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OFFICIAL REPORTS

AT

THE SUPREME COURT

BEGINNING OF TERM
FEBRUARY 27 THOUGH APRIL 8, 2018

TIMOTHY F. GEITHNER
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

OLIVER W. HOLMES, Jr., Chief Justice.
THURGOOD MARSHALL, Associate Justice.
NEIL M. GORSUCH, Associate Justice.
CLARENCE THOMAS, Associate Justice.
ROBERT H. BORK, Associate Justice.
SANDRA D. O'CONNOR, Associate Justice.
DAVID H. SOUTER, Associate Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 2018

IN RE UNITED STATES

ON APPLICATION FOR A GROUP-ARREST WARRANT

No. 05–14. Decided February 27, 2018

PER CURIAM.

The application for a group arrest warrant on the group TPR[1] is granted in accordance with the legal process set forth in the concurring opinion. See *post*, at 2 (joint opinion of HOLMES, C. J., and MARSHALL and GORSUCH, JJ.) ("we . . . ask whether objective information supports granting the warrant").

CHIEF JUSTICE HOLMES, JUSTICE MARSHALL, and JUSTICE GORSUCH, with whom JUSTICE GINSBURG, JUSTICE THOMAS, JUSTICE BORK, and JUSTICE O'CONNOR join, concurring.

The Constitution imposes three fundamental requirements on this Court in the exercise of its power to issue group arrest warrants. "[C]harges" must exist, a "trial" must occur within "seventy two hours" of the warrant's issuance, and the charges must be "actively pursued by the federal government" for the duration of the warrant. Art. III, § 5, cl. 1, 3. After extensive deliberation and in consideration of the nature of relief authorized, the Justices signing this joint opinion (the entirety of the Court) conclude the following:

First, that the remedy of a group arrest warrant is a preventative, not punitive, measure. It is not intended to replace criminal prosecution, which per our holdings must occur on an individ-

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[1] https://www.roblox.com/groups/group.aspx?gid=731626

ual basis (or consistent with lawful rules of joinder). See, *e. g.*, *CodyGamer100* v. *United States*, 2 U. S. 18 (2017). Thus, in the context of group arrest warrant proceedings, the "charges" required are not *criminal* charges—or, for lack of a better term, "Title 18" charges—but rather factual allegations which tend to show a need for preventative relief. These allegations must adequately demonstrate that the actions of group members are not isolated incidents, but rather part of some organized effort on the group's part to harm the peace of the United States and her cities.

Second, that in determining whether to grant the government's application for a warrant, we should consider that the affected group will not be able to defend itself against the charges until the "trial" opportunity occurring within 72 hours. Therefore, we should subject the government's allegations to appropriate scrutiny: Specifically, we should ask whether objective information supports granting the warrant.

Third, that the "trial" demanded by the Constitution is an opportunity for the affected group to challenge the quality of the charges presented by the government. Provided that having reached this stage of proceedings we would have already determined that objective information supported granting the warrant, the onus would be on the group to demonstrate why that is not the case. We should accord the group the benefit of all inferences.

Fourth, and finally, that if after the trial we resolve to maintain the warrant, we should request that the government provide an estimate of how much longer the warrant will be necessary as a preventative measure; we should accommodate that estimation to the maximum extent that objective information permits. The government may withdraw charges at any time during that period and we should thereupon dismiss the warrant. If the government determines the warrant will be needed longer, it may petition us to extend the warrant.

These conclusions are limited only to the context of group arrest warrants.

BANK OF AMERICA, INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES FEDERAL GOVERNMENT

No. 05–20. Decided March 10, 2018

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

JUSTICE BORK, concurring.

I agree with the Court that dismissal of the writ is in order because the petitioner wishes to withdraw. Nonetheless, considering the import of the question presented and the shortage of answers available in previous opinions, I write to explain that had this matter proceeded to argument and decision, I would have voted in the government's favor. At the outset, I feel it necessary to disclaim that this statement constitutes no part of any holding of this Court and represents my own personal conclusions of law.

I

The powers of the President to protect the American people from both foreign invasion and domestic violence are well articulated in the Constitution. In addition to wielding the general "executive power," the President is tasked with ensuring the laws are "faithfully executed." To be sure, both clauses deal in generals and are intended to enable the executive to adapt to new situations as they arise. The Framers appreciated and embraced the idea of "energy in the executive"—they firmly believed it to be a "leading character in the definition of good government." The Federalist, No. LXX. This belief was common among the founding generation. The powers conferred by Article II and the Amendments should be read in context of this observation.

As far as seizing the Bank of America's Las Vegas location temporarily goes, the President finds strong support in the

Constitution of the United States. The President's decision to do so was adequately based in public exigency. The Court itself recognized the unusual and extraordinary threat of the "TPR" organization when it granted the government's application for an arrest warrant on the group. See *In re United States Application for Arrest Warrant on TPR*, 5 U. S. 1 (2018) (*per curiam*). The President similarly recognized the threat of "TPR" and used the bank property's central location in the city to provide a shelter and safe house for the public in addition to a strategic headquarters for his men. I have little doubt that the bank was then "seized for a public use." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 680 (1952) (Vinson, C. J., dissenting).

The Court has consistently recognized the Federal Government's power of eminent domain in its decisions. See *Kohl* v. *United States*, 91 U. S. 367 (1876). The same goes for society by and large. The SuddenRush12G Administration's seizure of the roads leading to the federal prison in Las Vegas, for its security, went unchallenged by the general public. In fact, that seizure of property remains in effect and good standing even today. Yet in this case, a comparatively more modest (and temporary) measure, justified by a clear public exigency recognized by the Court, is challenged. Nonetheless, our precedents confirm what is obvious: unless the taking is otherwise unlawful, there is no cause for concern. See *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951).

The Founders obviously did not create an "autocrat capable of arrogating any power unto himself at any time"; the President has not asserted any such power. *Youngstown Sheet & Tube Co.*, *supra*, at 682 (Vinson, C. J., dissenting). But as proven earlier, they assuredly did not create "an automaton impotent to exercise the powers of Government at a time" when necessary either. *Ibid.* The Constitution, we have observed, is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 415, 424 (1819). Fulfilling that objective would

be a difficult task if the President was paralyzed to act without express Congressional approval. Furthermore, such a paralysis would be inconsistent with the Framers' and founding generation's appreciation of "energy in the executive."

II

The President's power to "take care that the laws be faithfully executed" is substantial. "With or without explicit statutory authorization," he must carry out that duty under the Constitution. 343 U. S., at 683. "Presidents have … dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act." *Ibid.* Every time, both Congress and the courts have responded with "consistent approval." *Ibid.* John Marshall, before he became Chief Justice, explained the power of the President to determine the mode of executing the laws of the United States (specifically addressing a treaty) when Congress has not made provisions for the same (such as in the case of a public exigency):

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses. See 10 Annals of Congress 596, 613–614 (1800).

The organization "TPR" deliberately and routinely violates the laws of the United States prescribed by Congress. The

President, whose judgment on national security we do not second-guess, concluded that they posed an exceptional and extraordinary threat to the national security of the United States. Congress did not outline a specific mode for the execution of the laws in the case of such a public exigency. The President's obligation to execute them nonetheless applied. I see no reason to challenge the mode he chose to do so.

Syllabus

ROEXPLO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

No. 05–07. Argued March 16, 2018—Decided March 20, 2018

On August 2, 2017, the Department of Justice began investigating RoExplo for multiple instances of murder and attempted murder. Soon, they decided to prosecute him, and he was convicted on all charges. The District Court sentenced him to a 150-day (or five-month) prison term, for the duration of which he would be subject to an arrest warrant.

Held: The 150-day sentence did not violate the Eighth Amendment, as construed in *CodyGamer100* v. *United States*, 2 U.S. 18, and was accordingly upheld by the Court.

(a) The Court's interpretation of the Eighth Amendment "must be firmly rooted in the original public meaning it carried at the time of its adoption."

(b) As originally understood, the Eighth Amendment's prohibition on "cruel and unusual punishment" was targeted at cruel innovations in punishment. That is, any entirely new punishment (or application of one), or one which fell out of use and was reintroduced, that—in the case of an application—is "incredibly severe" and "clearly out of proportion" such that it "shocks public sentiment and violates the judgment of reasonable people"; or—in the case of a mode of punishment—is "destitute of pity, compassion or kindness and has a separate tormenting element."

(c) The *CodyGamer100* rule against permanent exclusion as punishment for common crime is consistent with the original public understanding of the Eighth Amendment.

(d) A five-month sentence does not amount to "permanent exclusion" as contemplated in *CodyGamer100* and RoExplo's challenge to his sentence under that case exclusively accordingly must fail.

(e) Because RoExplo only invoked *CodyGamer100*, the Court only measured his sentence against the standard of "permanent exclusion" which it found was valid under the Eighth Amendment's original meaning. It did not apply its test directly to RoExplo's sentence.

3:18-bR0kAk1W, affirmed.

HOLMES, C. J., delivered the opinion for a unanimous Court. BORK, J., filed a concurring opinion.

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

Our interpretation of the Eighth Amendment must be firmly rooted in thet original public understanding it carried at the time

of its adoption. Failing to do so risks creation of an "ineffectual and incoherent" line of decisions. Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 684 (2005). In the present case, petitioner RoExplo challenges his 150-day sentence for murder and attempted murder on the grounds that it violates our finding in *CodyGamer100* v. *United States*, 2 U. S. 18 (2017), that the punishment of "permanent exclusion" cannot be imposed for common offenses (such as murder and attempted murder). *Id.*, at 23. Before turning to the question of whether his 5-month sentence qualifies as "permanent exclusion," we must first determine whether the relatively new rule of law announced in *CodyGamer100* is consistent with the original public understanding of the Eighth Amendment.[1]

I

The terms of the Eighth Amendment appear straightforward: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In practice, however, that is not the case. Legal commentators from across the spectrum and several Justices have criticized this Court's approach to the Eighth Amendment for being contradictory, see *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (opinion of Scalia, J.) ("*Woodson* and *Locket* are rationally irreconcilable with *Furman*"), a "mess,"[2] a "train wreck,"[3] and—in many cases—downright "embarrassing."[4] The cause has largely been the Court's long-time creed that "evolving standards of decency," and not original meaning, dictate the application of the Eighth Amendment. *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002). To

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[1] What follows is an extensive analysis of the legal and drafting history of the Amendment aimed at identifying its original public meaning. Those only interested in a summary of our findings on this question should skip to page 27.

[2] Tom Stacy, Cleaning Up the Eighth Amendment Mess, 14 Wm. & Mary Bill Rts. J. 475, 475 (2005).

[3] Benjamin Wittes, What Is "Cruel and Unusual"?, Pol'y Rev., Dec. 2005-Jan. 2006, at 15, 16.

[4] Robert Weisberg, Cruel and Unusual Jurisprudence, N.Y. Times, Mar. 4, 2005, at A2 1.

avoid repeating that confusion and to produce expectancy, we begin with the original understanding. Our analysis should not be taken to cast doubt on long-standing precedent.

