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The Separation of Legislative and Executive Powers

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13. The separation of legislative and executive powers

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From a global perspective, separating and dividing legislative and executive power constitutes a very low structural priority. Parliamentary systems of government, which predominate across the globe (Ackerman 2000, pp. 645–6), invariably unite legislative and executive authority in the same hands. Professor Sartori counts only thirty nations that have adopted a presidential, as opposed to parliamentary, system of government (Sartori 1994, p. 107).

The performance of parliamentary systems of government, although far from perfect, generally has been considerably better than presidential and semi-presidential systems featuring divided executive and legislative authority (Sartori 1994). Presidential systems are 'mostly concentrated in Latin America' and 'the record of presidentially governed countries is – aside from the United States – quite dismal' (id.; see Ackerman 2000, pp. 645–6 ('There are about thirty countries, mostly in Latin America, that have adopted American-style systems. *All* of them, without exception, have succumbed to the Linzian nightmare [the collapse of constitutional government in favor of direct presidential or military control of the government] at one time or another, often repeatedly.')). Far more nations have adopted and maintain a parliamentary system of government, which lacks the separation of legislative and executive powers.

Most political scientists and political theorists favor the parliamentary system because of its obvious efficiency advantages and its tendency to promote stable government (at least when contrasted with presidential forms of government) (Ackerman 2000). Thus, if dividing and separating legislative and executive power really represents an essential attribute of a well-ordered government, most national governments in the larger world come up short; on the other hand, as Professor Ackerman wryly asks, 'Given the British success in avoiding the inexorable slide into tyranny predicted by Madison and Montesquieu, perhaps we should give up on the separation of powers [in the United States]?' (Ackerman 2000, p. 640).

A related, but distinct, question involves whether judges should actively superintend legislative/executive branch relations. In other words, even if a constitution initially attempts to separate legislative and executive authority, if at some later point in time incumbent officers of each branch decide to enact statutes that blend these powers, should a reviewing court disallow a de facto reallocation of powers, particularly if the structural arrangement was necessary to secure passage of the legislation in the first place? An obvious example might be contingent authority to reorganize an executive department. For example, Congress might agree to grant contingent power to a president or attorney general to reorganize the Department of Justice, but only if Congress has an opportunity to superintend the exercise of this delegated power. Faced with the choice of an unconstrained delegation or no delegation, Congress might well elect the 'no delegation' option.

The point is a relatively simple one: achieving practical results efficiently might well lead perfectly rational legislative and executive branch officers to blend in practice powers that, at a constitutional level, are structurally separate and distinct (Albert 2009, pp. 531–4, 541–8).

This raises the question of the appropriate judicial response: should judges actively referee reallocations of power between a legislature and a chief executive? In the United States, the federal courts have generally enforced the constitutional separation of powers strictly with respect to statutory power-sharing arrangements between Congress and the President (Redish and Cisar 1991, pp. 450–51). Although this is one answer to the problem, as Justice White's dissent in *Chadha* suggests, it plainly is not the only possible answer.

In Latin American countries that have adopted presidential systems modeled on the US Constitution, such as Argentina and Honduras, judicial officials also have found themselves called to referee disputes between the legislative and executive branches of government. The Argentine federal courts having to decide whether President Cristina Kirchner could lawfully seize control of the Central Bank of Argentina's foreign currency reserves over the Central Bank President's objections or, alternatively, remove the bank's president and then take control of reserves provides a contemporary example (Moffett 2010; Moffett and Cowley 2009).

In response to a suit filed by opposition party members of Congress, a federal trial judge, Maria Jose Sarmiento, ruled against President Kirchner on both questions, holding that the president could neither place Argentina's foreign currency reserves under direct presidential control nor fire central bank President Martín Redrado without the approval of Congress (Moffett and Cowley 2009). The Court of Federal Administrative Disputes subsequently affirmed Judge Sarmiento's decision on appeal (Barrionuevo 2010, p. A11). Daniel Kerner, a senior political analyst for the Eurasia Group, a political risk consulting firm, noted that ' "[t]his is the beginning of what will probably be a long and complicated battle between the government [led by President Kirchner] and Congress [currently controlled by an opposition party], and, potentially, the Supreme Court" ' (Barrionuevo 2010, p. A8). Although President Kirchner ultimately succeeded in removing central bank President Redrado and replacing him with Mercedes Marcó de Pont in February 2009 (Grady 2010; Barrionuevo 2010, p. A11), the Supreme Court of Argentina is likely to provide the ultimate resolution of these crucially important questions.[1]

The June 2009 presidential succession crisis in Honduras provides yet another example of the successful assertion of judicial supervision of the separation of powers in a Latin American nation with a presidential system of government. President Manuel Zelaya, wishing to succeed himself in violation of a strict one-term limit in the Honduran Constitution (see Constitution of the Republic of Honduras 1982, tit. II, ch. 6, art. 239), planned to hold an 'informational plebiscite' to determine whether the Constitution should be amended to permit his re-election during the national elections to be held on 29 November 2009 (Booth 2009; Estrada 2009). The Honduran Constitution permits amendments only with a two-thirds vote of the Congress, in two successive regular annual sessions (see Constitution of the Republic of Honduras 1982, tit. VII, ch. 1, art. 373), but expressly forbids any amendment that would either extend the four-year term of the president or permit presidential re-election (Constitution of the Republic of Honduras 1982, tit. VII, ch. 1, art. 374). Thus, President Zelaya's informational plebescite seemed to be on a collision course with the plain text of the Honduran Constitution; the President essentially was attempting to exercise a power (the power to amend the Constitution) that the Constitution of Honduras expressly reserved to the National Congress and, moreover, to use this usurped power in a fashion that the Constitution itself prohibited even to the National Congress.

The Attorney General, with the support of a majority of the National Congress, brought an action in the Supreme Court of Honduras, seeking to block the referendum (Estrada 2009).

The Supreme Court declared the proposed referendum unlawful and issued an injunction requiring the military to prevent the vote from taking place (Estrada 2009; Renderos and Wilkinson 2009, p. A1). The head of the Honduran Joint Chiefs of Staff, General Romeo Vasquez, complied with the Supreme Court's order and seized the ballots, which had been imported from Venezuela, and refused to release them either to President Zelaya or to his supporters.

On 24 June 2009, President Zelaya attempted to fire General Vasquez and regain control of the ballots, but the Supreme Court once again intervened and ordered General Vasquez reinstated to his post (Renderos and Wilkinson 2009, p. A1). After President Zelaya refused to comply with this order, the Supreme Court ordered him removed from office; on June 28, 2009, the Congress also voted, by a margin of 122 to 6, to remove Zelaya from office (Booth 2009; Estrada 2009; Renderos and Wilkinson 2009, p. A1). Consistent with the Supreme Court's order and the Congress's impeachment vote, the military removed President Zelaya from office and, going beyond the letter of the Supreme Court's order, also expelled him from Honduras. Roberto Micheletti, President of the National Congress, and next in the line of presidential succession because the Honduran Vice-President, Elvin Santos, previously had resigned his office in order to run for President, immediately took office as interim president on the same day (Booth 2009; Estrada 2009; Renderos and Wilkinson 2009, p. A1).

