, 660 F.3d at 520.

<sup>145</sup> *Id.* at 521-22.

<sup>146</sup> *Id.*; *See supra* Part I.B.

in *Garcia-Avalino*.<sup>147</sup> If Congress had intended to remove traditional Fourth Amendment warrant requirements for the arrest of potential parole violators, *they could have left the statute alone*. Instead, they modified the system. This change is glossed over by the *Collazo-Castro* court without adequate explanation or analysis.

The change in nature of arrest warrants for parolees cannot be ignored. Along with continual recognition of more rights retained by parolees in revocation proceedings over the years,<sup>148</sup> Congress provided that, when an arrest warrant is needed for the return of a parolee, it is “[t]he court” who is authorized to issue the warrant.<sup>149</sup> There is no remainder left for the possibility of an administrative body stepping in. The Supreme Court has been clear on the procedural requirements between administrative and judicial search warrants:

The Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause. Although we have arguably come to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts, we have never done so for constitutionally mandated judicial warrants. There it remains true that ‘[i]f a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue.’<sup>150</sup>

The same kind of constitutional distinction that is drawn between administrative and judicial search warrants applies to arrest warrants as well.<sup>151</sup>

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<sup>147</sup> See *supra* notes 139-141 and accompanying text.

<sup>148</sup> See *supra* notes 30-43 and accompanying text.

<sup>149</sup> Section 3606.

<sup>150</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 877-78 (1987) (quoting *Frank v. Maryland*, 359 U.S. 360, 373 (1959)).

<sup>151</sup> *Giordenello v. United States*, 357 U.S. 480, 485-86 (1958).

B. Status as a Parolee Does not Absolve the Government's Burden of the Oath or Affirmation Requirement

After determining that the regular Fourth Amendment standards attached to judicial arrest warrants issued for federal parolees, the Ninth Circuit analyzed whether the status of a federal parolee abrogates the normal constitutional warrant requirements.<sup>152</sup> Once again, the starting point for their analysis was crucial. The critical question is whether these parolees are presumed to have the right in the first place. But this question can only be analyzed when looking at the bigger picture. It would be insufficient to analyze the rights of these parolees in the vacuum of history and ignore the modern context.

The Ninth Circuit distinguished between the different clauses of the Fourth Amendment to try and decipher whether the oath or affirmation requirement was one of the rights out of the “panoply” retained by federal parolees.<sup>153</sup> The court held that “while certain searches may be permissible when there is less than probable cause, under the Fourth Amendment, no warrant is valid unless there is probable cause supported by sworn facts.”<sup>154</sup> Thus, the oath or affirmation guarantee is fundamentally different from the “malleable restriction on unreasonable searches and seizures” that forms the vast majority of case law regarding the Fourth Amendment protections of parolees.<sup>155</sup>

This view of the oath or affirmation requirement fits within the overall construction of the rights of federal parolees and the purpose of the oath or affirmation requirement. It makes sense that we limit the privacy rights of federal parolees because of their enhanced proclivity for crime

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<sup>152</sup> United States v. Vargas-Amaya, 389 F.3d 901, 905-07 (9th Cir. 2004).

<sup>153</sup> *Id.* at 907.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

and necessity of close monitoring.<sup>156</sup> An accommodation to this necessity is provided within Section 3606. The statute provides that probation officers may always make an arrest of their supervisee with probable cause and without the need for a warrant.<sup>157</sup> However, the balance struck by the statute between the individual rights of parolees and the necessity of close monitoring respects the essence of the Supreme Court’s holding in *Morrissey v. Brewer*.<sup>158</sup> The key principle outlined in *Brewer* is that “the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others.”<sup>159</sup>

The ruling that the status of one as a federal parolee does not remove this right wholesale respects the dual nature of the right as a protection against unjustified governmental intrusion and a “quality control mechanism” for preliminary government investigations.<sup>160</sup> There is no governmental interest in having investigating officers lie or perform slip-shod preliminary investigations. The oath or affirmation requirement is one check against this. This constitutionally prescribed procedure does not unduly burden the legitimate governmental interests of efficient and effective policing.

It is telling that no court has asserted that necessitating an oath or affirmation for an otherwise already mandatory warrant would unduly burden the government or endanger the public. The traditional concerns about community safety seemed to be nullified by the Congressional directive that a judicial warrant be obtained before recapture. Additionally, no

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<sup>156</sup> For expansive discussions outlining why federal parolees have less of an interest in their privacy rights, and one that the community would be less willing to regard as reasonable, see *Sampson v. United States*, 547 U.S. 843, 850-53 (2006); *supra* notes 44-49 and accompanying text.

