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THE BACKGROUND OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PART TWO

*Joseph J. Stengel**

I. INTRODUCTION

UPON the conclusion of the Constitutional Convention in 1787 and after the proposed Constitution was submitted by Congress to the states for ratification, there arose a clamor concerning the absence of a bill or declaration of rights therein. Scholars have disagreed as to the basis for this controversy. Story says that the demand was "a matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution."¹ Cooley concludes that leading statesmen made the want of a bill of rights in the Constitution the ground of a "decided, earnest, and formidable opposition to the confirmation of the National Constitution by the people; and its adoption was only secured in some of the leading States in connection with the recommendation of amendments which should have covered the ground."² Rutland makes note of the view that the absence of a bill of rights was used in an attempt to defeat ratification, but adds that: "A more dispassionate view now indicates that a broad base of public opinion forced the adoption of the Bill of Rights upon the political leaders who knew the value of compromise."³ And Beard does not ascribe the opposition to the Constitution to the lack of a bill of rights, but to the economic interests of the small farmers and debtors.⁴

Whatever may have been the motives for the adoption of the Bill of Rights, the proceedings leading up to its adoption are a part of the history and background of the law of search and seizure; and the debates and newspaper accounts are helpful in determining what the in-

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¹ J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 602 (Bigelow ed. 1891).

² T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 312-14 (1890).

³ R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 218 (1955).

⁴ C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 325 (1962).

tent of the framers and adopters was with respect to the meaning of the key phrases contained in the fourth amendment.

II. THE CONTROVERSY OVER THE NECESSITY FOR A BILL OF RIGHTS

At the Constitutional Convention of 1787, the necessity for a bill of rights in the proposed Constitution was scarcely mentioned, and so far as can be ascertained from the reports thereof, there was no discussion regarding searches and seizures. There was, however, an attempt made to incorporate a bill of rights into the instrument.

On August 20, 1787, Charles Pinckney, of New York, submitted to the Convention, in order to be referred to the Committee of Detail, a short list of civil rights or liberties.⁵ George Mason, of Virginia and the author of that state's "Declaration of Rights," expressed a wish that the "plan had been prefaced" with a bill of rights and said he would second a motion if made for that purpose. Elbridge Gerry, of Massachusetts, concurred and moved for a committee to prepare a bill of rights. Mason seconded the motion. Roger Sherman, of Connecticut, thought the "State Declaration of Rights" was sufficient. The matter was put to a vote and every state voted against the motion.⁶

Later Mason declined to sign the proposed Constitution.⁷ He wrote to Richard Henry Lee, delegate to Congress from Virginia, expressing his objections to the proposed Constitution on the ground that it did not contain a bill of rights.⁸ Lee agreed with Mason that the plan should include a bill of rights, and also that it should provide for a council to advise and assist the President, for a doing away with the office of Vice-President, and for a securing of the common law and trial by jury throughout the United States.⁹

Lee thereupon opened and led the fight against the Constitution in Congress for a group that subsequently became known as the Anti-federalists. The Constitution was debated on September 26th and 27th. Lee proposed a series of amendments which he thought Congress should

⁵ J. MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787 (Documents Illustrative of the Formation of the Union of the American States)* 571-72 (1927).

⁶ *Id.* at 716. Mason "doubtlessly" had the Virginia "Declaration of Rights" in mind. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 185 (1913).

⁷ *DEBATES, supra* note 5.

⁸ C. VAN DOREN, *THE GREAT REHEARSAL; THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES* 176-77 (1948).

⁹ *Id.*

make before submitting the plan to the states. His attempt to amend failed, and a day later the proposed Constitution was transmitted without recommendation by Congress, "by post road and packet boat, to take its chances with the states and their conventions."¹⁰

Brant says that no sooner had the Continental Congress laid the proposed Constitution before the people than "a great cry went up; it contained no Bill of Rights." He states that the cry for a bill of rights came loudest from "state-minded politicians who hoped to defeat the Constitution altogether, or had dreams of a second convention in which Congress would be denied the power to lay taxes or to regulate Commerce." However, he concludes, "their expressions of alarm would have had no force if they had not touched a sensitive nerve among the masses of the people throughout the thirteen states."¹¹

In any event, Lee wrote Edmond Randolph, the Governor of Virginia, decrying the lack of a declaration or bill of rights to restrain the government established by the proposed Constitution. He enclosed with his letter the amendments he had proposed in Congress. Lee felt the plan for the dissenters to follow was to propose amendments, to express willingness to adopt the Constitution with amendments, and to suggest the calling of a new convention for the purpose of considering them. One of his proposed amendments stated: "That the citizens shall not be exposed to unreasonable searches, [or] seizure of their persons, houses, papers, or property."¹²