A

The original meaning of the word "unusual" in the Cruel and Unusual Punishments Clause has been largely overlooked in this Court's jurisprudence. This is true not just of the prevailing non-originalist approach but also of the originalist approach announced in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). Both essentially ignore the word, either by treating it as meaningless, or as in the case of the latter, assigning it a weak meaning inconsistent with the history of the Clause. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100 n. 32 (1958); *Harmelin*, *supra*, at 976 (1991) ("Wrenched out of its common law context, and applied to the actions of a legislature, the word 'unusual' could hardly mean 'contrary to law.' But it continued to mean (as it continues to mean today) 'such as [does not] occu[r] in ordinary practice,' '[s]uch as is [not] in common use' ") (citation omitted).[5] The result of this has been the transformation of the Cruel and Unusual Punishments Clause into a Cruel Punishments Clause, with the only difference between the originalist and non-originalist approach being the time-frame from which public opinion about cruelty is derived.

The meaning of the word "unusual" is crucial here. It cannot be presumed that it was intended to have no effect; we begin our analysis there because it necessarily informs the Clause's use of

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[5] The problem with *Harmelin*'s hypothesized original meaning of "unusual" is that it relies purely on abstract logic. After extensively analyzing the understanding of the term "unusual" during the drafting of the English Bill of Rights, the *Harmeltin* Court—moving from seventeenth century England to eighteenth century America—abandons that meaning without attempting to discern whether the founding generation shared it. It then asserts a new meaning out of almost thin air and does not attempt to justify it, quickly moving on. We are not convinced by the *Harmelin* Court's proposed original meaning of "unusual."

the word "cruel."

1

Unusual

In the seventeenth and eighteenth centuries, the term "unusual" had many of the meanings we currently attribute to it: "rare," "uncommon," "out of the ordinary." Oxford English Dictionary 249 (2d ed. 1989) (entry for "unusual"). The word also had a more specific meaning as a legal term of art: "contrary to long usage," or "immemorial usage." An analysis of seventeenth- and eighteenth-century legal and political history reveals that this last meaning is the *only* one plausibly attributed to the Eighth Amendment's Cruel and Unusual Punishments Clause.

Throughout the seventeenth and eighteenth centuries, in England and later America, the common law served as the primary (and most important) source of law. Blackstone explained it as the "first ground and corner stone of the laws of England." 4 William Blackstone, Commentaries (hereinafter Commentaries) at *73. Many today see the common law as a body of judge-made law where judges, acting in accordance with a voluminous framework of precedent, devise legal principles that apply to the changing circumstances of time. Common law judges, under that view, exercised a "legislative function," formulating legal rules, doctrine, and principles based on their views of "what is expedient for the community concerned." O. W. Holmes, Jr., The Common Law 35–36 (Boston, Little, Brown, & Co. 1881).

Practitioners of common law in the seventeenth and eighteenth centuries had a different perspective. Common law to them was not judge-made law, but rather the law of "long use" and "custom." Edward Coke, The Compleat Copyholder (1630) (hereinafter Copyholder) § 33, at 563, 563 ("Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised").[6] Judges at the time did not see them-

[6] Writings from as early as the fourteenth century express the belief that

selves as arbiters of public policy or makers of law; rather, they saw it as their job to identify long-standing customary rules and apply them to new cases. See, *e. g.*, Grant Gilmore, The Ages of American Law 5–7 (1977). The common law depended on "long use and custom" as a source of normative and actual authority. 1 The Works of James Wilson 186 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (hereinafter Wilson).

Both English and American legal thought regarded the terms "custom" and "long use" as being closely tied together as a matter of logic and grammar. Today we say that we "follow" a custom; in the seventeenth and eighteenth centuries they would "use" a custom. For example, Edward Coke wrote: "And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde." 1 Edward Coke, Institutes of the Lawes of England (1608) (hereinafter Institutes) § 170, at 701. More than a century later, Blackstone wrote that "in our law the goodness of a custom depends upon [its] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary." 1 Commentaries at *67. James Wilson, an American and among the drafters of the Constitution, wrote: "[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law." Wilson 435–36.

Long usage's binding authority was applied to private parties as well as the government. For private parties, long usage identified rights and duties.[7] For the government, on

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the common law is primarily a law of custom and long usage. See Thomas Usk, Testament of Love, bk. III, ch. 1, 11. 78–83 (R. Allen Shoaf ed., Medieval Inst. Pub. 1998) (c. 1380) ("But custome is a thyng that is accepted for right or for lawe, there as lawe and right faylen . . . . [C]ustome is of commen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constitutyon it is ywritten and ycleped."); see also Oxford English Dictionary 167–68 (2d ed. 1989) (defining "custom" as "[a] habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community)").

[7] For example, where the tenant of a farm had continuously crossed another's land by "immemorial usage," that tenant developed a right of way across the land. See 2 Commentaries at *36.

the other hand, long usage was the basis and justification for state action, such as the imposition of a given punishment for a given crime.[8] Actions that comported with long usage, for example the customary rules of royal succession, or the "usual course of descent," were said to be "usual." 1 Commentaries at *215. Following the same principle, actions that were contrary to long usage were described as "unusual." The Magna Carta disallowed the king from demanding an "unusual" fee for the issuance of a royal writ and a sheriff could be punished for holding a Torn in an "unusual" place. 3 Commentaries at *273; also 2 William Hawkins, A Treatise of the Pleas of the Crown 91 (John Curwood ed., London, S. Sweet 1824).

Americans in the late eighteenth and early nineteenth centuries similarly used the term "unusual" to refer to actions that were contrary to "long usage." In 1769, the Virginia House of Burgesses condemned Parliament's attempt to reinstate a long-defunct statute permitting trial of American protesters in England as "new, unusual, . . . unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906). The Declaration of Independence protested the recent English practice of convening colonial legislatures at "places unusual." The Declaration of Independence ¶ 6 (U.S. 1776). In 1788, George Mason worried that the lack of common law constraints in the new Constitution would enable Congress to create "new crimes, inflict unusual and severe punishments, and extend their powers." 2 The Records of the Federal Convention of 1787, at 637 (M. Farrand ed., 1911) (hereinafter Farrand). Patrick Henry similarly argued that absent common law constraint, the federal government would be a series of "new and unusual experiments." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, at 172 (Jonathan Elliott ed., Philadelphia, J. B. Lippincott & Co. 2d ed.

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[8] Blackstone explained that it was "ancient usage among the Goths" to punish murder by imposing a large fine (amercement) on the entire community where the murder occurred. 4 Commentaries at *195.

1881) (hereinafter Elliott's Debates).

These American examples are different from the cited English examples in that they utilize "unusual" to denote government actions that were not just contrary to long usage, but also fundamentally unjust. How this connotation developed will be discussed soon.

Edward Coke is oft-cited as the most important common law jurist in English history. One scholar proclaimed that "Coke's works have been to the common law what Shakespeare has been to literature, and the King James Bible to religion." Allen D. Boyer, Introduction to Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke xiii–xiv (Allen D. Boyer ed., 2004) (citing William Holdsworth). His writings on the common law, his judicial decisions, and his role in Parliament decisively shaped English thought about the nature and application of common law for centuries. Coke also heavily influenced American legal thought in the late eighteenth century.

Coke established several key principles that formed the common law basis invoked in the American Revolution as well as the drafting and adoption of the Bill of Rights. Pertinently, Coke argued the common law consisted of customary practices that enjoyed "long" or "immemorial usage," and were therefore inherently just and reasonable. Coke further argued that government actions that deviated from long usage—"unusual" actions—were dangerous and presumptively unjust. Lastly, Coke argued that acts of Parliament, and even the king, which deviated from fundamental common law principles were "void" because they contradicted "common right [and] reason." These principles helped set the terms of debate for the next 150 years, including in the American Revolution and drafting of the Bill of Rights.

In the seventeenth century, it was generally agreed that the foundation for law was an objectively real moral order that inhered in nature and was knowable by reason. See Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 Yale L. J. 1651, 1653 (1993) ("Natural law theory treats

law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience"). Despite the law's unitary foundation, positive law was sourced from many places in England and sometimes conflicted: custom, statute, decisions of common law courts, civil law courts, etc. See Sir John Baker, The Common Lawyers and the Chancery: 1616, at 254–55. The question then was what should be done when there is conflict between royal will, common law, and statutory law. More generally, how was one to distinguish genuine law—law that conforms to basic principles of justice—from mere "violence?"[9]

This question would not truly be answered until nearly a century and a half after Coke's death. Nonetheless, he set forth the basic principles for solving the problem, in a manner that would be highly influential on the development of the English and American constitutions (one unwritten, one codified). His principles would have particular relevance to the meaning of the Cruel and Unusual Punishments Clause.

Coke started with the proposition that basic principles of justice were built into the natural order itself; he asserted the "law of nature is part of the law of England." 1 Coke, Selected Writings, at 166, 195. He then also agreed that the fundamental basis of law was reason as opposed to will, and that therefore laws that violate basic principles of justice may not properly be called "law" at all: "[N]othing that is contrary to reason, is consonant to Law." 1 Institutes, § 69, at 684. However, rather than identifying "reason" directly with universal and abstract principles of justice, Coke associated it with a specific set of historically and culturally situated legal rules, the common law of England: "[R]eason is the life of the Law, nay the common Law

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[9] Thomas Acquinas, Summa Theologica, pt. II-I, Q. 93, art. 3, reply 2 ("Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence.")

it selfe is nothing else but reason." *Id.*, § 138, at 701.

The key to this was Coke's conception of the normative power of "long usage." If a given customary law was used over a long period of time, throughout the entire kingdom, Coke held that this process confirmed the law's goodness and eliminated from the law anything that was bad or unreasonable. He thus compared long usage to the refinement of gold: "[I]f all the reason that is dispersed into so many severall heads were united into one, yet could not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme." *Ibid.*

Coke considered long usage the most reliable means for determining the goodness of a law because it establishes both the reasonableness of the law and that it enjoys the consent of the people. Coke saw long usage as, like the previously cited quote shows, a process of legal development equivalent to the refinement of gold in a fire, reliably separating good from bad. As courts decide cases year after year, century after century, impractical and unjust practices fall away, while practical and just ones endure. Second, they must also enjoy the consent of the people, else they would fall out of usage. See, *e. g.*, Coke, Copyholder, § 33, at 563 ("Customes are defined to be a Law . . . which being established by long use, and the consent of our Ancestors, hath been, and is daily practiced"). This notion that long usage establishes both the reasonableness and the consensual nature of the law[10] was highly influential with, and repeated by, scholars like William Blackstone, James Wilson, and many others.

As noted above, many sources of law coexisted in England during Coke's time. The common law was the oldest and most important. The common law, however, because it looked to long usage as opposed to sovereign will for its rules of decision, was remarkably protected from royal control. For this reason, nu-

[10] Coke also believed that innovations in the law are presumptively unreasonable. See 1 Institutes, § 723, at 740 ("[W]hen any innovation or new in-

merous kings established special courts (the Star Chamber, the Court of High Commission, the Admiralty Court, among others) that followed continental European civil law practices instead of the common law. Coke sometimes practiced in those courts but came to see them as a means of undermining the liberty of English subjects protected by the common law. Coke said the first act of civil law proponents was to introduce a torture instrument—the "Rack"—into the Tower of London for use on prisoners:

> John Holland Earle of Huntingdon, [who] was by King [Henry VI] created Duke of Exeter … and William De la Poole Duke of Suffolk, and others, intended to have brought in the Civill Lawes. For a beginning whereof, the Duke of Exeter being Constable of the Tower first brought into the Tower the Rack or Brake allowed in many cases by the Civill Law; and thereupon the Rack is called the Duke of Exeters Daughter, because he first brought it thither.[11]

Here, we see most starkly the contrast Coke drew between the "reason" embodied in the common law's "usual" practices and the injustice and cruelty associated with efforts to introduce "unusual" or innovative practices, particularly those associated with the civil law. For the king, introduction of torture devices was a necessary first step toward adopting the machinery of civil law for the prosecution of criminal cases, thereby sidestepping many of the constraints imposed by the common law.

