

Bound By Oath Episode 403 | Oath or Affirmation. And Treason.

BBO Montage

John: Hello and welcome to Episode 3 of Season 4 of Bound By Oath, a podcast on constitutional history and civil rights. On this episode, we will explore a part of the Bill of Rights that has been virtually erased from the Constitution. A requirement that from the Founding until 1960 stood as a bulwark between ordinary Americans and the abuse of the government's power to break down doors to search and to seize.

Chief Justice Warren: Number 69, Cecil Jones, Petitioner, versus United States.

John: The Fourth Amendment makes three demands before an arrest warrant or a search warrant can be issued. Or at least it used to. Today, it's more like two demands.

Louis Henkin: [T]he Constitution requires oath and affirmation. ... The oath is a safeguard. The man has to be able to testify to something under oath, so that his lying about it would mean something.

John: At the Founding, and for over 150 years afterward, a warrant could not issue without sworn testimony from a real accuser, someone with firsthand knowledge of the facts who would face real consequences if they were lying.

Laurent Sacharoff: The thrust of my work is to show that the oath requirement in the Fourth Amendment, as originally understood in the Founding era, required a firsthand witness.

John: But that changed suddenly in 1960 in the case of *Jones v. United States*.

Laurent Sacharoff: The *Jones* case just transformed everything.

John: Today, warrants are issued based on mere hearsay – someone, generally a police officer, merely repeating under oath what someone else told them.

Laurent Sacharoff: That’s the cynical empty ritual that the oath in the warrant clause currently represents.

John: But an officer who swears, “I believe my informant” hasn’t sworn to anything meaningful. Which leads to mistakes.

Anjanette Young/SWAT victim: I could have died that night. If I’d have made one wrong move, I feel like they would have shot me.

John: A lot of mistakes.

SWAT raid audio: Chicago police search warrant! **News reporter:** Here’s how Cappello got the warrant approved. He made a drug arrest the day before and flipped that suspect into becoming a confidential informant he called John Doe. John Doe then gave him the name and address of a man he claimed was a major drug dealer, but Cappello never investigated to see if John Doe’s tip was even true. **Lawyer:** Did Judge Burns ask you any questions about your complaint for search warrant or any of the information in your complaint? **Officer:** No.

John: At the Institute for Justice, we are asking the Supreme Court to overturn its decision in *Jones* and to restore the oath or affirmation requirement to the Constitution. And we're doing so on behalf of our client Michael Mendenhall, who went to jail and had his property seized based on an unreliable, unsworn accusation.

Michael Mendenhall: I sat in the holding area for several hours, maybe two, three hours. And I think maybe it was after midnight when they finally give you a jail uniform, then take you upstairs and put you in a housing unit with ... I think there was about eight, ten other guys drunk and high, loud and kicking and banging. It was a pretty unpleasant evening.

John: I'm John Ross. Thanks for listening to Bound By Oath.

Warrant Clause Montage

Laurent Sacharoff: The warrant clause is one half of the Fourth Amendment. It dictates the requirements for a warrant, which in turn authorizes the police to break down someone's door and bust into their house to search the house, and we've all seen videos of these SWAT teams.

John: That is Laurent Sacharoff, a professor of law at Hofstra University.

Laurent Sacharoff: Warrants are not just a limit on what law enforcement can do. It's an authorization that gets them into the house. It's a key to the house.

John: A warrant is not just a limitation on government power; it's an authorization to use it. On the one hand, requiring a warrant protects people against arbitrary searches and seizures. But on the other, once a warrant has issued officers are mostly immune from suit for carrying it out. So it's important that warrants are not issued willy-nilly, and to that end the warrant clause makes three demands. As we talked about last season, warrants have to be specific about what or who is to be searched or seized. Warrants also require probable cause. Probable cause is not easy to define. But it means there has to be a quote "fair possibility" or a "reasonable likelihood" to believe that a crime has been committed. And then there's one more thing.

Laurent Sacharoff: The warrant requirement, of course, requires probable cause, but it also has this requirement of oath or affirmation. So probable cause has to be supported by oath or affirmation.

John: Probable cause must be supported by oath or affirmation. And not just anybody's oath.

Laurent Sacharoff: The thrust of my work is to show that the oath requirement in the Fourth Amendment, as originally understood in the Founding era, required a firsthand witness. That's the whole point of it.

John: The point of having a firsthand witness was twofold. First, you get a judicial inquiry into whether a witness or accuser is reliable and if the facts they attest to actually amount to probable cause. And second, because the testimony is given under oath, accusers who lie can be held accountable. They risk being charged with perjury or face civil liability for trespass or malicious prosecution or false imprisonment. And they know that going in, and so are less likely

to make things up. Today, however, that system of interlocking safeguards has been all but swept away.

