

# Extra Legal

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## *The Border Wall Emergency Declaration—Power Grab or Culmination of Expansive Presidential Authority?*

*By Andy Carr\**

### I. Introduction

On Friday, February 15, 2019, President Donald Trump issued his long-awaited national emergency declaration concerning the U.S.-Mexican border, namely, to unlock billions for the construction of the wall.<sup>1</sup> Lawmakers' initial reactions were—at best—cautious, if not alarmed, by the latest executive action. Shifting appropriations via presidential decree raises obvious separation-of-powers concerns, as discussed further below. But even more pragmatically, “many lawmakers in both parties regard the prospect of a [P]resident shifting billions of dollars of funding into a new project as a worrisome precedent even if the courts uphold the plan.”<sup>2</sup>

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<sup>1</sup> Jonathan Allen & Dartunorro Clark, *Trump Announces National Emergency to Obtain Billions for Border Wall*, NBC NEWS (Feb. 15, 2019, 1:15 PM), <https://www.nbcnews.com/politics/politics-news/trump-declare-national-emergency-obtain-billions-border-wall-n972021>.

<sup>2</sup> *Id.*

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Countless pieces undoubtedly will interrogate the proclamation and its legal implications over the months and years to come, but this essay offers a starting point and a first-run analysis. The following explores the general theoretical and doctrinal frameworks for understanding the bounds of executive power, especially as it relates to the countervailing authority of Congress. This essay concludes by applying both theoretical and doctrinal lessons to the border wall proclamation, finding it unlikely to be overturned if and when it reaches the Supreme Court—at least not in its entirety. A range of interrelated concerns are further explored, suggesting avenues for further research and analysis.

## II. The Nature—and Separation—of Federal Branches’ Powers

What is the nature of the branches’ powers? What are the limits imposed by separation-of-powers in our system *on the President*, specifically? There are three key theoretical approaches to answering these questions. The first advances a strict separation of the branches’ respective zones of authority. President William Howard Taft outlined general principles of strictly separate powers over a century ago, arguing that:

The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. ... There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest....<sup>3</sup>

A second major approach is departmentalism, *i.e.*, the view that each of the three federal branches of government have independent authority to interpret the Constitution and elaborate their own judgment as to

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<sup>3</sup> WILLIAM HOWARD TAFT, THE PRESIDENT AND HIS POWERS 139–40 (4th prtng., Columbia Paperback ed. 1967), *quoted in* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 4 (2002).

constitutional questions.<sup>4</sup> This perspective asserts a limited view of Supreme Court decisions as affecting only litigants in the case, rather than viewing the Court as the final, authoritative arbiter of constitutional questions.<sup>5</sup> Departmentalists do not reject the force of Supreme Court precedent entirely. But they *do* assert that all constitutional disputes arising among the political branches are open to some degree of independent interpretation—including any ambiguities left in court opinions. Supreme Court decisions still impose powerful limits on the political branches under this view, and the Court’s binding holdings on litigants—including governmental actors—cannot simply be disregarded. But for any constitutional disputes arising among the political branches *before* litigation ensues, each branch, for departmentalists, retains its own interpretive authority.

The third, final view is the assorted unitary executive theory

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<sup>4</sup> In part, departmentalism’s advocates see this theory as one of “popular constitutionalism,” where all branches—including the political ones, representing the people most directly—have a stake in constitutional disputes. See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 487–90, 496 (2018).

<sup>5</sup> Departmentalism traces its origins to the founding era of the American Republic—Thomas Jefferson and James Madison, among others, believed “that each branch or department of government should interpret the Constitution for itself, without any branch’s interpretation necessarily binding the others.” *Id.* at 489. Departmentalism thus contradicts the “prevailing view” of the Supreme Court as “the final arbiter” of constitutional questions, a common touchstone “entrenched in basic civics lessons” through legal education. Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 362 (1997). For present purposes, this essay focuses on departmentalism as it has been applied to executive branch and, more specifically, *presidential* constitutional interpretations within the various departmentalist perspectives. See, e.g., U.S. Attorney Gen. Eric H. Holder Jr., Dep’t of Justice, Opinion Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> (articulating the “careful consideration” and “review of a recommendation” from the DOJ to consider the merits of a constitutional challenge to Section 3 of the Defense of Marriage Act, and concluding that Section 3’s bar on federally recognizing same-sex marriages was unconstitutional because it “violates the equal protection component of the Fifth Amendment”).

