EVALUATING SEPARATION OF POWERS REGIMES IN THE CONTEXT OF IMMIGRATION POLICY: AN EXECUTIVE ORDER ODYSSEY

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I. INTRODUCTION

The United States and Western Europe are facing an ongoing crisis of conscience, policy, and identity as they grapple with an influx of refugees following the Syrian Civil War.[1] This is in addition to long-standing questions of general

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[1] Lizzie Dearden, *Syrian Civil War: More than Five Million Refugees Flee Conflict as Global Support for Resettlement Wanes*, THE INDEP., Mar. 30, 2017,

immigration policy.[2] The 2016 US Presidential Election was profoundly shaped and determined in part by the most recent surge of anxiety over immigration levels in the United States.[3] Western European nations have similarly riven, particularly over the question of admitting refugees from majority Muslim nations.[4] While the debates in the United Kingdom have not had the same energizing effect among populist candidates that was present in the election of President Donald Trump,[5] other European democracies have seen a substantial increase in support for populist parties who champion lower immigration rates or ceasing refugee intake.[6] While none of these parties have seen the success that President Trump did as an individual candidate, they have succeeded in shifting attitudes and policies toward immigration protectionism as center-right parties seek to recapture lost voters who

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http://www.independent.co.uk/news/world/middle-east/syria-civil-war-five-million-refugees-conflict-resettlement-un-geneva-donald-trump-europe-migrant-a7658606.html.

[2] *See generally* James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227 (1995).

[3] Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016, https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html ("But not until these voters were offered a Republican who ran as an unapologetic populist, railing against foreign trade deals and illegal immigration, did they move so drastically away from their ancestral political home."); *see, e.g.*, *Exit Polls*, CNN (last updated Nov. 23, 2016), http://www.cnn.com/election/results/exit-polls (showing that 64% of Trump voters labelled immigration as the most important issue facing the country).

[4] *Migrant crisis: What is the UK Doing to Help?*, BBC, Jan. 28, 2016, http://www.bbc.com/news/uk-34139960.

[5] *See General election 2017: Could UKIP's Immigration Policy Work?*, BBC, May, 8, 2017, http://www.bbc.com/news/uk-politics-39847685 (discussing UKIP's plan for net-zero migration in Britain); Robert Booth & Peter Walker, *Paul Nuttall Suffers Crushing Defeat as UKIP Vote Collapses*, THE GUARDIAN, June 8, 2017, https://www.theguardian.com/politics/2017/jun/09/ukip-vote-collapse-puts-paul-nuttall-leadership-in-danger.

[6] John Irish, *Down in Polls, France's Le Pen Targets Immigration for Boost*, REUTERS, Apr. 18, 2017, https://www.reuters.com/article/us-france-election/down-in-polls-frances-le-pen-targets-immigration-for-boost-idUSKBN17K19Z ("Speaking to a rally in Paris on Monday, [Marine Le Pen] vowed to suspend all immigration with an immediate moratorium, shield voters from globalization and strengthen security."); *The maps that show how France voted and why*, BBC, May 12, 2017, http://www.bbc.com/news/world-europe-39870460 (showing an increase in Front Nationale's first-round presidential election vote share in four out of five elections since 1995); *German Election: Just How Right-Wing is AfD?*, BBC, Sept. 25, 2017, http://www.bbc.com/news/world-europe-37274201 ("AfD's big success has been in challenging Angela Merkel's decision to let in around 1.3 million undocumented migrants and refugees, mainly from the Middle East, since 2015."); *German Elections 2017: Full Results*, THE GUARDIAN, Sept. 25, 2017, https://www.theguardian.com/world/ng-interactive/2017/sep/24/german-elections-2017-latest-results-live-merkel-bundestag-afd (showing that AfD receiving the third-largest vote share in the 2017 election).

desire more protectionist approaches.[7] An example can be seen in the outcome for British Conservatives. Although Conservatives gained a majority in Parliament, [8] a referendum for Britain's presence in the European Union (promised by Prime Minister David Cameron during the election campaign of 2015) resulted in a majority voting to leave.[9]

While the subsequent round of elections in 2017 in the United Kingdom, France, and Germany did not produce the dramatic change populists in the United Kingdom Independence Party (UKIP), Front Nationale (FN), and Alternative für Deutschland (AfD) clamored for, the rapid policy changes enacted by President Trump have given several of these parties tantalizing glimpses of what might be possible if they join a coalition government or win a presidency.[10] President Trump's bewilderingly rapid[11] enactment of Executive Order 13769[12] represents the predominant example of such action as other immigration measures stall or have

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[7] Henry Samuel, *Nicolas Sarkozy says immigrants must accept "your ancestors are the Gauls,"* THE TELEGRAPH, Sept. 20, 2016, http://www.telegraph.co.uk/news/2016/09/20/nicolas-sarkozy-says-immigrants-should-live-like-the-french (quoting former president Sarkozy, "If you want to become French, you speak French, you live like the French. We will no longer settle for integration that does not work, we will require assimilation."); Amita Joshi, *General election 2017: Where each party stands on immigration*, THE TELEGRAPH, June 7, 2017, http://www.telegraph.co.uk/news/0/general-election-2017-party-stands-immigration (showing the Conservative Party's pledge to double the Immigration Skills Charge and to reduce net migration to the "tens-of-thousands"); Justin Heggler, *Angela Merkel presents new plan to boost asylum deportations as she fights back against challenger*, THE TELEGRAPH, Feb. 9, 2017, http://www.telegraph.co.uk/news/2017/02/09/angela-merkel-presents-new-plan-boost-asylum-deportations-fights.

[8] *Election 2015: Results*, BBC, http://www.bbc.com/news/election/2015/results (last visited Feb. 26, 2019).

[9] *David Cameron promises in/out referendum on EU*, BBC, Jan. 23, 2013, http://www.bbc.com/news/uk-politics-21148282; *Brexit: David Cameron to quit after UK votes to leave EU*, BBC, June 24, 2016, http://www.bbc.com/news/uk-politics-36615028.

[10] *See* Angelique Chrisafis, *Marine Le Pen Says Trump's Victory Marks 'Great Movement Across World*,' THE GUARDIAN, Nov. 9, 2016, https://www.theguardian.com/world/2016/nov/09/marine-le-pen-says-trumps-victory-marks-great-movement-across-world; Christopher Hope, *Nigel Farage Tells Donald Trump Rally: 'I Wouldn't Vote for Clinton if You Paid Me,'* THE TELEGRAPH, Aug. 25, 2016, http://www.telegraph.co.uk/news/2016/08/25/nigel-farage-tells-donald-trump-rally-i-wouldnt-vote-for-clinton.

[11] Johnathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, REUTERS, Jan. 28, 2017, https://www.reuters.com/article/us-usa-trump-immigration-confusion/how-trumps-abrupt-immigration-ban-sowed-confusion-at-airports-agencies-idUSKBN15D07S.

[12] Exec. Order No. 13769, 82 Fed. Reg. 8977 (2017). Frequently referred to elsewhere as the "travel ban" or "Muslim ban." This Note discusses three iterations of the policy and therefore refers to the "first," "second," and "third order[s]."

been deferred to Congress.[13] While this action was being challenged and—for the most part—stayed by federal courts, the Supreme Court upheld the final iteration of the Order in June 2018.[14] This back-and-forth raises the question of whether democracies should evaluate their separation of powers regimes as they relate to immigration or administrative law more broadly.

Whether one favors more restricted immigration for a given country or not, a rapid but confused deployment of any given policy is inadvisable for societies that value stability, proscriptions against vagueness, and consistent enforcement.[15] If the lack of clarity attendant in Executive Order 13769 represents a sea of amorphous or ill-defined policy, the potential for administrative inaction in the face of legitimate pressures to the contrary represents a pitfall where potentially good policy goes to die.[16] Naturally, this political balancing act seems to be, in some form, necessary throughout any democratic government that values distribution of

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[13] Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES, Sept. 5, 2017, https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html.

[14] *See generally* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017), Trump v. Hawaii, 138 S.Ct. 2392 (2018); Lawrence Hurley, *Trump Opponents Urge U.S. Supreme Court to Rule on Travel* Ban, REUTERS, Oct. 5, 2017, https://www.reuters.com/article/us-usa-court-immigration/trump-opponents-urge-u-s-supreme-court-to-rule-on-travel-ban-idUSKBN1CA244.

[15] *See* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 653 (2008) ("[A]gency adjudication should theoretically have the ability to (1) increase consistency in the legal standards that are applied across the legal system; (2) promote predictability for regulated entities through rule creation; and (3) restrict government discretion that might otherwise be entirely unchecked."); *see also* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 33 (1987) ("The stability of the constitutional framework has economic value; by reducing uncertainty it facilitates investment. Stability is not the only value served by law, which is why a rigid policy of stare decisis is not optimal; but it is a value and it therefore weighs on the side of a policy of constrained constitutional lawmaking."); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1338 (2001) ("Even if one concedes that common law unpredictability permeates the entire American legal system, this does not necessarily preclude a successful deployment of the rule of law, so long as the latter is conceived of primarily in procedural rather than substantive terms.").

[16] *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1660 (2004) ("The constitutional structure should be understood as dedicated to preventing arbitrariness and not just promoting accountability. More specifically, the constitutional structure should be viewed as concerned with inhibiting administrative decision making that reflects narrow interests rather than public purposes."); Michael E. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. REV. 1337, 1341 (2013) (citing Daniel Carpenter & David Moss, *Introduction* to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 19 (Daniel Carpenter & David Moss eds. 2013) ("Capture can have deleterious effects on the regulatory system by promoting unnecessary and inefficient rulemaking and also by impeding efficient regulation that serves the public interest.")).

power as a means of avoiding autocracy while still functioning as a government capable of policymaking.[17]

However, immigration policy is an exceptionally difficult issue when considering the separation of powers context due to its nexus between administrative law, deep-seated cultural implications that enter into democratic discourse,[18] and the potential need for rapid adjustment in the face of national crisis or institutional failure to apply the law.[19] Parsing through these issues, this Note will compare the process of making immigration law in the United States, the United Kingdom, and France from a separation of powers perspective to identify the structural advantages of each system in producing executive action in a manner that advances the rule of law. Space prohibits a competent discussion of the effects of international treaties and supranational bodies such as the European Union; therefore, this Note will restrict this survey to constitutional and statutory structures.