A typical example of the general objections to the proposed Constitution is shown in a letter, dated November 5th, addressed to the citizenry and signed by "An officer of the late continental army." The letter contains a lengthy diatribe against the "tyrannical instrument" and against James Wilson, a supporter of the instrument and a delegate to the Constitutional Convention. Among the objections was the following: "6. Congress being possessed of these immense powers, the liberties of the states, and of the people are not secured by a bill of rights."¹³

¹⁰ *Id.* at 177-78. I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800 161-62 (1950).

¹¹ I. BRANT, THE BILL OF RIGHTS; ITS ORIGIN AND MEANING 39 (1965).

¹² "Letter from the hon. Richard Henry Lee, esq. one of the delegates in congress from the state of Virginia, to his excellency Edmond Randolph, esq. governor of said state," 2 THE AM. MUSEUM 553-58 (2nd ed. 1787).

¹³ "Objections to the new constitution. To the citizens of Philadelphia, Friends, countrymen, brethren, and fellow citizens," 2 THE AM. MUSEUM 422-32 (2nd ed. 1787).

The objections of "An officer" were answered, point by point, by "Plain Truth" in a letter to "Friend Oswald." The writer answered by referring to "friend Wilson's definition on this subject." He said that a state government is designed for all cases whatsoever; consequently, what is not reserved is tacitly given. He asserted that a federal government exists expressly for federal purposes, and is consequently bound by the terms of the compact. In the first case, he said, a bill of rights is indispensable. In the second, it would be at best useless, and if one right were to be omitted, what was intended to be reserved might injuriously be granted by implication.¹⁴

The leading statesmen of the day joined in the controversy regarding the adoption of the proposed Constitution. One of the more favored methods of getting their messages across to the people was to write in newspapers and periodicals using pseudonyms and addressing their letters to the public at large or to fictitious persons. Generally speaking, those newspapers and periodicals did not evidence a great concern about the absence of a bill of rights in the proposed Constitution, but some of the letters referred to above did contain arguments for and against the inclusion of a bill of rights. Some of the letters were vituperative; others were dignified.

George Mason was answered by Oliver Ellsworth, another member of the Convention. Ellsworth, writing as "A Landholder,"¹⁵ said that the bills of rights were introduced in England when its kings claimed all powers and jurisdiction. He said such instruments are not insignificant since government is considered as originating from the people, and that all the power government now has is a grant from the people. The Constitution that the people now establish with powers limited and defined, Ellsworth wrote, becomes to the legislators and magistrates what originally a bill of rights was to the people. To have inserted in the Constitution a bill of rights for the states, he continued, would suppose that the people derive and hold their rights from the federal government, when the reverse is the case.¹⁶

Luther Martin, writing from Maryland, said that had the government been formed upon a principle truly federal (as he wished it), legislating over and acting upon the states only in their collective or

¹⁴ "Answers to the objections to the new constitution, From the Independent Gazerter," 3 THE AM. MUSEUM 422-30 (2nd ed. 1787).

¹⁵ The identities of the persons using the pseudonyms are set forth in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788 415 (Ford ed. 1892).

¹⁶ Connecticut Courant, December 10, 1787.

political capacity, a bill of rights would have been unnecessary insofar as it related to the rights of individuals. However, he said, the proposed Constitution being intended and empowered to act not only upon states, but also immediately upon individuals, it rendered a recognition and a stipulation in favor of the rights both of states and of men not only proper but, in his opinion, absolutely necessary.¹⁷

James Winthrop, writing as "Agrippa" in the *Massachusetts Gazette*, asserted that a legislative assembly has an inherent right to alter the common law, and to abolish any of its principles which are not particularly guarded in the Constitution. Any system, therefore, "which appoints a legislature without any reservation of the rights of individuals, surrenders all power in every branch of legislation to the government."¹⁸ He added that in countries where the people do not possess a bill of rights, any resistance to the exercise of power "in an unaccustomed mode" is always, by the principles of their government, a rebellion which nothing but success can justify.¹⁹

James Sullivan, using the pseudonym of "Cassius" in that same newspaper, asked, in the name of common sense, "What use would be a bill of rights?" He said it would be of use only when it is supposed that Congress has infringed upon the unalienable rights of the people. But, he asked, would it not be much easier to resort to the Constitution to see if power is given therein to Congress to make the law in question? If such powers are not given, he said, the law is in fact a nullity, and the people will not be bound thereby.²⁰

Madison, in a letter to Jefferson, dated October 17, 1788, set forth his ideas with respect to the necessity for a bill of rights. He wrote that: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply power not meant to be included in the enumeration." However, he said, he did not view its absence from the proposed Constitution in an important light because, among other things, "experience proves the inefficiency of a bill of rights on those occasions when its control is most needed." He observed that, "Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current."²¹

¹⁷ Maryland Journal, March 21, 1788.