The Court of High Commission, for one, instituted civil law practices like trial by torture. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 848–49 (1969). Coke believed that the inherent reasonableness of the common law—guaranteed by long use—was the sole obstacle to cruel innovations imposed by

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vention starts up, … trie it with the Rules of the common Law, … for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly … applied to such novelties, it doth utterly crush them and bring them to nothing.")

[11] 3 Institutes, ch. 2, at 1025.

sovereign will, such as civil law torture practices.

Coke lived during a time of absolute claims to state power. The Tudors in England had bloated the powers of the monarchy over the preceding century, and when James I came to power in 1603, he explicitly claimed the power of absolute monarchy. See King James I, The True Law of Free Monarchies (1598), at 9–10. Coke never publicly disputed this claim, and agreed that the king did possess a sort of absolute power while sitting as head of the body politic represented in Parliament. See 4 Institutes, ch. 1, at 1067. When king and Parliament operated within the framework defined by the common law, with both working together towards the common good, Coke believed they possessed the same qualities of reasonableness attributed to the common law itself. Coke also acknowledged that Parliament had the power to change common law rules: "The Common Law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, it remaines still." 1 Institutes, § 170, at 711.

Coke nonetheless, having identified long usage so closely with fundamental principles of justice, attributed an effectively dual status to the common law in his writings. First, as a source of positive law (which could be altered by Parliament) and second, as fundamental law (which could not, or at least should not, be altered). Coke argued that abrogating the common law (in its aspect as fundamental law) would threaten to destroy the kingdom itself: "So dangerous a thing it is, to make or alter any of the rules or fundamentall points of the Common law, which in truth are the maine pillars, and supporters of the fabrick of the Common-wealth." 2 Institutes, ch. 35, at 907.

As a source of *fundamental* law, the common law had the potential to limit the arbitrary exercise of state power. Coke asserted that the common law, reflected in the Magna Carta and elsewhere, was the font of numerous rights and liberties of citizens. Although Coke found those rights in the Magna Carta and other ancient statutes, he made clear that the written laws merely affirmed the existence of rights developed through long

usage. He said the Magna Carta was "but a confirmation or restitution of the Common Law." 1 Institutes, § 108, at 697.

Coke upheld the long usage of the common law against the absolutist Stuart kings. He did so cautiously at first, but became more bold towards the end of his career. As noted earlier, Coke never expressly denied the claims of James I to absolute monarchy, but he did emphasize the following principle:

> The King is under no man, but onely God and the Law, for the Law makes the King: Therefore let the king attribute that to the Law, which from the law he hath received, to wit, power and dominion: for where will, and not law doth sway there is no King.[12]

Just as he had warned that Parliament could endanger the "fabrick of the Commonwealth" by changing fundamental common law rules, here Coke warned that the king endangers the very fact of kingship if he fails in subjecting himself to the laws and customs of the English people.

As a member of Parliament, Coke led the effort to pass the Petition of Right, seeking to enforce the fundamental law of England against the king. He was ultimately successful and the resulting law would serve as a model for the English Bill of Rights in 1689 and the American Declaration of Independence.

Approximately a century and a half would pass between the adoption of the Petition of Right and the Continental Congress' issuance of the Declaration of Independence. During that period, great political upheaval occurred. The English Civil War occurred in response to the claim of the Stuart kings to suspend laws by royal prerogative, followed by the Long Parliament, which abolished the monarchy and House of Lords, taking absolute power for itself, and then the Restoration brought about a milder form of Stuart absolutism, including a renewed claim of the power to suspend laws. Finally, the Glorious Revolution returned England to a system of parliamentary supremacy, setting the stage for the American Revolution.

Throughout that period, two views of the nature of government power struggled for dominance. The first view held that

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[12] Edward Coke, Preface, at 102.

some institution, whether it be the monarch or Parliament, must hold absolute, arbitrary sovereign power, and therefore must be itself above the law. The second followed Coke in holding that sovereign power was limited by the rule of law, specifically the fundamental rules of the common law embodied in long usage. See J. W. Gough, Fundamental Law in English Constitutional History 88 & n. 4 (1955) (citing Charles Herle, A Fuller Answer to a Treatise Written by Dr. Ferne 3, 8 (1642)). Conflicts between those two views of government tended to arise when the holder of sovereign power (whether the monarch or Parliament) tried to innovate in one of three ways: by changing the longstanding structure of the government itself, by taxing English citizens without proper authorization, or by trying and punishing English citizens in a manner contrary to common law. In each case, the innovation was protested on the ground that it was contrary to long usage, and therefore contrary to reason and destructive of the fabric of society. For example:

- In 1628, Parliament issued the Petition of Right which declared that King Charles I did not possess the power to impose taxes absent parliamentary approval or imprison subjects without cause, because such actions violated certain rights expressed in the Magna Carta and established through long usage.[13]
- In 1641, the Long Parliament voted to make itself perpetual; royalists and radical democrats objected on the grounds that the action was contrary to long usage. See David Jenkins, Discourses Touching the Inconvenience of a Long-Continued Parliament 123 (1647)
- When Parliament moved toward abolishing the monarchy in the 1640s, David Jenkins argued that Parliament did not possess that power because the monarchy had existed since before there were written records

[13] See Edward Coke, Selected Writings, at 1288–89 ("Your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent in parliament

> and "usage so practiced makes therein a fundamental law." David Jenkins, Lex Terrae; or Laws of the Land (1647).

Also during that time period, several prominent English judges affirmed and applied Coke's assertion that acts of Parliament which violated fundamental common law principles were void. In *Day* v. *Savadge*, 80 Eng. Rep. 235 (1614) (K. B.), Chief Justice Hobart of the Court of King's Bench repeated Coke's assertion that "even an Act of Parliament, made against Natural Equity … is void in it self." *Id.*, at 237. Similarly, in *Thomas* v. *Sorrell*, 124 Eng. Rep. 1098 (1673) (C. P.), Chief Justice John Vaughan of the Court of Common Pleas asserted that both the king and Parliament were without power to legal actions that were *malum in se*, like "murder, stealing, perjury, trespass." *Id.*, at 1102. Any law that sought to legalize such actions "would be a void law in itself," for "the same thing, at the same time, would be both lawful and unlawful." *Ibid.* In *City of London* v. *Wood*, 88 Eng. Rep. 1592 (1701) (K.B.), Chief Justice John Holt of the Court of King's Bench held that a lawsuit brought by the Mayor of London in the mayor's court to enforce a fine against a defendant must be dismissed on the ground that the mayor would be—at least nominally—both judge and party in the case:

> And what my Lord Coke says in *Dr. Bonham's* case … is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party.[14]

As these cases illustrate, by the eighteenth century Coke's ideas regarding the inherent reasonableness of the common law had achieved a great deal of acceptance in the English legal and

… And … also, by the statute called, 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned … but by the lawful judgment of his peers, or by the law of the land.")

[14] *Id.*, at 1602.

political communities. Coke's reasoning served as the primary basis for the notion that government power was limited by an unwritten constitution whose principles were embodied by long usage. Nonetheless, in the case of direct conflict between those principles and an act of a state power-holder—whether Parliament or the king—the power-holder invariably won out, at least in the short term. There was accordingly a growing divergence between the normative power of the common law and the actual power of the government.

While Coke was the most important expositor of the common law in the seventeenth century, William Blackstone assumed that mantle in the eighteenth and nineteenth centuries, particularly in America. His Commentaries on the Laws of England have been described as the "handbook of the American revolutionary," and the "bible of American jurisprudence in the 19th century." Robert Allen Rutland, The Birth of the Bill of Rights 11 (1991); Robert Lowry Clinton, God and Man in the Law: The Foundations of Anglo-American Constitutionalism 92 (1997). Blackstone's description of common law rights and liberties was among the key resources which Americans relied on in formulating their reasons for independence from England.

Blackstone exalted Coke's vision of the common law, emphasizing the inherent reasonableness and liberty assured by "long usage." Blackstone also importantly was a harsh critic of parliamentary deviation from the reason of the common law in the area of criminal punishment.

Blackstone believed in the supreme power of Parliament, but not in the supreme wisdom of all its acts. Much like Coke, he distinguished the normative power of the common law from the actual power of Parliament. Nowhere is this distinction more clear than in his discussion of the English criminal justice system. In England, he explained, comparing its system with those of continental Europe, "crimes are more accurately defined, and penalties less uncertain and arbitrary; . . . all our accusations are public, and our trials in the face of the world; . . . torture is unknown, and every delinquent is judged by such

of his equals, against whom he can form no exception, nor even a personal dislike." 4 Commentaries, at *3–4. He also praised the English system of criminal punishment because "the nature, though not always the quantity or degree, of punishment is ascertained for every offense; and … it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons." *Id.*, at *377. Although English judges had discretion in sentencing, "[their] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second)." *Id.*, at *378. Lastly, though the law permitted horrific punishments for crimes such as treason, including burning at the stake, drawing and quartering, and disembowelment, "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty." *Id.*, at *376. In other words, they were falling out of usage by the middle of the eighteenth century.

While Blackstone celebrated the relative fairness of the English common law system of criminal justice, he harshly criticized the fact that over the course of the eighteenth century, Parliament had deviated from the common law and transformed a whole 160 crimes into capital offenses. *Id.*, at *18 ("It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death"). Blackstone criticized Parliament for failing to make any distinction between greater and lesser offenses in assigning capital punishments, even insinuating that Parliament's approach to this issue revealed it to be incompetent and tyrannical:

> [S]anguinary laws are a bad symptom of the distemper in any state … It is moreover absurd and impolitic to

> apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.[15]

According to Blackstone, Parliament had departed from the rule of reason represented by the common law tradition by arbitrarily expanding the scope of capital punishment to include major and minor offenses without reference to customary notions of proportionality and desert, and had thus begun to exercise power in a tyrannical manner. He even implied that Parliament may have *exceeded* its legitimate power in designating those 160 offenses capital: "I would not be understood to *deny* the right of the legislature in any country to inforce it's own laws by the death of the transgressor, though persons of some abilities have *doubted* it." *Id.*, at *11. To recap, Blackstone seems to accuse Parliament of deviating from the long usage of common law in enacting these laws contrary to basic principles of justice. The laws were thus—for lack of a better term—"cruel and unusual."

The American Revolution was unique in that those who executed it saw themselves as fighting to preserve, rather than throw off, the legal traditions of the government against which they rebelled. Gordon Wood wrote that American devotion to English legal tradition was "what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it." Gordon Wood, The Creation of the

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[15] *Id.*, at *17.