This Note will examine Executive Order 13769, its subsequent revisions, its legal challenges, and the restraints (or spurs) present in the above countries that may prohibit or give rise to similar debacles. In so doing, one finds that strong-form judicial review in the United States cannot provide a complete guard against the consequences of hastily promulgated and poorly drafted legislation, and (as the end result of the *Trump v. Hawaii* litigation proves) such review is also no guarantee that plaintiffs alleging fundamental rights violations will get their way. However, the lack of such review in the United Kingdom and France, coupled with the co-mingling of executive and legislative power, results in fewer checks against an executive willing to put forward incompetent or invalid administrative or legislative directives. Therefore, the separation of powers regime in the United States remains better suited to guard against the consequences of such action.

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[17] *See* THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); Aziz Z. Huq & Jon. D. Michaels, *The Cycles of Separation of Powers Jurisprudence*, 126 YALE L. J. 346, 352 (2016) ("Consider, for example, the way in which the separation of powers promotes efficiency by eliciting institutional specialization among the branches and prevents tyranny by diffusing power between different branches; such aims are not necessarily or inevitably commensurable. Indeed, they regularly conflict.").

[18] *See* Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities Democratic Citizenship*, 60 OHIO ST. L. J. 399, 453 (1999) (discussing the connection between the reelection campaign of California governor Pete Wilson and the campaign for Proposition 187).

[19] *See generally* Syndenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L. REV. 1 (2006) (discussing the negative consequences of Attorney General John Ashcroft's attempt to eliminate unnecessary delays).

II. EXECUTIVE ORDER 13769: CHALLENGES AND REVISIONS

President Trump issued Executive Order 13769 on January 27, 2017, seven days after taking office.[20] This first order, following a description of its rationale,[21] directed the Secretary of the Department of Homeland Security to conduct a review of the immigration procedure to "determine the information needed from any country to adjudicate any visa, admission, or other benefit under the [Immigration and Nationality Act],"[22] with particular emphasis on the ability of the United States to determine the true identity of each individual seeking admission, and to determine if they pose a security risk to the United States.[23] The review was to conclude in 60 days with the Secretary notifying nations that did not provide sufficient information that they were thereby requested to do so.[24] If such countries did not begin producing the requested information, the Secretary was to present a list of recommended countries to the President for inclusion in the order, thereby suspending entry of aliens from those countries until they submitted the required information.[25] Concurrent with this review, the President issued a proclamation to the effect that the entry of aliens from countries of concern identified pursuant to the Visa Waiver Program governing statute[26] were to be immediately suspended for a period of 90 days.[27] Additionally, the Secretary of State was to suspend the US Refugee Admission Program (USRAP) for 120 days, during which the Secretary would review admission procedures, and institute changes once the 120 days had been completed.[28] The order stated that § 3(c), § 5(c), and § 5(d) were to be effected by presidential proclamations, while the remainder of the order came in the form of directives to the secretaries of named departments.

The most immediate consequence of the order was instant confusion among those traveling when the order was promulgated,[29] and among officials

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20 Exec. Order No. 13769.

21 *Id*. §1 ("In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles.").

22 *Id*. § 3(a)–(b).

23 *Id*.

24 *Id*. § 3(d).

25 Exec. Order No. 13769, § 3(e).

26 8 U.S.C. § 1187(a)(12) (2018); Press Release, U.S. Dep't of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (listing the countries from which alien travel would be restricted as being: Iran, Iraq, Sudan, Syria, Libya, Somalia, Yemen).

27 Exec. Order No. 13769, § 3(c).

28 *Id*. § 5.

29 The original order did not specify the time of day after which a person could not enter the U.S. if otherwise subject to the ban. *See also* Shear & Nixon, *infra* note 30.

tasked with its enforcement.[30] Almost immediately, challenges to the order were filed, and preliminary injunctions were granted by federal courts in Washington and Virginia.[31] The President responded by issuing a second Executive Order on March 6, 2017.[32] Section 1 of the new order provided further explanatory details on why the President felt the first order was required and why particular countries had been selected for travel restrictions.[33] Section 2 reordered the suspension of travel in a manner and justification akin to § 3 of the original order, including six countries in its sweep—removing Iraq from the list.[34] Section 3 provided clarifying details as to which foreign nationals were affected by the order,[35] and provided exceptions.[36]

Sections 4 and 5 again provided for general review of immigration procedures with an additional admonition that the Secretary of Homeland Security utilize information received from the Iraqi government to review visa applications from that country on a case-by-case basis.[37] Section 6 required a (clarified) suspension of USRAP for 120 days from the date of the second order.[38] Section 7 required the Secretaries of State and Homeland Security to consider rescinding their authority to voluntarily grant exceptions to individuals or groups who otherwise fell under the prohibition against visa issuance for prior terrorist or terrorism-related activities.[39] Section 8 required that the Secretary of Homeland Security expedite

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[30] Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES, Jan. 29, 2017, https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html?mcubz=1 (revealing that: 1) no legal review had been conducted of the order prior to signing, 2) then-Secretary of Homeland Security, Gen. John Kelly was receiving his first briefing on the order as the President signed it, and 3) that the lack of notice generated significant confusion for passengers bound for the U.S.).

[31] *See generally* Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash.) (issuing temporary restraining order against the government from implementing § 3(c), §5 (a)–(c), § 5 (e) nationwide), *aff'd* 847 F.3d 1151 (9th Cir. 2017); *see generally* Aziz v. Trump, 234 F. Supp.3d 724 (E.D. Va. 2017) (ordering a preliminary injunction against enforcement of § 3 of Exec. Order 13769 against residents of Virginia).

[32] Exec. Order No. 13780, 82 Fed. Reg. 13209 [hereinafter Exec. Order No. 13780].

[33] Exec. Order No. 13780, § 1.

[34] *Id.* § 2(c).

[35] *Id.* § 3(a)(i)–(iii) ("[T]his order shall apply only to foreign nationals of the designated countries who: "are outside the United States on the effective date of this order; did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and do not have a valid visa on the effective date of this order.").

[36] Exec. Order No. 13780, § 3(b)–(c).

[37] *Id.* § 4–5.

[38] *Id.* § 6(a) ("The Secretary of State shall *suspend travel* of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall *suspend decisions* on applications for refugee status, for 120 days after the effective date of this order.") (emphasis added).

[39] *Id.* § 7 (citing 8 U.S.C. § 1182(d)(3)(B) (2013) for the mentioned authority); *see also* 8 U.S.C. § 1182(a)(3)(B) (for the prohibition against visa issuance to aliens who have engaged in various forms of terrorist activity).

the completion of a biometric tracking system for visitors to the United States subject to such monitoring under the scope of the program.[40] Section 9 required that the Secretary of State immediately suspend the Visa Interview Waiver Program.[41] Section 10 required a review of visa reciprocity agreements,[42] and Section 11 required making additional information on foreign nationals charged with terrorist offenses publicly available.[43]

Section 12 attempted to rectify confusion surrounding enforcement of the order by: (1) providing for consultation between department secretaries and "domestic and international partners . . . to ensure efficient, effective, and appropriate implementation of the actions directed in this order";[44] (2) allowing for alien claims of credible fear of persecution or torture;[45] (3) prohibiting revocation of visas issued before the effective date of the instant order; (4) entitling those whose travel documents were marked cancelled due to the first order to nevertheless travel to the United States; and (5) restricting applicability against refugees already admitted and those granted withholding of removal under the Convention Against Torture.[46] Sections 13–16 revoked the prior order, set an effective date, added a severability provision, and provided additional general provisions—all of which were lacking in the former order.[47]

With clearer measures in place, and an effective date of March 16, 2017, Executive Order 13780 gave administrative agencies ten days to prepare for implementation, and time for aggrieved parties to file suits to enjoin enforcement of the order before it went into effect.[48] The plaintiffs in *Hawaii v. Trump* succeeded in enjoining nationwide enforcement of § 2 and § 6 of the order.[49] Concurrently, the District Court of Maryland in *Int'l Refugee Assistance Project v. Trump* also enjoined enforcement of § 2(c) nationwide.[50] Each of these injunctions were affirmed, at least in part, on appeal.[51] Given that the timed portions of the second

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40 Exec. Order No. 13780, § 8.

41 *Id*. § 9(a).

42 *Id*. § 10.

43 *Id*. § 11.

44 *Id*. § 12(a)

45 8 U.S.C. § 1225(b)(1)(A) (2009).

46 Exec. Order No. 13780, § 12(e).

47 *Compare id*. § 13–16 with Exec. Order 13769. Section 13 revokes the original order. Section 14 gives an effective date of March 16, 2017, 12:01 a.m. eastern daylight time. Section 15 is a severability provision. Section 16 provides construction instructions regarding other laws.

48 Given that the original order was effective immediately, no party had the opportunity to sue prior to its enforcement.

49 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017).

50 241 F. Supp. 3d 539, 565 (D. Md. 2017).

51 Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (affirming district court's enjoinment of §§ 2(a), 6(a)–(b) and vacating the enjoinment of those portions of the executive order relating to interagency review of procedure, and the enjoinment of the President); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605–06 (4th Cir. 2017)

executive order were stayed by courts before going into effect, the President issued a memorandum on June 14, 2017 making clear that the effective date of the stayed provisions was to be the date on which each injunction was to be lifted.[52] The US Supreme Court granted certiorari on June 26, 2017 to defendants in both cases and stayed the injunctions upheld below, insofar as they pertained to individuals without a "bona fide relationship with a person or entity in the United States."[53]

In granting certiorari, the Supreme Court discussed several arguments made by the parties that implicated the principle of separation of powers—although only in the context of deciding whether the equities in the case favored a stay of the injunctions entered below.[54] The first of these was raised by plaintiff John Doe in the *Hawaii* line of cases: that the second executive order violated the Establishment Clause of the First Amendment by "singling out Muslims for disfavored treatment" in predominately naming majority Muslim nations as subject to the ban under § 2(c) of the order.[55] This was in addition to "discriminating between 'minority religions' and majority religions" in its attempted reformulation of USRAP in § 5(b), (e).[56] While the plaintiff cited *Larson v. Valente*[57] for the proposition that "one religious denomination cannot be officially preferred over another," and further claimed that the government did not justify the alleged preference by any compelling interest, the plaintiff did not initially address what became defendant's case-on-point for this issue: *Kliendienst v. Mandel*.[58] *Kliendienst* implicates the principle of separation of powers in that it proscribes what courts may consider when determining the validity of exclusion by the executive.[59] Namely, the Court in *Kliendienst* held that:

> When the Executive exercises [the power to exclude aliens] on the basis of *a facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[60]

(affirming the lower courts' enjoinment against enforcement of § 2(c) but vacating enjoinment against the President), *vacated as moot*, 138 S. Ct. 353 (2017).