¹⁸ Massachusetts Gazette, January 11, 1788.

¹⁹ *Id.*, January 29, 1788.

²⁰ *Id.*, December 25, 1787.

²¹ THE COMPLETE MADISON 253-54 (Padover ed. 1953).

Jefferson answered Madison, five months later, summing up the objections to a bill of rights and answering them as follows:

1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer: A constructive act may certainly be so formed as to need no declaration of rights. The act itself has the force of declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draft of a constitution which I had once thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power, within the field submitted to them.

2. A positive declaration of some of the essential rights could not be obtained in the requisite latitude. Answer: Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.

3. The limited powers of the federal government, and jealousy of the subordinate governments, afford a security, which exists in no other instance. Answer: The first member of this seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also; as by the same text they may try the opposition of the subordinate governments.

4. Experience proves the inefficiency of a bill of rights. True. But though it is not absolutely efficacious, under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions.

But the evil of this is short-lived, moderate, and reparable. The inconveniences of a want of a declaration are permanent, afflictive, and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period.²²

There were some objections made with respect to the absence of a bill of rights which made specific reference to the need for protection against unreasonable searches and seizures. Such objections appeared during the debates at the ratification conventions and in letters in newspapers.

Pennsylvania quickly divided into two bitter camps over the ratification of the Constitution.²³ However, the Federalists prevailed and the Constitution was ratified by a vote of forty-six to twenty-three.²⁴ The dissenters remained bitter and twenty-one of them signed a statement entitled, "The address, and reasons of dissent of the minority of the convention of the state of Pennsylvania, to their constituents." In this statement the dissenters said that they had offered their objections to the conventions, and opposed those parts of the plan which they felt were injurious to those who sent them to the Convention. The minority said they had offered propositions to the Convention to meet their objections to the proposed Constitution. The fifth proposition which the dissenters desired the Convention to adopt stated: "That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others." The dissenters said that

²² Quoted in COOLEY, *supra* note 2, at 313. Discussions as to the necessity or non-necessity for the inclusion of a bill of rights in the proposed Constitution are set forth in THE FEDERALIST Nos. 24, 26, 38, 84, and 85, at 154, 166, 244, 247, 575, 588 (J. COOKE, ed. 1961) (Hamilton). Later writers agree as to the necessity for a bill of rights. Charles Warren, for example, writes: "The Framers of the Constitution failed to appreciate the scope of the Necessary and Proper Clause which they had adopted." He felt that under that clause, Congress might order searches without warrant to execute the taxing power. C. WARREN, THE MAKING OF THE CONSTITUTION 509 (1928).

²³ RUTLAND, *supra* note 3, at 134.

²⁴ BEARD, *supra* note 4, at 233.

had the Convention consented to this proposition, and others, they would have been willing to agree to the plan.²⁵

In Maryland the state convention met on April 21, 1788. William Paca produced a series of amendments which, although approved in part by a select committee, were not recommended to the convention.²⁶ Some members, after the convention, published an account of the transaction (including the proposed amendments) entitled, "The following facts, disclosing the conduct of the late convention of Maryland, are submitted to the serious consideration of the citizens of the state." One of the amendments was the following:

8. That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous and ought not to be granted.²⁷

The members said that this amendment was considered by many of the committee to be indispensable, "for congress, having the power of laying exercises, the horror of a free people, by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office." They felt that with that amendment "there could be no constitutional check provided, that would prove so effectual a safeguard to our citizens." The writers were also concerned about general warrants. They said that, under the proposed amendment, "General warrants, too, the great engine in which power may destroy those individuals who resist usurpation, are also hereby forbid to those magistrates who are to administer the general government."²⁸

In New York the question of the ratification of the proposed Constitution became a personal battle between Governor George Clinton and Alexander Hamilton. According to Brant, Governor Clinton, head of a powerful political machine, was trying to preserve New York's tremendous economic asset—its semi-monopolistic power to levy duties on all goods brought in through America's greatest seaport, regard-

²⁵ 2 THE AMERICAN MUSEUM 537-53 (1787).

