

GROH V. RAMIREZ, THE WARRANT REQUIREMENT, AND QUALIFIED IMMUNITY

Old debates on the Fourth Amendment¹ and qualified immunity² were recently rekindled in the Supreme Court opinion *Groh v. Ramirez*.³ In a case involving a federal agent drafting a constitutionally infirm warrant that was signed by a magistrate,⁴ the Justices lined up to reaffirm the Fourth Amendment's warrant requirement, seven-to-two,⁵ and limit qualified immunity for mistakes in preparing a warrant, five-to-four.⁶ In doing so, the Court affirmed the Ninth Circuit⁷ and limited an agent's qualified immunity solely because of his mistake in preparing a warrant. This decision serves as the Court's latest pronouncement on official immunity,⁸ further delineating what is

¹ See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1104 (1992) ("Through the years, the Fourth Amendment warrant requirement has ridden something of a legal roller coaster. It has risen to become a venerated principle of constitutional law, then fallen to the status of insupportable creation of overactive jurists, only to rise again to an exalted Fourth Amendment position." (footnote omitted)).

² See Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 473 (2000) ("The debate over the appropriate level of specificity with which to define 'clearly established' reflects the tension between competing values inherent in any application of the law of qualified immunity."). See generally Thomas E. O'Brien, Note, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 767 (2004) ("The primary purpose of qualified immunity is to shield government officials from 'undue interference with their duties and from potentially disabling threats of liability.'" (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982))).

³ 124 S. Ct. 1284 (2004).

⁴ *Id.* at 1288 (majority opinion).

⁵ Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, Ginsburg, Breyer, and Kennedy found a constitutional violation due to the lack of a valid warrant. See *id.* at 1289-93 (majority opinion) ("The Court of Appeals correctly held that the search was unconstitutional."); *id.* at 1295 (Kennedy, J., dissenting) ("I agree with the Court that the Fourth Amendment was violated in this case."). Justices Thomas and Scalia wanted to engage in a conversation "in order to determine the relationship between the Warrant Clause and the Unreasonableness Clause," *id.* at 1299 (Thomas, J., dissenting), and "[b]ecause the search was not unreasonable, [they] would conclude that it was constitutional," *id.* at 1301.

⁶ The majority, whose opinion was crafted by Justice Stevens and included Justices O'Connor, Souter, Ginsburg, and Breyer, felt qualified immunity was not appropriate, *id.* at 1293-94 (majority opinion), while Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia would extend qualified immunity to the agent, *id.* at 1295-98 (Kennedy, J., dissenting); *id.* at 1301-03 (Thomas, J., dissenting).

⁷ See *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002) (denying qualified immunity to Agent Groh).

⁸ The qualified immunity doctrine has been constantly evolving through Supreme Court opinions. See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); see also *infra*

expected of an agent in order to receive qualified immunity, while at the same time refusing to follow Justices Thomas and Scalia down the path to overruling *Katz's* warrant requirement.⁹ In the end, *Groh's* legacy may be a narrowing of the mistake justification for qualified immunity. However, in solidifying the Fourth Amendment's warrant requirement, the Court also left open the possibility for a general requirement that officers show search warrants to their subjects upon request.

I

Joseph Ramirez lived on a "large ranch in Butte-Silver County, Montana" with his family.¹⁰ In February 1997, Jeff Groh, an experienced Special Agent in the Bureau of Alcohol, Tobacco, and Firearms ("ATF"),¹¹ received a tip that Mr. Ramirez kept a "large stock of weaponry"¹² on his ranch in violation of federal statute.¹³ The source of the tip had personally observed the stockpile on visits to Mr. Ramirez's ranch.¹⁴ Wanting to search the property, Agent Groh prepared three documents for presentation to a magistrate.¹⁵ These documents included a sealed search warrant application,¹⁶ a sealed "detailed affidavit"¹⁷ to support the application, and a search warrant awaiting a magistrate's signature.¹⁸ The warrant application "particularly described the place to be searched and the contraband [Agent Groh] expected to find,"¹⁹ and was supported by Groh's executed affidavit, which also itemized the subjects of Groh's search.²⁰ However, the warrant was not as specific.

notes 69–72 and accompanying text (explaining how these cases shaped the qualified immunity doctrine).