<sup>157</sup> Section 3606.

<sup>158</sup> 408 U.S. 471 (1972).

<sup>159</sup> *Id.* at 481.

<sup>160</sup> *See supra* notes 11-15 and accompanying text.

court has argued that the added use of “stock” language to a warrant requirement reflects an onerous administrative burden on behalf of an investigating affiant. Indeed, the *Collazo-Castro* court noted that “. . . it is now considered a best practice to seek a revocation warrant based on sworn facts . . . .”<sup>161</sup> The Court even noted that the form used for such warrants had recently been amended to include the phrase “I declare under penalty of perjury that the foregoing is true and correct.”<sup>162</sup> Given this backdrop, it is curious why circuit courts have been so eager to dispense with the right.

It is insufficient to assert, as the Fifth Circuit did, that “[g]iven the relaxed constitutional norms that apply in revocation hearings, a warrant for the arrest of a supervised releasee need not comply with the Oath or affirmation clause of the Fourth Amendment.”<sup>163</sup> This analysis could be used to support the denial of any constitutional right of parolees. If no effort is made to define what marks the division between rights retained by parolees and rights lost by their status, courts will forever be able to argue: “parolees have rights, but this isn’t one of them.” Additionally, the act of obtaining an arrest warrant is fundamentally different from “the relaxed constitutional norms that apply in revocation hearings.”<sup>164</sup> The procedural norms for obtaining a warrant are explicitly outlined in the Fourth Amendment. They are non-negotiable when a judicial warrant is required.<sup>165</sup>

The approach of the First Circuit is unpersuasive. They noted that “requirements contained in the Federal Rules of Criminal Procedure that impose procedures for taking someone into custody do not necessarily apply to people who . . . are under court supervision as part of a

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<sup>161</sup> *United States v. Collazo-Castro*, 660 F.3d 516, 523 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012).

<sup>162</sup> *Id.* at 523 n.4.

<sup>163</sup> *United States v. Garcia-Avalino*, 444 F.3d 444, 447 (5th Cir. 2006).

<sup>164</sup> *Id.*

<sup>165</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 877-78 (1987).

criminal sentence.”<sup>166</sup> In support of this notion, the court cited several cases.<sup>167</sup> In the cited *Harrison* case, the court relied on the outdated and conclusory comparison of “the status of a parole violator to that of an escaped prisoner.”<sup>168</sup> The court in *Harrison* parsed out the *McNabb-Mallory* exclusionary rule for when arrestees are not promptly taken before a magistrate.<sup>169</sup> The *Brown* case dealt with the technical issue of whether parolees were “in constructive custody” for the purpose of federal habeas pleadings.<sup>170</sup>

Both cases are easily distinguishable from the issue at hand. It is simply doubtful that *Harrison* remains viable law for the cited proposition. While the *Brown* case deals nominally with whether a parolee is “in custody” for procedural appellate purposes, it tells us little about the liberty interests of the parolee in general and under what rationale they are restricted. Most importantly, however, while both cases address federal rules that ostensibly touch on constitutional issues, neither case addresses an explicit constitutional guarantee such as the oath or affirmation requirement. Explicit constitutional requirements are easily distinguished from case law interpreting more “malleable” constitutional demands.<sup>171</sup> These “malleable” portions of the Constitution are where the rights of free citizens and parolees diverge. As such, the persuasive power of these cases should be limited accordingly.

Given the sea change that occurred regarding the rights of parolees and the fact that Congress expressly altered the parolee arrest warrant statute to require judicially issued warrants, it is remarkable that the First Circuit found that Congress’ “failure to engraft [a sworn facts]

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<sup>166</sup> *Collazo-Castro*, 660 F.3d at 521.

<sup>167</sup> *United States v. Harrison*, 461 F.2d 1127, 1130 (5th Cir. 1972); *United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997).

<sup>168</sup> *Harrison*, 461 F.2d at 1130. For an explanation why this law is no longer applicable, see *supra* notes 30-43 and accompanying text.

<sup>169</sup> *Harrison*, 461 F.2d at 1130.

<sup>170</sup> *Brown*, 117 F.3d 471 at 475.