52 Effective Date in Exec. Order 13780, 82 Fed. Reg. 27965 (2017).

53 Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017).

54 *Id*. (citing Univ. of Tex. v. Caminisch, 451 U.S. 390, 395 (1981)) ("The purpose of such interim equitable relief is not to conclusively determine the rights of the parties.").

55 Joint Appendix, Vol. 1 at 221, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (Nos. 16-1436, 16-1540) 2017 WL 3448008 at *107.

56 Compl. for Declaratory and Injunctive Relief at ¶¶ 151–52, Int'l Refugee Assistance Project v. Trump, 2017 WL 511943 (D. Md. 2017).

57 456 U.S. 228, 244 (1982).

58 *See generally* 408 U.S. 753 (1972).

59 *Id*. at 769–770.

60 *Id*. at 770 (emphasis added); s*ee also* Haig v. Agee, 453 U.S. 280, 309–10 (1981) (holding that the revocation of a passport where there is a likelihood of damage to U.S.

While the Court leaves open the option to consider First Amendment implications where "no justification whatsoever"[61] is presented, the application of the facially legitimate and bona fide test would preclude plaintiff's implication of the First Amendment given the President's national security justification.[62]

In *International Refugee Assistance Project v. Trump*, the Fourth Circuit reasoned that *Kliendienst* must be interpreted in light of other cases that suggest that congressional (and therefore, delegated executive) immigration policy authority is not without limit.[63] The Fourth Circuit pointed to *Zadvydas* and *Chadha* for instances in which the broad power of Congress and the President in regulating immigration is subject to judicial review.[64] In seeking to apply both lines of case law, the Fourth Circuit looked to Justice Kennedy's controlling concurrence in *Kerry v. Din*.[65] There it was held, absent a showing of bad faith by the Executive branch, the Court was not permitted to look behind the contested action.[66] The Fourth Circuit held, based on the statements of then-candidate Donald Trump, as well as policy elucidated in office,[67] that such a showing had been made, and courts may look behind the national security justification.[68]

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national security interests is within the statutory authorization of the Secretary of State and is not impermissibly burdensome under the First Amendment).

61 *Kliendienst*, 408 U.S. at 770.

62 Exec. Order No. 17380, § 1(b)(ii) ("I determined that . . . while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States."); *id*. § 1(c)–(h) (for descriptions in brief of the security concerns presented by the six nations covered by the second executive order).

63 *Int'l Refugee Assistance Project*, 857 F.3d at 590 ("But in another more recent line of cases, the Supreme Court has made clear that despite the political branches' plenary power over immigration, that power is still subject to important constitutional limitations.") (internal quotation marks omitted) (citing Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that the Attorney General may only detain an alien subject to deportation for a reasonable period of time, rather than indefinitely) and INS v. Chadha, 462 U.S. 919 (1983) (holding that the section of the Immigration and Nationality Act authorizing the one-House veto of an immigration judge's decision to stay the deportation of an alien violated the doctrine of separation of powers)).

64 *Int'l Refugee Assistance Project*, 857 F.3d at 590 ("We are bound to give effect to both lines of cases, meaning that we must enforce constitutional limitations on immigration actions while also applying *Mandel* 's deferential test to those actions as the Supreme Court has instructed.").

65 *See* 135 S. Ct. 2128 (2015).

66 *Id*. at 2141.

67 *Int'l Refugee Assistance Project*, 857 F.3d at 591–92.

68 *Id*. at 594–601 (accepting plaintiff's suggestion of applying the *Lemon v. Kurtzman* test for religious purpose and finding that the second executive order "likely fails *Lemon's* purpose prong in violation of the Establishment Clause.") (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

A further argument considered the text of the Immigration and Nationality Act (INA) and plenary congressional control over immigration legislation.[69] It is concrete constitutional law that a President cannot issue any order that does not "stem either from an act of Congress or from the Constitution itself."[70] Since in this case, the President relies upon the INA for his authority,[71] it is necessary for the courts to consider the text of the INA and to "give effect to all parts of [the] statute, if at all possible."[72] Despite the President's reliance on 8 U.S.C. § 1182(f) and § 1185(a) for a broad grant of authority to suspend the entry of aliens, the Ninth Circuit contends that this power is cabined by the requirement of § 1182(f) that the President "find" rather than "deem" the entry of certain aliens detrimental to the United States, as well as the prohibition on national origin discrimination found in § 1152(a)(1)(A).[73] Thus, the court may find that, as a matter of executive authority, the power of the President here is either "at its lowest ebb" or is middling at best.[74]

On the balance between permitting the political branches to operate efficiently and prohibiting the unconstitutional burdening of plaintiff's First Amendment rights, the Fourth Circuit may have waded into uncomfortably burdensome waters. Besides the potentially troublesome precedent of having (implicitly) extended the rights granted under the First Amendment to foreign nationals outside the United States—and thereby running headlong into *Kliendienst*—the court stares down a pernicious hypothetical: what to do when an allegedly bigoted President correctly identifies a legitimate national security threat? Under the rationale just explained, an uncouth President faces the invalidation of potentially vital (and facially plausible) national security policy—a foreseeably problematic leap by a court in times of emergency.[75]

Before any of these pressing questions could be reviewed, the ground shifted yet again. As the period mandated by § 2(c) of the second executive order

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69 Hawaii v. Trump, 878 F.3d 662, 694–98 (9th Cir. 2017).

70 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

71 *See generally* Exec. Order No. 17380.

72 Hawaii v. Trump, 878 F.3d at 695 (quoting Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973)).

73 *Id*. at 690–97.

74 *Youngstown*, 343 U.S. at 637–38 (Jackson, J. concurring) (discussing three categories of executive action: 1) where the President acts with an express grant of power from Congress; 2) where the President acts according to his own inherent power; or 3) where the President acts in the absence of either an express grant of power or any inherent power). The reasoning of the Ninth Circuit would place the travel ban series of executive orders in either the second or third category.

75 Eric A. Posner & Adrian Vermuele, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1094–95 (2006) ("Smoking out government animus or opportunism requires information the judges do not have in times of emergency; the costs of judicial mistakes are higher, because judicial invalidation of a policy necessary for national security may have disastrous consequences; and the sheer delay created by vigorous judicial review is more costly as well, because time is at a premium in emergencies."); *see also* JOSEPH HELLER, CATCH-22 (1961) ("Just because you're paranoid doesn't mean they aren't after you.").

for exclusion of foreign nationals lapsed on September 24, 2017, the Supreme Court remanded the case to the Fourth Circuit with instructions to dismiss as moot on October 10, 2017.[76] On the same day that the second executive order's exclusion period lapsed, a third order was issued by way of proclamation from the President.[77] This order stated in part that the review of information sharing required by § 4 and § 5 of the previous order had been completed by the Secretary of State.[78] This review identified three forms of information sharing that the President declared essential to the security of the United States: identity management information, national security and public-safety information, and national security and public safety risk-assessment.[79]

Using these categories, the Secretary of Homeland Security submitted a report to the President on September 15, 2017, that found seven countries whose information sharing, as measured against the above three metrics, was deemed "inadequate," and recommended entry restrictions and limitations be implemented on them.[80] These countries were: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.[81] Iraq was also determined to have inadequate information sharing capacities.[82] However, considering the continuing close relationship between the United States and Iraq, as well as the Iraqi government's continued commitment to fighting terrorism, the order stated that restrictions as severe as those levied on other nations identified were not warranted.[83] A middling level of "additional scrutiny" was instead recommended for Iraqi nationals.[84]

The President then listed a variety of factors he considered in evaluating the recommendations of the Secretary of Homeland Security, which under the terms of this iteration of the order, were to be revisited when justifications for each travel restriction are presented in § 2.[85] Additionally, the President clarified that he was "adopting a more tailored approach" in distinguishing between the entry of non-immigrant foreign nationals and immigrant ones.[86] In § 2, the President listed the

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76 *See generally Int'l Refugee Assistance Project*, 857 F.3d 554.

77 Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

78 *Id*.

79 *Id*. § 1(c)(i)–(iii).

80 *Id*. § 1(g).

81 *Id*.

82 Proclamation No. 9645, § 1(g).

83 *Id*. § 1(g).

84 *Id*.

85 *Id*. § 1(i).

86 Proclamation No. 9645, § 1(h)(ii)–(iii) (In making the distinction, the President cites the fact that: "The United States affords lawful permanent residents more enduring rights than it does to nonimmigrants. Lawful permanent residents are more difficult to remove than nonimmigrants even after national security concerns arise, which heightens the costs and dangers of errors associated with admitting such individuals. And although immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national

justifications for each restricted country.[87] These justifications are more qualitatively detailed than those presented in the second executive order.[88] Section 3 set forth the scope and implementation of the suspensions.[89] Section 4 required that the suspensions be reviewed every 180 days for the purpose of recommending whether they should be cancelled or modified.[90] Section 5 required that reports on screening and vetting procedures be submitted to the President.[91] Section 6 delegated enforcement to the Secretaries of State and Homeland Security, and also provided that they comply with regulations that "provide an opportunity for individuals to enter the United States on the basis of a credible claim of fear of persecution or torture."[92] Section 7 set forth effective dates and incorporated the Supreme Court's limitations by placing suspensions on those who "lack a credible claim of a bona fide relationship with a person or entity in the United States" until October 18, 2017—at which point suspensions would apply to all such countries.[93]

One can detect a hint of on-the-nose exasperation in the opinion issued by the District Court of Hawaii on the final order.[94] This latest holding concerns only the countries named in § 2(a), (b), (c), (e), (g), and (h), and holds that the new order is also constitutionally deficient.[95] The judge again held that the findings do not support the conclusion (as required under the INA)[96] that "nationality alone renders entry of this broad class of individuals a heightened security risk."[97] The court also found again that no explanation was made as to why the President deemed existing procedures inadequate, as the applicant for admission bears the burden of proving eligibility to enter the United States,[98] and that the policy decisions concerning Iraq (and now Venezuela) undermined the national security rationale presented by the President.[99] The court held in favor of the plaintiffs again, and enjoined the

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security of the United States. For all but one of those 7 countries, therefore, I am restricting the entry of all immigrants.").

87 *Id*. § 2.

88 They are also accompanied in the latest iteration by the specific visa programs that are suspended for each nation. *Compare* Proclamation No. 9645 § 2, *with* Exec. Order 17380, § 1(c)–(h).

89 Proclamation No. 9645, § 3.

90 *Id*. § 4(a).

91 *Id*. § 5.

92 *Id*. § 6(b).

93 *Id*. § 7(a)(ii).

94 State v. Trump, 265 F. Supp. 3d 1140, 1144–45 (D. Haw. 2017) ("Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO–3.").