American Republic, 1776–1781, at 10. John Adams expressed mainstream American opinion when he wrote that "the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England." John Adams, On Private Revenge, Boston Gazette, Sept. 5, 1763.

The period from 1760 to 1776 was a time of conflict between the American colonies and the British Parliament. This conflict resembled England's seventeenth-century constitutional conflicts in at least two ways. First, as in seventeenth-century England, the holder of state power—in this case, Parliament—claimed absolute power unconstrained by fundamental common law limitations. Second, American protesters, like their seventeenth-century English counterparts, argued Parliament did not hold absolute power because it could not abrogate fundamental common law rules represented in long use.

As an example, take the Declaratory Act of 1766, wherein Parliament announced that it had "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America … in all cases whatsoever." The Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/declaratoryact_ 766.htm.

Americans who opposed Parliament's actions during this period claimed that Parliament's power was limited by the rights held by American colonists through their status as British subjects. These rights, in turn, were based on the long usage of the common law. Richard Henry Lee argued that American rights "are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and 'immemorial usage.'" Letters of Delegates to Congress, 1774–1789, at 46 (Paul H. Smith ed., 1976). Roger Sherman similarly asserted that American rights were based on the common law: "The Colonies adopt the common Law, not as the common

Law, but as the highest Reason." *Id.*, at 47. The Continental Congress shared that view, and affirmed that American rights were based on "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" of the various colonies. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), available at http://www.yale.edu/lawweb/avalon/resolves.htm.

Americans invoked Coke's vision of the common law in order to protest the acts of Parliament they saw as violating their rights. Take the issue of taxation. Americans argued that the common law forbade Parliament from taxing them because they were not represented in Parliament. John Dickinson thus wrote in his infamous Letter From a Farmer in Pennsylvania that Parliament's claim of power to tax the colonies was "an innovation; a most dangerous innovation." Sources & Documents Illustrating the American Revolution 1764–1788, at 34, 40 (Samuel Eliot Morison ed., 1967).

Ultimately, the Continental Congress resolved to sever ties with England; in doing so, it relied on common law principles in justifying its decision. Most relevantly, and as briefly discussed earlier, the Declaration of Independence complained that the Crown had disrupted the legislative process by "call[ing] together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures." It is worth reiterating the point from earlier that under English common law it was prohibited for a sheriff to hold a Torn in an "unusual" location. The Continental Congress's use of the word "unusual" in the Declaration of Independence indicates that at the moment America formally separated itself from all legal ties to England, it saw long usage as a relevant source of standards for judging government actions.

There are two primary points to retain from the above historical analysis. First, that in articulating the basis for their rights, the American colonists used the terms "immemorial usage," "common law," "constitution," "reason," and "natural eq-

uity" virtually interchangeably. Second, and similarly, when complaining about Parliament's violations of their rights, the colonists used the terms "innovation," "usurpation," "unconstitutional," and "unusual" virtually interchangeably. Because American rights were based on long usage, parliamentary acts that deviated from it—"innovative" or "unusual" acts—were presumptively unconstitutional. Americans saw such innovations as a precursor to the introduction of the cruel practices of the civil law, including trial by torture.

In the summer of 1787, around eleven years after the Declaration of Independence, delegates of the thirteen former colonies (now states) were sent to Philadelphia to amend and strengthen the Articles of Confederation. Instead, they decided to adopt a new constitution with a stronger federal government. The new government would not replace the states; rather, it would be one of limited, enumerated powers whose authority would be supreme within its proper sphere but would not exist at all outside of it. However, because the Constitution gave the federal government direct power to regulate the lives of Americans, and to prosecute violators of its laws, it vastly expanded its powers. Cf. Alexander Hamilton, The Federalist No. 21, at 130 (noting that under the Articles of Confederation, "the United States afford the extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws").

From the instant of the Constitution's adoption, it faced heavy criticism for its failure to include a bill of rights or acknowledgement of the federal government's common law limitations. George Mason, a delegate to the Philadelphia convention, led that charge. In the convention's final week, he had proposed attaching a bill of rights. See Farrand, at 587. Ultimately, after the other delegates—weary from the long effort of the drafting the Constitution—voted down his proposal, he declined to vote to adopt the Constitution. See *id.*, at 649. He then published a series of "Objections to this Constitution of

Government," where he complained,

> [t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States. *Id.*, at 637–40.

Mason also feared that without a bill of rights, and without the constraints of the common law, the federal government would be given license to claim for itself unlimited and tyrannical powers. He worried that the Necessary and Proper Clause, for example, would allow "Congress [to] grant monopolies in trade and commerce, constitute new crimes, *inflict unusual and severe punishments*, and extend their powers as far as they think proper." *Id.*, at 640 (emphasis added).

To be fair, the Constitution *did* contain several common law protections in its original form: the privilege of habeas corpus, see art. I, § 9, cl. 2, the right to criminal trial by jury, see art. III, § 2, cl. 3, and the invalidity of ex post facto laws, see art. I, § 9, cl. 3, to name a few. Antifederalists, however, believed these protections could be easily circumvented in the future. Recalling the cruelty of the European civil law system, they warned against guaranteeing jury trials only in the context of criminal proceedings. They believed that such right must also be applied in civil proceedings. Moreover, they pointed out that this Court's appellate jurisdiction applies "both as to Law and Fact," so they argued jury acquittals would not necessarily be safe. During Massachusetts's ratifying convention, Abraham Holmes, a prominent Antifederalist, gave a colorful vision of the future tyranny that the Constitution's gaps in common law protection might permit:

> On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and

> specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, *the Inquisition*.
>
> What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline. Elliott's Debates, at 111 (italics in original).

Underlying all of these Antifederalist arguments was a deep distrust of governmental power unrestrained by specific, enforceable, fundamental rights. They accordingly proposed amending the Constitution to include a bill of rights binding the federal government against the violation of common law rights, particularly in the judicial process. Among those amendments was the Eighth Amendment and its Cruel and Unusual Punishments Clause.

Ultimately, the most significant evidence we have regarding the publicly understood meaning of the word "unusual" in the Eighth Amendment comes from Virginia ratifying convention. In that debate, the term "unusual" was used primarily to signify Antifederalist concerns that the federal government would not be limited by common law constraints and would thus be able to exercise new and tyrannical powers. In the context of criminal punishment, "unusual" represented the danger that the federal government might innovate or experiment in criminal punishment—an occurrence known to lead to cruelty in the past and which might be repeated in the future. The Framers shared Coke's belief that innovation in punishment often led to torture and barbarity. See *ibid.* The word "unusual" in the

Eighth Amendment was meant to be a check on the federal government's ability to innovate in punishment. That is the only plausible meaning of the word as used in the Eighth Amendment.

Early legal applications of the term "cruel and unusual punishments" (by state courts, concerning analogous state provisions and in some cases the federal provision itself) confirm the definition of "unusual" we settle upon today. For example, the Supreme Court of New York held "[t]he disenfranchisement of a citizen is not an unusual punishment; [at common law] it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses." *Barker* v. *People*, 20 Johns 457, 459 (N. Y. Sup. Ct. 1823).[16] The General Court of Virginia similarly upheld the infliction of whipping as a criminal punishment against Eighth Amendment challenge because it was supported by "long usage." *Commonwealth* v. *Wyatt*, 27 Va. 694, 701 (Va. Gen. Ct. 1828). The same happened respecting the punishment of "banishment" in *People* v. *Potter*, 1 Edm. Sel. Cas. 235 (N. Y. Sup. Ct. 1846). In each case, the punishment was upheld because it was "usual"; that is, it was consistent with the long usage of common law.

It must be recognized, though, that a punishment may in fact *become* unusual if it falls out of usage. Recall Coke's observation that long usage is reliable because it is proof of both reasonableness and the people's consent as unreasonable practices and those which do not enjoy the people's consent would presumably fall out of use. He wrote explicitly: "Custome … lose[s its] … being, if usage faile." Copyholder, at 564. American courts similarly made the observation in the first half of the nineteenth century that when a traditional common law punishment falls out of use, it loses the presumption of validity that comes with being usual. See, *e. g.*, *James* v. *Commonwealth*, 12 Serg. &

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[16] A later opinion clarified that the Eighth Amendment challenge was also rejected on the grounds that it applied only to the federal government and not the states.

Rawle 220 (Pa. 1825).

* * *

The original public meaning of the term "unusual" in the Cruel and Unusual Punishments Clause was "contrary to long usage." A punishment which once enjoyed the presumption of validity which accompanies long usage loses that benefit when it falls out of usage. If it is reintroduced, it is therefore immediately suspect under the Eighth Amendment; the same applies for any other new punishment.

2

Cruel

Our analysis of the original public meaning of "cruel" should be much shorter than that of "unusual" as an extensive body of precedent is already available here. We are most persuaded by certain elements of the analysis of "cruel" provided in Justice Scalia's opinion for *Harmelin* and thus refer to it, and other cases it cited, only.

In his *Harmelin* opinion, Justice Scalia cited a few early cases interpreting proscriptions on "cruel" (just cruel, not "cruel and unusual") punishment. 501 U. S., at 985 (opinion of Scalia, J.). One proposed the "power of the courts to intervene 'in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people.'" *Ibid.* (quoting *State* v. *Becker*, 3 S. D. 29, 41, 51 N. W. 1018, 1022 (1892)). Moreover, although he rejected a general proportionality concept under the Eighth Amendment, Justice Scalia referenced a footnote from *Rummel* v. *Estelle*, 445 U. S. 263, 173 n. 11 which explained that "a proportionality principle [may] come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment."

In general, however, the Eighth Amendment applies to modes of punishment and only to a very narrow extent, their application to certain offenses. The *application* component comes

into play only when the punishment is incredibly "severe" and *clearly* "out of proportion" and thus can be definitively taken to "shock public sentiment and violate the judgment of reasonable people." With respect to modes, however, a punishment is "cruel" if it is "destitute of pity, compassion or kindness" and has a separate "tormenting" element. 1 Noah Webster, American Dictionary of the English Language (1828).

B

With a suitable conception of the Cruel and Unusual Punishments Clause's original public meaning in hand, we can now properly address the question of whether "permanent exclusion" for common crime is prohibited, as the *CodyGamer100* Court found in dicta. From the mentioned meaning, we have identified three specific guidelines to consider:

> (1) The punishment, as a mode or application, whichever relevant, is either a new innovation or one of old which fell out of use.
>
> (2) The mode of punishment is "destitute of pity, compassion or kindness and has a separate tormenting element."
>
> (3) The application of the punishment (which in itself is "incredibly severe") to a certain offense is "clearly out of proportion" and "shock[s] public sentiment and violate[s] the judgment of reasonable people."

These guidelines are helpful but do not always provide us with bright-line distinctions. In order for an Eighth Amendment challenge to be successful under its original public meaning, however, the first guideline must always be met. The second or third guideline must also be substantially met, of course dependent on whichever one relates to the claim.

Permanent exclusion, both as a mode of punishment and in its application to common crimes, is not supported by long usage. Never has it been *commonly* applied in our group and it eventually fell out of use entirely. The *CodyGamer100* instance was the punishment's first use in a long time, and likely its first application at all to common crime in the group's history. It

was thus an attempt to reintroduce a punishment which fell out of use and an attempt to introduce it for the first time as punishment for common crime. The first guideline is clearly met in all respects for permanent exclusion.