The scheduled presidential election took place without incident on 29 November 2009 and Porfirio 'Pepe' Lobo, the conservative National Party candidate, defeated Elvin Santos, of Zelaya's Liberal Party, by a wide margin (Ellingwood and Renderos 2010; Renderos and Wilkinson 2009, p. A4). Even so, the Supreme Court's involvement in this constitutional crisis between the legislative and executive branches of government was not finished; in early January 2010, the Attorney General asked the Supreme Court to consider criminal charges against General Vasquez and five other military commanders for their decision to involuntarily deport President Zelaya from Honduras after his removal from office, an action that the Attorney General argued was illegal. The Supreme Court agreed to take the case, but rejected the Attorney General's argument, ruling instead that General Vasquez and the other military officers had acted in good faith and, accordingly, had not acted unlawfully or otherwise breached their constitutional duties (Ellingwood and Renderos 2010).

Just as the judiciary has undertaken a key role in resolving the crisis between Argentina's executive and legislative branches of government over control of Argentina's central bank and national foreign currency reserves, the Supreme Court of Honduras played a key role throughout the presidential crisis and consistently found itself having to mediate competing and conflicting claims of legitimacy advanced by the executive and legislative branches of government. Thus, as these examples demonstrate, it would be quite mistaken to suppose that judicial enforcement of the separation of legislative and executive powers constitutes a public law concern only in the United States.

Even though the separation of legislative and executive powers is a central defining characteristic of most presidential systems of government, as noted earlier, viewed from a global perspective, this approach to structuring the operation of government remains very much a minority approach. Moreover, the rejection of legislative/executive separation of powers concerns completely bridges the common law and civil law world; both common law and civil law jurisdictions feature parliamentary systems of government in which the highest executive officers also serve as sitting members of the national legislature (Jackson and

Tushnet 1999, pp. 36–63, 710–11). Indeed, these arrangements do not seem particularly bothersome to persons, including lawyers and legal academics, living in these nations.

1 THE US MODEL: STRICT SEPARATION

In the United States, a strong commitment to separating and dividing legislative and executive power exists at the federal level (it exists in most state constitutions as well). This separation of powers commitment appears front and center in recent opinions of the Supreme Court; it reflects concerns appearing in bold relief in the legislative history of the Constitution; and, perhaps most importantly, the text of the Constitution itself commands a strong form of legislative/executive separation of powers.

1.1 The Supreme Court of the United States and Legislative/Executive Separation of Powers.

The Supreme Court of the United States has rigorously enforced the separation of powers, disallowing a number of novel institutional innovations that the Congress and the President adopted in order to facilitate good governance (Edley 1990, pp. 172–5, 213–15, 221–34). As Justice Powell observed in *Buckley*, '[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787' (*Buckley v Valeo*, 424 US 1, 124 (1976)). Accordingly, '[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other' (id. at p. 123). Thus, as Professor Martin H. Redish and Elizabeth J. Cisar have perceptively noted, '[a]lthough one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear – bordering on what some might uncharitably describe as paranoia – of the concentration of political power' (Redish and Cisar 1991, p. 451).

The consistency of the Supreme Court's efforts at enforcing separation of powers principles is open to criticism, however. As Redish and Cisar note, '[i]n the separation of powers area, however, the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called "functional" approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another' (Redish and Cisar 1991, p. 450). That said, in the area of policing the blending of legislative and executive functions, the Supreme Court has been relatively strict in enforcing separation of powers limits, disallowing both encroachments on one branch by the other and attempts by one branch to aggrandize itself at the expense of the other.

In *Chadha*, for example, the Supreme Court invalidated the use of so-called legislative vetoes, a procedure whereby Congress delegates authority to the President, but reserves for itself, via a single house or a committee of a single house, the power to oversee, and even to disallow, the President's use of this delegated authority (*INS v Chadha*, 462 US 919, 944–54 (1983)). Writing for the *Chadha* Court, Chief Justice Burger explained that in order to modify a law, a bill must be enacted by both houses of Congress and presented to the President for

signature or veto; as the Court put the matter, '[t]hese provisions of Article I are integral parts of the constitutional design for the separation of powers' (*Chadha*, 462 US at 946). Because Congress cannot execute laws and because bicameral action and presentment are necessary to modify an existing law (for example, to disallow the President's use of previously delegated authority), a one house or one committee 'legislative veto' represents an unconstitutional aggrandizement of Congress at the expense of the President (id. at 945–57).[2]

Similarly, in *Bowsher v Synar* (478 US 714 (1986)), the Supreme Court invalidated the Balanced Budget and Emergency Deficit Control Act of 1985, also known as the Gramm-Rudman-Hollings Act, because it vested execution of the law with the Comptroller General, a government officer only nominally appointed by the President (from a list devised by Congress) and an officer subject to removal by Congress without resort to impeachment. The Court explained that '[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto' (*Bowsher*, 478 US at 726). Because '[t]he structure of the Constitution does not permit Congress to execute the laws', Chief Justice Burger concluded that 'it follows that Congress cannot grant to an officer under its control what it does not possess' (id.).

Other major US Supreme Court decisions involve strong efforts to enforce the structural separation of legislative and executive powers, including cases such as *Buckley v Valeo* (424 US 1 (1976) (holding that Congress may not appoint members of a commission charged with enforcing the Federal Election Campaign Act of 1971, as amended, because legislative appointment to an executive office does not comport with the Appointments Clause of Article II, § 2, cl. 2)) and *Clinton v City of New York* (524 US 417 (1998) (invalidating the Line Item Veto Act, a statutory effort to vest the President with the power to cancel 'any dollar amount of discretionary budget authority', 'any new item of direct spending' or 'any limited tax benefit' after having signed the law authorizing the appropriation or creating the limited tax benefit because only Congress can repeal a statute once a statute has been enacted and by the exercise of a line item veto '[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each')). Thus, the Supreme Court has repeatedly rejected efforts to blend legislative and executive powers in novel ways, even if Congress and the President mutually agreed to such power sharing, and even if concrete benefits might be associated with the novel power sharing arrangements (Krotoszynski 1997, pp. 475–81).

One should be careful, of course, not to overstate the point; contrary evidence and trends exist, and one must acknowledge them. For example, the Supreme Court has largely abandoned efforts to enforce the non-delegation doctrine (Krotoszynski 2005, pp. 264–7), which purportedly limits the scope of delegated authority that Congress may grant to the executive branch (Krotoszynski 2005, pp. 260–68). In theory, unless Congress provides an 'intelligible principle' that limits the scope of delegated authority, the delegation violates the separation of powers by vesting the President with core legislative powers; in practice, however, virtually any statutory mandate that Congress enacts meets the 'intelligible principle' standard (Krotoszynski 2005, pp. 265–8). In this area, US separation of powers *practice*, if not *theory*, seems remarkably consistent with the approach taken to these questions in parliamentary democracies, such as Canada and Australia.