Laurent Sacharoff: The oath requirement today only requires that the officer swear the oath, not that the informant have sworn the oath. And the officer is just swearing that someone told them these facts. And so the oath requirement does some little tiny bit of work in ensuring that the officer isn't lying about what he or she was told. But that doesn't really do anything.

John: At the Founding, hearsay – that is, testifying to things you didn't personally witness or don't have firsthand knowledge about – was not sufficient. Which is not to say that repeating something you heard from someone else is never reliable or can't be true. But the Founders made a choice that it wasn't good enough for a warrant to issue. As the Pennsylvania Supreme Court ruled in 1810, quote: "It is true, that by insisting on an oath, felons may sometimes escape. This must have been very well known to the framers of our constitution; but they thought it better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression."¹

Laurent Sacharoff: It wasn't until 1960 when the U.S. Supreme Court decided that hearsay was admissible to obtain a warrant. And that case is the *Jones* case, and that's where the Supreme Court just completely went off the rails.

John: But before we get to *Jones*, we're going to talk about the legal history and tradition that *Jones* completely ignored. Even before the Founding, firsthand testimony was a requirement under the common law. Both in England, and in colonial America. In those days, there were no

¹ Quoted in Douglas [dissent in Draper](#)

formal police forces. So when a crime was committed, it was usually the victim who initiated the process of getting a warrant.

Laurent Sacharoff: The people seeking a warrant in an ordinary criminal case were the victims. So a typical case is a stolen goods warrant. Someone's goods are stolen. They go to a judge and say, I want you to issue a warrant to order a constable to accompany me while I search for my stolen goods. And the person or alleged victim, who is seeking the warrant had to swear under oath. And that was well established under the common law.

John: And that person didn't just swear. They were examined by a magistrate: Where did this happen? When? How do you know your goods can be found in this particular place? The examination was put into writing. It was the magistrate's role to determine if the accuser was reliable and whether there was sufficient cause to issue a warrant. And if the search turned out to be wrongful, it was the accuser who set the whole thing in motion who could be sued for trespass or charged with perjury, not the constable. Of course, the common law varied from jurisdiction to jurisdiction, so it can sometimes be tricky to understand whether Virginia common law, or Pennsylvania law, or Massachusetts, or some mix were the version of the common law that became constitutional law. But according to Prof. Sacharoff, when it comes to the oath or affirmation requirement, the law in its essentials was the same everywhere. And when the American colonies became states and adopted state constitutions, they also included bans on hearsay.

Laurent Sacharoff: Those search and seizure provisions, those state analogs of the Fourth Amendment, had various formulations for what's required to get a warrant. Some used the word oath, but Virginia used the word evidence. And evidence then had a very technical meaning, just

as it does now. And evidence just automatically banned hearsay. That was just as as black letter as you could get.

John: When James Madison wrote the Fourth Amendment, he borrowed from those state constitutional provisions and from the common law. And while there were not all that many cases about the oath or affirmation requirement in the Early Republic period, legal treatises – that early American lawyers read from – and justice of the peace manuals – that early American judges trained on – all relate this same understanding of what the oath meant. And there were some cases that touched on the issue, including one of the most notorious incidents of the period: the treason trial of Aaron Burr in 1807:

Laurent Sacharoff: Shortly after the Fourth Amendment was enacted, about 15 years later, there was the extremely prominent treason trial of Aaron Burr.

John: Aaron Burr was by that time the former vice president whose political fortunes had tanked after he killed Alexander Hamilton in a duel and also after becoming the bitter political enemy of the president, Thomas Jefferson. In an effort to resuscitate his career, Burr traveled west with plans to raise an army funded by the British to carve out a new republic from territory claimed by the United States or possibly Spain. What exactly he was up to was not all that clear, but contemporary newspapers circulated all kinds of reports and rumors. Burr himself said at trial that he'd just planned to do some farming in land claimed by Spain with the knowledge and support of the Spanish government.²

² <https://www.pbs.org/wgbh/americanexperience/features/duel-burr-conspiracy/>;
<https://constitutioncenter.org/blog/the-great-trial-that-tested-the-constitutions-treason-clause>;
<https://www.neh.gov/humanities/2013/mayjune/feature/burr-versus-jefferson-versus-marshall>

Laurent Sacharoff: He was tried for treason, and as part of that, two of his co-conspirators were also arrested and committed based on a warrant. And in that case, the *Bollman* case, the parties, the lawyers for both sides more or less seemed to agree that Fourth Amendment warrants could not be based on hearsay. And in fact, the defense lawyer for Bollman expressly said the Fourth Amendment prohibits hearsay, and he used the word hearsay.