We do not address the application of the second factor to permanent exclusion at this time because our petitioner has referenced a constitutional bar on permanent exclusion *for common crime* only. Similarly, *CodyGamer100* only had to do with common crime. We therefore look to the third guideline, which we conclude is clearly met by the application of permanent exclusion to common crime. Permanent exclusion is undoubtedly an "incredibly severe" punishment (the most severe at a court's disposal). Common crime is often seen by the public as so trivial that the application of such a severe punishment to it would "shock public sentiment and violate the judgment of reasonable people." Moreover, the punishment would be "clearly out of proportion."

* * *

We approve of the *CodyGamer100* Court's dicta finding that the use of permanent exclusion as punishment for common crime is cruel and unusual under the Eighth Amendment and affirm it as a holding of this Court.

II

With the fact in mind that permanent exclusion for common crime is cruel and unusual, we now consider whether the petitioner's five-month sentence for murder and attempted murder fits that definition. Obviously, a five-month sentence is not equal to permanent exclusion. Petitioner, however, argues that the gravity of such a sentence, and its practical effect, has the purpose and effect of permanent exclusion. We reject this argument for a few reasons.

First, we recognize that such a line of thinking is an inherently slippery slope which extends a reviewing court's power to determine the acceptability of a sentence far beyond that which was originally conceived by the Framers. Second, as we empha-

sized earlier: holding the *application* of a specific sentence unconstitutional requires the meeting of a very high bar, which we are not convinced can be met with a five-month sentence. And finally, if we were to invalidate petitioner's sentence on the asserted grounds, there would be no logical endpoint. Where would we draw a line in the application of a "purpose and effect" test for permanent exclusion?

* * *

For the foregoing reasons, the sentence imposed by the District Court is accordingly

Affirmed.

JUSTICE BORK, concurring.

I join the Court's opinion because I agree with its decision on the merits that *CodyGamer100* v. *United States*, 2 U. S. 18 (2017), does not apply to the 150-day sentence received by petitioner. *Ante*, at 1–23. I write separately to explain that I conclude res judicata generally precludes petitioner's Eighth Amendment claim.

I

Some time after petitioner first commenced his appeal, the President—aware for the first time of petitioner's plight (neither petitioner nor his counsel made any effort, of which I am aware, to obtain clemency)—granted him an unconditional pardon. The Court may take notice of that pardon because it was "brought regularly into the cause" through the Government's motion to dismiss. *United States* v. *Wilson*, 32 U. S. 151, 161 (1833); see also Motion to Dismiss. While the Court denied the motion because there is "no power to force" a pardon recipient to avail himself of the pardon's benefit,[1] *Ibid.*, it is still relevant

[1] I disagree with this reasoning but for the purposes of this opinion, I will accept it as valid because it is not relevant to the claim preclusion.

to the case and constitutes part of the record.

Petitioner, after receiving the Presidential pardon, could have at any time eliminated his sentence—the one he believed was unconstitutional. In that way, he "carr[ied] the keys of [his] prison in [his] own pockets." *Hicks* v. *Feiock*, 485 U. S. 624, 633 (1988). Nevertheless, he *chose* not to use that option and instead continued his appeal.

Even by just thinking about this situation logically does it appear nonsensical. Petitioner is alleging that he's being inflicted cruel and unusual punishment prohibited by the Constitution; however, because of his pardon, he may end that punishment at any time. What is the need for the appeal then? Is any punishment being "inflicted" which he does not himself allow (or invite)?

II

Res judicata—or "claim preclusion," as it is more commonly known—is a "bedrock principle of our legal system." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___, ___ (2016) (Alito, J., dissenting) (slip op., At 3). Primarily, it serves the "public policy" purpose of ensuring there is "an end to litigation . . . once [matters have been] settled." *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). Courts exist to ensure the "conclusive resolution of disputes." *Montana* v. *United States*, 440 U. S. 147, 153 (1979). If that has been accomplished already, a court has no business continuing to insert itself into the affairs of parties. Other objectives are also fulfilled by adherence to the rules of res judicata: Doing so "protects . . . adversaries from the . . . vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.*, At 154. These are "vital public interests" that should be "'cordially regarded and enforced.'" *Federated Department Stores, Inc.* v. *Moitie*, 542 U. S. 394, 401 (1981) (internal quotation marks omitted).

An unconditional pardon is considered an irrevocable grant of clemency. Once the President issues an unconditional pardon,

"it is presumed to be in [the recipient's] custody, and the property of it belongs to him." *Wilson*, *supra*, at 162 (internal quotation marks omitted) (citing Hawkins, b. 2, ch. 37, § 65). Because the issuance of an unconditional pardon inasmuch effects a definitive grant of power to a convict to end their punishment, the dispute which may have once existed between the Government and the convict over the Eighth Amendment validity of punishment ceases to exist and the convict is precluded from raising any such dispute before a court. The matter is "settled." *Baldwin*, *supra*.

* * *

For the reasons stated in this opinion and the Court's, I concur with the affirmation of the sentence imposed by the District Court.

Syllabus

ROEXPLO *v.* UNITED STATES

APPLICATION FOR A GROUP-ARREST WARRANT

No. 05–22. Argued March 1, 2018—Decided April 6, 2018

On February 27, 2018, the Court granted an arrest warrant for the criminal street gang TPR at the Government's application. Soon after, a constitutionally required trial took place. Upon completion, the Court conducted a vote on whether to extend the warrant beyond its original 72-hour time frame.

Held: The warrant must not be extended beyond its original 72-hour time frame.

(a) There is very little precedent addressing the specific matter of group-arrest warrants. The "lack of [outlined] procedure" has been an issue "since the Court's duty [over group arrest warrants] was first outlined in the Constitution. *Post*, at 31.

(b) The Court must exercise discretion in deciding whether the specific facts support extending the warrant and should specifically consider real-world "necessity."

(c) The size of a group is one of the factors which may be considered in the analysis of whether to continue the warrant.

GINSBURG, J., delivered the opinion of the Court, in which HOLMES, C. J., and MARSHALL and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which HOLMES, C. J., and MARSHALL, J., joined. THOMAS, J., filed a dissenting opinion, in which GORSUCH and BORK, JJ., joined.

JUSTICE GINSBURG delivered the opinion of the Court.

United States v. *TPR*, 5 U. S. 30 (2018) brings forth a series of contemporary circumstances that have been recorded numerous times on paper—not once in a physical practice. The Court's preeminent proceedings respecting the warrant ordered on the 26th of February, 2018, are principally unique due to the absence of precedent within our court—a miscellany of cases never held. This lack of procedure has been overlooked since the Court's duty was first outlined in the Constitution, where the Court's authority to act upon the matter of a collective "group" arrest warrant (group AOS, AOS hereinafter) has rarely ever been questioned. The trial phase of the order in question established a "new" mode of procedure: the same, consistent pugnacious proceedings (with innumerable interjections

by the Court), and the traditional hold-and-go refutation allowance. Throughout the defending counsel's arguments, one question was regularly prevalent: "Why is the necessity for the approval of a group AOS expected when there an overwhelming imbalance between two parties?" The (as a collective) law enforcement bodies have (roughly) a threefold advantage over a meager street gang fueled only by notoriety, where the common federally funded law enforcement agency (or department) will have two, perhaps three assault rifles, a taser, and have been militarized with other crime-prevention equipment. Article III of the United States Constitution ensures no constraint for a trial concerning a group AOS, however, the United States is permitted to continue with the proceedings. Throughout the arguments, the preceding information has proven critical for fundamental contentious support, however, the texts are vague to a point of little clarity: What are the procedures for this practice? Is this case pursued ordinarily?

Law enforcement individuals should have easily been able to pursue the crimes committed by individuals of the amalgamation, not the collective itself. The warrant has no need to continue, as the organization is, and always has been outnumbered.

* * *

We therefore deny the Court's question of warrant continuance.

It is so ordered.

CHIEF JUSTICE HOLMES, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

I write briefly to respond to the dissenters.

Legal Standard

Despite JUSTICE THOMAS's fifteen pages of opinion, the legal standard required by the Constitution in group arrest warrant trials is actually quite clear. We have already held that what the Constitution requires is a weighing of "objective information." *In re United States Application for Arrest Warrant on TPR*, 5 U. S. 1, 2 (2018) (*TPR Application*) (unanimous concur-

ring opinion). We have also emphasized that the Government carries the burden of establishing the need for a warrant. See *ibid.* Moreover, because we err on the side of protecting associational liberty against potentially arbitrary Government impositions, we must "accord the [affected] group the benefit of all inferences." *Ibid.*

JUSTICE THOMAS would disregard those constitutional principles and instead apply Fourth Amendment *pretrial* standards to the group arrest warrant *trial* phase.[1] Namely, he wishes to require a mere showing of probable cause for the Government to be successful at trial. That suggestion contradicts his admonition that special rules cannot be made applicable to the group arrest warrant context. See *post*, at 43. If the same rules were applicable, then the Government's burden at a group arrest warrant trial would be "proof beyond a reasonable doubt" of the group's guilt of a crime as is the case in an individual criminal trial, not the lesser showing of probable cause JUSTICE THOMAS has selected. *In re Winship*, 397 U. S. 358, 364 (1970). The reasonable doubt standard, however, cannot be the correct standard. See generally *CodyGamer* v. *United States*, 2 U. S. 8 (2017) (holding that groups cannot be collectively responsible for a crime: individuals are). JUSTICE THOMAS, realizing he does not wish to embrace the logical conclusion of his original argument, then argues that "criminal-trial requirements" are not necessarily what would be applicable. (Why? Because JUSTICE THOMAS says so.) *Post*, at 47. We agree with him on that point: they are not. But it is odd for JUSTICE THOMAS, despite all his harping about there being "no distinction whatsoever" between the two contexts (group arrest warrant and individual ar-

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[1] Our *TPR Application* decision makes clear that Article III is the appropriate law to apply to group arrest warrant proceedings. JUSTICE THOMAS's out-of-thin-air assertion that the Fourth Amendment is controlling makes little sense and is based entirely on a silent legislative record. Our decisions make clear though that "silence in the legislative record, 'no matter how clanging,' cannot defeat . . . the text." *Encino Motorcars, LLC* v. *Navarro*, 584 U. S. ___, ___ (2018) (slip op., at 11) (quoting *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495, n. 13 (1985)).

rest warrant), *post*, at 43, to turn around in the second half of his opinion and disavow his original premise in order to protect his hand-picked result against its many constitutional flaws. That exercise in gymnastics insults the intelligence of the reader.

JUSTICE THOMAS is correct in noting that the group arrest warrant provisions of Article III cannot be read in isolation. It is axiomatic that "proper interpretation of . . . the Constitution . . . requires paying attention to the whole." *British* v. *Ozzymen*, 3 U. S. 60, 76 (2017) (opinion of Scalia, J.) (internal quotation marks and citation omitted). But while JUSTICE THOMAS inexplicably consults the Fourth Amendment for ascertaining the standard to be applied at the trial phase, I look to more related clauses. The Venue Clause, for instance, provides that "the trial of all crimes … shall be held in a federal district court." Art. III, § 2, cl. 3. Because Article III also requires that *this Court* (not a district court) hold a trial for continuation of a group arrest warrant, it is obvious that the trial required is not a *criminal* trial. From there, we have found that group arrest warrants are necessarily preventative. *TPR Application*, *supra*, at 1–2. That is, they are meant to aid the Government in preventing "organized effort[s] . . . to harm the peace of the United States." *Id.*, at 2. If objective information does not support need for that type of relief, it must be refused as a matter of prudence and law.[2]

Analysis of the Facts Here

The Court's opinion and JUSTICE O'CONNOR's concurrence both provide excellent reasons, all things considered, for why the warrant should be declined. I offer two others.