Were the Supreme Court to enforce the separation of powers doctrine as aggressively in this context as in the legislative veto and appointments cases, far more federal laws would be invalidated for violating the non-delegation doctrine. Thus, the Supreme Court's efforts to

enforce the separation of legislative and executive powers are not all-encompassing or unyielding. Even with this caveat, however, the fact remains that the Supreme Court has not simply left Congress and the President free to referee the appropriate metes and bounds of their respective institutional authority (Redish and Cisar 1991, pp. 450–51).

1.2 The Original Understanding and Legislative/Executive Separation of Powers

It would be easy to assume that the contemporary commitment to formalism in enforcing the separation of powers in the US is a modern innovation; such an assumption would not be warranted. To be sure, the structural separation of legislative, executive and judicial powers into three distinct branches does not, of its own force, preclude the voluntary redistribution of such powers among and between the branches going forward (as seems to have happened, for example, in Australia). However, the *Federalist Papers* confirm the view that the initial allocation of powers between the three branches was meant to be more than simply an initial starting point.

In Federalist No. 47, James Madison emphasized the importance of establishing and maintaining the separation of powers:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.' Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author (Federalist No. 47, at 300, 303 (James Madison) (Hamilton et al. 1961) (emphasis in the original)).

Thus, for Madison, the division of legislative and executive power represented an essential bulwark against tyranny. And, in turn, the Framers carefully separated and divided legislative and executive power, placing legislative power in the hands of Congress and executive power squarely in the hands of the President (see *Buckley v Valeo*, 424 US 1, 120 (1976) (noting that 'the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct')).

Madison's concerns with the risk of tyranny did not cease with ratification of the Constitution in 1788. Although largely forgotten, one of Madison's proposed amendments to the Constitution, included in the package of proposed amendments that later became the Bill of Rights, was a proposed amendment that would have reiterated the irrevocable nature of the separation of powers:

> The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise powers vested in the executive or judicial, nor the executive exercise powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive branch (Gales and Seaton, 1834, pp. 435–6) (8 June 1789)).

Had this amendment been adopted, this new provision would have been largely redundant with the existing vesting clauses in Artice I, § 1, which vests 'all legislative Powers herein granted' in the Congress, Article II, § 1, which vests '[t]he executive Power' in the President, and Article III, § 1, which vests '[t]he judicial Power of the United States' in the Supreme Court and the inferior federal courts (should Congress create lower federal courts). Madison defended the amendment as necessary in order to ensure that the powers of the federal government would remain 'separate and distinct' and argued that the vesting clauses were an insufficient safeguard (id. at 760).

Thus, even though the Framers, including Madison himself, had carefully and expressly made the vesting of clearly separated legislative, executive, and judicial power the very first provision of each article constituting a particular branch of the federal government, Madison nevertheless feared the reunification of these powers through voluntary, or perhaps even involuntary, transfers of power among the branches of the federal government. Accordingly, Madison sought to establish a textual prohibition against any branch, through whatever means, exercising the powers vested in the other two branches of the federal government. The House of Representatives actually adopted the proposed amendment by the requisite two-thirds vote, but the Senate, for reasons lost to history, declined to adopt this amendment (2 Schwartz 1971, p. 1150).[3]

For many of the Framers, including James Madison, the aim was to divide power, in hopes of better controlling it. In particular, the Framers believed that rather than relying on a perpetual supply of virtuous and wise rulers (a commodity that the Framers knew to be in very short supply and which history suggested could be something of a null set), the better course was to create a carefully calibrated system of government that would create strong institutional incentives to resist encroachments against one branch by the other branches of the federal government (Federalist No. 51, at 320, 320–22 (James Madison) (Hamilton et al. 1961); see also Redish and Cisar 1991, p. 505). 'We see [this principle] particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights' (Federalist No. 51, at 322 (James Madison) (Hamilton et al. 1961)).

The Framers' thinking on these questions was undoubtedly influenced significantly by the writings of Enlightenment political philosophers who strongly advocated the separation of legislative, executive and judicial powers, such as John Locke and Montesquieu. As Madison himself noted, in Federalist No. 47, '[t]he oracle who is always consulted and cited on this subject [the separation of powers] is the celebrated Montesquieu' (Federalist No. 47, at 301 (James Madison) (Hamilton et al. 1961)). Thus, even if existing British constitutional arrangements did not incorporate the separation of powers (Hyre 2004, pp. 430–35; Skold 2007, pp. 2154–5),[4] the Framers certainly would have been familiar with the concept and the arguments in favor of structuring government institutions to incorporate it. The Framers' innovation was not so much the creation or articulation of the concept, but rather a strong commitment to implementing the principle in the Constitution of 1787 (Vile 1967, pp. 58–61; see Redish and Cisar 1991, pp. 456–5).

1.3 The Constitutional Text and Legislative/Executive Separation of Powers

The Supreme Court has not developed its concern with the separation of legislative and executive powers based solely on its own fears or those of the Framers. Instead, the text of the

Constitution itself contains a strong wall of separation between the Legislative and Executive Branches: the Incompatibility Clause. The Incompatibility Clause provides that:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and *no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office* (US Constitution, art. I, § 6, cl. 2 (emphasis added)).

The Incompatibility Clause effectively prevents a sitting member of the House or Senate from serving as a cabinet secretary without resigning her seat in Congress (*Freytag v Comm'r*, 501 US 868, 904 (1991) (Scalia, J, concurring). Of course, members of Congress have served – and do serve – in the Executive Branch after resigning from Congress before receiving a formal appointment to an Executive Branch office (Calabresi and Larsen 1994, pp. 1078–86).

James Madison, one of the principal architects of the Constitution, firmly believed that legislative service in the executive branch was not merely a prescription for legislative featherbedding, but also an affirmatively dangerous practice. Writing on the subject to Thomas Jefferson, Madison observed that:

> The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other (6 Boyd 1952, pp. 308, 311).

Thus, the rationales for the Incompatibility and Ineligibility Clauses are both highly practical (in the absence of such a clause the legislature will create unnecessary sinecures for its members at the public's expense) and highly theoretical (merger of the legislative and executive powers is conducive to 'tyranny', even if bad results do not actually occur).[5]

The Constitution itself thus prevents the adoption of the common practice in parliamentary democracies of staffing senior executive branch posts with sitting legislators (Jackson and Tushnet 1999, pp. 361–2, 710–11); the Framers designed and 'We the People' ratified a document that squarely rejects a very common institutional design that marries legislative expertise with responsibility for oversight over an executive department.[6] In the United States, those drafting the Constitution perceived the division of legislative and executive power to be an essential component of a just government, an imperative no less pressing than a written constitution, the creation of an independent judiciary with the power of judicial review, and the retention of states as a kind of vertical federalism check on possible overreaching by the central government.