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perspectives, which push an even stronger form of presidential authority. In part, unitary executive theory builds upon the open-ended language of “The Executive Power” under Article II, underscoring the singular form of that power (“The Executive Power,” rather than “Powers”) and related text which does not cabin the executive’s purview with “enumerated” or “necessary and proper”-based powers, as with Congress under Article I.<sup>6</sup> Over sixty years ago, in *Youngstown Sheet & Tube Co. v. Sawyer*, a series of opinions from the Supreme Court laid out the subsidiary forms of unitary executive theory.<sup>7</sup> The case arose out of a labor dispute in the steel industry. Late in 1951—just as the Korean War was beginning to escalate—steel workers threatened to strike after steel executives rejected the Federal Wage Stabilization Board’s proposed raises for steelworkers.<sup>8</sup> Negotiations soon collapsed and, by spring of 1952, steel unions announced plans for a “nation-wide” strike.”<sup>9</sup> Justice Black speculated that President Truman

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<sup>6</sup> See U.S. CONST. arts. I & II.

<sup>7</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655–59 (1952) (Burton, J., concurring) (while concurring in the opinion and judgment, articulating a vision of presidential authority whose “validity turns upon its relation to the constitutional division of ... power” among the legislative and executive branches, with unilateral presidential actions contravening congressional intent available *only* in case of “an imminent invasion or threatened attack”); 343 U.S. at 660–63 (Clark, J., concurring in the judgment) (similarly proposing that, “where Congress has laid down specific procedures to deal with the type of crisis” present in the case, the President “must follow those procedures,” reserving independent agency to the President only when acting “in the absence of such action by Congress”); 343 U.S. at 629–32 (Douglas, J., concurring) (advocating a two-part view of presidential power in which, first, “legislative” actions like the “taking” of steel mills in the instance case are per se within the legislative domain, yet second, unilateral actions by the President nonetheless *might* be ratified by ex post congressional approval, but otherwise “would [not] be lawful”); 343 U.S. at 667–68, 680 (Vinson, C.J., dissenting) (propounding the strongest version of unitary executive theory, under which the “powers the President and ... future Presidents [have] to act” must be preserved, and any presidential exercise of power should be respected unless it is directly barred by acts of Congress).

<sup>8</sup> *Id.* at 582–83.

<sup>9</sup> *Id.* at 583.

believed “that the proposed work stoppage would immediately jeopardize [the] national defense and that governmental seizure of the steel mills was necessary . . . to assure the continued availability of steel,” leading to his issuance of Executive Order 10340.<sup>10</sup> After Truman notified Congress—which had “taken no action” by the June 1952 Supreme Court opinion—steel companies filed suit, claiming “the seizure was not authorized by an act of Congress or by any constitutional provisions,” and seeking an injunction to prevent the seizures.<sup>11</sup> Writing for the majority, Justice Hugo Black echoed Taft’s restricted view of presidential powers, declaring, *inter alia*, that:

The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that *expressly authorizes* the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can *fairly be implied*.<sup>12</sup>

Later in his opinion, Justice Black continued:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws . . . and the vetoing of laws . . . [a]nd the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.<sup>13</sup>

A series of concurring opinions in *Youngstown* advocate for alternative views on the extent of executive powers and the increasingly stronger versions of unitary executive theory. Justice Frankfurter, for example, offers a middling view of executive authority, refusing to join the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 585 (emphasis added).

<sup>13</sup> *Id.* at 587.

majority's absolutist, strict-separation conclusions.<sup>14</sup> Justice Jackson's concurrence articulated three levels of executive power: (1) where the President acts with express or implied authority from Congress (where the presidential power reaches its zenith); (2) where the President's power is middling in a "zone of twilight" and acts in the absence of authorization or express challenge from Congress (*i.e.*, where Congress has remained silent); and (3) where the President defies a Congressional demand, and his authority recedes to its "lowest ebb."<sup>15</sup> Justice Burton presented a similarly restrictive view vis-à-vis presidential authority in his separate concurrence, a view applicable even in emergencies (as in the Korean War): Congress, rather than the President, retains the power to act in emergencies, *i.e.*, to pass legislation in response to those emergencies, without which the President is barred from seizing steel mills amid labor disputes.<sup>16</sup> Finally, even Justice Vinson's dissent recognized the primacy of Congress's legislation-making powers, despite preferring to uphold the steel mill seizures in the case at bar—indeed, he argued a sequence of congressional acts before and during the escalating Korean War *had* compelled the President to "execute [Congress's] legislative programs."<sup>17</sup>