⁹ See *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that a warrant was a "constitutional precondition").

¹⁰ *Groh*, 124 S. Ct. at 1287 (majority opinion).

¹¹ See *id.* at 1287–88 (noting Jeff Groh had been a special agent with the ATF since 1989).

¹² *Id.* at 1288. The stockpile included "an automatic rifle, grenades, a grenade launcher, and a rocket launcher." *Id.*

¹³ *Id.* at 1288 n.1 ("Possession of these items, if unregistered, would violate 18 U.S.C. § 922(o)(1) and 26 U.S.C. § 5861.").

¹⁴ *Id.* at 1288.

¹⁵ *Id.*

¹⁶ See *id.* (noting the application had been sealed).

¹⁷ *Id.* at 1288 & n.3.

¹⁸ *Id.* at 1288.

¹⁹ *Id.*

²⁰ See *id.* ("Petitioner supported the application with a detailed affidavit, which he also prepared and executed, that set forth the basis for his belief that the listed items were concealed on the ranch.").

The pre-prepared warrant was submitted to the magistrate along with the two other supporting documents.²¹ The significance of Agent Groh filling out the warrant himself was not lost on the Court, as the majority later points to his authorship as a factor in denying qualified immunity.²² The warrant “failed to identify any of the items that [Agent Groh] intended to seize”²³ and instead listed the entire ranch house as the place to be seized.²⁴ Although the warrant did indicate that the Magistrate found probable cause on the basis of the affidavit, the warrant application and affidavit were not incorporated into the warrant.²⁵ Groh and a team of officers served the warrant the day after the Magistrate signed it.²⁶ The search failed to turn up any illegal weapons and no charges were brought against the Ramirezes.²⁷ Agent Groh left a copy of the search warrant with Mrs. Ramirez as he and his team were leaving the property.²⁸ Because the warrant application was sealed, a copy of the application was not left with Mrs. Ramirez.²⁹

²¹ *Id.*

²² *See id.* at 1293 (“[B]ecause petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.”).

²³ *Id.* at 1288.

²⁴ *See id.* (“In the portion of the form that called for a description of the ‘person or property’ to be seized, [Agent Groh] typed a description of respondents’ two-story blue house rather than the alleged stockpile of firearms.” (footnote omitted)).

²⁵ *Id.* Incorporating the application into the warrant would make the list of things to be seized part of the warrant, but the magistrate’s finding of probable cause gives no additional specifics about the subject of the search to a third party reading the warrant.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* There was some debate about whether Agent Groh orally told Mrs. Ramirez the specifics regarding the subjects of his search. *See id.* (explaining that while Agent Groh claims to have “orally described the objects of the search,” Mrs. Ramirez claims he only said he was looking for “an explosive device in a box”). However, the Court placed no emphasis on this debate since the case reached the Court on Agent Groh’s motion for summary judgment and, therefore, the Court had to accept Mrs. Ramirez’s account of disputed evidence. *Id.* at 1293 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Given the Court’s concentration on the *warrant’s* deficiency, it is doubtful that Groh’s oral clarification would carry any weight, even if the Court were to accept his version.

²⁹ *Id.* at 1288. The page of the warrant application listing the items to be seized was faxed to the Ramirez’s attorney the following day upon the attorney’s request. *Id.*

The Ramirezzes brought a *Bivens* action,³⁰ along with federal statutory claims,³¹ against Agent Groh and his fellow officers claiming, among other things, a violation of their Fourth Amendment rights.³² The district court granted summary judgment for Agent Groh and all of his fellow officers.³³ The court analogized this case to others where the warrant simply contained an improper address, and found no constitutional violation.³⁴ In dicta explaining that even if there were a constitutional violation, qualified immunity would be given to the officers, the court again characterized Agent Groh's conduct as a "typographical error" that a reasonable officer could make.³⁵