Moreover, one also should note that the Framers were very much aware of the fact that the Incompatibility and Ineligibility Clauses represented a stark break with existing separation of powers practices in other nations, including Great Britain. At the Federal Convention in Philadelphia, Nathaniel Gorham, of Massachusetts, strongly supported weakening the Ineligibility Clause because without such amendment 'we go further than has been done in any of the States, or indeed any other Country' (Madison, 1965, p. 572) (3 September 1787). Significantly, however, no delegate argued in favor of permitting a sitting member of the House or Senate also to serve in an executive or judicial office; the debate focused solely on

how broadly to write the proscription against appointment of incumbent members of Congress to newly created federal offices or to existing offices with recent salary enhancements.

Given the strength of the Framers' concerns about the danger of mixing executive and legislative functions, and the salience of these concerns up to the present day, at least in the pages of the *US Reports*, one would think that the concern would have found some measure of traction in other nations. To state the matter simply, if merging legislative and executive functions is conducive to tyranny (Redish and Cisar 1991, pp. 476–8, 505–06), one would predict that persons drafting new constitutions would assiduously avoid merging legislative and executive powers. This has not, however, proven to be the case.

2 PARLIAMENTARY SYSTEMS IN THE COMMON LAW WORLD (THE WESTMINSTER MODEL)

Consideration of the parliamentary, or Westminster, model of government, the model from which the Framers of the US Constitution of 1787 intentionally broke, will shed further light on the question of the necessity, and desirability, of separating legislative and executive government powers. In such systems, control of both the legislative and executive branches of government rests in the same hands. The executive branch of government remains theoretically accountable to the legislative branch of government, which retains the formal power to remove executive branch officers from office. However, the dual role of a prime minister as head of the executive branch and concurrently leader of the majority party in the legislature gives the executive branch, in practice, much more freedom of action than a president usually enjoys in a presidential system of government.

Thus, in the United Kingdom, Canada, and Australia, all common law jurisdictions, the majority party in the national parliament also selects the principal executive officers, usually drawn from within its own ranks (Jackson and Tushnet 1999, pp. 360–64). These officers, in turn, form the 'cabinet', an executive leadership corps that usually enjoys complete control over the legislative agenda and decides not only whether a particular measure will receive a floor vote, but also whether a particular amendment will receive a vote (Atiyah and Summers 1987, pp. 301–04). Cabinet-level ministers are invariably incumbent members of the legislature drawn from the majority party. To be sure, an independent 'executive branch' exists that features lower-level bureaucrats who work entirely independently of the national legislature. Accordingly, even in parliamentary democracies using the common law, a weak form of separation of powers exists below the highest offices within the ministries (Currie 1994, p. 173). The fact remains, however, that persons with substantial responsibility for writing and revising the laws also enjoy principal responsibility for enforcing the laws as well (1 Hogg 2007, §§ 9.1–9.5, pp. 9-1 to 9-22).

It would be nonsensical, of course, to attempt a discussion of judicial supervision of the separation of legislative and executive powers in the context of a parliamentary system that intentionally vests these powers in the same hands. In other words, in the absence of a structural separation of legislative and executive powers, a reviewing court would have no cause to object to a parliamentarian undertaking an executive task, or vice versa. This practical limit on the role of judges arises independently of the effect of the doctrine of parliamentary supremacy that remains a dominant feature of British constitutional law; simply put, a prop-

erly enacted act of Parliament is valid and the British courts have an absolute duty to enforce a properly enacted statute (Atiyah and Summers 1987, pp. 227–9, 267–70). As Atiyah and Summers (1987, p. 55) emphatically state the proposition, '[s]tatutes are of paramount authority, and any conflict between a statute and a judicial decision must be decided in favour of the statute'.

One might object that international obligations to entities such as the European Union and the Council of Europe effectively limit the scope of Parliament's legislative powers (Atiyah and Summers 1987, pp. 54–5; see Slaughter 2000, p. 1106 (arguing that the British courts have 'overturned the sacrosanct doctrine of parliamentary sovereignty' in order to ensure that the United Kingdom does not breach obligations owed to the European Union); but compare Atiyah and Summers 1987, pp. 54–5 (arguing that European Union treaty obligations do not affect or limit Parliament's formal domestic legislative authority)). To be sure, it is highly unlikely that Parliament would intentionally place the United Kingdom in breach of duties owed to the European Union or the Council of Europe. But this is a matter of practical politics, not a judicially enforceable limit on the scope of Parliament's legislative powers. It remains the case today that the British judiciary lacks the power of judicial review, and the decisions of both the European Court of Justice (an EU entity) and the European Court of Human Rights (a Council of Europe entity) are not self-enforcing under the domestic law of the United Kingdom, and instead require Parliament to enact implementing legislation.

Of course, judicial enforcement of the separation of executive and legislative powers still exists, at least at the margins, in the United Kingdom. British courts exercise a supervisory jurisdiction over administrative regulations adopted by government agencies; when hearing a petition for review, the British courts, applying *Wednesbury* review principles, determine whether a reasonable regulator could reasonably have adopted the particular regulation (*Associated Provincial Picture Houses Ltd. v Wednesbury Corp.*, 1 KB 223, 230 (1948) (holding that an administrative regulation may not stand if it is 'so unreasonable that no reasonable authority could ever have come to it'); see Wade 1988, pp. 388–462). It is a forgiving standard of review, to be sure, and the House of Lords (whose judicial functions now reside in the Supreme Court of the United Kingdom) emphasizes that its authority is not 'appellate' (or de novo), but rather merely 'supervisory' (i.e., limited to ensuring that the agency has not grossly overstepped the bounds of the agency's delegated authority) (*Regina v Secretary of State for the Home Department, Ex Parte Brind*, [1991] 1 App. Cas. 696, 748–9).

If the British courts were to play absolutely no role in policing the boundaries of legislative and executive action, if the two spheres of government power were really unified in both theory and in practice, then the notion of enforcing limits, even very broad limits, on the scope of administrative power would make no sense: if the executive and legislative departments were truly one in the same, it would be nonsensical to ask whether the left hand properly implemented the mandate from the right hand. Clearly, then, the very fact of judicial review of agency work product in the United Kingdom, even under a double-barreled 'reasonableness' standard that courts apply with great deference, suggests that courts, at least at the margins, police the boundary between executive authority (delegated from Parliament; limited in its scope) and legislative authority (plenary).

However superficially attractive this argument might be, however, another narrative exists that can better explain judicial review of administrative action in Great Britain. Although the

leader of the majority party in the House of Commons serves as Prime Minister, and as Prime Minister, names the heads of the executive departments and agencies (Atiyah and Summers 1987, pp. 299–304), these ministerial officials, and the agencies themselves, do act as the agents of the collective, Parliament. One could conceive of judicial review of agency action not as an effort to police the boundaries of legislative and executive power, but rather as a necessary means of enforcing parliamentary supremacy.

