

BORK, J., dissenting

**SUPREME COURT OF THE UNITED STATES**ALEXJCABOT *v.* UNITED STATES STATE POLICEON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09–30. Decided June 6, 2020

The petition for a writ of certiorari is denied.

JUSTICE BORK, dissenting from the denial of certiorari.

Under *Technozo v. United States*, when a “clan manager . . . act[s] pursuant to their prescribed duties in an area traditionally within the group holder’s control,” questions about the legality of their conduct are nonjusticiable.<sup>1</sup> When presented with such a case, a court must “dismiss [it].”<sup>2</sup> Although it may not initially seem like one, this is one of those cases. I would have granted certiorari solely for the purpose of vacating the judgment of the district court and remanding with instructions to dismiss this case as nonjusticiable.

## I

After committing a federal crime in Washington, D. C., the petitioner was arrested by a USSP officer. He responded by filing this lawsuit in the district court, asserting variously that the arrest was illegal because (1) USSP is not authorized to enforce federal law; (2) the city councils cannot give them that authorization; (3) the city laws authorizing law enforcement activity by USSP are invalid since USSP is authorized to operate in both cities, which is unconstitutional for a city agency; and (4) USSP isn’t subject to oversight by the D.C. Attorney General and shouldn’t be engaging in law enforcement.

Without briefs and oral argument, I do not pretend to

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<sup>1</sup>6 U. S. 5, 6.

<sup>2</sup>*Federal Election Comm’n v. Raps*, 6 U. S. 42, 43.

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have a conclusive answer on one or any of these questions. In this case, however, it doesn't matter yet.

Let's start from the beginning, forgetting about these questions and considering the relief that the petitioner asks the courts to grant him once all is said and done. He asks for an injunction preventing USSP from functioning as law enforcement. But we already know that USSP acted as law enforcement in Washington, D. C., before any of the legal authorizations the petitioner challenges took effect.<sup>3</sup> On what grounds was that? Before the D. C. City Council got around to formally legalizing USSP law enforcement activity, USSP was authorized and empowered by the city's lead developer to act as law enforcement to ensure the city would always maintain a baseline level of in-game activity. They operated as part of the city's baseline infrastructure. To my knowledge, the lead developer hasn't withdrawn that status from the agency.

So now add back in all the legal questions and let's assume that the petitioner wins on all of them. What then? There would still be one final unanswered question standing between him and all the relief he seeks: Was the lead developer's infrastructural empowerment of USSP legally sound? Because the lead developer is a clan manager, the district court would need to apply the *Technozo* framework to figure out if that question is justiciable before attempting to answer it. If it isn't justiciable, the petitioner would not be able to obtain relief in his lawsuit and the lawsuit would have to be dismissed for failure to state a claim on which relief can be granted. If it is, however, the district court would have to answer that question before deciding on any relief. Either way, *Technozo* is an unavoidable element of this case.

As I will show, under *Technozo*, the question of if the lead

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<sup>3</sup>*E.g.*, *Snowbleed v. Nevada Highway Patrol*, 4 U.S. 20 (concurring opinion).

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developer’s infrastructural empowerment of USSP was legal is a nonjusticiable one. I would therefore vacate the district court’s judgment and send the case back with instructions to dismiss.

## II

Applying *Technozo*, I conclude the underlying question in this case is nonjusticiable.

## A

The first step of *Technozo* is to figure out if the clan-manager action at issue was within the “prescribed duties” of the clan manager.<sup>4</sup> As part of this analysis, we consult facts like the “[c]ommon sense” role of the clan manager who acted, which can be reasonably inferred from their job description.<sup>5</sup> In *Technozo*, for example, the actions of a “community clan manager” were before the Court.<sup>6</sup> That particular clan manager’s role involved little more than “engaging the community with streams of gameplay and other methods.”<sup>7</sup> It wasn’t at all “apparent that [those] duties involve[d]” the conduct at issue in the case.<sup>8</sup> He could not invoke the protection of our justiciability rules.