John: That defense lawyer was one of the most prominent attorneys of his time, who argued and won a case you may have heard of, the case of *Marbury v. Madison*. And regarding the Fourth Amendment, the lawyers for the prosecution did not dispute that it prohibited hearsay. Instead, they argued the evidence in question wasn't hearsay. That evidence was a summary of a letter written in code by Burr and sworn to as accurate by the recipient of the letter.

Laurent Sacharoff: Now the court was split two two on the precise question of whether certain hearsay was admissible under the Fourth Amendment, and they didn't even clearly say they were ruling under the Fourth Amendment. But when you look at the case carefully, it more or less suggests that the Fourth Amendment prohibits hearsay. It certainly doesn't say that it permits it. And then there were a series of other cases around that time that are even more express – not the Supreme Court.

John: Burr was acquitted, though maybe not in the court of public opinion, and afterwards he fled to Europe for several years. Anyway, it would have been nice if the Supreme Court had been more express about hearsay and the Fourth Amendment in the early Republic. But there weren't all that many cases about it. Which wasn't unusual. If you recall from our episode on the Excessive Fines Clause, the Supreme Court didn't get around to hearing its first case about that provision of the Bill of Rights until the 1980s. According to Professor Sacharoff, almost certainly

the reason the Court didn't have much to say about the Fourth Amendment early on was because everyone was just following the old common law rule that the Fourth Amendment was based on.

Laurent Sacharoff: But then there's not a lot of cases, almost certainly because those seeking warrants brought firsthand witnesses in. That was the common law anyway. You didn't even need the Fourth Amendment for that. It was already the law.

John: But towards the second half of the 1800s, that started to change because of new developments in criminal procedure.

Laurent Sacharoff: Two things happened. Grand juries started to be replaced by informations to start cases.

John: For starters, a new procedure called an information where prosecutors brought charges directly to a judge for approval started to replace the traditional grand jury system in some jurisdictions. And secondly, states started to ban alcohol.

Laurent Sacharoff: And also prohibition on the state level meant that officers were searching houses and warehouses and other locations more often based on confidential informants who didn't want to come forward because it was dangerous. And so that development in particular, very similar to drugs today, brought about a new challenge to courts. And with this new challenge, courts had to address: can you get a warrant based on hearsay, whether it's under the state version of the Fourth Amendment, or the federal.

John: Over the course of the 1800s, modern police forces began to enter the scene, and requests for a warrant increasingly came from law enforcement agents rather than victims. Even so, courts insisted on firsthand testimony from a real accuser.

Laurent Sacharoff: And under the federal, the majority rule, almost unanimous rule, quickly developed that no, you cannot use hearsay to get a warrant because of the oath requirement. And by the early 20th century, when prohibition became federal law as well both federal statute and federal case law said you can't rely on hearsay to get a warrant.

John: State courts were a bit more mixed than federal courts.

Laurent Sacharoff: On the state level is a little bit more mixed, but a rough majority of state courts held the same under their state constitutions. So it was by the 1920s very well established legally in the courts, that the Fourth Amendment banned hearsay.

John: For example, the case of *In re Rule of Court*, written Justice Bradley in 1877, who was riding circuit in Georgia. Responding to the concerns of a federal district judge that too many people were being arrested for failing to pay taxes on alcohol based on accusations from unnamed informants, Justice Bradley confirmed the rule of court. Quote: “[T]he magistrate ought to have before him the oath of the real accuser. ... [A]n affidavit of some officer, who, ... swears that ... he has reason to believe, and does believe, the person charged has committed the offense,” does not “meet the requirements of the constitution.” And it was not just the judicial branch that understood what was required, Congress did as well. When it passed the Espionage Act of 1917 and then later the National Prohibition Act of 1919, each law spelled out strict and detailed limits on searches of houses – requiring sworn, firsthand testimony

examined by a judge beforehand. The oath requirement wasn't an idea lost to history. It was litigated, defended, and upheld even when the government argued that enforcing it would be impractical or inconvenient. The courts really did hold the line. Until they didn't.

Laurent Sacharoff: The *Jones* case just transformed everything. This was a decision ~~that~~ written by Felix Frankfurter that completely ignores part of the text. It ignores the words oath or affirmation.