Stronger versions of unitary executive theory are firmly grounded in the Take Care Clause, the requirement that the President "take Care that the [l]aws be faithfully executed."<sup>18</sup> Over the intervening decades, the executive power has grown while Congress—at least since the start of the 1980s—has

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<sup>14</sup> *Id.* at 589 (Frankfurter, J., concurring) ("Although the considerations relevant to . . . the principle of separation of powers seem to me more complicated and flexible than may appear from [the majority], I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case").

<sup>15</sup> *Id.* at 635–38 (Jackson, J., concurring).

<sup>16</sup> *Id.* at 658–60 (Burton, J., concurring).

<sup>17</sup> *Id.* at 672.

<sup>18</sup> See U.S. CONST. art. II, § 3.

slid increasingly into a state of gridlock and dysfunction.<sup>19</sup> In mid-February, David Frum wrote in *The Atlantic* that *Youngstown*, “the most binding Supreme Court ruling on emergency powers,” which “delivered a rebuke to presidential power” in its most expansive forms, should impose a sharp restraint on the present proclamation as well.<sup>20</sup> Among Frum’s concerns is that by “inviting another sharp rebuke” the President will trigger one which “will bind future presidents, too,” including those who “might someday want for an authentic political purpose” the emergency powers of their office.<sup>21</sup> But Justice Black’s views in *Youngstown*<sup>22</sup> are hardly the only ones which reverberate in the federal courts—or the Supreme Court’s hallowed chambers—today.<sup>23</sup>

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<sup>19</sup> See generally CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 1–3 (2017) (discussing the importance of group and often overtly partisan “loyalties” in driving political behavior, and thus elected elites’ conduct in-office); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 133–34 (2018) (discussing the increased use of legislative tools—such as the filibuster—in Congress as contributing to the erosion of “informal norms,” in part driving modern “dysfunction”); Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA, 19, 22–23 (Cass R. Sunstein ed., 2018) (naming political polarization among the “Four Horsemen of Constitutional Rot,” *i.e.*, a major driver of suboptimal policy outcomes which is highly positively related to “rising economic inequality”); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014).

<sup>20</sup> See David Frum, *A State of Unreality*, ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/trump-state-of-emergency/582913/>.

<sup>21</sup> *Id.*

<sup>22</sup> See discussion *supra* pp. 3–4.

<sup>23</sup> For a recent discussion of judicial deference toward the executive see *e.g.*, Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 768 (2016), proposing a “judicial capacity model” where federal courts are predicted, “in certain important constitutional domains,” to be constrained by “the limits of judicial capacity” in dealings with the other branches; as applied to the executive, “a departure from deferential or rule-based decisions would invite more litigation than the Court could handle without sacrificing minimum professional standards.” See also Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347 (2013) (discussing the various applications of justices’ opinions from *Youngstown* in subsequent cases).

### III. The Nature of Emergencies and Presidential Powers under Federal States of Emergency

In addition to precedents, February's events must be understood in their statutory context. The governing statute from which the national emergency proclamation draws its ostensible validity is the National Emergency Act of 1976 ("Act").<sup>24</sup> The Act, as *Lawfare's* Catherine Padhi pointed out, was intended in part to curb the "constant" state of emergencies, but in reality many never-terminated emergency declarations have remained long after the prompting emergency situation resolved.<sup>25</sup> The Act has not only failed to serve its intended purpose, but failed spectacularly: dozens of emergencies declared under the Act remain in effect today, including the first post-Act declaration, President Carter's November 1979 declaration in the wake of the Islamic Revolution in Iran.<sup>26</sup>

With divided partisan control of the current Congress, a joint resolution terminating the President's latest declaration seems politically impossible—any resolution would require the President's signature, and Republican control of the Senate makes a two-thirds majority override of his very likely veto unfathomable.<sup>27</sup> Originally, Congress could terminate

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<sup>24</sup> 50 U.S.C. § 1601 *et seq.*

<sup>25</sup> Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE (Dec. 8, 2017, 9:00 A.M.), <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency>.