²⁶ VAN DOREN, *supra* note 8, at 207-08.

²⁷ 3 THE AMERICAN MUSEUM 419-23 (1788).

²⁸ *Id.*

less of their ultimate destination.²⁹ However, many of the delegates to the state convention, held in Poughkeepsie to consider ratification of the proposed Constitution, "were genuinely concerned by the lack of a bill of rights."³⁰ So, apparently, were some of the citizens of New York. A "New York Citizen," on January 7, 1788, addressed a letter to his brother in Connecticut, reading in part as follows:

It is extraordinary that the Congress should presume to infringe upon, and not to secure to the people, the fundamental principles of *free elections—freedom of the press, trial by jury in civil cases as usual—seizures by general warrants without oath, Ec.*³¹

Robert Yates, writing as "Sydney," told the delegates that, "The omission of a bill of rights in this State has given occasion to an inference that the omission was equally warrantable in the constitution of the United States." He then gave reasons why such a bill should be included in the federal Constitution.³²

The "Federal Farmer," in a letter addressed to the "Republican," listed a number of items that he "allowed to be unalienable or fundamental rights in the United States," and which should be included in the proposed Constitution. Among these was the right of a man not to be subjected to "unreasonable searches and seizures of his persons, papers or effects."³³

In Massachusetts Samuel Adams' proposal for a prefatory bill of rights to the Constitution was as follows: "And that the said Constitution be never construed to authorize Congress . . . to subject the people to unreasonable searches and seizures of their persons, papers or possessions." In the state convention debates, a Mr. Holmes commented, on January 26, 1788, on the alleged deficiencies of the proposed Constitution, as follows:

These circumstances, as horrid as they are, are rendered still more dark and gloomy, as there is no provision made in the Constitution to prevent the attorney general from filing information against any person, whether he is indicted by the grand jury or not; in a consequence of which the most innocent person in the commonwealth

²⁹ BRANT, *supra* note 11, at 40.

³⁰ Heslin, *Amendments Are Necessary*, 43 N.Y. Hist. Soc. Q. 437 (1959).

³¹ "Extract of a letter from a gentleman in the state of New York to his brother in Connecticut," Connecticut Courant, October 8, 1787.

³² New York Journal, June, 1788.

³³ New York Packet, May 2, 1788.

may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintances, and confined in prison, until the next session of the court, which has jurisdiction of the crime with which he is charged, (and how frequent those sessions are to be we are not yet informed of), and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expense, and perhaps cruel sufferings.

The framers of our state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws which it was deemed so unsafe to intrust our state legislature with, I am unable to conceive.³⁴

In Virginia, the leading adversaries were Patrick Henry and James Madison. Brant says that Henry was fighting against abolition of the state powers that had been the basis of his political supremacy—the power to issue paper money, whose depreciation would ease the payment of debt, and the power to impair the value of contracts by laws postponing payments under them.³⁵ This contention may be accurate, but at the state convention, in June, 1788, Henry attacked the proposed Constitution because it lacked a bill of rights. Among the items that he felt should be contained therein, Henry addressed himself to freedom from unreasonable search and seizure. He asked, “When these harpies (Federal Sheriffs) are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people bear it?” “Suppose,” he said, “an exciseman will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go.” The general warrant was also on Henry’s mind. He pointed out that:

In the present [state] Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, etc. There

³⁴ 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 107-13 (1907).

³⁵ BRANT, *supra* note 11, at 40.

was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred. The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.³⁶

Because of the opposition to the proposed Constitution in general, its fate was far from clear. However, the Federalists eventually carried the day, although the necessity for amendments setting forth a bill of rights in order to mollify the opposition was evident. Some of the states, additionally, ratified with recommendations for a bill of rights or giving their construction of the Constitution as not infringing on rights.

Virginia ratified the Constitution on June 27, 1788, recommending, in its letter of notification, that the first Congress provide for a bill of rights, including the following:

Fourteenth. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and his property; "all warrants, therefore, to search suspected places, or seize any freeman, his papers or property," without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.³⁷

New York ratified a month later, declaring and making known that its construction of the Constitution was as follows:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers or his property; and therefore, that all warrants to search suspected places, or seize any freeman, his papers or property, without information upon oath or

³⁶ 3 ELLIOT, *supra* note 34, at 58, 412, 447-49.