John: In 1960, in the case of *Jones v. United States*, the Supreme Court abruptly changed course.

Chief Justice Warren: Number 69, Cecil Jones, Petitioner, versus United States.

John: [The case](#) involved heroin. In 1957, a police officer in Washington, D.C. went to a judge – who was called a commissioner – and filed an affidavit that said that an unnamed informant had told the officer that a man named Cecil Jones was selling heroin out of an apartment in northwest D.C. The officer said that the informant had given him information on quote “previous occasion” that had turned out to be correct. The officer did not claim to have personal knowledge himself of what was happening in the apartment. He was repeating what the informant told him. On that basis, the commissioner issued a search warrant on August 21st, 1957, a date which, some years later, would become my birthday. Anyway, police broke in to the apartment and found drugs. Cecil Jones was convicted and sentenced to seven years.³

Louis Henkin: Mr. Cecil Jones was convicted in the district court of the District Court of Columbia for violations of the Harrison Act, and he is now in federal prison.

³ “Search and seizure,” *Evening Star*, May 19, 1959.

John: Initially, Jones, who was illiterate, had represented himself. But by the time the case reached the Supreme Court, he was represented pro bono by Louis Henkin, a young law professor who would go on to have an extremely prominent career at Columbia Law School.

Louis Henkin: [T]he question that remains to be decided is whether there was probable cause for the issuance of the warrant.

John: Henkin had seen combat during World War II and won a Silver Star for gallantry in action. When he returned, he served as a law clerk to Justice Frankfurter. And he was not actually supposed to argue the case, but his co-counsel who had been the one appointed by the appeals court below had fallen ill.⁴ When he stood up before the justices as an advocate, Henkin tried to explain that allowing officers to ransack people's homes based on an unverified tip was truly unprecedented.

Louis Henkin: In regard to probable cause, we think, and I should not like to use these words carelessly, we think that this is the most shocking and flimsiest case. The flimsiest case of any reported case we have found of the issuance of a warrant for a search of a dwelling. We have a tip from an informer. There is no affidavit from the informer either given to the police or to the commissioner.

John: And he argued that when the officer said the informant had been reliable on a "previous occasion" that sounded like a careful way of saying "once before."

⁴ Source: the end of oral argument

Louis Henkin: The words are very important to note because it seems that the man who drafted this seemed to weigh them very carefully. He said this source of information has given information to the undersigned on previous occasion ... and which was correct. ... On previous occasion. To us, that sounds like a nice way of trying to say one previous occasion.

John: But more to the point:

Louis Henkin: We do not know whether there were any other tips. We do not know how many tips he may have given which were incorrect.

John: The informant may have given one tip in the past that had turned out to be correct, but the officer didn't say whether he'd given other tips that turned out to be incorrect. So how could the commissioner determine that he was reliable? And more importantly, how could the tip support probable cause if it wasn't sworn? If there was no threat of perjury?

Louis Henkin: [T]he Constitution requires oath and affirmation. But the oath it should be meaningful. ... The oath is a safeguard. The man has to be able to testify to something under oath, so that his lying about it would mean something.

John: A few minutes later, Justice Frankfurter pressed Henkin on whether simply naming the informant would be enough. Maybe the informant wouldn't swear an oath, but what if his identity was known to the commissioner?

Justice Frankfurter: Do you suggest he could rely if he gave him a name?

John: It's hard to hear. Sorry. We'll play it again.

Justice Frankfurter: Do you suggest he could rely if he gave him a name?

John: Henkin said no – just naming the informant to the judge wouldn't be enough. There needed to be an oath.

Henkin: Not if I could cross-examine him, if I had an affidavit. He didn't say this under oath, sir.

John: Then Justice Whittaker posed a hypothetical. One that is again, I'm sorry, super tough to hear.

Justice Whittaker: What do you say about this? The informant who has been found

John: Justice Whittaker asked, what if the informant has a long history of working with the police and he gives an extremely specific tip. Is that enough?

Henkin: We don't think so, sir, as Mr. Justice Bradley says in the case we cite in the note ... this man didn't say this under oath. And if he's going to make statements about the apartment not under oath, he can fill in all that details that he wants to. If one is going to fabricate a story, well, he can fabricate it.

John: And Henkin said, the oath isn't just about catching fabrications and liars. It also increases the chances that mistakes are caught before police bust into the wrong house.

Henkin: It isn't only the lack of reliability that we're concerned with. When you just have a tip, think of the dangers of mistake. The man said apartment 36, maybe he said 63. Maybe he said 35.

