

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 05–20

BANK OF AMERICA, PETITIONER *v.* UNITED STATES
ON WRIT OF CERTIORARI TO THE UNITED STATES GOVERN-
MENT

[March 10, 2018]

PER CURIAM.

The writ of certiorari is dismissed as improvidently
granted.

It is so ordered.

Statement of BORK, J.

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Statement of JUSTICE BORK.

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.

Statement of BORK, J.

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. ____ (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 safehouse 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).

Statement of BORK, J.

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*, 17 U. S. 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

Statement of BORK, J.

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.