On appeal, placing an emphasis on Groh's position as team leader, the Ninth Circuit left the district court opinion largely undisturbed, but allowed the Fourth Amendment claim to proceed against Agent Groh, and only Groh.³⁶ The court found a constitutional violation because the warrant was not particular enough.³⁷ The judges reasoned that, "the absence of a sufficiently particular warrant increased the likelihood and degree of confrontation between the Ramirezzes and the police"³⁸ and "the invalid warrant deprived the Ramirezzes of the means to be on the lookout and to challenge

³⁰ A *Bivens* action, named for the case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is a cause of action whose right to a remedy is found in the Constitution itself—specifically the Fourth Amendment in that case. In the absence of legislation, the Court fashions a remedy for such a violation as it does at times with federal statutes lacking a remedy. *Id.* at 402 (Harlan, J., concurring) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944)). *Bivens* actions have an extremely low success rate. See Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343 (1989) ("Of the some 12,000 *Bivens* suits filed [from 1971–1989], only thirty have resulted in judgments on behalf of plaintiffs." (footnote omitted)). Furthermore, over time the Court has narrowed *Bivens* actions "to a few narrowly defined circumstances." Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 197–98 (2003). Therefore, the fact that a *Bivens* action was even sustained in this case is worth noting.

³¹ *Groh*, 124 S. Ct. at 1288 (majority opinion).

³² *Id.* at 1288–89.

³³ *Ramirez v. Butte-Silver Bow County*, No. CV 99-17-BU-DWM, 1999 WL 33649117, at *6 (D. Mont. Oct. 20, 1999). More specifically, the court granted the agents' motion to dismiss and ordered an entry of a judgment in their favor. *Id.*

³⁴ See *id.* at *5 (noting that there are only violations in such cases "if the premises is not sufficiently described to enable officers to locate the correct address or if there is a reasonable probability that the officers will search the wrong house"). The Ramirezzes made a tongue-in-cheek, but nonetheless poignant, argument that if the agents were looking for a "two-story blue house," as the warrant listed, they surely would not find one opening cupboards and drawers. *Id.* at *4. This point emphasizes how poorly the warrant was drafted *prima facie* and how little guidance it gave to someone observing the search.

³⁵ *Id.* at *5.

³⁶ The remaining officers were entitled to qualified immunity on account of the fact that "[i]ne officers . . . are required to do much less." *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1028 (9th Cir. 2002).

³⁷ *Id.* at 1026.

³⁸ *Id.* at 1027.

officers who might have exceeded the limits imposed by the magistrate.”³⁹ The court withheld qualified immunity from Groh because “[t]he officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions.”⁴⁰ In this case, a simple review of the warrant he prepared would have made clear to Groh that the warrant, which listed the dwelling as the thing to be seized, had a problem.⁴¹ The Supreme Court granted certiorari on the Fourth Amendment and qualified immunity questions as they pertained to Agent Groh.⁴²

II

Seven Justices found a constitutional violation simply on a straightforward reading of the amendment.⁴³ The Fourth Amendment requires that warrants “*particularly* describ[e] the place to be searched, and the persons or things to be seized.”⁴⁴ As Justice Kennedy explains, using basic logical reasoning, “The warrant issued in this case did not particularly describe the things to be seized, and so did not comply with the Fourth Amendment.”⁴⁵ In fact, the majority states that the warrant “failed altogether” to meet this requirement.⁴⁶ The warrant’s supporting documents included an itemized list, but that list was not incorporated into the warrant automatically.⁴⁷ Rather, the officer must explicitly incorporate *and* attach the documents, if he chooses to use this method.⁴⁸ Neither condition was met in this case and therefore the warrant was not sufficiently specific.⁴⁹

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.* at 1028 (taking notice that Groh admitted “he did not read the warrant after the magistrate issued it and before he began the search”).

⁴² *See Groh v. Ramirez*, 537 U.S. 1231 (2003) (mem.) (granting certiorari); *see also* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at *i, *Groh v. Ramirez*, 124 S. Ct. 1284 (2004) (No. 02-811), *available at* 2002 WL 32101201.

⁴³ *See Groh v. Ramirez*, 124 S. Ct. 1284, 1289 (2004) (majority opinion) (finding a plain violation of the language of the amendment); *id.* at 1295 (Kennedy, J., dissenting) (same).

⁴⁴ U.S. CONST. amend. IV (emphasis added).