³⁷ 13 JOURNAL OF CONGRESS 173-78 (1801).

affirmation of, sufficient cause, are grievous and oppressive; and that all general warrants, (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.³⁸

North Carolina ratified on August 1st, making the same recommendations as Virginia, and in the same language, with respect to an amendment protecting against unreasonable searches and seizures.³⁹ Rhode Island did not ratify until May 29, 1790, giving its understanding of the Constitution with respect to searches and seizures in the same language as that of New York.⁴⁰

III. THE ADOPTION OF THE FOURTH AMENDMENT

On Monday, June 8, 1789, in the first session of the first Congress, James Madison rose, reminded the House of Representatives that this was the day he had named for bringing forward amendments to the Constitution, and moved that the House go into a committee of the whole "on this business." There was, however, opposition from some members in regard to amending the Constitution "at this early date," stating the same arguments that had been made by Alexander Hamilton in *The Federalist* No. 84,⁴¹ concerning the lack of necessity for a bill of rights and, additionally, the urgency of organizing the government.

Madison replied by saying that he was sorry that the urgent business reason still existed in some degree, but that the reason operated with less force when it was considered that he did not then propose to enter into a full and minute discussion of every part of the subject of the Bill of Rights, but merely to bring it before the House. He gave as his reason for bringing up the subject at that point "that our constituents may see we pay a proper attention to a subject they have much at heart, and if it does not give that full gratification which is to be wished, they will discover that it proceeds from the urgency of business of a very important nature."

Madison said that if Congress continued to postpone from time to time and refuse to let the subject "come into view," it might occasion suspicions, which, though not well founded, might tend to influence

³⁸ *Id.* at 178-84.

³⁹ *Id.* at 184-89.

⁴⁰ ELLIOT, *supra* note 34, at 334-35.

⁴¹ THE ENDURING FEDERALIST No. 84, at 361-67 (C. Beard ed. 1948) (Hamilton).

or prejudice the public mind against the members' decision. He said that the constituents might think that the members were not sincere in their desire to incorporate a bill of rights into the Constitution. He added that the people felt that their rights were not sufficiently safeguarded; that the application for amendments came from a "very respectable number" of the constituents; and that it was "certainly proper for Congress to consider the subject, in order to quiet that anxiety which prevails in the public mind."⁴²

Madison then stated that, "The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these:

The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.⁴³

Mr. Madison's propositions were ordered to be referred to a committee of the whole.

Over a month later Madison brought up his amendments for further consideration and moved that the House again go into a committee of the whole on the subject. Opposition was again encountered and a motion that the amendments be referred to a select committee carried. The committee consisted of a member from each state, and Mr. Madison was appointed as one of the committee members.⁴⁴

On Thursday, August 13th, Mr. Lee moved that the House resolve itself into a committee of the whole on the report of the select committee to take up the subject of the amendments under consideration. The House did so and considered the amendments on that day and the two following days. The House finally reached the proposed amendment on searches and seizures on Monday, August 17th. This amendment was changed somewhat as it emerged from the select committee.

The House, sitting as a committee of the whole, went on to the

⁴² Gales, 1 ANNALS OF CONG. 427 (comp. 1834).

⁴³ *Id.* at 434-35. As proposed by Madison, the propositions were to be scattered throughout the body of the Constitution, wherever they fitted the original articles. On motion of Roger Sherman, this plan was altered in favor of numbered articles of amendments to be appended to the original document. BRANT, *supra* note 11, at 45.

⁴⁴ ANNALS, *supra* note 42, at 660, 664-65.

consideration of the seventh clause of the fourth proposition, which then read as follows:

The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

Mr. Gerry said that he presumed there was a mistake in the wording of this clause; that it ought to be "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." He thereupon moved for an amendment of the clause to that effect. Mr. Gerry's motion was adopted by the committee.

Mr. Benson objected to the words "by warrants issuing." He said that this declaratory provision was good as far as it went, but he thought it was not sufficient. He therefore proposed to alter the clause so as to read "and no warrant shall issue." The question was put on this motion, but it lost by a considerable majority.

Mr. Livermore objected to the words "and not" between "affirmation" and "particularly." He moved to strike them out in order to make it an affirmative proposition. The motion failed to pass.

The two proposed clauses, as amended, were agreed to by the committee.⁴⁵ Slightly over a week later the proposed amendments, as agreed to in the House, were received by the Senate. (Practically nothing is available on the deliberations in the Senate on the proposed amendments, perhaps because of its rule of secrecy in effect in those days.) On Wednesday, September 9th, the Senate agreed to some of the amendments but not to others, and so informed the House.⁴⁶ The matter was referred to a Committee on Conference.