First, during our consideration of this case, the President's chosen czar to coordinate the Executive Branch response to

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[2] In responding to this conclusion, JUSTICE THOMAS's argument transforms from "somewhat engaging with the law," *post.*, at 47, into hilariously self-defeating. Maintaining that probable cause is the correct standard to apply, JUSTICE THOMAS argues with a straight-face that limiting group arrest warrants to circumstances where objective evidence shows not only that a group *previously* organized crime, but that it continues to do so, and *will* continue

TPR (while he was still on the job) tweeted the following statement:

> Yet another successful two days of repelling TPRs raids. Pictures were taken from the responses last night (DHS/FPS, SWAT, FBI, NSA and SF) and from today (FBI, SWAT, SF, DHS, DOD and help from LVPD and EMS). **Attacks are becoming rarer** and **we are more prepared each time**. See Statement of SirReginaldII (2018), available at https://twitter.com/sirregii/status/970075389111357440 (emphasis added).

I'm not sure about JUSTICE THOMAS, but I would not say that the statements "[a]ttacks are becoming rarer" and "we are more prepared each time" really convey any urgent need for preventative relief. They also contradict his unsupported claim that TPR continues to turn cities into "warzones." *Post*, at 50.

The most recent evidence in the public record—the second reason for refusing extension of the warrant—however, confirms the need for refusing the Government's requested extension of the warrant: TPR was shut down. The group's description now reads, "Shut down by the Federal Government on April 1, 2018" and the group's only member is the White House Chief of Staff

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to do so, and that the Government will need aid in stopping it—a standard he described in the beginning of his opinion as "an incredibly strict review," *post*, at 40—now is a threat to individual liberty because it allows "one [to] be arrested and detained not for committing a crime, but for the possibility of committing crime." *Post*, at 43. But probable cause is a lesser standard which requires only a relaxed form of the first showing which is required by *TPR Application* that I just described: that the group previously organized crime. Next.

JUSTICE THOMAS predicates his opposition to *TPR Application*'s finding that group arrest warrants are preventative (a finding Article III's Venue Clause compels) on the basis that it would mean that the "requirement of probable cause would make no sense." *Post*, at 43. But we have not asked for probable cause, we have asked for objective evidence. Group arrest warrants are not a substitute for criminal prosecution of individuals: they are solely for helping the Government deal with the problem of gang violence in a proactive way.

(who holds the group on the Government's behalf). See Appendix, *infra*.[3]

* * *

There is absolutely no reason to continue the arrest warrant against TPR. I join the Court's opinion and judgment.

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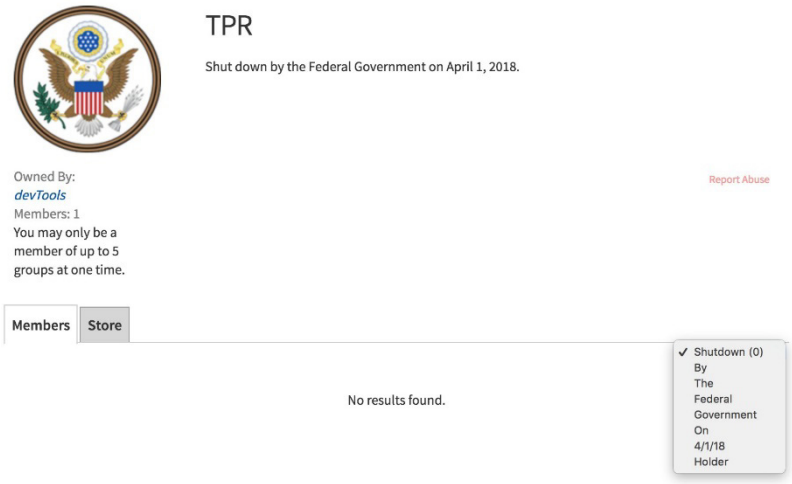
[3] JUSTICE THOMAS criticizes me for considering TPR's shutdown in my opinion. That criticism is illogical. The standards we adopted in *TPR Application*—those the Constitution requires in the group arrest warrant context—make clear that we must draw all inferences in the affected group's favor. Making an inference requires consideration of both "evidence" and "known facts." Merriam-Webster Dictionary (2018), available at https://www.merriam-webster.com/dictionary/inferences. In other words, the evidence submitted by the parties must be considered in light of general knowledge. TPR's shutdown was widely publicized and is thus general knowledge.

Utilizing all facts leading up to our final date of decision, April 6, 2018, does not make me a "time travel[er]." *Post*, at 46. It simply makes me prudent. JUSTICE THOMAS's suggestion that we decided this case against extending the warrant on March 1, 2018, see *post*, at 48, is just plain wrong. We concluded a *straw vote* on March 1st. Interestingly, the result of that vote was to *grant* that extension, not to deny it. The warrant was removed only because we did not reach a final decision within 72 hours from the warrant's issuance. Our final decision came on April 6th with the release of the opinions.

APPENDIX



(Retrieved from https://twitter.com/realTimGeithner/status/980611049924767745)

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring.

I join the opinion and judgment of the Court. I write separately here to express my doubts about the Government's position as to the facts surrounding the gang situation in which we find ourselves entangled. Customarily, warrants for arrest are issued by federal-court judges. Whether these are in accordance with an ongoing sentence or as punishment for a contempt of court, they have—outside of contempt proceedings—been only used on those who have been tried and convicted of a crime under our criminal justice system. Regardless the reason, they are issued to arrest individuals. The ability to take down organized crime, however, necessitates the existence of group arrest warrants, too. Recognizing such a warrant could be easily abused by lower courts, our Constitution's framers confined the power to issue group arrest warrants to the Supreme Court. By requiring our Court to be the only one capable of issuing these warrants, the Constitution ensures a safe process. It has not always been efficient; but it has always been fair.

The historical nature of issuing any group arrest warrant, though, should not be overlooked by this Court. It has been over a year since an arrest warrant for a group was issued; that is precisely because of the significance of doing so. Bold times demand bold action. Here, the United States asks this Court to extend its arrest warrant for the criminal gang known as "TPR." TPR has, for the last two months, engaged in what can be accurately described as a total ground war against the United States at the city of Las Vegas. With its leaders' blood lust growing, TPR soon moved beyond just drive-by shootings; it began to mechanically infiltrate federal agencies and departments. All in all, the Government's argument for an extension boils down to this: "Gang" violence must be stopped.

This leads to, what seems to me, an obvious question: Can a gang comprising 29 members (as is the case with TPR) really cause the Government—and the Nation—enough strife to warrant an extension on the warrant? The Government has yet to show sufficient evidence that such an environment exists. And

upon further inspection the Government's position weakens even more. One need only look at our law-enforcement community. With 224 on-duty officers from the Federal Bureau of Investigation, Federal Protective Service, U. S. Marshals Service, Las Vegas Police Department, and the National Highway Patrol, one would think that forcing TPR to bear the brunt for their actions would be easier than the Government claims.

The Government can easily handle the threat of gang violence at American cities—just as it has done for years and will continue to do for all coming time. And the ground itself paints a far more peaceful picture than does the Government's telling of the facts; there has not been a coordinated attack on an American city by TPR for days. The White House, on March 14, 2018, returned Bank of America's Las Vegas location, seeming to suggest that the extenuating circumstances that warranted such an action have since decayed. See Natl. Security Presidential Memorandum No. 3 of President Geithner (2018).

Thus, if TPR truly is the threat the Government makes it out to be—if TPR really can continually best a police force that has it outnumbered by over 10 to 1—then I find it hard to believe that there exists any solution to the problem. If 250 men and women armed with the weapons of the State cannot dispatch a band of rabble-rousers with glorified handguns, I doubt that an extended arrest warrant by this Court would be anything more than what was a Bill of Rights in Soviet-era Russia: a parchment guarantee.

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE BORK join, dissenting.

The Federal Government asks us to extend our warrant for the arrest of members of the most powerful and havoc-wreaking criminal organization in recent history known as "TPR." Faithful application of established precedents and common sense would have made this case easy to resolve. For reasons beyond me, however, the Court razes usage of both in opinions that, at best, represent interpretive handwringing and, at worst, an atti-

tude so cavalier it ought to offend.

I

The Fourth Amendment guarantees the right to be free from unreasonable government searches and seizures. In one way, it represents the right of a person to "retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). In another, it reflects clearly that the Constitution neither tolerates nor allows for a police state to form. See generally, *e. g.*, *Davis* v. *United States*, 328 U. S. 582, 597 (1946) (Frankfurter, J., dissenting). Through this, the Fourth Amendment provides fundamentally important protections to the People.

One of those protections is the requirement of probable cause. Before the Government may arrest somebody or search a home, they must—outside of, for example, exigent circumstances, see *Missouri* v. *McNeely*, 569 U. S. ___ (2013)—obtain a warrant from a lawful authority. To do this, probable cause must be demonstrated. We have previously defined probable cause to mean "where the facts and circumstances within [the Government's] knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949) (citation omitted). In constitutional challenges against arrests, "[t]he test for probable cause is not reducible to 'precise definition or quantification,'" *Florida* v. *Harris*, 568 U. S. ___, ___ (2013) (slip op., at 5) (citing *Maryland* v. *Pringle*, 540 U. S. 366, 371 (2003)), for "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision." *Illinois* v. *Gates*, 462 U. S. 213, 235 (1983). Instead, we turn to the totality of the circumstances. See *Pringle*, 540 U. S., at 371; *Gates*, 462 U. S., at 232; *Brinegar*, 338 U. S., at 176. By going for an all-things-considered approach, we are able to balance the competing interests of efficiency and fairness. Thus, if probable cause is adequately demonstrated, a Court has no place issuing a

judicial veto as it does today. The Constitution requires that *all* warrants—whether for searches and seizures, arrests, etc.—be backed by probable cause. See Amdt. 4.

There are, however, certain unique protections related to arrest warrants: charges must exist, Art. III, § 5, cl. 1, be "actively pursued" by the Government within 72 hours upon a warrant's issuance, see cl. 2, and only the Supreme Court may issue arrest warrants to groups of individuals. See cl. 3. We have construed these portions of Article III to mean two things: (1) that issuing "charges" is synonymous with demonstrating *some* form of need for the warrant,[1] with a more restrictive standard for group arrests, and (2) that "trial" means a judicial environment in which both the Government and the individual(s) accused may contest that showing of cause, with the onus of proving the Government wrong on the accused. See *In re United States Application for Arrest Warrant on TPR*, 5 U. S. 1, 1–2 (2018) (joint concurring opinion).