John: What is also striking about the oral argument is that when Professor Henkin brought up the oath, Justice Frankfurter steered the conversation away from the oath of the accuser.

Justice Frankfurter: The question is whether he's given enough to the commissioner on the basis of which he, on his oath, can issue a warrant.

John: Justice Frankfurter said, actually, the question in the case is whether the commissioner, or the judge, on *his* oath thinks there is enough there to amount to probable cause. We'll play that again.

Justice Frankfurter: The question is whether he's given enough to the commissioner on the basis of which he, on his oath, can issue a warrant.

John: Of course, judicial officers are bound by oath to uphold the Constitution. But a judge's oath is not the oath referred to in the Fourth Amendment. Nonetheless, what Frankfurter was really asking was: isn't the real question in the Fourth Amendment whether a judge is satisfied with what has been presented to him?

Justice Frankfurter: The commissioner probably had experience with this particular affiant ... I'm satisfied that he's acting within reason.

John: And Frankfurter posed another hypothetical. What if the judge knew that the police officer was a careful and conscientious officer who, in the judge's experience, always took care to make sure the informant was reliable. Couldn't, in that case, the judge just be satisfied with the word of the officer and not need to cross examine the informant?

Justice Frankfurter: Now what I am putting to you is that a past experience, he may have known Didone [the officer] was a very conservative, skeptical cross-examining officer. ... [I]t goes to the reliance a commissioner may make on an undisclosed informer.

John: Frankfurter reframed the oath requirement as being about the judge's oath – the judicial officer's confidence in issuing the warrant – not the accuser's oath. But that is a fundamentally different thing than an oath sworn by someone with firsthand knowledge of the facts. Under Frankfurter's reframing, the oath is satisfied so long as the judge is satisfied with the reliability of the probable cause. That subtle shift would carry the day. When the government's lawyer took the podium, he also steered the conversation away from what the Constitution says and toward a policy question about what seems reasonable to require of police officers.

Lawyer for govt: I don't think the question is so much as to whether the warrant was issued on information that might be hearsay. But what kind of hearsay? How reliable? How reasonable was the officer in relying on it? And I think that here there are certainly certain indicia of truthfulness or veracity enough to justify a man to rely upon that information and to act upon it.

John: No need for an oath sworn by the accuser. No need for the judge to cross-examine the accuser. You just need a certain indicia of truthfulness. And, ultimately, the Supreme Court agreed. In an 8-1 decision, the Court held that hearsay could support a warrant. The opinion focused entirely on probable cause – whether the informant’s tip, relayed through the officer, gave the judge a quote “substantial basis” for concluding that drugs were in the apartment. The words “oath or affirmation” do not appear in the ruling.

Laurent Sacharoff: Where the Court in *Jones* went so seriously wrong was to completely ignore the oath and affirmation requirement. It completely focused on probable cause and said probable cause can rest on hearsay – and that’s fine, sure, why not, it’s a low standard. But what about this other provision, the oath or affirmation requirement, which tells us not the level of proof necessary to get a warrant – namely probable cause – but the method of establishing that probable cause – namely firsthand witness or evidence?

John: In the ruling, written by Justice Frankfurter, the Court simply ignored legal tradition and history and it ignored all the prior caselaw and precedent. Instead, it relied on two Supreme Court cases that, astoundingly, did not involve warrants. [Brinegar v. United States](#) from 1949 and [Draper v. United States](#) from 1959.

Laurent Sacharoff: There were a series of cases that leads to *Jones* that are odd because they’re actually not warrant cases. These two cases, *Brinegar* and *Draper*, were warrantless arrests.

John: In each case, an officer made an arrest based at least in part on hearsay. In the *Brinegar* case, officers witnessed Brinegar driving into Oklahoma, which was a dry state, in a car that appeared to be “heavily loaded” or “weighted down with something.” One of the officers personally recognized Brinegar, who he had arrested several months earlier for bootlegging. Brinegar fled the traffic stop, the officers gave chase, and indeed a search of the car revealed a cache of alcohol. Brinegar argued the arrest was based on hearsay; he was just stopped because of his outlaw reputation. But the Court said however much his reputation played into it, the officers had personal knowledge enough that the warrantless arrest wasn’t really based on hearsay. In the *Draper* case, though, hearsay was at the forefront. There, a paid informant told a federal narcotics agent that Draper was bringing drugs on his person from Chicago into Denver by train. The agent didn’t do any investigating to back up the tip; Draper was just stopped and searched when he stepped off the train. And the Supreme Court said, yep, the tip was hearsay, but it was still enough for probable cause for a warrantless arrest.