95 *See id*. at 1146 (The countries being Iran, Libya, Syria, Yemen, Somalia, and Chad. The restrictions on North Korea and Venezuela were not enjoined).

96 *Id*. at 1154 (citing Hawaii v. Trump, 859 F.3d at 772–73).

97 *Id*. at 1155–56 (citing Hawaii v. Trump, 859 F.3d at 772.).

98 *Id*. at 1156.

99 State v. Trump, 265 F. Supp. 3d at 1156–57.

responsible secretaries from enforcing § 2(a), (b), (c), (e), (g), and (h) of the order.[100] Despite the District Court's similar conclusion in the latest argument of *Trump v. Int'l Refugee Assistance Project*,[101] the Supreme Court allowed enforcement of the third order on December 4, 2017, staying the lower court holdings, pending appeal to the Ninth and Fourth Circuit Courts of Appeals.[102] Subsequently, both the Ninth and Fourth Circuit Courts of Appeals affirmed the decisions made by the lower courts, with the Supreme Court then granting certiorari.[103]

On June 26, 2018, the Supreme Court held that the President had validly exercised his authority granted under the INA in issuing the third executive order, putting an end to plaintiffs' efforts to enjoin the policy.[104] In its ruling, the Court held that the President was granted broad power under 8 U.S.C. § 1182(f) (§ 212 of the INA) to exclude aliens, and that the section "exudes deference to the President in every clause."[105] More to the point, the Court held that the President was not obligated to "explain [his] finding with sufficient detail to enable judicial review,"[106] and that in any case the President had provided a "worldwide multi-agency review" to satisfy that end,[107] and that the order otherwise comported with statutory restrictions in identifying a legitimate class and restricting the measure's scope to the time necessary to address executive concerns.[108] The Court dismissed plaintiffs' legislative history-based arguments given the unambiguous nature of the text;[109] it further dismissed plaintiff's arguments based on an INA section prohibiting visa denials based on certain characteristics, including nationality, because that subsection governs only visa issuance rather than admissibility determinations regulated by the executive order.[110]

In addressing the First Amendment claims raised by the plaintiffs, the Court, while noting the President's expressed animus,[111] concluded that that the proper standard of review was rational basis; despite agreeing with the Government's suggestion that it would be appropriate to look beyond the facial justification of the order, as distinct from *Kliendienst*.[112] This was the result of the

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100 State v. Trump, 265 F. Supp. 3d at 1160

101 265 F. Supp. 3d 570, 633 (2017).

102 *See generally* Hughes v. U.S., 138 S. Ct. 542 (Mem) (2017).

103 Hawaii v. Trump, 878 F.3d at 673; Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 274 (4th Cir. 2018); Hawaii v. Trump, 138 S. Ct. 923 (Mem) (2018).

104 Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).

105 *Id*.

106 *Id*. at 2409.

107 *Id*.

108 *Id*. at 2409–10.

109 Trump v. Hawaii, 138 S. Ct. at 2412.

110 *Id*. at 2414–15.

111 *Id*. at 2416–18.

112 *Id*. at 2419 (citing *Kliendienst*, 408 U.S. at 769) The Court circumscribes this probe to "consider[ing] plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id*. at 20.

twin justifications noted above: the traditional purview of the legislature (in both congressional action and presumably in its delegation of power to the president) in governing questions of immigration,[113] and the unique disability of the courts to evaluate national security justifications.[114] That said, the majority notes that the Government conceded the possibility that it would nevertheless be appropriate to extend its inquiry beyond the facial neutrality of the order.[115] The Court then, as the issues raised by plaintiffs concern the admissibility of foreign nationals, opts for rational basis review of the order, and predictably finds a sufficient link between the policy and "the Government's stated objective to protect the country and improve vetting processes."[116]

Justice Kennedy offered a brief concurrence to note that, while the motivations behind government action may in some cases be unreviewable, as in the instant example, the government is not simply free to disregard fundamental rights.[117] Justice Thomas also authored a concurring opinion voicing his concern with the lower court issuance of universal injunctions against the Government's policies, as being unsupported by statute, constitutional text, or the history of judicial powers.[118]

As for the dissents, Justice Breyer's dissenting opinion (joined by Justice Kagan) is grounded in the practical impacts of the order on admission to the United States, with a focus on the individual review and waiver provisions.[119] They observe evidence offered by plaintiffs that the government was not abiding by the ostensibly rights-protecting portions of the proclamation in their exercise, and would have accordingly remanded the case or invalidated the order.[120] The other dissent, by Justice Sotomayor (joined by Justice Ginsburg), seizes on the lengthy list of statements by President Trump concerning Muslims, and concludes that "a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[121] Seizing on the majority's circumscribed explanation of its use of rational basis, it would have held that the proper standard of review, given that an

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113 Trump v. Hawaii, 138 S. Ct. at 2418 (citing Fiallo v. Bell, 430 U.S. 787 (1977); Harisiades v. Shaughnessy, 342 U.S. 580 (1952)).

114 *Id*. at 2419 (citing Holder v. Humanitarian Law Project, 561 U.S. 1 (2010)).

115 *Id*.

116 *Id*. at 2420–21 (citing Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

117 *Id*. at 2424 (Kennedy, J., concurring).

118 Trump v. Hawaii, 138 S. Ct. at 2425–29 (Thomas, J., concurring).

119 *Id*. at 2432–33.

120 *Id*.

121 *Id*. at 2438.

Establishment Clause claim is not evaluated on rational basis, but rather strict scrutiny[122] and would have accordingly invalidated the order.[123]

In tracing the case as it unfolded, one observes at minimum, three separation-of-powers-oriented concerns emerging: (1) how can a legislature ensure that orders drafted to enforce delegated powers are issued in a manner that minimizes confusion—as President Trump's first order failed to do—through its authorizing legislation; (2) what constitutional structures would enable a legislature to implement immigration law in a manner that balances legitimate foreign and domestic policy against potential populist pressure; and (3) what role should judicial review play in evaluating policy implementation. To see what effect constitutional structures have (or could have) on immigration law, we will begin by discussing the British system.

III. BRITISH CONSTITUTIONAL LAW AND SEPARATION OF POWERS

Despite there being no written "Constitution of the United Kingdom," the central operating principle of the UK is universally understood to be the sovereignty and supremacy of Parliament.[124] This sovereignty may be summed up with two axioms: (1) that Parliament has the right to make or unmake any law whatsoever; and (2) that no government body can set aside the legislation of Parliament.[125] This would seem at first inimical to separation of powers generally (in the US sense) and judicial review in particular as commentators in both the United States and United Kingdom have pointed out.[126] Nevertheless, both principles find themselves

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[122] Trump v. Hawaii, 138 S. Ct. at 2440–41 (citing McCreary Cty. of Ky. v. ACLU of Ky., 545 U.S. 844, 860–63 (2005); Larson v. Valente, 456 U.S. 228, 246 (1982); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 449–52 (1969)).

[123] Trump v. Hawaii, 138 S. Ct. at 2441. The dissent also holds that the order was invalid anyway under rational basis, taking the position of plaintiffs who argue that the order is motivated by the simple desire to harm Muslims.

[124] VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 12 (2009).

[125] *See id*. at 12–13 ("But in addition to this historical reason why we do not have a codified constitution, there is also a conceptual reason. It is that the fundamental, perhaps the only principle at the basis of our system of government, has been the sovereignty of parliament."); *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 4 (Liberty Fund 1982) (1885) (more precisely stating: 1) "Any act of Parliament, or any part of an act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by Courts," and 2) "There is no person or body of persons who can, under English law, make rules which override or derogate from an act of Parliament.").

[126] J.W.F. ALLISON, THE ENGLISH HISTORICAL CONSTITUTION: CONTINUITY CHANGE AND EUROPEAN EFFECTS 85 (2007) (quoting British law professor Anthony Bradley concerning the Lord Chancellor prior to reform, "all well-catechised lawyers know [the

represented to a limited degree in the British system of government. Separation of powers has generally been found in the British system to be muddled in terms of practical effect but distinguished by way of constitutional authority.[127]

A. Development and Scope of British Executive and Judicial Power

Regarding the executive and legislative powers, at one point, the Crown (from which all governmental authority still emanates by way of the royal prerogative)[128] had the authority to issue proclamations with the force of legislation.[129] As that power no longer exists, nearly all legislative authority rests with Parliament.[130] It is now common political parlance to distinguish between the Crown as the Head of State, and the Prime Minister being the Head of Government.[131] Besides this separation of nominally executive power, each Minister of a Department (appointed by the Prime Minister) holds some inferior degree of executive authority—and certainly is held to collective accountability—for the performance of government agencies in general, as well as over the agencies

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office of Lord Chancellor as both government minister and head of the judiciary] to be living proof that separation of powers does not exist in Britain and we are better off without it."). Debra Perlin, *Marbury on the Thames: Separation of Powers in the United Kingdom's Nascent Supreme Court*, 42 N.C. J. INT'L L. 191, 200 (2016) ("Today, Parliament is undisputedly and unabashedly the controlling force within the British government. In other words, whereas the American system is rooted in judicial supremacy in the context of policing separation of powers, the modern British system is rooted in parliamentary sovereignty with no need for such policing.") (citing A.V. DICEY, LAW OF THE CONSTITUTION 38–39 (10th ed. 1959)).

127 A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 92–93 (12th ed. 1997) (citing WALTER BAGEHOT, THE ENGLISH CONSTITUTION 65 (1867) for the idea of "efficient secret" of the fusion of legislative and executive authority; L.S. AMERY, THOUGHTS ON THE CONSTITUTION 28 (1953 ed.) for the contrary perspective that while "intertwined and harmonized" the Government and Parliament remain "separate and independent entities" with "separate historical origins," "its own methods," and "its own continuity.").

128 *Id*. at 271–80 (for instance, it is said that the King makes law through Parliament.).

129 *See* DICEY, *supra* note 125, at 11.

130 *Id*. (discussing the apotheosis of regal power reached by Act 31 Henry VIII., c.8 in 1539 which gave the Crown's proclamations the force of parliamentary legislation); *see id*. at 13 (citing *The Case of Proclamations*, 12 Co. Rep. 74 [1610] for judicial clarification of King Henry's act during the reign of James I: that the King may only seek enforcement of the law through proclamation but may not legislate himself and noting the 1766 passage of an Act of Parliament overriding a regal proclamation as the likely death-knell of Crown-issued legislation). *See also* BRADLEY & EWING, *supra* note 127, at 269–71 (discussing the Privy Council as one of the last (promulgatory) vestiges of royal legislative power).