Whatever authority an executive agency enjoys, it enjoys only because Parliament has delegated that authority in the first place and designated the department or agency as the recipient. Both the precise scope of the delegated authority and the terms of its use are questions that Parliament answers, and answers definitively. *Wednesbury* review of agency regulations simply constitutes a means of ensuring that an agency does not transgress (at least badly) the scope or terms of delegated power. Thus, courts reviewing administrative regulations (commonly called 'secondary legislation' in the United Kingdom) really serve more as an auditor than as an enforcer of constitutional boundary lines. Moreover, if Parliament wished to abolish judicial review of agency regulations, it would be free to do so; the very existence of this judicial review power continues only at the sufferance of Parliament. Thus, the judiciary plays this role because Parliament wishes it to do so, not because the British Constitution limits the scope of power that Parliament may transfer to executive branch entities.

Unlike Congress in the United States, Parliament would be quite free to adopt unusual governmental structures that condition delegations to the executive branch on the approval of a standing committee of the House of Commons or of the House of Commons itself. Of course, it would be almost unimaginable that Parliament would adopt a legislative veto provision, precisely because the highest executive officer and head of government, the Prime Minister, also serves as the leader of the majority party in the House of Commons. In the absence of the possibility of divided government, and in the absence of a structural separation of legislative and executive power, the concept of a legislative veto makes very little sense. Why should Parliament reserve for itself a veto over the work product of its own members serving as ministers?[7]

Canada presents a similar case; like the United Kingdom, the federal Parliament in Ottawa selects from its own ranks the principal officers of the executive branch and the Prime Minister is invariably the leader of the majority party in the House of Commons (1 Hogg 2007, § 9.4, pp. 9-8 to 9-15). As Professor Peter W. Hogg (1 2007, § 9.4(a), p. 9-9), the leading Canadian constitutionalist, succinctly states the matter, '[i]t is basic to the system of responsible [parliamentary] government that the Prime Minister and all other ministers be members of Parliament'.

In fact, if the Prime Minister appoints a minister who is not a member of the federal Parliament, she 'must quickly be elected to the House of Commons or appointed to the Senate', and '[i]f the minister fails to win election, and is not appointed to the Senate, then he or she must resign (or be dismissed) from the ministry' (1 Hogg 2007, § 9.4(a), p. 9-9). As in the United Kingdom, professional civil servants also work in the executive departments, with the highest-ranking civil servants holding the rank of 'deputy minister' (1 Hogg 2007, § 9.4(a), p. 9-9 n.20; § 9.4(d), p. 9-13).

As in the United Kingdom, the ministers collectively constitute the 'cabinet' and '[t]he cabinet formulates and carries out all executive policies, and it is responsible for all of the departments of government' (1 Hogg 2007, § 9.4(b), pp. 9-10 to 9-11). As Professor Hogg (1

2007, § 9.5(e), p. 9-20) observes, '[i]t will now be obvious that in a system of responsible [parliamentary] government there is no "separation of powers" between the executive and legislative branches of government'. The cabinet, selected from members of the legislature, exercises effective control over the Parliament itself. Moreover, '[t]he control of the legislature by the executive is not normally something that the courts are concerned with' (1 Hogg 2007, § 9.5, p. 9-21).

Thus, '[t]here is no general "separation of powers" in the [Canadian] Constitution Act, 1867', and '[t]he Act does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only "its own" functions' (1 Hogg 2007, § 7.3(a), p. 7-37). Indeed, '[a]s between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government' (1 Hogg 2007, § 7.3(a), p. 7-37).

The Canadian courts, unlike their counterparts in the United Kingdom, do enjoy the power of judicial review and may invalidate both federal and provincial legislation that transgresses Charter rights. Since 1982, this power of judicial review has been express (Hogg 1982, pp. 64–6, 104–06; Russell 1992, pp. 33–4). Prior to 1982, however, the Supreme Court of Canada possessed a more limited power of judicial review to determine whether a particular legislative matter belonged to the federal government or to the provincial governments (Hogg 1977, pp. 197–8).

Since 1982, judicial review has rested on a firmer constitutional footing, with two provisions of the Charter expressly authorizing courts to review both legislative and executive actions for consistency with Charter values, and empowering them to invalidate any government act that violates a provision of the Charter. This has empowered the Canadian courts to more directly protect fundamental human rights from government encroachment; it has not, however, involved the Canadian courts in supervising the division of legislative and executive authority. The Charter did nothing to alter the parliamentary system of government that existed at both the national and provincial levels and this system of government did not – and does not – provide for structural separation of legislative and executive powers.

One finds in Canada, as in Britain, that federal courts enjoy a power to review agency action and to disallow 'ultra vires' agency decisions (1 Hogg 2007, § 1.8, pp. 1-16 to 1-17; 2 Hogg 2007, § 34.2, pp. 34-2 to 34-6). Review involves a two-step process, with the reviewing court engaging in de novo review of an administrative tribunal's construction of the scope of its jurisdiction (*Canadian Broadcasting Corp. v Canada*, [1995] 1 SCR 157 (Can.); *Pezim v Superintendent of Brokers*, [1994] 2 SCR 557 (Can.); *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 1088 (Can.)), but engaging in a much more circumscribed review of an agency's use of policymaking authority clearly within the scope of its jurisdiction. As Chief Justice Dickson stated the matter, a reviewing court must determine whether an administrative agency has:

> so misinterpreted the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review? (*Canadian Union of Public Employees, Local 93 v New Brunswick Liquor Corp.*, [1979] 2 SCR 227, 237 (Can.); see Allars 1994).

Thus, as one commentator has stated the point, 'judicial review of administrative action in Canada has become a two-part merit review' (Weiler 1995, p. 91 n.39). At step one, '[i]f the

court really disagrees with the body's decision, it will classify it as jurisdictional' and invalidate it (Weiler 1995, p. 91 n.39; Allars 1994, pp. 193–4). On the other hand, if a reviewing court 'only disagrees mildly, it can either find the decision patently unreasonable or let it stand' (Weiler 1995, p. 91 n.39). Accordingly, as in the United Kingdom, a legally incorrect agency decision that is not 'patently unreasonable' should survive judicial review.

As Professor Hogg explains (2 Hogg 2007, § 34.2, p. 34-6), in Canada 'courts have confined the scope of official discretion by holding that power conferred in broad terms may not be "abused" by exercise in bad faith or for an improper purpose or upon irrelevant considerations'. Even so, he notes (2 Hogg 2007, § 34.2, p. 34-6) that the Canadian courts have developed and applied these rules cabining executive discretion 'without any denial of parliamentary sovereignty, and without the aid of a bill of rights …'. Instead the common law tradition itself presumes 'the availability of remedies to citizens injured by illegal official action' (2 Hogg 2007, § 34.2, p. 34-5).