⁴⁵ *Groh*, 124 S. Ct. at 1295 (Kennedy, J., dissenting).

⁴⁶ *Id.* at 1289 (majority opinion).

⁴⁷ *See id.* (“The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.”).

⁴⁸ The Court recognizes that many circuits have allowed incorporation of other documents into the warrant “if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.” *Id.* at 1290 (citing *United States v. McGrew*, 122 F.3d 847, 849–50 (9th Cir. 1997); *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993); *United States v. Blakeney*, 942 F.2d 1001, 1025–26 (6th Cir. 1991); *United States v. Maxwell*, 920 F.2d 1028, 1031 (D.C. Cir. 1990); *United States v. Curry*, 911 F.2d 72, 76–77 (8th Cir. 1990); *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980)).

⁴⁹ The reference to the sealed affidavit in this case was not a cross-reference, but rather a statement of satisfaction by the magistrate. The fact that the affidavit was sealed means it could

The reasons behind the particularity requirement were debated at oral argument⁵⁰ and could shed some light onto why there was a Fourth Amendment violation in this case. A warrant serves more than one purpose.⁵¹ The Ninth Circuit had given the following three reasons for the particularity requirement: (1) to decrease disagreements between the officers and search targets; (2) to give the search targets the ability to be on the “lookout” for police conduct that runs astray of the warrant; and (3) to exclude oral enlargements by police officers of the realm of the search.⁵² Rather than adopting these reasons, the Court points to previous cases explaining the reasons behind the particularity requirement. The Court says the particularity requirement’s rationale is broader than simply preventing “general searches,”⁵³ and includes the purpose of legitimizing the officer’s conduct, authority, and scope of search.⁵⁴ The Court does not go as far as the circuit court and place an emphasis on the possibility of an individual right to monitor the search because the Fourth Amendment does not require the warrant to be served before the search.⁵⁵ Yet one wonders if the only way to legitimize the search is to prohibit officers from playing a game of keep-away with the warrant—in most circumstances.

Pairing the reasoning behind Fourth Amendment particularity and reasonableness could lead to a requirement that, upon request, a warrant be shown to the subject of a search *before* commencement of the search. Even conceding that the Ninth Circuit was wrong and there is no individual right to review the warrant, if one assumes no exigency or other exceptions (like a covert wire-tap search), would it

not be meaningfully attached to the warrant. See David Horan, *Breaking the Seal on White-Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 323–25 (2001) (“With a sealing order . . . the government denies the target access to these materials even after the agents complete the search.”). Yet, the affidavit’s sealing is not a viable excuse for the warrant’s deficiency. Any reasonable officer must realize that if the warrant does not have any particulars and the incorporated documents are sealed (the affidavit was not incorporated in this case either), then the warrant must be more specific. The sealing of the affidavit is a barrier put up by the government. Surely, it cannot use its own barrier as a reason not to be specific. Additionally, listing the items to be seized in the warrant would not compromise the rest of the information in the affidavit.

⁵⁰ See Oral Argument Transcript at 8–11, 23–30, 35–41, *Groh* (No. 02-811) [hereinafter Transcript] (discussing reasons behind, and possible implications of, the particularity requirement), available at http://supreme.lp.findlaw.com/supreme_court/docket/2003/november.html#02-811.

⁵¹ See *Groh*, 124 S. Ct. at 1292 (majority opinion) (“We have long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches.”).

⁵² *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027–28 (9th Cir. 2002).

⁵³ *Groh*, 124 S. Ct. at 1292 (majority opinion) (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

⁵⁴ *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). As drafted, there was no way the warrant in this case would satisfy these purposes.