Laurent: *Jones* comes along and says, okay, well, same thing applies to warrants, because it’s all probable cause. What the Court failed to do is notice one little difference, which is *Draper* was a warrantless arrest and *Jones* was an arrest based on a warrant. And there’s a warrant clause, and the warrant clause has something in addition to a probable cause requirement.

John: If hearsay could support an arrest without a warrant, the Supreme Court said, it could also support warrants. But, we submit, that can’t be right.

Laurent Sacharoff: The Court was really looking at which ruling would be best for law enforcement outcomes. We want to make it easy to get a warrant so that officers get it.

John: Justice Frankfurter wrote that if police have to go through the trouble of bringing an accuser before a judge, officers would be quote “discouraged” from seeking warrants. Instead, they’d just avoid the hassle and make the arrest without a warrant. So by making it easier to get warrants, Frankfurter said, actually we’re doing everyone a solid because there will be at least be some judicial scrutiny beforehand.

Laurent Sacharoff: It was an era of balancing. It was an era of ignoring the text, ignoring originalism, and doing what made sense for law enforcement, essentially.

John: The Court replaced a bright-line rule with what is disparagingly called a balancing test. And notably, there was no hue and cry from the legal profession when the Court issued its decision.

Laurent Sacharoff: It went unremarked in the sense of “Wow, they just allowed hearsay. This is a huge thing.” No one really said that. So it was an era that not just the Supreme Court, but all courts and lawyers were on board with this idea that: Oh, let's just be reasonable. We're not really going to look at the text.

John: That is what is meant by balancing. The Court purported to balance the interests of the police with the interests of criminal defendants in service of being flexible and doing what seems reasonable. Except, even on its own terms, what the Court did in *Jones* was not reasonable. Officers cannot pivot so easily to making warrantless arrests if they don't feel like getting a warrant. The general rule for warrantless arrests is that an officer needs to have personally witnessed the crime. That rule has been watered down, including in the *Brinegar* and *Draper* cases, but it still provides the basic context. If an officer witnesses a crime, probably out

in public, then it makes sense to have a warrantless arrest right there on the spot. By contrast, if the officer does not have that firsthand knowledge and they are contemplating breaking into private property – possibly days, or weeks, or months later – that’s a different situation entirely, and the warrant clause says a judge needs to examine the accuser.

Laurent Sacharoff: So that aspect went unremarked. The result of the holding, though, created tremendous problems, pretty much right away. Judges now have to assess whether there's probable cause without having the witness in front of them. They can't ask questions. They can't ask the person, oh, well, did you see this? How did you see it? Were you in the house, etc. Instead, they have to ask the officer questions to try to get, indirectly, answers about the informant.

John: After *Jones*, things only got worse. Once the Court allowed hearsay to support a warrant, judges had to figure out how to evaluate witness reliability without having the witness in front of them. And that produced a series of increasingly complicated frameworks.

Laurent Sacharoff: And so there were a couple of cases that are often taught in criminal procedure class, both *Aguilar* and *Spinelli*, and a test developed called the *Aguilar-Spinelli* test – this jury-rigged, complicated framework for magistrate judges to assess whether there's probable cause when the witness is not in front of them. How did the absent informant have the chance for first-hand observation? Are they reliable? Do they have reason to lie? Is what they said corroborated?

John: And then in 1983, the situation got even worse. In case of *Illinois v. Gates*.

Laurent Sacharoff: There, the informant wasn't just a confidential informant, the informant was an anonymous informant. And an anonymous informant means even the police don't know who they are. Even the police have no basis to know whether they're reliable or whether they had the opportunity for firsthand knowledge, and even the police can't respond to the question by the magistrate judge trying to meet the *Aguilar-Spinelli* factors of reliability, firsthand knowledge, et cetera.

John: But in *Illinois v. Gates*, the Court said, that's fine.

Laurent Sacharoff: As long as the judge can extremely indirectly conclude from a totality of the circumstances that the informant who's absent and anonymous is reliable, then the judge can issue the warrant. And that was a further erosion of the Fourth Amendment and the oath requirement. But it's also, again, making things super complicated where they would be much, much easier. None of this would be necessary if we just read the oath or affirmation requirement for exactly what it says, which is just bring the witness in.

John: Totality of the circumstances. Certain indicia of truthfulness. The oath or affirmation requirement has been replaced by an empty ritual. Today, according to a study published in the [Harvard Law Review](#), judges spend only about three minutes on the median reviewing warrant applications. One in ten applications are approved in 60 seconds or less. That study involved tens of thousands of warrant applications in Utah, which is one of the few jurisdictions to make such data available. Whatever the elements of the complicated test that judges are supposed to be applying, they are doing it in mere moments. So it is perhaps surprising that there was not much of an outcry in 1960 when the Supreme Court issued its opinion in *Jones*. And it is equally

surprising that since then there never really been all that much attention given to the lost oath requirement.