One also should note that Canada's federal Parliament cannot escape constitutional limitations through the expedient of delegating authority to an administrative tribunal to engage in an unconstitutional course of conduct and then seek to block judicial review of the agency's (presumably unconstitutional) actions through a 'privative clause' that purports to withdraw the availability of judicial review over the agency's use of the delegated authority. 'There can be no quarrel with the proposition that a legislative body should not be able to insulate its statutes or its administrative tribunals from judicial review on constitutional grounds' (1 Hogg 2007, § 7.3(f), p. 7-55).

The larger point remains that judicial review of agency action in Canada, whether on constitutional or statutory grounds, has much to do with enforcing the Charter and common law notions of rational governance, and nothing to do with attempting to police the boundary between the legislative and executive branches of government. As Professor Hogg puts it (1 Hogg 2007, § 14.2(a), p. 14-5), '[t]he difference between the Canadian and American systems resides not only in the different language of the two constitutional instruments, but in Canada's retention of the British system of responsible government'. Moreover, '[t]he close link between the executive and legislative branches which is entailed by the British system is utterly inconsistent with any separation of executive and legislative function' (1 Hogg 2007, § 14.2(a), p. 14-5).

Thus, in a parliamentary, or 'responsible', system of government, the addition of a written Bill of Rights and the vesting of judicial review powers in the national courts does not alter the structural fact that legislative and executive powers are held by the same people. As Professor Currie (1994, p. 172) explains, '[a] parliamentary system, which Germany shares with most other successful democracies, necessarily entails a sacrifice of separation to better coordination of official policy and more effective safeguards against the abuse of executive authority'.[8]

Even in common law countries, featuring a parliamentary system of government, that maintain written constitutions that facially incorporate a structural separation of powers, courts are not much inclined to attempt to enforce any structural separation of powers between the legislative and executive branches. For example, courts in Australia, forced to reconcile a constitution that, unlike Canada's constitution, enumerates and separates legislative, executive, and judicial powers, have concluded that the constitutional text *does not* impose or legitimate any court-enforced limits on delegations from the Parliament to the executive branch, even if the scope of a particular delegation is such that one might plausibly

claim that Parliament has transferred core legislative powers to the executive branch (*Victorian Stevedoring and Gen. Contracting Co. Pty. v Dignan*, (1931) 46 CLR 73 (Austl.); *Roche v Kronheimer*, (1921) 29 CLR 329 (Austl.); see Aronson and Dyer 1996, p. 204). In Australia, the tradition of unified control of legislative and executive powers in a parliamentary system effectively overrides any structural implication that might otherwise be drawn from the constitutional text.[9] (Australian courts do, however, conduct jurisdictional error-based review similar to the Canadian Supreme Court.)

3 PARLIAMENTARY SYSTEMS IN THE CIVIL LAW WORLD

Turning to parliamentary nations outside the common law orbit, one will not find any greater concern with separating legislative and executive powers – much less any interest in deploying judges to enforce such a separation. Civil law nations, such as France, Germany, and Japan, also feature constitutional arrangements that tend to blend, rather than strictly separate, legislative and executive power. France is instructive in this regard because the President enjoys some measure of lawmaking authority – in this sense, then, the Executive Branch enjoys the power to legislate, at least with respect to certain subject matter. But, even in France, the Prime Minister, selected from the majority party in the legislature,[10] retains significant responsibility for the implementation of government policies and difficulties can arise when a President of one party is forced to work with a Prime Minister drawn from the opposition party's ranks (periods of so-called *cohabitation*).

The French system's blending of lawmaking power in both the Parliament and the President, however, creates both the possibility for and the necessity of judicial review of the Parliament's exercise of its legislative powers; if the Parliament promulgates a law (*loi*) that the President believes to be beyond the scope of its authority, the President may seek and obtain review of the question before the Conseil Constitutionnel. This, of course, is a kind of mirror image of judicial enforcement of the separation of legislative and judicial power in the United States; because the French Constitution vests certain lawmaking powers in the President, the question can arise whether the Parliament has overstepped the bounds of its legislative authority and transgressed Presidential policymaking powers through the issuance of regulations (*réglements*). Determining where the President's unilateral power to act ends and Parliament's power to legislate – or not – begins plainly constitutes a kind of judicial enforcement of the separation of powers.[11]

Ironically, perhaps, the drafters of the Constitution of the Fifth French Republic created the Conseil Constitutionnel with the express purpose of having the body serve to defend presidential prerogatives; given the long history of parliamentary supremacy in France, they feared that absent a check on the National Assembly and Senate, the legislature might encroach on presidential authority to issue regulations with the force and effect of law (Bell 1992, pp. 14–33, 78, 87–111; Brown and Bell 1998, pp. 9–24; Stone 1992, pp. 57, 60–61). Indeed, François Mitterand dismissed the Conseil Constitutionnel in 1964 as an entity whose 'sole utility is to serve as an errand boy for General de Gaulle' and whose function in the early years of the Fifth Republic François Luchaire uncharitably described as serving as 'a cannon aimed at Parliament' (Stone 1992, pp. 59–60). In other words, the Conseil Constitutionnel came into existence precisely for the purpose of enforcing newly established limits on the scope of the Parliament's legislative powers, limits intended to give the President of the

French Republic some measure of autonomous policymaking through the issuance of regulations.

Thus, in France we see a system intentionally designed to enforce the blending, rather than the separation, of legislative responsibilities between the Legislative Branch and the Executive Branch, a kind of mirror image of *Chadha*. Instead of lending some empirical support to the US system of separation of powers, however, the French example tends to reconfirm the oddity of the US approach, at least if viewed in a broader comparative law perspective.

4 CONCLUSION: THE US AS OUTLIER

Even though concerns over the constitutional separation of powers are widely shared in other democratic republics, the specific US concern with the conflation of legislative and executive power, and the concomitant commitment of enforcement of this separation of powers by the federal judiciary, has failed to gain much traction, not only in places like France or Germany, but also in neighboring common law jurisdictions like Canada.

In the United States, a rich literature exists not so much on the existence of the legislative/executive separation of powers under the original US Constitution, or with regard to the Framers' obsessive concern with the concept, but rather with regard to the proper role of the federal courts in actually enforcing the Framers' separation of legislative and executive powers (Strauss 1987; Tushnet 1992; see Flaherty 1996, pp. 1755–807). By contrast, in parliamentary systems, one would look in vain for scholarship addressing these same points. For nations that have adopted the Westminster model, the question of whether to abandon – or even to question – the cabinet's control of the apparatus of government, including both the executive and legislative branches, simply does not arise. The related question, the role of courts in enforcing a non-existent separation of powers between the executive and legislative branches, also simply does not occur to law professors or political scientists studying the operation of parliamentary systems of government. Neither question has any relevance in a system that intentionally promotes efficiency over abstract concerns with a threat of tyranny.