<sup>26</sup> *Id.* Accord Exec. Order No. 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979).

<sup>27</sup> See National Emergencies Act, 50 U.S.C. § 1622(a)(1) ("Any national emergency declared by the President in accordance with this subchapter shall terminate if . . . there is enacted into law a joint resolution terminating the emergency"); see also Stephen Collinson, *Trump's Allies Get Set for Fierce Fight Over Emergency Declaration*, CNN (Feb. 18, 2019), <https://www.cnn.com/2019/02/18/politics/donald-trump-immigration-border-wall-republicans-democrats/index.html> (noting that while "Senate Majority leader Mitch McConnell is unlikely to be able to prevent a termination effort from coming to the [Senate] floor," other congressional insiders have "predicted that Trump's critics would not be able to put together a two-thirds majority in each chamber of Congress to override any presidential veto," meaning any redress of the declaration will proceed via litigation, in all likelihood).



an emergency through a simple concurrent resolution. In *INS v. Chadha*,<sup>28</sup> however, the Supreme Court declared such legislative vetoes over exercises of presidential power unconstitutional, leading Congress to pass the 1985 amendment to the Act containing the joint resolution process that allows Congress to reverse an emergency declaration with a joint resolution, although such resolutions remain subject to risk of presidential veto.<sup>29</sup> Thus, as a constitutional matter, Congress *can* attempt to block the President's recent proclamation, and did so, surprisingly, in both houses—leading the President to issue his first veto in office.<sup>30</sup>

The litigation that the President bluntly admitted he expected to be filed after he issued the national emergency has since commenced;<sup>31</sup> thus far, at least fifteen states have joined a lawsuit filed by California Attorney

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<sup>28</sup> *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983).

<sup>29</sup> Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93 § 801, 99 Stat. 405, 448 (1985) (amending 50 U.S.C. 1622 to include the phrase “joint resolution” in lieu of “concurrent” resolution); see Padhi, *supra* note 25.

<sup>30</sup> See Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can Block Him*, NPR (Feb. 11, 2019, 5:00 AM), <https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him>; see also Jim Newell, *Trump Plans to Sign the Border Deal—and Declare a National Emergency*, SLATE (Feb. 14, 2019, 4:51 PM), <https://slate.com/news-and-politics/2019/02/trump-border-security-funding-deal-declare-national-emergency.html> (citing Senate Majority Leader Mitch McConnell's “support” for “the [P]resident's decision to declare the national emergency ... [despite McConnell having been] one of the sharpest critics of the [P]resident's threat to declare a national emergency, knowing that it would divide Senate Republicans and set a precedent for Democrats to use” in the future). Ultimately, the Senate followed the House lead, voting 59 to 41 in favor of overturning the declaration (including, among the approving votes, a dozen Republicans). Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html>.

<sup>31</sup> Roberta Rampton, *Trump Declares Emergency for Border Wall, House Panel Launches Probe*, REUTERS (Feb. 15, 2019, 11:01 AM), <https://www.reuters.com/article/us-usa-shutdown-emergency/trump-declares-us-mexico-border-emergency-democrats-object-idUSKCN1Q420N> (during the Rose Garden ceremony, President Trump predicted—verbatim—“I expect to be sued”).

General Xavier Becerra challenging the President's proclamation.<sup>32</sup>

#### IV. Abuse of Power, Rule-of-Law Crisis, or Foreshadowing?

In the absence of direct congressional rebuke, the President's national emergency proclamation has been widely derided as "an abuse of power" or, more colorfully and precisely, an act "likely to go down as an extraordinary violation of constitutional norms."<sup>33</sup> Syracuse University law professor William C. Banks added that the proclamation poses "a real institutional threat to the separation of powers" in how it uses "emergency powers to enable the [P]resident to bypass Congress to build a wall on his own initiative."<sup>34</sup> This framing of the current controversy, grounding it in the undercurrent of besieged democratic norms, demands greater attention.