131 *Head of State*, ENCYCYCLOPAEDIA BRITANNICA (Jun 20, 2013).

that they personally oversee.[132] Naturally, this means that as Head of Government, the Prime Minister has a significant degree of executive authority, including having the authority to appoint and accept the resignation of department ministers, and to create and abolish departments.[133]

The executive function is primarily vested in the Prime Minister who (in addition to possessing the legislative prerogative as head of the majority party or coalition)[134] consults with the Crown concerning ministerial appointments,[135] and supervises the Cabinet decision-making.[136] This latter responsibility bears the closest resemblance to US executive authority—though with noticeably greater stakes: consent of the majority party/coalition is required to continue governing, with either a vote of no confidence or a leadership election being an ample method of removing a Prime Minister.[137] Thus, the resignation of a Cabinet minister with whom the Prime Minister incorrigibly disagrees may provoke the wrath of the Prime Minister's own party in the House of Commons.[138] In keeping with the tenor of the unwritten British Constitution, generally, it may be said that the majority of the checks placed on the Prime Minister operating specifically as an executive are political rather than statutory—that is, if one loses confidence, one loses position.[139] A further check on policy implementation exists in the form of the "fiercely independent" civil service, of which the Prime Minister's Cabinet Secretary serves as the head.[140]

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[132] BRADLEY & EWING, *supra* note 127, at 115–30 (discussing the concept of responsible government, whereby ministers are held responsible for implementing government policy in their department and accountable for the actions of civil servant actions—whether expressly ordered or not).

[133] *Id*. at 289.

[134] BRADLEY & EWING, *supra* note 127, at 93–94. (Authors note that while the majority will generally not be defeated on policy issues, a modern feature of British government is the tendency for secure majorities to suffer defections over severe policy disagreement when no real danger of defeat is present).

[135] *See id*. at 289. In effect, making the appointment.

[136] PETER LEYLAND, THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS 161 (2d ed. 2012).

[137] Fixed-term Parliaments Act 2011, c. 14, § 2(4) (UK), http://www.legislation.gov.uk/ukpga/2011/14/pdfs/ukpga_20110014_en.pdf.

[138] LEYLAND, *supra* note 136, at 162–63 (noting that Prime Minister Margaret Thatcher's fall from grace was preceded with the departure of her deputy Sir Geoffrey Howe, causing her formerly formidable position to "evaporate.").

[139] *Id*. at 159 ("but to hold the position of head of government, the incumbent needed to have the confidence of the sovereign, and also to have the full support of Parliament. In the contemporary constitution, it is the support of . . . the elected House of Commons, that is crucial."); *see also id*. at 162–63.

[140] LEYLAND, *supra* note 136, at 164–66. (Leyland notes that the civil service will frequently provide "incomplete briefing and advice" on issues important to the Prime Minister, coupled with "problems of communication and implementation." For a humorous take on the problem: see generally, *Yes Minister*, (BBC television broadcast 1980–84).

Before 2009, the highest court of appeals in the United Kingdom consisted of the Law Lord members of the House of Lords sitting as a court.[141] The Lord Chancellor was the officer entitled to preside over such judicial proceedings, and was further responsible for recommending appointments to various courts.[142] The Lord Chancellor was at that point—and remains—a member of the Cabinet, and therefore acted in both the judicial and political realms.[143] That any sort of tangible distinction between those functions exists is a relatively new development in British law, as the office of Lord Chancellor—which functioned as both head of judiciary and as a member of the Prime Minister's Cabinet—was only recently modified by the Constitutional Reform Act of 2005 to explicitly proscribe Cabinet interference in judicial decisions, further separating legislative and judicial function.[144] Under Part 3 of the Act, a Supreme Court of the United Kingdom was constituted for the first time in October 2009.[145] This took the place of the House of Lords (sitting as a court) as the final court of appeal in the United Kingdom.[146] This development is notable for our purposes for the future potential for additional judicial review.[147]

B. British Doctrine of *Ultra Vires* and Extent of Judicial Review

Before, and continuing with the establishment of the Supreme Court, the judiciary of the United Kingdom had the closest approximated constitution-based judicial review with *ultra vires* doctrine relating to executive acts and administration.[148] Nineteenth-century British courts laid out the outer contours of *ultra vires* doctrine in holding that, "whatever may fairly be regarded as incidental

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[141] BRADLEY & EWING, *supra* note 127, at 410. Criminal cases originating in Scotland being excepted—final appeals for such cases were heard by the Scottish Inner House of the Court of Session. *See id*. at 409.

[142] Among numerous other responsibilities. *Id.* at 440.

[143] *Id*. at 441.

[144] Constitutional Reform Act 2005, c. 4, § 2 (for new qualifications for nomination to the position of Lord Chancellor), § 3 (for the requirement that the Lord Chancellor as a Cabinet member must not seek to influence judicial decisions through the special access they possess), schs. 3, 4 (for nomination and other duties now assigned to or delegable by the Lord Chancellor) (UK) [hereinafter Constitutional Reform Act 2005]; *see also* ALLISON, *supra* note 126, at 85.

[145] Constitutional Reform Act 2005, § 40; *see also History*, SUPREME COURT OF THE UNITED KINGDOM, https://www.supremecourt.uk/about/history.html (last visited Feb. 27, 2019).

[146] Constitutional Reform Act 2005, § 40.

[147] *See generally* Perlin, *supra* note 126; *see also* Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 N.W. U. L. Rev. 543, 582–83 (2014) (suggesting that the UK Supreme Court's vertical jurisdiction over acts of the devolved Scottish Parliament may later extend to horizontal review of the UK Parliament).

[148] Delaney, *supra* note 147, at 554–55 (describing the argument that the common law may actually place some limits on Parliament and arise through *ultra vires* doctrine).

to, or consequent upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."[149] The simplest definition of the doctrine is that, "if a decision-maker acts beyond the powers conferred by legislation the courts simply exercise a supervisory jurisdiction by interpreting the law so as to set limits on statutory authority."[150]

The case *R. (on the application of Pub. Law Project) v. Lord Chancellor*[151] provides a recent example of the doctrine being utilized by the UK Supreme Court to invalidate executive action. In it, the UK Supreme Court held to be *ultra vires* a draft order prepared by the Lord Chancellor and laid before Parliament[152] which adopted a residency requirement for legal aid funding distributed under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[153] The Lord Chancellor had drafted the order pursuant to § 9(2)(b) of the Act which provided for so-called "Henry VIII" power—the ability for the executive to actually vary the statute rather than simply adding additional clarification and regulative language.[154] Secondary legislation proposed by the executive, the Court notes, is enacted either by way of an affirmative vote in the House of Commons, or (depending on the authorizing statute) by not being voted down after a specified period.[155] Strikingly, at least for a US audience, the Court framed its approach in terms of upholding Parliamentary sovereignty[156]—provided that full debate and consideration is not given to

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[149] S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 95 (4th ed. 1980) (quoting Att'y Gen. v. Great Eastern Ry., (1880) 5 App. Cas. 473, 478).

[150] LEYLAND, *supra* note 136, at 204–05. Leyland also notes the competitive common law interpretation of judicial review which suggests that the common law provides a diverse array of principles from which judicial review may arise without merely relying on legislative intent. *Id*.

[151] R. v. Lord Chancellor [2016] UKSC 39, 2016 WL 03626473 (appeal taken from Eng., [2015] EWCA Civ 1139).

[152] The Court explains the distinction between the order, which would constitute "secondary legislation" and "primary legislation" or statutes to be that secondary legislation is drafted by an executive and laid before Parliament for either a "negative resolution" or "positive resolution" procedure (i.e. the order becomes law either by Parliament *not* voting it down, or *only* if Parliament votes in favor of it). *Id.* §§ 20–21.

[153] *See generally* Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10 (Eng.) [hereinafter Legal Aid].

[154] *Id*. § 9(2)(b).

[155] *Id*. § 21.

[156] *Id*. § 27 ("Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is. . . legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is *any* doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.") (emphasis added) (quoting *McKiernon v. Sec. of State*, The Times, November 1989, Court of Appeal (Civil Division) Transcript No. 1017 of 1989) (Lord Donaldson, MR).

secondary legislation as it is to primary legislation,[157] it is appropriate for the Court to review this exercise of authority to ensure that it comports with Parliamentary intent.[158] Under this framework, the Court engaged in statutory analysis of the authorizing legislation, determining that the Lord Chancellor acted *ultra vires* in his draft order.[159]

C. The Human Rights Act 1998 and Future British Judicial Review

Despite my earlier admonishment that this Note would not discuss international law *vis a vis* treaties or conventions, the Human Rights Act 1998[160] must play some role in our analysis. Of all recent legislation, it comes closest to beginning to codify a British Constitution according to many commentators, bringing Britain closer to *Marbury*-style judicial review.[161] This is not merely due to it being a bill dealing with fundamental human rights, as Parliament had already passed legislation on similar topics going back to the seventeenth century—most notably what is known as the English Bill of Rights.[162] Rather, the Act requires that

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[157] *See* LEYLAND, *supra* note 136, at 135–40 for the process of passing Public and Private Bills through Parliament, including three readings, debate, and assent by the House of Lords and the Crown.

[158] R v. Lord Chancellor, headings 22–23.

[159] *Id*. headings 29–39.

[160] *See generally* Human Rights Act 1998, c. 42 (UK).

[161] *See Perlin*, *supra* note 126, at 193–94; *id*. at 219–20 (arguing that incorporation of Article 6 of the European Convention on Human Rights by the Human Rights act necessitated the move from the House of Lords as a final court of appeals to a fully independent Supreme Court, and demonstrating that the Human Rights Act 1998's grant of power to the courts to declare statutes incompatible with the Convention is a move closer to judicial review—albeit without the actual ability to overturn statutes passed by Parliament); *see also* Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 480–81 (2011) (calling the incompatibility declaration ability a "significant power of judicial review."), Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J. L. REFORM 497, 544–45 (2001) (stating that as the primary duty of public officials under the Act is to not act in a manner incompatible with the Convention, "English courts can no longer simply say that the law is clear and that reference to the Convention is therefore not necessary. As far as public authorities such as the courts are concerned, they always have a duty to refer to the Convention, so it becomes a relevant consideration in almost any conceivable litigation even in litigation between purely private parties who are themselves under no duty to act compatibly with the Convention."); Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L. J. 329, 362–65 (2002) (suggesting that while the Act itself has no special legal status, its prestige, political potency, and expansive view of rights compensate enough to make it more than a "damp squib.").