For me, a more interesting question than the causes and effects of the lack of transnational scholarly interest in the US separation of powers obsession, indeed, a question that demands to be asked and answered is: Why do other nations find the conflation of legislative and executive policymaking power to be entirely unproblematic? As explained earlier in Section 2, the Framers of the US Constitution, and contemporary federal judges, appear to view the merging of legislative and executive powers as creating a potentially dangerous concentration of power. From the perspective of the rest of the world, such dual roles provoke yawns, rather than dire predictions of 'tyranny' (Redish and Cisar 1991, pp. 463–5, 476–8).

Diagnosing the root causes of this phenomenon lies beyond the scope of this chapter. That said, I can offer a few preliminary observations about why legislative/executive separation of powers, a concern with such salience in the United States, represents a kind of 'shot (not) heard 'round the world'.

The US, to this day, features a skepticism towards government and governmental institutions that is not widely shared in other nations.[12] As Professor Michael Asimow has stated the proposition, '[a] generalized distrust of government officials and government power is a recurrent strain in American history' (Asimow 2007, p. 662). To a remarkable degree,

Americans tend to be hostile toward government and its motives (Asimow 2007, pp. 662–3 ('A substantial number of Americans suspect government officials and agencies of meddlesomeness, incompetence, or corruption.')).

Both before and after the Great Depression, and certainly in the modern era since the election of Ronald Reagan as President in 1980, the rhetoric of US politics has reflected a shared assumption that government is the problem, not the solution (Asimow 2007, pp. 663 and 663 n.45). Recall that President Bill Clinton famously declared that 'the era of big government is over' (Clinton 1996, p. 90) and worked assiduously to unravel the social safety net through legislation like the 1996 Welfare Reform Act (Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); 42 USC §§ 601–79 (codifying material provisions of the Welfare Reform Act of 1996)).

In a similar vein, President Barack Obama ran on a platform of reforming the federal government, not celebrating its accomplishments or the benefits of massively expanding its reach except as necessary to address the current financial and economic crises. To the extent that the contemporary economic crisis has opened the door to more ambitious government intervention in private markets, the Obama Administration, like the Bush Administration before it, tends to style these efforts to combat the financial crisis as a necessary evil, rather than a positive or desirable permanent state of affairs.

To a remarkable degree, US citizens mistrust government and seek to minimize its ability to impact their daily lives. The unwieldy design of the federal government, replicated in all of the states save Nebraska, which has a unicameral legislature (Nebraska Constitution art. III, §§ 1, 7), incorporates the notion that slowing down the ability of government to act is a good, not bad, idea.[13] For reasons having to do with an idiosyncratic political culture, 'government' in the contemporary United States is almost an epithet. I do not wish to essentialize the attitudes of citizens of Canada, France, Germany or Japan, but my strong impression is that citizens in these nations do not view government with the same level of skepticism, if not outright hostility, that US citizens often manifest toward their own governing institutions (Hacker 1997, p. 86; Westin 1983, p. 31; but compare L'Heureux-Dube 2001, p. 18 ('Whereas Americans have always distrusted government, Canadians seem to have inherited from Great Britain a certain faith in both the role and the nature of the state.')).

The US obsession with impeding the ability of government to act is entirely rational if one views government as a problem, rather than as the provider of solutions. And, a more efficient, streamlined model of governance, one that empowers rather than impedes the ability of government to act, makes perfect sense in a polity where citizens repose faith in the ability of the government to make wise decisions on a predictable basis (L'Heureux-Dube 2001, pp. 16–19; see Currie 1994, p. 172). One still needs to inquire into the source of US hostility toward government and its institutions.

My own view is that US hostility toward government is a feature of the pluralistic nature of the United States; the US was, in large measure, a nation built not on ties of religion, ethnic kinship, or even geography, but rather on immigration (Wills 1999, p. 17). In such a cultural jambalaya, is it at all surprising to find that members of one ethnic group might view with suspicion and hostility the motives and actions of government officials who happen to be members of another ethnic group (Perea 1992)?

The division lines are hardly limited to those based on ethnicity or race. Religious differences, for better or worse, have played a major role in US politics. There are other cleavages – cultural, regional and urban-rural – that also make the country particularly diverse.

Going back to the time of the framing of the US Constitution, strong factions, whether defined by race, ethnicity, religion, region or urbanization, have been a persistent feature of domestic politics (The Federalist No. 10, at 78–9, 81–4 (James Madison) (Hamilton et al. 1961); see Sunstein 1985). These divisions create suspicion of those drawn from outsider groups and, ultimately, of government itself because members of outsider groups might well enjoy a majority in the city council, the state legislature, or the Congress.

In a nation sharing a common ethnic, religious and cultural heritage, trust in government might well come more naturally, and be held more readily, than in a nation built of immigrants that still features significant divisions based on race, ethnicity, religion, region, urbanization and culture (Cross 2005, pp. 1532–43; see L'Heureux-Dube 2001, pp. 28–9). Thus, that the citizens of the United Kingdom or Canada do not fear 'tyranny' from a central government in which members of the national legislature also head the major executive departments of the government should not be particularly surprising. When government features people drawn from a common national culture, who share longstanding ties of language, religion and kinship, it is not at all surprising that citizens would repose more trust, more reflexively, than when institutions of government are staffed by persons viewed in important respects as outsiders.

NOTES

1. Argentina's constitutional crisis over control of the Central Bank of Argentina and the nation's foreign currency reserves actually involves Congress asserting that *blended* control, rather than unilateral presidential control, governs the central bank, which is an independent executive agency. Argentina's Congress has claimed that the President cannot either fire the incumbent bank president or take control of the nation's foreign currency reserves without the Congress's consent; thus, it is asserting some measure of legislative control over both questions. In the United States, whether the President could unilaterally fire an executive branch officer appointed by the President with the advice and consent of the Senate, without first securing the Senate's approval to the discharge, remained an open, and hotly disputed, question of separation of powers law until the Supreme Court of the United States issued its landmark decision in *Myers v United States*, 272 US 52 (1926), holding that the President could lawfully remove an executive branch officer without first seeking the Senate's consent. Indeed, this very question provided the predicate for Congress's unsuccessful attempt to impeach President Andrew Johnson in 1868 (*Myers v United States*, 272 US 52, 114–15, 166–7, 175–7 (1926)).
2. Of course, Congress could delegate power to the President, with a duty to report on how he exercises it, and provide for accelerated consideration of legislation disallowing the President's action – but such legislation would have to be enacted by both houses of Congress and presented to the President for a probable veto. Moreover, Congress could require the President to wait for a prescribed period of time before implementing his plan. Thus, so-called 'report and wait' provisions do not fall afoul of *Chadha*'s rule against legislative vetoes (*Chadha*, 462 US at 935 n.9; see also *Alaska Airlines v Brock*, 480 US 678, 690 (1987); Koplow 1992, p. 1061 (noting that report and wait provisions do not raise the same constitutional problems as legislative veto provisions)). Since 1996, all 'major' regulations have been subject to mandatory 'report and wait' periods (5 USC §§ 801–08 (2006); see Rubin 2003, pp. 133–4 (advocating increased congressional oversight of federal agencies and suggesting that the generic comprehensive report and wait obligation for all major regulations provides a means of accomplishing this objective)).
3. For a concise history of the legislative debate of Madison's proposal in the House of Representatives, see Schwartz 1990, pp. 589–91.
4. The United Kingdom, then and now, maintains a 'balance of powers' rather than a 'separation of powers' (Hyre 2004, pp. 430–35; see Skold 2007, pp. 2154–5 ('In contrast to the American system based on a clear separation of powers and effective checks and balances, the British system traditionally has fused the three branches of government together, creating more of a balance of powers than a separation.')).
5. Interestingly, no formal bar exists on judicial personnel serving in the Executive Branch and, from time to time, federal judges have served in the Executive Branch concurrently with their Article III judicial service (*Mistretta v United States*, 488 US 361, 397–8 (1989); see Calabresi and Larsen 1994, pp. 1131–46 (canvassing historical examples of joint service, as well as refusals by Article III judges to undertake extra-judicial duties within