⁵⁵ *Id.* at 1292 n.5.

be reasonable to deny the target of a search access to the search warrant? This hypothetical was pushed during oral arguments,⁵⁶ although it was not a central issue to this case. Per the Federal Rules of Criminal Procedure, an officer must leave a copy of the warrant *after* finishing the search and taking property.⁵⁷ Furthermore, in footnote five, the Court recognizes that there is no requirement in the rules or Fourth Amendment to show a warrant *before* commencing the search.⁵⁸ Therefore, it is significant that notwithstanding the recognition, the Court still leaves open the possibility that an officer may need to provide a particular warrant before beginning a search if the person answering the door requests to see a search warrant—and there are no exigencies—for the search to be considered reasonable.⁵⁹ In such a case, the warrant shown must be particular in order to give some guidance towards “assur[ing] . . . the lawful authority of the executing officer.”⁶⁰

Throughout this debate, Justices Thomas and Scalia want to move away from a warrant requirement in hopes of a return to “reasonableness.”⁶¹ They find no constitutional violation even though they

⁵⁶ Mr. Schlick, an attorney representing the United States as amicus curie supporting Agent Groh pushed the hypothetical:

QUESTION: . . . [T]here’s a knock on the door and the policeman says, I have a warrant. And I say, may I see it? He says, well, oh no, you can’t see it until I leave. Is that—is that your position?

MR. SCHLICK: No, again that would be analyzed under the law of knock and announce, and it may be reasonable under the circumstances—

QUESTION: If they have a warrant, do I have a right to read the warrant?

. . . .

MR. SCHLICK: If—if the homeowner denied entry until a copy of the warrant is provided, the officer would be faced with the question, is this a constructive denial of entry? Is there some exigency for getting into the property? And it may be reasonable under the circumstances—

QUESTION: No, there—no, there—there’s no exigency because there’s only one person there and he’s at the door and that person says, I’d like to read this warrant. Does he have the right to do that before officer enters?

MR. SCHLICK: If there were no exigencies, then ordinarily the reasonableness principle probably would require that, but the purpose of the particularity requirement, it’s very clear, is to ensure that the search is conducted in accordance with what the magistrate authorized.

QUESTION: Why isn’t that in our rule if—if you’re willing to concede that that’s a constitutional requirement?

Transcript, *supra* note 50, at 24–25.

⁵⁷ See FED. R. CRIM. P. 41(f)(3) (requiring officers seizing property to leave a copy of the warrant).

⁵⁸ *Groh*, 124 S. Ct. at 1292 n.5 (majority opinion).

⁵⁹ See *id.* (leaving open the question of the reasonableness of a refusal to show a warrant where “an occupant of the premises is present and poses no threat to the officers’ safe and effective performance of their mission.”).

⁶⁰ *Id.* at 1292 (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

⁶¹ *Id.* at 1298 (Thomas, J., dissenting) (“[T]he text of the Fourth Amendment certainly does not mandate” a warrant requirement.). This is not a new position for Justice Scalia, who has been arguing for a return to reasonableness for some time. See, e.g., *California v. Acevedo*, 500

concede the warrant in this case was “defective.”⁶² While the Court has held warrantless searches presumptively unreasonable,⁶³ the dissent points to the various exceptions to the presumptive unreasonableness of a warrantless search as an indication of the imprecision and shortcomings of the rule.⁶⁴ The dissent sarcastically notes, “[O]ur cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.”⁶⁵ Justice Thomas then argues that this search was reasonable because all of the officers in the team were given copies of the sealed application and affidavit, they went over them orally, and the search was performed within the parameters the magistrate approved.⁶⁶

Even assuming, *arguendo*, a disjunction between the Reasonableness and Warrant Clauses of the Fourth Amendment, there could still be a violation in this case. Is it reasonable to conduct a search pursuant to a warrant that lacks one of the requirements specifically spelled out in the Fourth Amendment? It must be that the warrant meets constitutional criteria, at a minimum, to be considered reasonable. If an officer wants to conduct a search under the guise of a warrant, and all the legal-sounding gravitas it conjures up in the citizenry, it can only be expected that the warrant the officer claims to be using is a legitimate one for the search to be deemed reasonable. However, this debate is purely academic at this point because seven members of the Court found a constitutional violation simply on the breach of the particularity requirement of the Fourth Amendment.

U.S. 565, 581 (1991) (Scalia, J., concurring) (“The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”). The case Justice Thomas cites as an example of the Court having at one time adopted the reasonableness only approach is *United States v. Rabinowitz*, 339 U.S. 56 (1950)—a case that has since been overruled. *Groh*, 124 S. Ct. at 1298 (Thomas, J., dissenting).