The House, on Thursday, September 24th, considered and agreed to the report of the Committee of Conference (with a minor qualification) and the Senate concurred therein the next day.⁴⁷ The proposed amendments were sent to the President for transmission to the states. As transmitted to the states, the pertinent proposed amendments then read as follows:

⁴⁵ *Id.* at 753-54. There was no debate or opposing vote on the due process clause.

⁴⁶ *Id.* at 72, 77.

⁴⁷ *Id.* at 88, 913.

Art. VI. The right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon principal cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁸

By the time sufficient states had ratified the Bill of Rights to satisfy the three-quarters requirement, eleven ratifications were necessary.⁴⁹ As proclaimed on December 15, 1791, the proposed article VI became article IV.⁵⁰ Article IV was corrected by the insertion of "and" between "papers, effects," and by the substitution of "probable" for "principal" cause. Punctuation marks in both articles were changed to a certain extent.⁵¹

IV. CONCLUSION

The Constitution, as originally drafted, did not contain a bill of rights, and the Antifederalists seized upon that deficiency as a ground for opposing the adoption of that governing document. The opposition to the adoption of the Constitution based on the lack of a bill of rights appears to have been more political in nature than a concern that the federal government might violate civil liberties. Nonetheless, it is clear that the Constitution would not have been adopted but for assurances that a bill of rights would be added by the new federal government.

The thrust of the opposition arguments regarding searches and seizures during the process of the adoption of the Constitution was directed against the writ of assistance and the general warrant. There was a total absence of an expressed concern about the rights of the

⁴⁸ ELLIOT, *supra* note 34, at 338.

⁴⁹ Three of the remaining states—Connecticut, Georgia and Massachusetts—did not ratify until 1939. DOUGLAS, AN ALMANAC OF LIBERTY 304 (1954).

⁵⁰ RUTLAND, *supra* note 3, at 233-34.

⁵¹ Some authorities are of the opinion that the language of the fourth amendment comes from the Massachusetts Constitution's "Declaration of Rights" of 1780. *See, e.g.,* Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361-62 (1921). Justice Frankfurter, in his dissent in *Harris v. United States*, 331 U.S. 145, 158 (1947) said, "When Madison came to deal with safeguards against searches and seizures in the United States Constitution, he did not draw on the Virginia model but based his proposal on the Massachusetts form. This is clear proof that Congress meant to give wide, and not limited, scope to the protection against police intrusion." He cited no authority for this assertion. On the other hand, a contemporary account is that the whole Bill of Rights "is nearly a copy of the Virginia bill." *Intelligence*, 4 THE COLUMBIAN MAGAZINE OR MONTHLY MISCELLANY 196 (1790).

run-of-the-mill criminal. Moreover, the adoption of the fourth amendment made no appreciable dent on the practice of search and seizure then in vogue.⁵² Thus Congress passed laws permitting searches by customs officers and Indian agents based on mere suspicion,⁵³ and the Supreme Court sustained, or did not take exception to, such statutes.⁵⁴ It wasn't until the *Boyd*⁵⁵ case in the latter part of the nineteenth century that the guarantees contained in the fourth amendment were given effect by the courts.

⁵² Contemporary statutes and practices are set forth in Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 U. RICH. L. REV. 278 (1969).

⁵³ See, e.g., the Act of April 25, 1808, 2 Stat. 501, whereby customs officers were empowered to "detain" any vessel whenever "in their opinion" there existed "the intention" to violate the embargo provisions. See also the Act of May 6, 1882, 3 Stat. 682, authorizing Indian agents to search traders "upon suspicion or information" that ardent spirits were being carried into the Indian countries by the said traders.

⁵⁴ In *Crowell v. McFadon*, 12 U.S. (8 Cranch) 94, 99 (1814), where it was argued that the officer must show "probable cause," the Supreme Court merely answered that the "law places a confidence in the opinion of the officer." See also *American Fur Company v. United States*, 27 U.S. (2 Pet.) 358, 359 (1829), where the Court made no objection to the language of a statute that permitted searches by agents upon "suspicion or information." Also, in *Locke v. United States*, 11 U.S. (7 Cranch) 339, 347 (1813), the Court said that "probable cause" in the case of seizures "imports a seizure made under circumstances which would warrant suspicion."

⁵⁵ *Boyd v. United States*, 116 U.S. 616 (1886).