All in all, the textual scheme of Article III in relation to the Fourth Amendment is simple. It reflects a check on the judiciary, members of which prior to the Constitution's ratification were able to routinely abuse the power of issuing arrest warrants. What it does not reflect, however, is the picture the majority and the concurring opinions paint: that to sustain a warrant to arrest a group of individuals, the Government must survive what can only be logically read to imply an incredibly strict review.[2] The majority's mistake is their emphasis not on the *process by which* an arrest warrant is to be obtained and (if

[1] I write, "*some* form of need," *supra* (emphasis present), because the Court describes "charges" to mean "factual allegations which tend to show the need for relief." *In re United States Application for Arrest Warrant on TPR*, 5 U. S. ___ (2018) (slip op., at 1) (joint concurring opinion); see *ante*, at 1 (majority opinion). This is nothing more than a disastrous restyling of an otherwise obvious clause. See *infra*, at 4–7.

[2] While the text of the majority's framework is not in and of itself strict, the fact that the Court rejects an extension of a group-arrest warrant for a gang as active, dangerous, and damaging as TPR is leads me to one conclusion (while implying it to future litigants before us): The Government will *never* satisfy the majority's framework's expectations.

needed) extended, but instead in whom the Constitution vests the power to issue the warrant in the first place. Respectfully, this is a strategical way of dodging what is staring us in the face, so we may then claim to be the saviors of liberty and due process, brag about it through judicial opinion, and continue on the next day as though nothing is wrong. When a Court of Nine—comprising the top jurists of the Nation—cannot acknowledge the destruction caused by members of TPR, something is very wrong, and it shows to everyone but the majority.

II

The Court not only misapplies the warrant provisions of Article III: It steps all over them. In reaching the conclusion to deny the Government's request for an extension of the warrant, it reasons that the text and history surrounding those provisions suggest a never-before-seen standard for group-arrest warrants. This departs from both what we know the text suggests and the history that surrounds it. Because the majority fails to take these factors into account, I shall do so for them.

A

As we should always do when interpreting the Constitution, a statute, or a regulation, we begin with the text itself. There are two separate "additions" in Article III to the general warrant requirements housed within the Fourth Amendment. I have already demonstrated that these provisions—"charges" and a "trial" requirement—bear, as a matter of new precedent, synonymous meanings with some type of showing of need and a fair, judicial environment in which the merits of extending a warrant may be debated. The problem, however, with this reading is that it eviscerates the answer to what should be a very easy question to resolve.

The majority forgets that the Article III provisions relating to arrest warrants are ancillary to the Fourth Amendment, which governs all general warrants. The Court in holding and continuing to apply the decision that the Article III "charges"—and arrest warrants overall—demand a showing of need for preven-

tative relief turns long-understood notions of the warrant process and the Fourth Amendment on their heads, while also ignoring the very makeup of Article III. I fear that today, much like in *British2004* v. *Ozzymen*, 3 U. S. 60 (2018), the Court has yet again violated "an interpreter's ability to give uniform meaning across every word and clause of a law," *id.*, at 79 (opinion of Scalia, J.). It has been and continues to be my understanding that lawmakers try to avoid using words that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803); it hardly "require[s] a constitutional scholar," *Safford Unified School Dist.* v. *Redding*, 557 U. S. 364, 380 (2009), to realize such a truth.

The problem with the Court's analysis of "charges" is that it ignores, crucially so, that "charges" is used twice—both in the second and third clauses of section 5 of Article III. Understand, Article III simply prescribes a general process for arrest warrants and then, for group-arrest ones, confines that process to our Court. So it seems rather silly to me that the Court's basis for its reading of "charges" is the "context of group arrest warrant proceedings," *In re United States Application for Arrest Warrant on TPR*, 5 U. S., at 1–2 (joint concurring opinion). Why note the context at all when the procedures are the exact same? This is the procedure for individual-arrest warrants: "a trial occurs within seventy two hours of the issuance of the Warrant and charges have been actively pursued . . . ." And then for group-arrest warrants: "a trial occurs within seventy two hours of the issuance of a Warrant and charges have activity been pursued . . . ." Without these obvious-to-everyone-but-the-majority facts resolved, the Court purports to rely on the straightforward meaning of "charges" to find its reading, but it would be more accurate to say that it does so by applying the appearance of a straightforward meaning of "charges."

I accept, though, that the meaning of "charges" is not necessarily plain. While judges should always to ordinary words apply their plain meaning, when doing so "would produce an absurd and arguably unconstitutional result," a Court is permitted to give an "unusual (though not unheard-of) meaning to a word,"

United States v. *X-Citement Video*, 513 U. S. 64, 82 (1994); see *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 527 (1989). The Court, however, relying on a non-existent context to define "charges," has declared that the group-arrest warrant is a preventative measure—they continue that today. That is fairly incongruous with the very *point* of a warrant for arrest as well as why we arrest in the first place.

In society, arrests are not made to prevent crime; they are made to detain for already committed actions and then—if convicted—punish the sentenced. The group-arrest warrant, therefore, is the same—just applied to a ROBLOX group of individuals rather than individuals themselves. And because we have already acknowledged that the Constitution makes no distinction whatsoever between individual and group-arrest warrants besides vesting the authority to issue them in two different original bodies, the substantive requirements for regular arrest warrants should logically apply to group-arrest ones, too. Nor is point of an arrest to prevent a crime; if that were the point, then the entire requirement of probable cause would make no sense, for it hinges on showing that illegal conduct *already happened* to justify the arrest, not on whether it *will* happen. And in circumstances where the arrest would be arresting for the *anticipation* of a crime, statutes fill the gaps. See, *e. g.*, 18 U. S. C. § 371; 18 U. S. C. § 1349. Regardless, even those are not truly preventative in the majority's sense of the word; the Government, to be given a warrant to arrest based on such a type of crime, would still have to show that the planning to commit a crime—the planning being a crime itself—was *already committed*. Respectfully, the idea that warrants for arrest—and thus arrests themselves—have ever been preventative rather than to detain for crimes already completed turns the *entire* criminal justice system into nothing more than a system in which one may be arrested and detained not for committing crime, but

for the possibility of committing crime. Such a system has its place in a banana republic, not the United States of America.

Given that these provisions merely are subsidiaries of the general warrant requirements of the Fourth Amendment, "charges" should, rather than require the Government to show a "need" for preventative relief (whatever that means), just mean what the word in *full* context naturally suggests: the Government must show probable cause to be granted an issuance of an arrest warrant—be it for an individual or for a group.

B

The Court can find no basis for its reading of "charges" in the text of the Constitution, nor can it in the history surrounding its text. These Article III provisions were not implemented to establish a procedure whose substantive components depart from the Fourth Amendment's requirements; they were implemented to require through more forceful writing what is generally required in real life. This corrective measure is one of many in the Constitution, written with the failings of the previous one fresh in the mind. Some are found in amendments; others in the original five Articles. The most obvious example of this would be the Eleventh Amendment, which constitutionalized the prohibition on employment in more than one civil office at once, while providing a simple procedure for how civil offices are to be defined—thereby avoiding the pitfall that I shall now describe.

A downfall of our virtual environment is that details often fall through the cracks in day-to-day work. For instance, take a look at our very own Court. In real life, dozens of briefs fill individual cases, each full of elaborate legal arguments to which the Justices confine themselves when drafting their opinions; here, however, we often either (a) do not receive briefs or (b) receive them sparingly, and often they lack the elements that, well, would constitute them as proper legal "briefs." For us, the parties, and the thousands of Americans affected by our decisions, this shortfall does not present a concern worth stressing. But some process failures prove fatal. This cannot be demonstrat-

ed better than by looking to the history of arrest warrants in our country.

Before the present Constitution was ratified, there was no specific textual scheme outside of the general requirements of the Fourth Amendment to establish constitutional guarantees sufficient enough in light of the above-mentioned shortfall to ensure a fair process. Judges were not (and often still are not) capable of employing the proper legal methods used in real life on ROBLOX. That is so because, simply, most here are teenagers; they do not possess a law degree, nor do they study judicial opinions like some. They are, after all, here to have fun, so the, to many, tedious steps of the arrest-warrant process—from both the perspective of the Government and the courts—deterred their very operation.

Thus, instead of the Government going in front of a judge, showing probable cause, and the judge issuing an appropriate warrant for arrest, judges would instead issue *sua sponte* arrest warrants for individuals they thought were criminals or members of groups they thought constituted criminal enterprises. One need not think long and hard to come to the understanding that such a practice would be hit or miss—and the misses, given the very subject, always hit hardest those who deserve such beatings least. In light of this shortfall, the Constitution includes those Article III provisions to *constitutionalize* those basic steps, not to create some new standard set apart from what is applied for all other warrant requests.

Concerning the group-arrest portion, there is one simple reason why the power to issue those types of warrants is vested solely in the Supreme Court: the history and struggles of the federal court worried the Constitution's drafters.[3] It was not to add a *third* (on top of an already unnecessarily added second) tier of scrutiny to the arrest-warrant process. One would think

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[3] By vesting it in the Supreme Court, the Constitution requires group-arrest warrants to have the assent of a majority of this Court, rather than individual judges at the federal-court level. Art. III, § 5, cl. 3.

if that was the goal in mind, the text would reflect that instead of bearing the exact same wording as the preceding clause does.

III

While I reject the Court's overall reading of the Article III provisions in tandem with the Fourth Amendment, I will, for the sake of argument, show that when applying the current circumstances of the case to its framework, there should have been no question as to whether the warrant should have been extended. I wish to, in doing this, note that it is at this point that the majority and those in concurrence take a turn from expounding bad to downright offensive law.

The Court's framework demands that the Government, in showing a need for preventative relief, demonstrate that the actions of a group's members are not merely coincidental, but deliberate, organized, and consistent. TPR's actions more than satisfy all three factors and then some. But in opinions and oral-argument transcripts reflecting truly how out of touch our Court is with the everyday American—and what will look like almost deliberate ignorance to readers—the Court, in putting out the candle, sends a much more worrying sentiment: It might just not care. We Justices spend almost all of our time in Discord-based chatrooms and using word-processor applications. We do not experience things regular Americans do at our cities. We do not bear the brunt of TPR's actions; they bear it for us. This backwards ruling puts on bright display why we ought to get out of the business entirely of arbitrarily judging whether a crime is severe enough to warrant an arrest. That has never been the question (until now). We arrest those who commit crimes because they committed crimes; we thus ask the

Government to show that there was probable cause to believe that they were committed.

IV

I also write to respond first to THE CHIEF JUSTICE's discovery of time travel, and second to JUSTICE O'CONNOR's newfound expertise on criminal-organization strategy.

A

THE CHIEF JUSTICE's concurrence gives one prevailing reason why the majority's opinion is correct: "the legal standard required by the Constitution in group arrest warrant trials ['charges' require a showing of preventative need] is quite clear." *Ante*, at 31 (HOLMES, C. J. concurring). According to THE CHIEF JUSTICE, however, the reason for this is that the Court proclaimed it to be so. *Ante*, at 31–32 (citing *In re United States Application for Arrest Warrant on TPR*, 5 U. S.). The problem with that is the Court's justification then for its reading was as empty as THE CHIEF JUSTICE's is now. If the test applied to our precedents' validity is to ascertain their mere existence, rather than their contents' validity, then there is no test applied at all. Moreover, it is worth nothing that, of course, the Government "carries the burden of establishing the need for a warrant." *Ibid.* But what exactly that burden entails is probable cause, see *supra*, at 41–45, not a showing that a group of individuals is dangerous enough to scare Members of this Court stiff.