<sup>171</sup> *United States v. Vargas-Amaya*, 389 F.3d 901, 907 (9th Cir. 2004).

requirement onto section 3606 speaks volumes.”<sup>172</sup> Equally remarkable was their conclusion that Congress *knew* that their use of the term “warrant” failed to incorporate traditional Fourth Amendment guarantees when the First Circuit failed to identify a single statute where Congress had actually removed such guarantees from an otherwise validly issued judicial warrant.<sup>173</sup> Additionally, the First Circuit identified no congressional language stating that the Fourth Amendment protections were presumptively denied to parolees or those on supervised release.<sup>174</sup>

It is unclear why the First Circuit felt the need to elaborate further as to why such warrants need not comply with the oath or affirmation requirement. However, the *Collazo-Castro* court argued that parole officers need not swear an oath because, as trusted “officer[s] of the court,” the importance of telling the truth need not be impressed upon them.<sup>175</sup> This analysis perverts constitutional protections. If the Fourth Amendment explicitly prescribes something, it doesn’t matter how trustworthy the court feels a person is. But the very notion that the Court would make such an argument undercuts the fundamental purposes of the oath or affirmation requirement – checks on the potentially coercive power of government and an independent assurance of the veracity of accusations that lead to the loss of individual liberty.<sup>176</sup>

A judge cannot look into the conscience of an investigator and determine that an oath would have had no effect on their commitment to tell the truth. This is true notwithstanding how trustworthy the judge believes the affiant to be. From a historical standpoint, it is impossible to imagine that the authors of the Fourth Amendment would have acquiesced to judges relieving

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<sup>172</sup> United States v. Collazo-Castro, 660 F.3d 516, 522 (1st Cir. 2011) cert. denied, 11-8130, 2012 WL 82252 (U.S. Feb. 21, 2012).

<sup>173</sup> *Id.* at 521-22.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 523.

<sup>176</sup> See *supra* notes 11-23 and accompanying text.

government officials of such procedural burdens for the sake of efficiency.<sup>177</sup> Enshrining the oath or affirmation clause within the Constitution ensured that it cannot be contextualized away in this manner.

The case cited by the First Circuit to support their proposition is easily distinguishable.<sup>178</sup> *United States v. York* dealt with whether it was proper for the court to delegate certain tasks to parole officers that constituted supervisory authority.<sup>179</sup> Supervisory authority over parolees is the entire reason we have parole officers in the first place. Nowhere in the case is it hinted that parole officers need not comply with otherwise express constitutional commands because of their “trusted status” before the tribunal.

Why should the parole officer, with a potentially acrimonious relationship with a parolee, be given a presumption of trustworthiness when courts have repeatedly acknowledged how the “competitive nature of ferreting out crime” may lead police to stretch the truth?<sup>180</sup> The First Circuit seems to ignore that “[t]he Fourth Amendment does not contemplate the executive officers of the Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute.”<sup>181</sup> Even though a parole officer’s

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<sup>177</sup> For a good overview of why the Founding-era leaders would be very wary of relieving procedural warrant requirements, see *Payton v. New York*, 445 U.S. 573, 608-10 (1980).

<sup>178</sup> *Collazo-Castro*, 660 F.3d at 523.

<sup>179</sup> 357 F.3d 14, 22 n. 6 (1st Cir.2004).

<sup>180</sup> See *Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

<sup>181</sup> *United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972).

functions may extend beyond these traditional police powers, their general supervisory duties transform upon their belief that their supervisee has violated a term of their release.<sup>182</sup>

Additionally, there is no principled reason why parole officers, bailiffs, attorneys, magistrates or other judges need to swear an oath before testifying under the formulation of the First Circuit. This is because they are likewise “officers of the court” whose trustworthiness is known to the presiding judge. Tellingly, the First Circuit does not delve into this logical extension of their holding.

#### CONCLUSION

The nature of the rights of federal parolees has changed greatly over the past forty years. Where once potential parole violators were accorded the same rights as prison escapees, courts now recognize the distinct liberty interest maintained by those on supervised release. The modern federal supervised release scheme reflects of the over-arching movement towards a broader recognition of the rights retained by federal parolees.

As history has demonstrated, the rights of parolees are not absolute. However, courts reviewing the Sentencing Reform Act have a duty to interpret this statutory scheme under accepted methods constitutional and statutory interpretation. By denying the right to federal parolees to have their arrest warrants sworn to by investigating officers, these courts have further complicated the field of constitutional analysis and abrogated the government’s responsibility to act responsibly without a countervailing societal benefit.

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<sup>182</sup> See Section 3606 (parole officers may arrest their supervisees upon probable cause of a violation of the terms of their release).