Laurent Sacharoff: I was teaching Criminal Procedure and *Aguilar* and *Spinelli* and *Illinois v. Gates*, and a student asked about the oath requirement and whether it prohibited hearsay, or whether the officer could swear the oath that someone had told him that there were drugs in the house. And I stared open-mouthed, probably, because I did not know. So I did some research, and I found that the *Jones* case, which itself —the *Jones* case is rarely cited. It's *Aguilar-Spinelli* and *Illinois v. Gates* that are the ones that ones that come up. So I read *Jones* and I was like, wait a second. This makes no sense. And then I did more and more digging and discovered that the original meaning of oath or affirmation banned hearsay and required firsthand witnesses.

John: Case books do not cite *Jones* for erasing a requirement from the Constitution. All of the history that we've talked about was pretty much forgotten until Professor Sacharoff started beating the drum.

Laurent Sacharoff: I thought, well, let's see if I can do something about this. I'm a lawyer, it turns out. And so I started looking for warrants and cases that would make for a good test case.

John: But there was a practical problem: search warrants are generally sealed. The public, and even law professors, can't just go look at them. Unless, it turns out, you live in Denver. Which is where he taught when we recorded this interview.

Laurent Sacharoff: Denver court is one of the very few courts that has their warrants open to the public. So I went to the Denver court, and I went to the window, and I said "I would like to see the

warrants, please.” And the person at the window said “yes, I’d be happy to give you the warrants.” And then they reached right under the desk on their side of the window – literally, they were right at their hands – the last three months, in manila folders. And they just handed me a stack of three months of search warrants. And I almost I was looking around for surveillance cameras. I thought I was going to be arrested myself. This is too good to be true.

John: Professor Sacharoff and his students went through those warrants, trying to find a case they could bring under Section 1983. That is, instead of finding someone who was on trial and trying to have evidence in their case suppressed, they were looking for someone who had been wrongfully searched or arrested based on hearsay and had had their charges dismissed. And they found a man named Michael Mendenhall, who was searched not just on the basis of hearsay but on double hearsay – an officer swearing that another officer had told him something that someone else had said.

Laurent Sacharoff: I just called Mr. Mendenhall, out of the blue, and he picked up, which was shocking, because no one picks up their phone nowadays. And I explained to him who I was. I was a law professor, and I’m bringing this test case. And he was like, bring it on.

John: Michael Mendenhall is a businessman in Denver who, in March of 2020, launched a staffing company with a partner – two weeks before the world shut down. But their business survived COVID, and by 2023 was thriving. And they moved it into a historic building near Coors Field.

Michael Mendenhall: It's a historic building. It has the designated landmark, and it was many, many years ago, in the 1800s, part of the Windsor Hotel. But it was converted to mixed use. It's kind of like a row home type of setting.

John: The building is close to the street – just two steps up from the sidewalk to the double front doors. It's in a busy area with lots of foot traffic and bars and restaurants. And on a Friday evening after 9pm in 2023, Michael and a colleague had been working late and were just about to wrap things up.

Michael Mendenhall: We just heard like a bang or a bash on the double front doors and some very loud female shrieking. And then we heard, in response to that, a male voice that was yelling. It was very startling. We didn't know if someone was trying to come in. I didn't know if these females were being assaulted or exactly what was going on. So I went to the door.

John: And before he opened the door, Michael grabbed the closest thing at hand, a baseball bat – in fact, a commemorative All-Star Game bat.

Michael Mendenhall: So I opened the door with a bat in my hand. I said, what the hell is going on our here? Get the eff off my porch. And as I was opening the door, the females were already departing, and they had like a little dog with them.

John: And there was a man with a larger dog, who was sitting on Michael's stoop and initially refused to move. But then he got up, crossed the street, and said he was going to call the cops.

Michael Mendenhall: "I'm gonna call the cops. I'm gonna call the cops." Okay, well, call the cops. And so everybody dispersed. We went back in. It was all very, very quick. Just a matter of maybe thirty or forty seconds.

John: Soon after, there was a knock on the door.

Michael: It was the Denver Police Department, and they said some man had reported an incident, and they wanted to come and speak to us regarding that. And a very short time later, I was in handcuffs and taken out to a police cruiser and sat out there for a long, long time. It might have been seventy-five, ninety minutes, a long time. And they were waiting to get their warrant, apparently, based on his hearsay.