the Executive Branch)). Even so, a de facto constitutional custom against such joint service has developed. As Professors Calabresi and Larsen (1994, p. 1139) state the proposition, 'it is fair to say that a tradition has evolved that very nearly replicates the situation that would exist if [the Constitution contained] a judicial-executive incompatibility clause'. On the other hand, neither the Constitution nor the contemporary practices of the Framers establish any prohibition on joint federal/state officeholding; a member of Congress is free to serve in a state government post concurrently with her federal service (*Metropolitan Washington Airports Auth. v Citizens for the Abatement of Aircraft Noise*, 501 US 252, 282–3 (1991) (White, J, dissenting)). That said, a strong – and largely unbroken – tradition of 'one person, one office' exists in this context as well (Calabresi and Larsen 1994, pp. 1146–56). Thus, '[t]oday, it seems almost unimaginable for one individual to hold salaried, full-time federal and state offices' (Calabresi and Larsen 1994, p. 1151).

6. For a sympathetic treatment of such institutional arrangements, see Ackerman 2000, pp. 642–56, 688–90.
7. Perhaps, however, the idea is not as entirely nonsensical as I have suggested. If we imagine that an idiosyncratic member of Parliament comes to serve in a cabinet post, it might be conceivable that her policies would not necessarily reflect those of the party caucus in all cases. But, in the British system, the Prime Minister would be able to remove a renegade minister from office at will; the majority also could simply disallow the regulations through a direct legislative veto. In the absence of a meaningful bicameral system (the House of Lords can only delay the enactment of most legislation, not prevent it) and a President with a veto power, the problem of a disagreement between the executive and legislative branches of government simply cannot arise. In a very real sense, then, a case like *Chadha* is simply unthinkable in the United Kingdom, primarily because Parliament would never need to have recourse to a legislative veto, but also because the Prime Minister, unlike the President, lacks a wholly independent role in the legislative process.
8. With respect to the latter point – avoiding abuse of executive authority – the matter could be framed in favor of separation of powers, i.e., an independent legislative branch would seem to have more power, and more incentive, to ferret out wrongdoing than a majority party would possess in embarrassing the party's leader (viz., the prime minister or chancellor).
9. It should go without saying that courts in the United Kingdom and Canada also do not attempt to enforce any limits on the scope of delegated authority from the legislative branch to the executive branch. With respect to Canada, '[t]here is no requirement that "legislative" and "executive" powers be exercised by separate and independent bodies' and 'a delegation cannot be attacked on the ground that it confers "legislative" power on the executive branch of government' (1 Hogg 2007, § 14.2(a), p. 14-4 to 14-5). And, in the United Kingdom, '[a]ny House of Lords decision with serious political implications is open to subsequent modification or reversal by Parliament, sometimes even with retrospective effect' (Atiyah and Summers 1987, p. 269). Moreover, 'in the British political system, this is no mere ritual phrase on the lips of judges anxious to disclaim ultimate responsibility for the long-term state of the law', but instead 'a reflection of political reality' (Atiyah and Summers 1987, p. 269).
10. Interestingly, however, the French Constitution contains an incompatibility clause, Article 23, which provides that 'The functions of members of the Government are incompatible with the exercise of any parliamentary mandate, any role of representing a profession at the national level, and any public employment or professional activity' (Constitution of the Fifth French Republic, art. 23; see Bell 1992, p. 17 ('Article 23 creates an incompatibility between being a minister and being a member of Parliament, with the result that ministers need have no parliamentary experience.')).
11. Strictly speaking, the Conseil Constitutionnel lacks jurisdiction to determine whether a regulation exceeds the scope of Article 37 and trenches on a matter reserved to Parliament under Article 34. That said, Parliament, if controlled by the opposition, could attempt to protect its legislative prerogatives by enacting a statute that overrides the presidential regulation. The President would then likely challenge the constitutionality of the statute before the Conseil Constitutionnel and seek a declaration that the subject matter fell within Article 37, rather than Article 34 (Bell 1992, pp. 86–91). This process of disallowing laws that go beyond the scope of Parliament's authority under Article 34 is called 'declassification' (Bell 1992, pp. 86–91; see also Constitution of the Fifth French Republic, art. 37(2)).
12. This proposition is perhaps too obvious to require support, but the academic literature is rife with works that establish the truth of this assertion (see Blendon et al., 1997; Kingdon 1999, pp. 23–56; Wills 1999, pp. 15–22, 297–320). As Professors Atiyah and Summers (1987, p. 40) put it, juxtaposing the US and British legal systems:

> For whereas the English legal and political machine is a well integrated machine in which the various constituent parts operate with a high degree of trust for each other's functions and role, the American legal and political machine is to a large extent based on a contrary principle, a principle of *distrust* for other constituent parts. . . . It could, indeed, be said that the American system of government has even institutionalized its distrust to a considerable degree. The people distrust all government, so the powers of government are limited, divided, checked, and balanced (emphasis in the original).

13. As Professor Gary Wills (1999, p. 319) sarcastically states the proposition, '[i]nefficiency is to be our safeguard against despotism'. Even though Wills (id.) identifies this as part of the prevailing national political ethos, he flatly rejects the proposition, noting that '[i]nefficient governments are often the most despotic' and asks rhetorically, '[i]n your own observation of life around you, has inefficiency been a protection against the arbitrariness of an employer, the random vindictiveness of a teacher, the insecure bluster of a physician?' We nevertheless embrace inefficiency in the United States because of a general belief 'that a government unable to do much of anything will be unable to oppress us' (id.).

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