⁶² *Groh*, 124 S. Ct. at 1299 (Thomas, J., dissenting) (“despite the defective warrant”).

⁶³ *See id.* at 1298 (citing *Payton v. New York*, 445 U.S. 573, 583 (1980); *Katz v. United States*, 389 U.S. 347, 357 (1967)).

⁶⁴ *Id.* at 1298–99. The exceptions Justice Thomas notes include: “searches incident to arrest” from *Chimel v. California*, 395 U.S. 752, 762–63 (1969); “automobile searches” from *United States v. Ross*, 456 U.S. 798, 800 (1982); “searches of ‘pervasively regulated’ businesses” from *United States v. Biswell*, 406 U.S. 311, 315–17 (1972); “administrative searches” from *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534–39 (1967); “exigent circumstances” from *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967); “mobile home searches” from *California v. Carney*, 471 U.S. 386, 390–94 (1985); “inventory searches” from *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983); and “border searches” from *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). *Groh*, 124 S. Ct. at 1298–99 (Thomas, J., dissenting).

⁶⁵ *Groh*, 124 S. Ct. at 1299 (Thomas, J., dissenting).

⁶⁶ *Id.* at 1301.

III

Finding a facial violation of the Fourth Amendment by Agent Groh, the question remains whether or not he is entitled to qualified immunity from civil suit.⁶⁷ Here there was a less decisive majority, five-to-four, to withhold qualified immunity.⁶⁸ Qualified immunity, given to most executive officials rather than absolute immunity,⁶⁹ is an immunity that depends on whether the officer violated a “clearly established” right.⁷⁰ The standard is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”⁷¹ The inference is that if an officer makes a reasonable mistake, he is entitled to qualified immunity even though his actions were illegal.⁷² Because the mistake so clearly violated the Fourth Amendment in this case, the Court holds no reasonable officer could claim the warrant met Fourth Amendment requirements.⁷³ It is upon this point that Justice Kennedy and Chief Justice Rehnquist differ from the majority.

Justice Kennedy, in dissent joined by Chief Justice Rehnquist, characterizes the mistake as a mere “clerical error.”⁷⁴ Indeed, in the dissent’s view it was such a minor error, that no one picked it up

⁶⁷ *Id.* at 1293 (majority opinion) (citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). See generally Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 270 (2003) (“Under this [qualified immunity] defense, a public official is entitled to qualified immunity from liability for a civil rights violation where a reasonable official would not have known that his specific conduct in the case in question violated a clearly established constitutional right of the plaintiff.” (footnote omitted)).

⁶⁸ See *supra* note 6 (discussing how the Justices aligned in deciding the qualified immunity issue).

⁶⁹ See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (holding that “in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity”).

⁷⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), moved towards a completely objective determination. More recently *Hope v. Pelzer*, 536 U.S. 730 (2002), explained, “For a constitutional right to be clearly established, its contours ‘must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *Id.* at 739 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

⁷¹ *Groh*, 124 S. Ct. 1293 (majority opinion) (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

⁷² See *Saucier*, 533 U.S. at 205 (“An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.”).

⁷³ See *Groh*, 124 S. Ct. at 1293 (majority opinion) (“Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.” (citing *Harlow*, 457 U.S. at 818–19)).

⁷⁴ *Id.* at 1295 (Kennedy, J., dissenting). Agent Groh correctly noted the thing to be seized in two of the three documents. “When he typed up the description a third time for the proposed warrant, however, the officer accidentally entered a description of the place to be searched in the part of the warrant form that called for a description of the property to be seized.” *Id.*

along the process—not Groh, the magistrate, nor any of the other officers.⁷⁵ Groh even explained and executed the search warrant as if there had not been the clerical error.⁷⁶ Justice Kennedy’s view is if an agent fulfills the “number of serious responsibilities” a supervising agent has,⁷⁷ he should “be excused” for a mere scrivener’s error.⁷⁸ He notes that we all make mistakes that we miss in the “myopia when looking for our own errors,”⁷⁹ and there needs to be “some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.”⁸⁰ In his opinion, the Court’s view “requires our Nation’s police officers to concentrate more on the correctness of paper forms than substantive rights.”⁸¹