John: The man, who was homeless, told an officer Michael had threatened him, but his story was not particularly coherent. He said he lived in a town nearly 50 miles away, but that he was in a place in his life "where I need to walk." And he volunteered that he was carrying a handgun. The officers did not ask many followup questions and they overlooked the man's strange interjections and discrepancies in his story and arrested Michael Mendenhall without asking for his side of the story. And then an officer at the scene relayed the man's accusation to a detective who wasn't there and hadn't spoken to the man. And that detective applied for a search warrant. When the warrant was approved, officers entered Michael's office and seized the commemorative bat. And then they took Michael to jail.

Michael Mendenhall: I sat in the holding area for several hours, maybe two, three hours. And I think maybe it was after midnight when they finally give you a jail uniform, then take you upstairs

and put you in a housing unit with ... I think there was about eight, ten other guys drunk and high, loud and kicking and banging. It was a pretty unpleasant evening.

John: Michael was released the following afternoon. A few days later, the detective called and told him the charges were being dropped.

Michael Mendenhall: Of course, I was greatly relieved.

John: But the relief was incomplete. Even though the charges were dropped, he should not have been arrested nor should a search warrant have been issued based on hearsay. And to this day, now over three years later, the police have not returned the bat. Fortunately, Professor Sacharoff found the warrant.

Michael Mendenhall: He said, I'd be interested in meeting with you, along with some of my law students and some other professors. Would you be willing to sit down and share your story? And I said, sure.

John: With the help of Professor Sacharoff and the Civil Rights Clinic at the University of Denver, Michael filed a lawsuit, arguing that search warrant for his office violated the Fourth Amendment's oath or affirmation requirement. The district court dismissed the case, as it had to because the Supreme Court's ruling in *Jones*. At that point, the Institute for Justice took over on appeal, and earlier this year we lost again in the Tenth Circuit, which said quote: "Any change in the law that Mendenhall seeks to change must come from the Supreme Court, not us." And right now, we are waiting to see if the Supreme Court will take up the case. We know at least one of the justices is interested because earlier this month the Court issued a call for a response from

Denver. And I must add that while revisiting bad precedent is always a big deal and a bit of a long shot, we are not asking for the moon here. The current Court is especially interested in restoring original meaning, particularly in cases where a categorical historical rule – like, warrants cannot issue based on hearsay – have been replaced by a squishy balancing test – like *Aguilar-Spinelli*. For example, in the cases of *Crawford* and *Ramos*, the Court ruled that certain hearsay at trial and also non-unanimous jury verdicts are just straight-out, flat prohibited by the original meaning Constitution, and the Court overturned precedent to the contrary. Each of those opinions favored criminal defendants, and put the burden back on the government. Better to let the guilty go free than to subject everyone to vexation and oppression.

CJ Roberts: It certainly wasn't a problem in the 19th century.

SG Sauer: No, but of course we're in new world now ...

CJ Roberts: Well, it's a new world. It's the same Constitution.

John: And I should also add that we at IJ are certainly sensitive to the issue of witness safety. There are certainly instances where a witness has legitimate fears about coming forward. The Founders would have been aware of that too. And the courts, then as now, had methods to protect witnesses. Witnesses can testify in chambers, under seal, by pseudonym, today they can testify by videoconference. Anyway, even if the Court does not grant certiorari, we have other cases in the pipeline with the same claim. And separately, as we are fond of pointing out, every state has its own constitution, and many contain their own oath requirement. Some of them pre-dated the Fourth Amendment, dating all the way back to the various declarations of rights that some of the new states adopted in 1776. Those requirements are a rich but underlitigated source of constitutional law, history, and tradition. Someday soon, courts are going to have to start grappling with the original meaning of the oath requirement. But that is where we will leave

things for now. When we return next episode, we will return to abstention doctrine. Specifically, the doctrine of *Younger* abstention, which comes from the case of *Younger v. Harris* decided in 1971, which in turn originated from peaceful protesting over a police shooting in Los Angeles.

CA AG: But this whole incident occurred in April 1966 about six months after the great Watts Riots. It grew out of the shooting and killing of a man named Leonard Deadwyler in Los Angeles. He was a black man and it turned out he was taking his pregnant wife to hospital.

John: I'm John Ross. Thanks for listening to Bound By Oath.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. This episode was produced by John Ross and John Wrench. Audio from oral argument in the Supreme Court comes from Oyez. The theme music is by Patrick Jaicomo.