[162] Bill of Rights [1688], c. 21 Will. and Mar. sess. 2 (UK) [hereinafter Bill of Rights [1688]].

courts interpret statutes in a manner that is consistent with provisions[163] of the European Convention on Human Rights,[164] and that statutes be read compatible with the Convention.[165] A court may also declare statutes to be incompatible with the Convention,[166] allowing for judges to weigh in on statute compatibility with fundamental law.[167] While the Act has been criticized for the omission of the remedies portion of the Convention in its incorporation (potentially for fear of more wide-ranging judicial encroachment),[168] the Act's "strong interpretive obligation"[169] to interpret statutes in light of the Act has the effect of constraining the executive by making draft orders and other secondary legislation subject to supranational authority, and the political effect of forcing Parliament to expend political capital in explicitly overruling the judiciary if it objects.

D. British Constitutional Law as Applied to Executive Order Three

In imagining a hypothetical Prime Minister Trump (of UKIP perhaps, for the sake of illustration), we see the new Prime Minister quickly encounter some brakes on his authority by way of Cabinet authority and political pressure. Supposing the Prime Minister desired to enact the precise text of his first executive order, he would not be able to do so directly.[170] Instead, he would necessarily work through the Secretary for the Home Office, who in turn supervises the Minister of State for Immigration.[171] While the Prime Minister is fully capable of directing policy orientation in proposed delegated legislation as head of the party in power, (in the case of the first executive order: review of information sharing, denying access from specific countries, etc.), the department with which the Minister oversees (UK Visas and Immigration) would have the delegated responsibility for

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[163] Human Rights Act 1998, § 1 (Arts. 2–12 & 14 of the Convention, Arts. 1–3 of the First Protocol, and Art. 1 of the Thirteenth Protocol).

[164] *See generally* Eur. Conv. on H.R. [ECHR], 213 U.N.T.S. 221 (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[165] Human Rights Act 1998, § 3.

[166] *Id*. § 4.

[167] *See supra* note 161.

[168] WADHAM, ET AL., BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998 17–18 (4th ed. 2007).

[169] *Id*. at 8.

[170] *What is Secondary Legislation*, PARLIAMENT.UK, http://www.parliament.uk/about/how/laws/delegated/ (last visited Feb. 27, 2019) (outlining the process by which delegated legislation is enacted, specifically that delegated legislation in the common form of a statutory instrument is typically drafted by the department overseeing the policy) [hereinafter *What is Secondary Legislation*].

[171] *See Ministers, Ministers by Department, Home Office*, GOV.UK, https://www.gov.uk/government/ministers (last visited Feb. 27, 2019); *Minister for State for Security and Immigration*, GOV.UK, https://www.gov.uk/government/ministers/minister-for-security-and-immigration (last visited Feb. 27, 2019).

drafting a policy, circulating it in the Cabinet, and presenting any delegated legislation before Parliament for approval or disapproval.[172] Depending on the office holder, severe drafting errors akin to those included in the first executive order issued by President Trump would be less likely.[173] The accompanying inter-executive information sharing problems would be even less likely as the one overseeing the implementation of a policy is the official who drafted, circulated, and is ultimately responsible before Parliament for that same policy.[174] Even supposing the appointee to that particular position under a Trump government is less than competent, the draft order itself would be drafted by civil servants with policy experience and who continue in their positions irrespective of changes in government.[175] The power to draft (and therefore shape) initial secondary legislation is highly dispersed to unelected officials and other ministers in the British system; as a result of this diffusion, any drafted legislation would be unlikely to suffer the defects of an executive order drafted by unequipped policy advisors.

Additional pressure would be political in nature. As noted above, a Cabinet uneasy with the decisions of the Prime Minister may resign and prompt a leadership challenge. Even if our hypothetical Prime Minister Trump were to successfully implement, or even advocate for a policy in the form of a command paper,[176] the resignation of a disgruntled cabinet official who is blindsided by an incompetent draft could prematurely bring down a Trump government as has happened with even the most well-positioned Prime Ministers.[177] Furthermore, the Prime Minister would likely face some measure of opposition from the House of Lords whose membership is politically adroit, scarcely subject to popular pressure,

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[172] CABINET OFFICE, MINISTERIAL CODE, 2016 §§ 2.3–2.6, http://www.civilservant.org.uk/library/2016_ministerial_code.pdf [hereinafter MINISTERIAL CODE].

[173] *Compare Minister without Portfolio: The Rt Hon Brandon Lewis MP*, GOV.UK, https://www.gov.uk/government/people/brandon-lewis (last visited Dec. 18, 2017). The current office holder for the Conservatives, the Rt. Hon. Brandon Lewis, MP holds a bachelor's of science in Economic and LLB (Hons.) from the University of Buckingham, and an LLM in commercial law from King's College, London; and has served in various other government positions, *with* Glenn Thrush & Maggie Haberman, *Trump and Staff Rethink Tactics after Stumbles*, N.Y. TIMES, Feb. 5, 2017, https://www.nytimes.com/2017/02/05/us/politics/trump-white-house-aides-strategy.html (reporting that no review process constrained White House policy advisors Stephen Miller and Steve Bannon who oversaw the drafting of the travel ban – neither of whom hold a law degree).

[174] MINISTERIAL CODE, *supra* note 172.

[175] *See* BRADLEY & EWING, *supra* note 127, at 299; *see also What is Secondary Legislation*, *supra* note 170 ("Statutory Instruments (SIs) are documents drafted by *a government department* to make changes to the law." [emphasis added]).

[176] Essentially a document stating official government policy. *See Government publications (Command Papers)*, PARLIAMENT.UK, http://www.parliament.uk/about/how/publications/government/ (last visited Dec. 19, 2017).

[177] LEYLAND, *supra* note 136, at 162–63.

and capable of blocking both primary and secondary legislation to a degree.[178] In truth, one of the primary functions of the House of Lords is to ensure the legality of legislation.[179] In each instance, power-sharing among legislative branch members reduces the likelihood of shocking or deficient legislation being enacted.

The final backstop to such legislation would be the judiciary. A deficient item of secondary legislation can be either narrowly construed or deemed *ultra vires*.[180] Supposing the text of the first executive order were enacted as secondary legislation, the UK Supreme Court may find it to be an illegal action based on its own precedent on the grounds that it: (1) violates the principle of legal certainty in not clearly giving a timeline for implementation;[181] or (2) is *ultra vires* per the statutory authorization of the order in question.[182] Alternatively, presuming the order contravenes a European Union obligation per the Human Rights Act 1998, the Court may make a declaration of incompatibility and wait for Parliament to address it again at a later point.[183] However, it should be pointed out that this action by the Court would not prevent Parliament from enacting and enforcing a poorly written bill, or one ostensibly motivated by animus. Ultimately, the power granted to the judiciary is just so: granted, and therefore limited if a Prime Minister—via Parliament—is truly determined to pass a given law.

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[178] However, one should note the purpose served by the House is not equivalent to that of the United States Senate as merely another legislative body with membership being the only difference (though this has been the aim of some unsuccessful party efforts to effect). *See* BRADLEY & EWING, *supra* note 127, at 215–218. The primary purpose served is to offer amendments to improve legislation, and that per the Parliament Acts of 1911 and 1949, there are two exceptions to the necessity of consent by the House of Lords for royal assent: 1) where a public bill is endorsed as a money bill and has not been passed by the Lords after a month; and 2) where the Lords have refused to pass a bill in two successive legislative sessions after approval by the House of Commons. *Id*. at 213. An instance of the second procedure's use given by Bradley & Ewing is the 1991 royal assent of the War Crimes Bill after two successive legislative sessions of blocking by the House of Lords. *Id*. at 215.

[179] *House of Lords: Making laws*, PARLIAMENT.UK, http://www.parliament.uk/business/lords/work-of-the-house-of-lords/making-laws/ (last visited Jan. 12, 2018) ("The Lords plays an essential role in improving bills, highlighting problems and making them workable.").

[180] *See generally* R. v. Lord Chancellor.

[181] *See* R. (on the Application of Reilly and another) v. Sec. for Work and Pensions [2013] UKSC 68 ¶ 47, *on appeal from* [2013] EWCA Civ 95 (quoting Scott, LJ Blackpool Corp. v. Locker [1948] 1 KB 349, 362).

[182] *See* R. v. Lord Chancellor, at ¶ 23.

[183] *See* R. (on the application of Nickelson and another) v. Ministry of Justice [2014] UKSC 38 ¶ 38, *on appeal from* [2013] EWCA Civ 961.

E. Conclusions on British Constitutional Law

As noted above, most of what makes predicting a Trump-style government action in the United Kingdom difficult is the degree to which the British constitutional order relies on unwritten rules and norms that are not enforceable by a stronger form of judicial review, and that can be entirely dispensed with by legislation. Over the past decade, the United Kingdom has seen significant changes in the distribution of power, but in each instance, the only locus of government necessary to enact these changes has been the same: Parliament. A constitutional order built on tradition and parliamentary sovereignty would seem to remain ultimately political despite various moves toward an independent judiciary and codified human rights law.[184] Barring a move toward truly *Marbury*-style review (where the UK Supreme Court could declare primary legislation unenforceable), even if one recognizes all the political pressure that may be brought to bear against a badly behaving cabinet secretary or prime minister, if we were to translate the Trumpian political moment into the United Kingdom along with an executive order, a UKIP government could really do as it pleased regarding immigration policy—if not by delegated legislation, then by primary legislation. While a strong and independent civil service can guard against badly drafted policy papers, and the courts can guard against *ultra vires* secondary acts, neither they nor any other power in the United Kingdom could overrule an Act of Parliament curtailing immigration in a racially or religiously suspect way. Even if a protectionist immigration policy were correctly drafted so as to be decipherable by the courts and workable by agencies, the lack of judicial review regarding constitutional validity means that no recourse is afforded to those who would denied entry as a result of authorizing legislation. The most an opponent could hope for is a repeal following the next election—little different from the hope of any real-life Trump opponent concerning his executive orders, but with the problematic language having the power of legislation and lacking the hope of judicial review.

This is by no means to say that a UKIP or any similar government is in anyway a political possibility, but one might caution that an innately historical constitution that relies on unwritten rules and norms of behavior may be severely tested in a profoundly ahistorical moment. In attempting to balance maneuverability with restraint against a blindly populist movement, the UK Constitution relies on parliamentary supremacy to ensure popular government and accountability for all policy choices. This works well in a political climate where norms are respected and the people at large consent to their utility in a general sense.