The bleak reality is that, at this moment in particular, federal courts—including the Supreme Court—are unlikely to approach any legal challenges to the declaration in ways that are in-line with activists' current outcries. Since *Youngstown* was decided nearly seven decades ago, executive power has only expanded—especially that of the President.<sup>35</sup> Even after President Nixon's implosion amid the Watergate scandal, and in the wake of his ensuing impeachment and ultimate resignation, the

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<sup>32</sup> See Collinson, *supra* note 27; see also Emily Tillet, *Trump's National Emergency Order Facing Legal Challenge by Multiple States*, CBS NEWS (Feb. 18, 2019, 7:11 AM), <https://www.cbsnews.com/news/trump-national-emergency-order-several-states-to-join-california-lawsuit/>. In addition to California, fifteen states—Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, and Virginia—joined by the following Monday, February 18. Camilo Montoya-Galvez, *16 States Sue Trump Administration Over National Emergency Declaration*, CBS NEWS (Feb. 18, 2019, 8:41 PM), <https://www.cbsnews.com/news/16-states-sue-trump-administration-over-national-emergency-declaration/>.

<sup>33</sup> Charlie Savage, *Trump's Face-Saving Way Out of Crisis Raises Fears Over Rule of Law*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/trump-national-emergency-law.html>.

<sup>34</sup> *Id.*

<sup>35</sup> See Barnum, *supra* note 3, at 6, 60–61.

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collective “strong reaction against executive power” of the late 1970s quickly “[seemed to] be giving way to a renewed tendency toward vigorous assertion of executive claims” by the early 1980s.<sup>36</sup>

## V. Conclusion

As in another signal Nixon-era case, perhaps the Court will rule against the administration narrowly, without proscribing the executive’s overarching—and extensive—emergency powers, as a best-case possible outcome.<sup>37</sup> For those concerned about expansive executive powers, this offers only minimal assurance.

“Abuse of power” or not, resolving or terminating the emergency declaration necessitates legislative, *i.e.*, political, action in Congress, either directly reversing the latest move or, *in extremis*, rectifying any serious abuse of power (and its antecedent abuses) through impeachment.<sup>38</sup> This is more of a general conclusion about *plausible* outcomes and the few remaining, constrained avenues available to politicians, not a prescriptive statement. And even the initiation of impeachment proceedings or successfully, directly reversing February’s pronouncement through an unlikely joint resolution would elide much larger concerns. In an era of extreme partisan polarization, and with a President uninterested in at least perfunctorily adhering to traditional, if long-deteriorating norms which

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<sup>36</sup> Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 2 (1981).

<sup>37</sup> *United States v. United States Dist. Court for E. Dist. Mich.*, 407 U.S. 297, 313–14, 321 (1972); accord Quint, *supra* note 36, at 22–23. For a more-recent overview of judicial review standards of executive actions and concomitant separation-of-powers controversies in recent decades, see, e.g., David M. Driesen, *Judicial Review of Executive Orders’ Rationality*, 98 B.U. L. REV. 1013, 1044–65 (2018); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer’s Essay*, 1 HARV. L. & POL’Y REV. 41 (2007).

<sup>38</sup> Edward D. Re, *Article III Federal Judges*, 14 SAINT JOHN’S J. OF LEGAL COMMENT. 79, 87–89 (1999) (citing THE COMM. ON FED. LEGISLATION OF THE BAR ASS’N OF THE CITY OF N.Y., LAW OF PRESIDENTIAL IMPEACHMENT 155–56 (1974)).

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cabin executive overreach and overt power-grabs, the Trump administration's legacy on matters of executive power remains to be seen. Regardless of next year's electoral outcome, the almost-certain litigation challenging the latest proclamation, and unforeseen upcoming developments, restoring America's democratic norms will be a much tougher challenge than those faced already. Whether or not democracy's safeguarding principles ought to be formalized in statutory text, as Preet Bharara and Christine Todd Whitman deftly argued last January,<sup>39</sup> Americans must not ignore the profound, systemic concerns raised by these recent events.

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<sup>39</sup> Preet Bharara & Christine Todd Whitman, *Trump Abuses Show We Must Turn Tradition into Laws*, USA TODAY (Jan. 29, 2018, 12:01 AM), <https://www.usatoday.com/story/opinion/2018/01/29/trump-abuses-show-we-must-turn-traditions-into-laws-preet-bharara-christine-todd-whitman-column/1063619001/>.

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