The majority’s retort to Justice Kennedy is two-fold.⁸² On one hand, the case Justice Kennedy cites calls for latitude in “making arrests and executing search warrants,”⁸³ not simply *drafting* warrants. Clearly, the same exigency does not apply to drafting a warrant as serving one.⁸⁴ The Court then points to the “constitutional magnitude” of the violation in this case to focus the issue on the right that is being violated rather than the fact that the right was violated by incorrect papers.⁸⁵ According to Justice Kennedy, “the essential question here is whether a reasonable officer in petitioner’s position would necessarily know that the warrant had a clerical error in the first place.”⁸⁶ This fails to recognize that Groh created the error himself in drafting the warrant, and jumps straight to Groh’s review of the warrant. While checking a warrant is passive action, drafting one is taking decisive affirmative action. The actual question is whether an agent would necessarily know how to, and make sure that he did,

⁷⁵ *Id.* at 1295–96.

⁷⁶ *Id.* at 1296.

⁷⁷ *Id.* Justice Kennedy points to the “difficult and important” duties to “establish probable cause,” “articulate specific items that can be seized, and a specific place to be searched,” “obtain the search warrant from a magistrate judge,” “instruct a search team,” and “oversee the execution of the warrant.” *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* Justice Kennedy points out that “[e]very lawyer and every judge can recite examples of documents that they wrote, checked, and double-checked, but that still contained glaring errors.” *Id.* He can add to that list student authors who wrote, checked, and double-checked pieces that may still contain *Bluebook* errors. See generally THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 17th ed. 2000).

⁸⁰ *Groh*, 124 S. Ct. at 1296 (Kennedy, J., dissenting) (citing *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)).

⁸¹ *Id.* at 1298.

⁸² See *id.* at 1294 n.9 (majority opinion) (responding to the opinion of Justice Kennedy).

⁸³ *Garrison*, 480 U.S. at 87.

⁸⁴ See *Groh*, 124 S. Ct. at 1294 n.9 (majority opinion) (taking note of the difference between drafting and serving a warrant).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1296 (Kennedy, J., dissenting).

fill out the warrant correctly. When the stakes are as high as they are, such obvious mistakes cannot be made. Justice Kennedy's point about lawyers and judges making clerical mistakes is well taken;⁸⁷ however, in some circumstances, such as drafting contract language or filling out an order form, "clerical mistakes" have consequences. Similarly, a "clerical mistake" that creates a constitutional violation must have consequences.

Justice Thomas, joined on this point by Chief Justice Rehnquist as well as Justice Scalia, would also grant qualified immunity to Groh.⁸⁸ Thomas attacks the qualified immunity holding because he feels the "clearly established" rule it turns upon was defined at too high a level of generality.⁸⁹ In *Anderson v. Creighton* the Court ruled that the reasonable officer must understand that "what he is doing violates th[e] right" for immunity to be denied.⁹⁰ The majority's rejoinder points to the ATF's own directive, which warns agents that a search warrant must be "sufficient on its face even when issued by a magistrate."⁹¹ Thus, not only did Groh know of the language of the Fourth Amendment, but also an ATF order pointed out to him the need to check warrants. Then Justice Thomas makes an argument similar to Justice Kennedy's that Groh simply did not realize there was an error in the warrant when he executed the search and his "failure to notice the defect" was reasonable.⁹² The same reply that violating a constitutional requirement makes a warrant so facially deficient that no reasonable officer can presume it valid is in order.⁹³

This case may be *sui generis* when compared to other qualified immunity cases. Most other qualified immunity cases deal with an officer's mistaken understanding of a constitutional principle that is

⁸⁷ See *supra* note 79 and accompanying text (explaining Justice Kennedy's example).

⁸⁸ *Groh*, 124 S. Ct. at 1298, 1301–03 (Thomas, J., dissenting).

⁸⁹ *Id.* at 1301–02 (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

⁹⁰ *Anderson*, 483 U.S. at 640.

⁹¹ *Groh*, 124 S. Ct. at 1294 (majority opinion) (citing ATF Order O 3220.1(7)(d) (Feb. 13, 1997)). The order points out potential liability and reads: "Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate." *Id.* (citing ATF Order O 3220.1(7)(d) (Feb. 13, 1997)).