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[184] BOGDANOR, *supra* note 124, at 19 ("The old constitution, then, was a political constitution, in that its character was determined by events rather than pre-existing constitutional norms."). Bogdanor later describes some of the changing aspects of the Constitutional order that we have discussed so far as putting Britain on the path toward "a fully codified constitution." *Id.* at 215. Given that a number of his predicted reforms have not yet materialized, it is fair to say that the British Constitution remains a fundamentally political one. Even if that state of being is on its way out the door, ours is the analysis one must make if conducting *contemporary* comparative analysis.

However, in a climate of discontent, the absence of judicial review will leave no clear backstop against a Parliament that is determined to overrule what some would consider individual rights or propriety in government.

IV. FRENCH CONSTITUTIONAL LAW AND SEPARATION OF POWERS

The French Constitution of 1958 is the highest order of law governing the Fifth Republic of France.[185] Adopted after over 20 failed coalition governments under the parliamentary supremacy of the Fourth Republic, a primary distinction of the new Constitution was the granting of substantial power to an independent-executive President apart from the Prime Minister.[186] Intentionally distinct from the British vision of blurred executive and legislative powers,[187] the key framer of the Constitution, General Charles de Gaulle, sought to keep the new republic's government from becoming "no more than a collection of delegations" responding to the interests of Parliament.[188] Therefore, the Fifth Republic is a semi-presidential system: there is both a Parliament headed by a Prime Minister who can be replaced with a vote of no-confidence, and a popularly elected President with separate powers.[189] These powers include the exclusive ability of the President to legislate by decree in policy areas that are not enumerated in Article 34 of the Constitution by *règlement*.[190] This power-sharing arrangement is distinct from the British system not only in that it is constrained by the text of the Constitution, but also because these powers are independent, rather than derivative of each other.[191] This is

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185 CATHERINE ELLIOT & CATHERINE VERNON, FRENCH LEGAL SYSTEM 31 (2000); *see generally* 1958 CONST. pmbl. (Fr.).

186 ELLIOT & VERNON, *supra* note 185, at 9.

187 And more to the point, distinct from the Fourth Republic's problematic tendency for either chamber to withdraw confidence from the government by a simple majority vote. *See* JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 141 (1998).

188 ELLIOT & VERNON, *supra* note 185, at 12.

189 Cindy Skatch, *The Newest Separation of Powers: Semipresidentialism*, 5 INT'L J. CONST. L. 93, 93 (2007).

190 1958 CONST. art. 37 (Fr.). Additionally, under article 38, the government has the ability to ask Parliament for authority to authorize decrees within those domains as well, called *ordonance*. These are adopted by the President's cabinet, but must be subject to an opinion by the *Conseil d'Etat* and laid before Parliament for approval within the timeframe required by the authorizing legislation. *Id*. art. 38. *See* ELLIOT & VERNON, *supra* note 185, at 47. These are therefore much more akin to similarly delegated legislation found in our discussion of British Constitutional Law: executive action with ratification by the legislature. *See supra* Part III.

191 Skatch, *supra* note 189, at 96. ("The most critical feature of semipresidentialism is the additional separation of powers that comes with the division of the executive into two independently legitimized and constitutionally powerful institutions. . .").

necessary in the French system as there is no crown from which power to legislate originates.[192]

A. Development and Scope of French Executive and Judicial Power

Despite this separation, the President holds substantial power over Parliament, having the ability to appoint the Prime Minister.[193] Naturally, the power of Parliament to pass a motion of censure constrains his choice to a member capable of commanding a majority,[194] but that power by itself ensures that "Prime Ministers derive their powers from the President and not from Parliament."[195] This leads to the tendency of Prime Ministers resigning upon disagreement with the President on policy grounds that the government intends to pursue.[196] The Government (comprised of the Council of Ministers, who oversee various government departments, and the President, and frequently referred to as the Cabinet) retains the ability to regulate by decree in areas that are not listed under the domain of Parliament, and to amend an Act that addresses those domains.[197] While this is a more expansive view of executive authority than what is present in separation of powers regimes like that of the United States, not only does the number of listed domains limit the utility of this presidential power, but principles of judicial review addressed later *automatically* arise in issuing regulations by decree.[198] In the

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[192] *Compare* BELL ET AL., *supra* note 187, at 14 ("Echoing article 2 of the Declaration of the Rights of Man and Citizen, article 2 of the 1958 Constitution makes clear that legal sovereignty resides in the people.") and BELL ET AL., *supra* note 187, at 20–22 (discussing the theoretical and practical decline of parliamentary sovereignty in France) *with* DICEY, *supra* note 125, at 11 (discussing the residual monarchist theory behind the British Parliament's power). As power arises from the people, there is no need to trace power to anything other than "a republican pedigree," which is the practice of the *Conseil constitutionnel*. BELL ET AL., *supra note* 187, at 17.

[193] 1958 CONST. art. 8 (Fr.).

[194] ELLIOT & VERNON, *supra* note 185, at 17.

[195] *Id*.

[196] BELL ET AL., *supra* note 187, at 144–45.

[197] 1958 CONST. arts. 34, 37 (Fr.). Commentators have also noted that the distinction between parliamentary *loi* and *règlement*, at least insofar as parliament's legislation beyond the bounds of art. 34, is not impermeable. L. NEVILLE BROWN & J.F. GARNER, FRENCH ADMINISTRATIVE LAW 12 (3d ed. 1983).

[198] Fr. 1958 Const. art. 37; *see also* L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 11 (4th ed. 1993) (stating that Constitutional requirements for a *loi* to state principles and rules over a large range of areas coupled with the trend toward declassification (where the *Conseil constitutionnel* reviews whether or not an act of Parliament exceeds its art. 34 authority—frequently finding that it does not) both serve to limit executive regulatory authority). *But see* BELL ET AL., *supra* note 187, at 21 (noting concerning the division between *loi* and *règlement*, "[W]hile Parliament is limited to the list, the legislative power of the Government consists of all the rest. The executive appears to be seriously advantaged by this divide.").

immigration context, "nationality, status, and the legal capacity of persons" is a domain of Parliament under Article 34.[199] Beyond this, Parliament may also pass legislation enabling the President to regulate by *ordonannce*, areas of policy ordinarily reserved to it under Article 34.[200] However, such decrees must be first adopted by the Cabinet and then counter-signed by the Prime Minister, and are automatically subject to judicial review, albeit by a different body than ordinary decrees.[201] Insofar as Acts of Parliament are concerned: once enacted, as in Britain, there is no judicial recourse.[202]

Next, we turn to the two courts that have some form of jurisdiction over constitutional questions concerning *règlement* and *ordonannce*: the *Conseil d'Etat* and the *Conseil constitutionnel*. Before discussing the cases themselves, one should note that the value given to precedent in civil law countries like France is distinct from that in common law nations—precedent cannot formally bind courts making later decisions concerning legislation.[203] This principle arose in the context of the French Revolution as a reaction to the former abuse of stare decisis by judges during the monarchy.[204] This practice protecting the power of the legislature and executive from the judiciary has persisted in some form to the Fifth Republic.[205] This has resulted in a short and syllogistic format categorizing most French decisions, relying heavily on the language of the statute in question.[206] The *Conseil d'Etat* and *Conseil constitutionnel* each make several exceptions to these rules that are discussed below.

The *Conseil d'Etat* is the highest administrative law court in the Fifth Republic.[207] Commentators have noted two areas of jurisdiction that are of interest to us here: actions taken by members of Parliament to annul a government decree

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199 1958 CONST. art. 34 (Fr.).

200 ELLIOT & VERNON, *supra* note 185, at 47. The act enabling such regulation must contain time limitations in which the President may produce the *ordonannces* and the time by which Parliament must approve them.

201 *Id*. at 47–48. Additionally, art. 92 of the original constitution granted the government the power to set up institutions necessary for the health and safety of the French people. Authors note that this provision was repeatedly abused and repealed in 1995. *Id*.

202 BROWN & BELL, *supra* note 198, at 12.

203 EVA STEINER, FRENCH LEGAL METHOD 82 (2002).

204 *Id*. at 77–78; BROWN & BELL, *supra* note 198, at 166–67 (noting that while the *Conseil d'Etat* produces caselaw as a common law court does, the principle of stare decisis does not apply and the *conseil* may depart freely from its precedent); ELLIOT & VERNON, *supra* note 185, at 51–52 (specifically noting that judges in the post-Revolutionary period could be fined or barred from performing their function by relying on precedent in lieu of codified law).

205 STEINER, *supra* note 203, at 131–32 (noting again the distinction between the deductive reasoning of civil law systems like France and the concrete-ness of common law jurisdictions).

206 ELLIOT & VERNON, *supra* note 185, at 111.

207 *See id*. at 6.

or *ordonnance*, and proceedings to challenge particular administrative acts.[208] Additionally, the *Conseil* must advise Parliament concerning every *loi* (literally, "law") presented to it by the government.[209] Furthermore, the *Conseil* is similar to a common law court in that almost all administrative law over which it has jurisdiction is judge-made law, but with the twist that this law is persuasive authority, owing to the rejection of stare decisis.[210]

The *Conseil constitutionnel*, operates in a manner distinct from both the US and British systems: like the US system, the *Conseil* passes on the constitutionality of the *loi* presented before it, with an offending statute being ineligible for promulgation and enforcement.[211] However, much like the British system, while its judgments and rationale are considered authoritative among courts, there are limitations on the power of the court—most apparent is the inability to contest a statute's constitutionality after it has been promulgated.[212] Additionally, the French system is unique as only certain persons in government may ask the *Conseil* to determine the constitutionality of a *loi*.[213] Supposing that a law has not been challenged before being promulgated, there is no recourse by individual citizens to the *Conseil*.[214] Given its limited purview, it is questionable whether the *Conseil constitutionnel* is in fact a constitutional court in the usual sense of the term.[215]

B. French Judicial Review and Individual Rights

To understand the effect of a Trump-like French presidency, one must also address the treatment of individual rights, particularly religion, in French law. Unlike the Preamble to the US Constitution, the French Constitution's Preamble serves a legal purpose: to incorporate two other foundational sources of law in the Declaration of Rights of Man and Citizen of 1789 and the Preamble to the Constitution of 1946 as providing constitutional norms.[216] Thus, while courts adjudicate matters of statute, the courts also take into account general principles of French law including that of *laïcité*, or official state secularism.[217] This form of

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208 BROWN & BELL, *supra* note 198 at, 51–52.

209 *Id*. at 61(also noting that Parliament need not countenance the advice).

210 BROWN & BELL, *supra* note 198, at 166–67; STEINER, *supra* note 203, at 82 (discussing factors giving weight to particular decisions).

211 ELLIOT & VERNON, *supra* note 185, at 94.

212 *Id*. at 97.

