BENCH MEMO

No. 05-22 FT 2018
United States v. TPR
Group-Arrest Warrant Proceeding

Mr. Justice--

In view of the conference discussion of March 29, 2018--with first draft opinions already circulated--it may be best not to treat this as an ordinary bench memo. Instead, I would like to outline the existing opinions by Chief Justice Holmes and Justice O'Connor and to suggest the manner in which this case may be disposed of best. I will also attempt to flag a number of questions that we might wish to explore in more detail.

I. THE CHIEF JUSTICE'S CONCURRENCE

It would be accurate to say that the Chief's concurrence represents the majority's real opinion. Written to primarily respond to your dissent, the Chief's concurrence is split into two sections. I will tackle them individually.

(1) Legal Standard

The Chief's primary argument against your dissent is that you read too much into Article III--that Article III's meaning is actually quite clear. But to bolster this claim, the Chief makes no substantive argument, instead he merely states that it is clear because of In Re United States, 5 U. S. ——, —— (2018) (slip op., at 2). This will satisfy junior-varsity lawyers but collapse upon even the thinnest of further review. The Court's reasoning in In

re United States was as empty as the Chief Justice's opinion's is. A footnote should suffice to parry this section.

The Chief Justice, in footnote no. 2, says that your quip--that the majority's reading allows Americans to be detained not for committing crime but for the possibility of committing crime--is wrong because group-arrest warrants require a showing of criminal conduct at the initial request stage (probable cause). The problem, however, is that reading is not at all what the In re United States Court held. Instead, to obtain a group-arrest warrant, the Court said that the United States must demonstrate "factual allegations which tend to show a need for preventative relief." Id., at —— (slip op., at 1) (emphasis added). Nowhere in the Court's opinion ~~in that case~~ was there ever mention of a probable-cause requirement ~~to secure~~ the warrant's initial issuance. And such a requirement would indeed require a showing of already committed criminal conduct, as ~~described~~ in his concurrence. But it is not so with the majority, so I do not know why he went down this avenue, especially given that he says he agrees with them.

The Chief Justice seems to be confusing your statement about banana republics with one that warns against the judicial abuse of a case-based standard for reviewing general warrant claims. But, from what I read, you seem to instead be trying to articulate that in the United States you must commit a crime initially to be arrested--

regardless of what the Chief's concurrence says, no actual holding of the Court confirms what his footnote's analysis claims.

The Chief Justice's next primary point of this section is that the "trial" phase of Article III warrants is synonymous with a criminal "trial" as we understand the word generally. This, again, disagrees with the In re United States Court, which said that the "trial" for Article III warrants simply means a fair environment where the group for which the warrant was issued may challenge the initial showing of (according to the In re United States majority) "preventative need"--it is not an opportunity for the Court to conduct a criminal trial and discern to what extent, if any, the group's members are guilty of the crimes for which they are accused of committing. Considering your view on this subject of law, I believe you could explain this best by simply pointing out that, after an Article III trial phase concludes, the decision to be made is not whether the group has committed the crime for which it is accused, but instead whether the warrant should be sustained under probable cause as your argues.

The Chief Justice seems to think you believe "special rules" (I am unsure of what he is getting at here--he probably means "unusual interpretation") cannot be made for the group-arrest-warrant Article III provisions. I do not believe this accurately reflects your dissent draft, as you

included a section specifically to qualify your interpretation: reading "charges" to bear a synonymous meaning with "charges" in the trial context would produce an absurd result, so the Court is therefore at liberty to ensure a reasonable interpretation that would avoid an unreasonable result. That reasonable interpretation, as you say in your dissent, is to hold the Article III provisions ~~to be~~ are subsidiaries of the Fourth Amendment--and, therefore, the provision requirements, therefore, should be interpreted as closely as possible with the general requirements and intentions of the Fourth Amendment.

He also maligns your dissent's focus on the near-exact similarities between individual and group-arrest warrants. What he reads into this part of your dissent, however, bears little similarity--if at all--to what it actually says. He says that by noting there is no distinguished context between arrest warrants for individuals or for groups, while then requiring a probable-cause rule, the opinion breaks its own logic. This, however, stems from a failure to distinguish its contents. I believe, if I am correct, that this is the basic "gist" of your dissent:

1. The Fourth Amendment requires all warrants be backed by probable cause.
2. Article III puts down into text a process similar to what would be done in real life to handle arrest warrants.

3. That textual process is the same for individual- and group-arrest warrants, so the requirements, at least textually, should not be different for group-based warrants.

4. Because the text of the Article III provisions is the exact same, apart from only allowing the Supreme Court to grant warrants for group arrests, the Constitution suggests that, in interpreting the meaning of "charges" and "trial," the general requirements of the Fourth Amendment (showing of probable cause) are what apply, too, to group-arrest-warrant requests.

5. A "strict construction" of the text would produce an absurd result, so this is the most logical and textual-based interpretation that avoids ambiguity or confusion in application.

I do not know why he read your dissent as basing its interpretation of "charges" (to mean probable cause) on the same nonexistent-context you chided the majority for using; it is very obvious that the only "context" you have relied on in your interpretation is the Fourth Amendment itself.