⁹² *Id.* at 1302–03 (Thomas, J., dissenting).

⁹³ See *United States v. Leon*, 468 U.S. 897, 923 (1984) ("Depending on the circumstances of the particular case, a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid."). One *Groh* dissenter wonders why this is one of those cases and the good-faith exception should not apply. See *Groh*, 124 S. Ct. at 1302 (Thomas, J., dissenting) (pointing out that the Court does not explain why the exception does not apply). Again, the violation of a constitutional requirement, which the Thomas dissent does not find, makes this one of those cases. The other *Groh* dissenter feels that the reliance on *Leon* is misplaced since this case is not about relying on the deficient warrant, but rather not knowing it was deficient. See *id.* at 1297 (Kennedy, J., dissenting). However, missing such a clear violation of the Fourth Amendment caused the agents to rely on a deficient warrant.

vague and open to debate.⁹⁴ Comparatively, this case dealt with an officer who likely knew the rule, but did not realize he was violating it. Agent Groh could not claim he did not understand the contours of the particularity rule since it is so plainly explained in the Constitution itself⁹⁵ and his own department's orders further emphasize the rule.⁹⁶ Therefore, this case may stand as an outlier and the holding be narrowed to its facts, thereby leaving the mistake justification intact for mistakes about more ambiguous legal provisions.

IV

Understanding *Groh's* impact means understanding its potential as well as its limits. For Fourth Amendment purposes, it is an important decision because it solidifies the warrant requirement and further outlines what is required for its satisfaction. While the Court leaves open the door to the general rule that officers need to show warrants upon request, it does not reach the issue and even points out constitutional conceptual hurdles in recognizing such a proposition.⁹⁷ Similarly, *Groh* is significant for qualified immunity purposes because it narrows the mistake justification for clear violations of the Constitution to almost zero tolerance. Even though there is no suggestion of bad faith on behalf of Agent Groh, he will likely now be found liable for his drafting of the warrant. Nevertheless, the Court was willing to withhold immunity from Groh because a violation of clear constitutional language cannot be reasonable. However, it must be remembered that the particularity requirement is one of the few clear and precise clauses of the Constitution—most others use vague terms such as “cruel and unusual punishment[]”⁹⁸ or “probable cause”⁹⁹ that are open to debate over their meaning.¹⁰⁰ Therefore, this opinion

⁹⁴ See, e.g., *Hope v. Pelzer*, 536 U.S. 730 (2002) (cruel and unusual punishment); *Saucier v. Katz*, 533 U.S. 194 (2001) (excessive force); *Anderson v. Creighton*, 483 U.S. 635 (1987) (probable cause); see also Jason P. Rubin, Comment, *A Constitutional Education: Use of the Enforcement Clause to Limit the Unfortunate Effect of the Qualified Immunity Doctrine*, 6 U. PA. J. CONST. L. 163 (2003) (arguing for congressional legislation mandating constitutional education for officers to raise the standard of the “reasonable officer” in cases involving qualified immunity determinations that deal with more ambiguous clauses). Such a heightened education is not needed in this case as the violation is of the constitutional language itself, but may be useful in other qualified immunity cases.

⁹⁵ U.S. CONST. amend. IV.

⁹⁶ See *supra* note 91 (referencing the ATF orders relied upon in *Groh*).

⁹⁷ See *Groh*, 124 S. Ct. at 1292 n.5 (majority opinion) (pointing out that showing the warrant before a search is *not* required by the Fourth Amendment while leaving open the question of the reasonableness of a search that denies a request to see the search warrant).

⁹⁸ U.S. CONST. amend. VIII.

⁹⁹ U.S. CONST. amend. IV.

¹⁰⁰ See generally Rubin, *supra* note 94 (proposing a way to elevate the reasonable officer standard in these more ambiguous cases).

may have little impact on other qualified immunity cases. The debate about the importance of the particularity requirement and the narrowing of qualified immunity for honest, but constitutionally flagrant, mistakes will continue on in the law journals and courts. It can be certain that these old debates will continue for some time to come.

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