213 *Id*. at 96. Listing the President, Prime Minister, the Presidents of the National Assembly and Senate, and 60 Members of Parliament, including opposition members. Elliot & Vernon note that the number of cases heard by the *Conseil* in this way is fairly substantial given the access by opponents of the government.

214 ELLIOT & VERNON, *supra* note 185, at 97.

215 *Id*. at 90–91.

216 BELL ET AL., *supra* note 187, at 16–18.

217 1958 CONST. art. 1 (Fr.).

separation of church and state, as well as commitment to a secular public square, constitutes a far more consistent and culturally salient variety than its US counterpart.[218] Its relationship to the present subject of controversy in particular, Islam, has impacted public education,[219] public accommodation,[220] and what in the United States would be considered symbolic speech in the public square.[221] In each instance (except in Cannes), the principle of public French secularism has permitted the majority to restrict the religious expression of the minority where, "a conciliation which is not manifestly disproportionate" between freedom of religion and the safety of the Republic is made.[222] The acceptance of this legislation despite the apparent aim of targeting a particular religious practice would seem to make judicial review to animus-motivated legislation unlikely where the text is facially neutral.[223]

However, a constitutional hurdle is present to any complete restriction on petitions for asylum. The incorporated Preamble to the 1946 Constitution includes a provision guaranteeing the right to asylum to "[a]ny man persecuted in virtue of his actions in favour of liberty."[224] Actions by the government have been held unconstitutional for presenting hurdles to the exercise of this right.[225] However, in so doing, the *Conseil* has acknowledged that "the State is entitled to define the conditions of admission of foreigners to its territory subject to the respect of the

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[218] *Compare* J. CHRISTOPHER SOPER ET AL., THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN SIX DEMOCRACIES 12 (3d ed. 2017) with *id*. at 52.

[219] JANE FREEDMAN, IMMIGRATION AND INSECURITY IN FRANCE 127–141 (2004) (discussing the *Affaire des foulards*, where the exclusion of headscarf wearing girls from a secular school prompted a controversy as to whether their continued use of such clothing constituted, "a sign of failure of the French Republican system to fully assimilate second and third generation immigrants into French society.").

[220] SOPER ET AL., *supra* note 218, at 51 (discussing the decision of the mayor of Cannes, France to ban the wearing of full-body swimsuits on the beach, though suspended by the *Conseil d'Etat*).

[221] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Act prohibiting concealment of the face in public space], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18345 (prohibiting any person from wearing a covering that is intended to conceal the face).

[222] Conseil constitutionnel [CC] [Constitutional Court] decision no. 2010-613DC, Oct. 7, 2010 (Fr.).

[223] SOPER ET AL., *supra* note 218, at 65 ("But the [face covering] ban is widely perceived as targeting the practice of some Muslim women who wear the *niqab*, *burqa*, or other masking clothing.).

[224] 1946 CONST. pmbl. § 4. (Fr.).

[225] Conseil constitutionnel [CC] [Constitutional Court] decision no. 92–307DC, Feb. 25, 1992, Rec. 48 (Fr.) ("[I]t follows that by conferring on the administrative authority the power to maintain a foreigner permanently in a transit zone without reserving the possibility for the judicial authority to intervene as soon as possible. . . [is] contrary to the Constitution.").

international commitments it has subscribed and the principles of constitutional value."[226]

Insofar as administrative action is concerned, judicial review by the *Conseil d'Etat* plays a much more important role in both a substantive and symbolic sense. As immigration advocates have noted, litigation before the *Conseil* is not competent to actually overturn enacted legislation.[227] Nevertheless the *Conseil* can "review all applications of the law, from ministerial decisions to street-level bureaucrats."[228] Additionally, while some writers have noted the eminent symbolic value of victorious litigation at the level of the *Conseil*,[229] it should also be noted that the characteristically syllogistic decisions of the court do not generally provide guidance based on broad human rights themes.[230] In discussing any case, "from the text of the decision alone, it is impossible to know the legal reasoning by which the *Conseil d'Etat* deduced this result."[231]

C. Conclusions on French Constitutional Law

In examining the structure of the French Constitution in isolation, there is much to commend it for in the administrative context. While the ability of the executive to legislate by decree or *ordonnance* is broad, it is checked by the institutional ability of a minority party to challenge its constitutionality through the *Conseil constitutionnel* and by the threat of a vote of no-confidence.[232] Administrative action is likewise reviewed and overturned where statutory law, interpreted through the *Conseil d'Etat*, requires.[233] Yet there is no surplus of judicial review as Parliament may still do as it pleases if no party objects, and in selecting a Prime Minister, the President still holds a powerful lever in making even a divided government productive.

Nevertheless, no constitution really operates in isolation. Two factors in particular make French separation of powers constraints especially problematic in the immigration context. The first is the power of the French presidency over the mechanisms of Parliament. The French President possesses a number of tools for regulation by which a poorly drafted measure or regulation that violates fundamental rights may be promulgated. In the context of immigration, the President's unilateral power is naturally limited given that nationality is a legislative domain under Article 34.[234] However, the ability to choose a compliant Prime

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226 *Id*.
227 LEILA KAWAR, CONTESTING IMMIGRATION POLICY IN COURT 130–31 (2015).
228 *Id*.
229 *Id*.
230 *Id*. at 130.
231 *Id*. at 137.
232 *See generally supra* notes 211–213.
233 *See generally supra* notes 207–210.
234 1958 CONST. art. 34 (Fr.).

Minister or to dissolve Parliament per Article 12 gives the President enormous leverage to push for popular measures and to force Parliament to confront voters if they fail to act. Thus, even if an Act of Parliament (or an Article 37 delegation) does not contain the errors attendant in unreviewed executive action, a President may use the dissolution power in an attempt to compel Parliament to grant delegated power or to act in a manner that is contrary to individual rights.

The second difficulty is *laïcité.* The strong-form state secularism present in France[235] renders judicial protection unlikely for individuals who receive disparate treatment because of the majority religion of their country of origin. This is particularly the case where the difference in treatment need only satisfy a "not manifestly disproportionate" standard.[236] Therefore, regarding fundamental rights protections, it is unlikely that the *Conseil constitutionnel* would prove sympathetic to claims akin to those raised by plaintiffs in the US travel ban cases above, and it is therefore less likely to check excesses. While this is properly a critique of the French conception of fundamental rights, in our context, the inability of a court to intervene with respect to an individual executive action on such grounds implicates the French separation of powers by indirectly conferring more power to the executive by removing a potential backstop.

In attempting to compensate for the parliamentary discord of the Fourth Republic, the modern French Constitution gives substantial power to the executive while allowing for ample room for facially legitimate legislation that takes aim at minority religions. Admittedly, the separation between President and Prime Minister places distance between a hypothetical French President Trump and the type of regulatory power wielded by any given British Prime Minister. This is in addition to the review available for *ordonnances* by the *Conseil d'Etat.* Furthermore, the rule of parliamentary supremacy is somewhat blunted by the availability of judicial review on request by the *Conseil constitutionnel*. However, the ability of the President to regulate all areas not overseen by Parliament; the capacity to pick the Prime Minister and to dissolve Parliament; and the cultural antipathy toward public religion reflected in *Conseil constitutionnel* decisions give substantial room for a potential Front Nationale President to act in an animus-driven manner. In France, the potential for a repeat of a US executive order is far more politically viable than in Britain,[237] and it bears consideration whether the moderation of a semi-presidential system is sufficient to guide the executive to balanced action.

V. CONCLUSION

A comparison of the US separation of powers regime with that of the United Kingdom and France yields several insights into the proper balance between

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[235] SOPER ET AL., *supra* note 218, at 52.

[236] Conseil constitutionnel [CC] [Constitutional Court] decision no. 2010–613DC, Oct. 7, 2010 (Fr.).

[237] *Compare* polls cited *supra,* notes 5–6.

restraint of the executive and fluid decision-making. The primary insight is that a lack of strong-form judicial review places both the United Kingdom and France at risk of seeing rapid or ill-considered changes of policy with no recourse by affected citizens even where fundamental rights are threatened by executive action. The United Kingdom is made vulnerable by the nearly unlimited power that the Prime Minister exercises in guiding policy that is essentially unimpeachable thanks to parliamentary sovereignty. While this commingling of executive and legislative authority does enable quick responses to national emergencies, it is unencumbered by any judicial restraint that could conform such action to fundamental values. To be fair, the advantage of a strong, independent civil service does somewhat mitigate the chance of harm from poorly drafted executive rulemaking, and the *ultra vires* doctrine could be invoked again. However, that hardly removes the damage that can be done through Acts of Parliament that, in other respects, are technically sufficient but motivated by animus and popular sentiment.

The French system does provide further safeguards in the form of a separate President and Prime Minister; however, this particular semi-presidential system poses risks by giving substantial rulemaking power to executive where legislative authority does not extend. In the immigration context, where Parliament is competent to act, a President may use their inherent power to choose a Prime Minister or to dissolve Parliament to face an election in order to pressure an otherwise reluctant legislative branch to adopt unwise policy on the basis of a rapid change in public opinion. Again, while the *Conseil d'Etat* can invoke *ultra vires* when an *ordonannce* that is the result of delegated power is questioned, neither it nor an individual who is disadvantaged by legislation that is not ruled unconstitutional by the *Conseil constitutionnel* has any further recourse. Given the legal consequences of French public secularism discussed above, intervention by the latter court is unlikely in cases where legislation is passed based on animus.

Despite the initial confusion of the executive order issued by President Trump, the power of strong judicial review subjected a questionable executive action to over a year of extensive litigation, and also prompted revision of orders that were embedded with significant technical flaws. While this necessarily dampened the ability of the executive to respond rapidly to changing circumstances, it places a significant backstop on the ability of any given president to enact animus-motivated executive action. While the length of litigation is certainly not ideal in an emergency, the alternatives of mixed power and little judicial review (or rank majoritarian fiat) would seem to sacrifice most individual rights protections for the sake of expediency. The trade-off by the United Kingdom and France is not ideal, particularly in scenarios wherein popular pressure makes political branch protection of minorities untenable. This does not preclude all rapid executive action in the face of emergency. As Justice Jackson points out in his *Youngstown* concurring opinion, "we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency," namely grants of Congressional authority to the President.[238]

[238] *Youngstown*, 343 U.S. at 652 (Jackson, J., concurring).

This coupled with judicial oversight allows the balance of expediency and rights protection to be better realized than under systems whereby ill-considered or ill-intended executive force may stretch out its hand against individuals by way of parliamentary supremacy or semi-presidential pressure.