THE CHIEF JUSTICE then says that unless the majority's reading is accepted, then criminal-trial requirements and standards would have to apply to the process of procuring a warrant. See *ante*, at 32 (quoting *In re Winship*, 397 U. S. 358, 364 (1970)). This is hard to follow, given that the avenue that the text naturally suggests would require a showing of probable cause, not need for preventative relief based on level of dan-

ger. Wherever THE CHIEF JUSTICE found this assertion, it was certainly incorrect.

THE CHIEF JUSTICE devotes the remainder of the page to arguing why trials of Article III are not criminal. I apologize to this Court's printing staff; your ink was wasted. Neither this dissent nor the Court's opinion asserts that they are criminal and require criminal elements of procedure. Where disagreement is found is at the point of deciding what is required *at* the "trial" phase.

At this point, THE CHIEF JUSTICE's concurrence evolves from somewhat engaging with law into travelling into the future. Before I explain, I wish to remind readers that this case is about deciding whether the arrest warrant granted for TPR should be extended. The Court, siding with TPR, ruled against the Government, and denied the extension on March 1, 2018. Thus, the relevant law and record to this case is what existed up to that moment. THE CHIEF JUSTICE, however, discards that established-for-centuries judicial rule. He says that the denial of the warrant extension was justified because TPR, on April 1, 2018, was shut down by the Government, so *ipso facto* the extension denial was based on good law. *Ante*, at 34–35. I was unaware that TPR had been shut down when we sat for oral argument in this matter on March 27, 2018; or that good news of a recent-but-not-final win against a grouped enemy, *ibid.*, was the equivalent of an all-out victory worthy of celebration. And these two reasons proposed still rest on the faulty assumption that arrests are made to prevent crime rather than to detain for crime committed either for the duration of a trial or for imprisonment. The very test of deciding how dangerous a group is, and how dangerous need be "dangerous," inherently disregards the very purpose and meaning of warrants and the Fourth Amendment. But regardless of how misguided the legal theory espoused by THE

CHIEF JUSTICE's concurrence may be, it pales in comparison to that of JUSTICE O'CONNOR's.

B

Much of what JUSTICE O'CONNOR writes is a broad (but curiously short) rejection of the Government's assertions as to the criminal conduct and nature of TPR's members and actions.

JUSTICE O'CONNOR begins with a titillating explanation of what exactly arrest warrants are in the first place.[4] Then, recognizing that a group-arrest warrant has not been issued in nearly a year, see *ante*, at 37–38, JUSTICE O'CONNOR decides that was because such an issuance would require "significan[t]" circumstances." JUSTICE O'CONNOR and I agree: Significant circumstances would seem to correlate with and cause the need for a group-arrest warrant. JUSTICE O'CONNOR acknowledges this much, writing: "Bold times demand bold action." *Ante*, at 38. (Not too bold an action, however.)

JUSTICE O'CONNOR, attempting to faithfully apply the Court's erred framework, subjects the Government's argument to her very nuanced test: comparing the number of federal and municipal law-enforcement agents with TPR's member count. See

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[4] JUSTICE O'CONNOR writes, "warrants for arrest . . . have . . . been only used on those who have been tried and convicted of a crime under our criminal justice system." *Ante*, at 37. The problem with such a definition is that arrest warrants are issued before the trying and conviction of a defendant—issuing a warrant for the arrest of someone only after trying them seems to beg the question: How is one to compel attendance to court? JUSTICE O'CONNOR sprinkles in a contempt-citation exemption in her definition, yet this, too, makes little sense; how is one to get to the stage where a contempt citation would even arise if one cannot arrest the offender to bring him to be tried in the first place? Perhaps, I might dare surmise, JUSTICE O'CONNOR has confused "arrest"—which is reasonably defined as, "[t]o deprive a person of his liberty by legal authority . . . for the purpose of holding or detaining him to *answer a criminal charge or civil demand*," Black's Law Dictionary 100 (8th ed. 2004)—with "serving out a prison sentence," where defendants who have been found guilty by a jury of their peers and have been sentenced fairly under the law by a judge are incarcerated in a federal-prison center.

ibid. I am no statistician, but I think it is safe to say there are some missing factors in JUSTICE O'CONNOR's analysis.

JUSTICE O'CONNOR mistakenly assumes personnel count to be the sole and final determinate factor in resolving questions like this. The argument that the higher count of heads will predict the battle has been historically, professionally, and logically rejected—but apparently not by JUSTICE O'CONNOR. JUSTICE O'CONNOR, marching forward, puts on her lack-of-awareness hat in then stating (without even a modicum of evidence or a citation to such), to further back her erroneous conclusion, that there must be no conflict because "there has not been a coordinated attack on an American city by TPR for days." *Ibid.* I am sure that a few strolls on the streets of Las Vegas would change JUSTICE O'CONNOR's outlook; any seriously proposed idea that the attacks have stopped should concern more than surprise, for they lack even the thinnest façade of an honest and competent analysis—legal or otherwise.

But even that is not what is most offensive about JUSTICE O'CONNOR's assumptions. JUSTICE O'CONNOR makes the argument, *ante*, at 38, that if the Government cannot handle TPR as it currently functions, then a group-arrest warrant would serve no purpose—it would amount to nothing more than a "parchment guarantee" against an unbeatable enemy. *Ibid.* JUSTICE O'CONNOR believes the Government has *not* shown that the circumstances surrounding TPR necessitate a group-arrest warrant. This, however, is a fairly mystifying argument, for one then would wonder how JUSTICE O'CONNOR believes the Government *should* be dispatching with society's criminals if JUSTICE O'CONNOR at the same time would deny the Government the ability to *arrest* and *detain* those individuals under a warrant; JUSTICE O'CONNOR, I presume, must instead think that turning cities into first-person-shooter warzones is how crime is fought efficiently and safely, and that warrantless arrests will ink the remaining dry spots. Except this ignores—while again exposing the majority's troubled logic—the fact that arrests are made *after* crimes are committed. Had JUSTICE O'CONNOR and the

rest of the majority understood that warrants for arrest are not preventative measures—no one arrest warrant is—but tools for dealing with crime and detaining and trying criminals, perhaps such a concurrence that insults hundreds of law-abiding citizens would not have been written.

* * *

No single word summarizes the Fourth Amendment better than does "reasonableness." That is because principles governing procedure and substance in criminal justice require it. But reasonableness has been thrown out the window in now two cases establishing what is none other than a very troubling trend line. By turning Article III's bolded guarantees of the rights already afforded within the Fourth Amendment into an unrecognizable, tiered, and confusing system imposed through judicial fiat, the Court has taken the side of neither society nor criminals. Today, the Court—with THE CHIEF JUSTICE's and JUSTICE O'CONNOR's helping hands—sides with itself, placing with a wildly out-of-touch perspective a new doctrine that has no textual, historical, or logical support from the Constitution above that of the safety of law-abiding citizens.

I respectfully dissent.

CODE_RAGER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–25. Decided April 8, 2018

PER CURIAM.

Petitioner Code_Rager was convicted almost two years ago of perpetrating an admin attack against the United States Court Process Trello board. For his crimes* he was sentenced to 200 years of federal imprisonment and arrest on sight. In other words, he was issued the sentence of "permanent exclusion," *CodyGamer* v. *United States*, 2 U. S. 18, 23. See also *RoExplo* v. *United States*, 5 U. S. 7, 31–32 (2018). Following our holding in *RoExplo*, Code_Rager appealed his sentence, alleging violation of the Eighth Amendment. We granted certiorari. 5 U. S. — (2018).

Not long after we granted certiorari, however, the President issued Code_Rager a "full and unconditional pardon." See Appendix, *infra*. Consistent with the process this Court articulated in *United States* v. *Wilson*, 32 U. S. 150 (1833) for the use of an issued pardon, Code_Rager moved us to vacate his sentence. For the reasons stated below, we grant that motion. Both Code_Rager and the United States, however, also requested that—despite the fact that the underlying sentence no longer exists—we decide the merits of this case anyways. That is something we are unable to do, and we therefore dismiss the writ of certiorari as improvidently granted for the reasons provided below.

Vacating the Sentence

The motion to vacate the sentence imposed by the District Court is straightforward enough. If we are satisfied that the

* He was charged with 96 counts of violating 18 U. S. C. §1361, which punishes anyone who "willfully injures or commits any depredation against any property of the United States" and with committing treason under 18 U. S. C. §2381.

President indeed granted the asserted pardon and that Code_Rager indeed wishes to avail himself of its benefit, we must grant the motion. *Id.*, at 163.

Firstly, we are satisfied that the President granted the asserted pardon for two distinct reasons. For starters, the pardon was first brought to our attention by the Attorney General, an officer of the President. Furthermore, the President himself confirmed the pardon's legitimacy upon direct inquiry by the Court. Second, we are equally convinced that Code_Rager wishes to avail himself of the pardon's benefit. The fact that he moved this Court to vacate his sentence is enough proof of that. If it were not, his continued insistence on it suffices. We thus grant the motion to vacate his sentence.

Dismissing the Case

Both parties have asked this Court to decide this case on the merits despite us already having vacated the sentence on account of the Presidential pardon. Both the United States and Code_Rager's counsel impress upon us the magnitude of the constitutional question presented and insist that for that reason, the case should proceed. But the judicial power, exercised by the courts under Article III, is a power "to decide not abstract questions but real, concrete 'Cases' and 'Controversies.'" *United States* v. *Windsor*, 570 U. S. —, ——— (2013) (Scalia, J., dissenting) (slip op., at 1–2). Our ordinary Article III powers (Anytime Review excluded) are confined to "determin[ing] the outcome of a lawsuit." *Id.*, at — (slip op., at 3). In so doing, we address constitutional questions which are necessary to the disposition of a case.

We frequently refrain from addressing questions which are not "outcome determinative." *British* v. *Ozzymen*, 3 U. S. 60, 66 (2017) (citing *Sigma* v. *United States Marshals Service*, 3 U. S. 2, 15 (2017) (Holmes, C. J., dissenting)). That practice

very much has to do with the limits imposed by Article III on the exercise of our powers.

We agree with the parties that the question presented is of great consequence. This case, however, is not its answer.

* * *

The sentence imposed on Code_Rager is vacated and the case is dismissed.

It is so ordered.

Appendix to the per curiam opinion of the Court

APPENDIX

Executive Grant of Clemency

Timothy F. Geithner

President of the United States of America

To All to Whom These Presents Shall Come, Greeting:

Be It Known, That This Day, I, Timothy F. Geithner, President of the United States, Pursuant to My Powers under Article II, Section 2, Clause 1, of the Constitution, Have Granted Unto

Code_Rager

A Full and Unconditional Pardon

For His Conviction of Section 1361 and 2381, Title 18, United States Code in the United States District Court for the District of Nevada, of which he was convicted on August 24, 2016, and for which sentencing is currently set for August 24, 2216.

In Testimony Whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this thirtieth day of March, in the year of our Lord two thousand and eighteen, and of the Independence of the United States of America the two hundred and forty-first.

Timothy F. Geithner
President