In fact, I can find no support in your dissent for the proposition that the procedure for procuring arrest warrants is any different when concerning individuals instead of groups. Only under the majority's reading is such a distinction compelled, because there is no absolutely no textual basis for having different procedure

requirements for individual-arrest warrants and for group-arrest warrants.

(2) Factual Analysis

The Chief Justice then lays out his reasons for why he feels, under the majority's framework, that there is no longer a need for the warrant. As I understand, your personal view is somewhat separate from even that of your dissent, but feel restricted by the text and the In re United States holding. Regardless, the Chief Justice references two facts: (1) a statement from the leader of the President's operation against TPR and (2) the fact that TPR was shut down on April 1, 2018. There are problems with both.

In regard to the first, it again shows why the majority's framework is so dangerously flawed. An arrest warrant permits the Government to arrest an individual for committing a crime--it is not a permit for only a single-use arrest. Once a warrant is issued, it does not expire once a single arrest is made; that is as deeply ingrained into our Nation's history as it is simply required by reality. We have no true method of detainment; thus, being placed "under arrest" means to have an arrest-on-sight status imposed. These are procured by arrest warrants and allow the Government to "detain" (under our environment's definition) the individual until he has been tried in court or the warrant expires. So it does not matter how damaging TPR is; the arrest warrant is not issued to be tough on

crime. It is issued to arrest and detain for crime committed, so what matters is that initially crime was committed. This seems to be the main "theme" of your dissent--because it shows how illogical the majority's holding is once actually scrutinized. It may be helpful to distinguish pressing charges from arresting and detaining an individual because the Chief Justice's argument could be construed to give a court the legal breathing room to decline group-arrest warrants simply because the criminal group at issue happens to be bogged down by law enforcement, thereby throwing the purpose of arrest warrants out the window. That seems to me almost a quasi-exercise of prosecutorial discretion--only from a judge instead of a prosecutor (prosecutors often drop charges when pursuing a case is too costly, when the individual is no longer a problem and resources must be extended onto more important cases, etc.).

As for the second, this is a wholly inappropriate action; a Justice, I suspect, would be asked to remove such a portion of his opinion in any other case, but I suppose being Chief Justice has its "perks." He asserts that it is okay to include evidence not raised at any point in the actual record during the disposition of the case itself because In re United States requires that the Court "draw all inferences in the affected group's favor"--"[m]aking an inference requires consideration of both evidence and known facts." TPR, 5 U. S., at ——, no. — (slip op., at 5, no.

3) (emphasis added). You agree that this is what In re United States holds, but in no means does the Chief Justice's concurrence in application follow it. First, clearly, the fact that TPR was shut down a month after oral arguments concluded should be the end of this; the warrant was, to my knowledge, denied officially in the early days of March--with a promise of opinions to be released at a later date. If we go by this assumption, then no developments after the warrant itself was denied can be included in the record--it would make little sense to justify denying a warrant in March with evidence obtained in April.

If, however, we accept his re-telling of the timeline, that the warrant will not actually be denied until the release of the opinions, then this Court is a month late and in violation of the Constitution. Though, I am not sure which possibility, out of this and the above-mentioned one, you will find worse. Note: The Constitution says that arrest warrants expire if a warrant "trial" does not occur within 72 hours of their issuance. The Chief Justice could construe this to mean that all ~~it requires~~ is that a warrant trial begin within 72 hours--not necessarily conclude, too. This, however, could be a stretch in interpretation because, generally, ~~verbs~~ like "occur" used in the past tense imply completion.

Regardless, neither of the points of evidence he raises are any more statistically or logically valid than

are the ones the majority and Justice O'Connor raise, either; they can easily be dispelled in passing for readers. Should they be, though?

II. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor wrote to qualify her vote with the majority. Her argument is that the government outnumbers TPR, so the TPR warrant is no longer required. I think it easy to show how flawed and primitive that analysis is while also showing why it should not matter because, again, arrests are not preventative measures. It will not be difficult to show that comparing the size of the gang with law enforcement is not enough to determine the danger a group presents or its capabilities.

III. DISCUSSION

I am persuaded ~~none by the~~ majority and concurring opinions; I share your view on this matter of law. In light of this, I would recommend that you qualify certain areas of your dissent to clarify the Chief Justice's and Justice O'Connor's misreading of its contents. Footnotes should be enough to do this.

There is one question, though, that I believe will eventually merit review (and I expect it will come before the Court anyway): How ~~does~~ do the majority and concurring opinions reconcile their holding with arrest warrants that targeted at individuals? The Constitution requires the same "charges" and "trial" for all arrest warrants--the

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only distinction it makes, as your dissent notes, involves who is to issue the warrant, not how it is to be issued.

Please let me know if you have any further questions and I will devote more time to them.

Chief Justice fails to respond substantively to dissent. O'Connor concurred w/ us, but b/c of its ~~analysis~~ stand-alone analysis — does not respond directly like Chief does.

Req's that warrant be denied — thus support dissent. Advises, further footnoting to clarify Chiefs' misreadings.

11/10/18