This case, however, involves a development clan manager, whose prescribed duties are far more significant than those of a community clan manager.<sup>9</sup> In my view, these duties encompass the provision of baseline infrastructure within their city of responsibility. This has always been an aspect of a development clan manager’s role and if the group holder did not intend for that to be the case, surely, he’d have “explicitly stated [that] *somewhere*.”<sup>10</sup>

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<sup>4</sup>*Technozo*, *supra*, at 6.

<sup>5</sup>*Id.*, at 12.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>*Cf. Raps*, 6 U. S. at 46.

<sup>10</sup>*Technozo*, *supra*, at 13 (emphasis in original).

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For example, when the City of Las Vegas was first released, that city's lead developer<sup>11</sup> included several pieces of baseline infrastructure in the city. Among them: a bank which had not received a government charter or been licensed by a government agency; a sheriff's office which had not been approved of by any government entity at the time; and an emergency medical service with no government permit.<sup>12</sup> When a development clan manager launches a city, they have to provide some form of baseline infrastructure to guarantee that the city is equipped to obtain and retain players.

The actions of the development clan managers challenged in this case are standard operating procedure: USSP is part of Washington, D. C.'s baseline infrastructure. They may be a controversial agency which many disapprove of, but their origins are bona fide fact. Having proven now that establishing USSP was within the scope of the development clan managers' prescribed duties, I move on to the second step of *Technozo* to assess if this case is therefore nonjusticiable.

## B

The second step of *Technozo* is to figure out if the prescribed duty before the Court falls within "an area traditionally within the group holder's control."<sup>13</sup> If it does, the clan manager's actions are nonjusticiable and immune from judicial review. If it doesn't, the courts may exercise judicial review. Here, we conduct a "history-driven [analysis]."<sup>14</sup> In my view, providing the baseline

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<sup>11</sup>That city's lead developer is the incumbent group holder.

<sup>12</sup>All necessary proof of these baseline features is available to the public. For reference, one could look to the establishment dates for each of these entities and cross-reference that with the dates formal legal authorization arrived.

<sup>13</sup>*Id.*, at 6.

<sup>14</sup>*Id.*, at 13.

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infrastructure for a city is an area traditionally within the group holder's control.

As I just recounted, upon the release of Las Vegas the city's lead developer included crucial pieces of baseline infrastructure to guarantee the game's playability.<sup>15</sup> In every city release in our country's history, this has been standard practice. When the first version of Washington, D. C. was released,<sup>16</sup> government agencies were included and authorized to act as law enforcement *even though* there is no evidence that any legislation was enacted at the time authorizing those law enforcement activities.

Think of an analogy: baseline infrastructure is like a foundation and legislation is the building atop it. Baseline infrastructure provides a starting point where our government proceeds from. It is not the role of this Court or any unelected judge to tear down that scaffolding when it no longer considers it necessary. It is the lawmakers in Congress who have the right to scrap powers granted as part of baseline infrastructure when *they* deem them unnecessary, but doing so requires more than protest, strongly-worded letters, or even indirect Acts of Congress. To do away with aspects of baseline infrastructure, Congress must pass "*clea[r]*" legislation.<sup>17</sup>

No clear legislation from Congress repealing the powers of USSP conferred as part of Washington, D. C.'s baseline infrastructure exists. I would not substitute the courts for Congress.

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Because I conclude this case is nonjusticiable, I would have granted certiorari and vacated the district court's judgment and remanded with instructions to dismiss. Because the Court chooses to sit this case out for now, I

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<sup>15</sup>See *supra*, at 4.

<sup>16</sup>This was our country's first city.

<sup>17</sup>*Technozo*, 6 U. S. at 11 (emphasis in original).

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respectfully dissent and hope that someday soon the views  
I express in this opinion will become those of the Court.