

EXECUTIVE POWER. RE THINKING THE MODALITIES OF CONTROL*

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INTRODUCTION

Let me begin by expressing my gratitude to Dean Levi for having invited me to deliver this Lecture and to Dean Kerry Abrams who not only maintained the invitation but has also extended me an extremely warm reception. It is an honor for me to speak to you on a subject of enduring importance. The task of controlling executive power, or indeed, of controlling governmental power of any form, is the first project of constitutionalism, and it is a challenge that we all must confront.¹ This task

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** Chief Justice, Supreme Court of Singapore. I am deeply grateful to my colleague, Assistant Registrar Scott Tan, and my law clerk, Ho Jiayun, for their assistance in the research for and preparation of this lecture.

1. CHARLES H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21 (Liberty Fund 2008) (1947) (“[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”); Albert H. Y. Chen, *The Achievement of Constitutionalism in Asia: Moving Beyond ‘Constitutions without Constitutionalism’*, in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 1, 16 (Albert H Y Chen ed., 2014) (“Constitutionalism is concerned with . . . the design and operation of those ‘techniques of liberty’ that are put into effect and used by the constitution for the purposes of

becomes especially critical in difficult or dangerous times because it is in these situations that societies sometimes countenance that which would at other times have seemed unthinkable.

Take the *Korematsu* decision,² for instance, where a majority of the Supreme Court – “swept up [as they were] in the war and its passions”³ – acquiesced to an extraordinary assertion of executive power in the name of responding to a hostile power, even though it came at the expense of the rights of an innocent minority. *Korematsu* has long been seen as a stain on American jurisprudence, and it was finally overruled just this year,⁴ but it is by no means unique. Across the Atlantic, and in much the same context, a majority of the House of Lords in *Liversidge v Anderson*⁵ upheld the emergency powers vested in the British Home Secretary in 1939, which allowed him to detain all whom he had “reasonable cause” to *subjectively* believe to be of “hostile origin or associations”. The majority, influenced by the fact that the nation was facing an existential crisis like none other in its history, held that as long as the Court was satisfied that the Secretary had acted in good faith, he would not have to disclose the basis for his decision nor could the Court inquire into it.

While states and governments are vested with immense power which is generally exercised for the good of their societies, power needs to be controlled and managed, perhaps especially in times of threat and danger. The management and control of power, and, in particular, the endeavor to strike the appropriate balance between affording governments the ability to act swiftly and decisively in the public interest while providing for adequate safeguards against governmental excess, is an intensely difficult undertaking. There is no one model that is correct for all times and all places. How that balance is struck will depend greatly on the fears, hopes and aspirations of the designers of any given constitution. In that context, the aim of my lecture today is therefore a modest one. I hope to share with you some of the salutary lessons that we have learnt from our experience in Singapore, contrasting it where appropriate with what I know of your experience, in the hope that there might be something here that is of interest to you.

I plan to divide my lecture into three parts. First, I will provide a brief overview of the control of executive power as it has developed in America

constraining, controlling and regulating the exercise of political power by government, preventing power from being arbitrary or absolute . . .”).

2. *Korematsu v. United States*, 323 U.S. 214 (1944).

3. Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1466 (2010).

4. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

5. *Liversidge v. Sir John Anderson* [1942] AC 206.

and Singapore to explain how the models our respective countries have developed are the products of our own unique historical circumstances. While we share a commitment to the notion of the separation of powers, we differ in the minutiae of its application. And so in the second part of my lecture, I will examine how the control of executive power is achieved to a significant degree through some mechanisms for intra-branch control in the Singapore Constitution. These, involve among other things, (a) insulating pockets of executive power from the political center of the Executive in order to preserve their apolitical nature and (b) dividing certain vital powers between different independent centers of executive power. But these forms of intra-branch checks do not obviate the need for judicial review, the exercise of which raises fundamental questions as to the proper conception of the judicial role. Hence, in the third part of my lecture, I will discuss the position in Singapore, where we have found that executive power can best be checked when courts eschew politics and secure a relationship of trust and respect between the three branches by recognising and maintaining the legitimate space of each.

I. THE LEGAL CONTROL OF EXECUTIVE POWER: TWO MODELS

Let me begin with a brief history of the control of executive power. In medieval England, the Crown exercised all powers of the state, subject only to vague limits defined by practical exigencies.⁶ Parliament and Cabinet began as advisors to the King, rather than independent institutions, and they were summoned only sporadically at the King's pleasure.⁷ And while justice between subjects was administered by the Royal Courts and the King's Parliament, this was all done expressly in the name of the throne.⁸ In the words of the great legal historian, F.W. Maitland, all of the core institutions of the state were but "emanation[s] of kingly power."⁹

6. *R v. Secretary of State for Exiting the European Union* [2017] UKSC 5 (appeal taken from N. Ir.) [hereinafter *Brexit Decision*].

7. PETER CANE, *CONTROLLING ADMINISTRATIVE POWER: A HISTORICAL COMPARISON* 27 (2016).

8. *Id.* at 25, 27; CHARLES H. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: A HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* (1910).

9. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 298 (1919).

Over the centuries, the powers of the Crown were gradually constrained as Parliament grew in stature.¹⁰ After the Rebellion,¹¹ the Restoration¹² and the Glorious Revolution,¹³ it was finally settled that Parliament would wield supreme law-making authority, thus ousting the Crown's personal power to make, suspend, or dispense with laws.¹⁴ The common law courts then assumed prominence as interpreters of the Acts of Parliament, which paved the way for an independent Judiciary.¹⁵ Over time, the Westminster model, as it has come to be called, has been defined by a "basic concept of separation of legislative, executive and judicial power."¹⁶

A. The American Model

For your Founding Fathers, the separation of powers was no abstract philosophical principle, but one of the preeminent "inventions of prudence."¹⁷ Fueled by a deep distrust of power and suspicion of the human nature, the strategy that your Founding Fathers devised was not just to separate power between the three branches,¹⁸ but to do so in a way that ensured that their allocation would not be cleanly divided. By design, the powers of each of the branches are intricately connected and blended such as to give each a measure of control over the others.¹⁹ It was hoped that the resulting clash of competing ambitions that this produced would incentivise each to keep the others in check.²⁰

10. By 1611, the common law courts were challenging the Crown's powers to personally administer justice and create new crimes without an Act of Parliament. *See the Case of Prohibitions* (1607) 77 Eng. Rep. 1342; 12 Co Rep 64; *Case of Proclamations* (1611) 77 Eng. Rep. 1352; 12 Co Rep 74. By 1628, the Commons was disputing assertions of prerogative power to raise loans and impose taxes: *see The Petition of Right* (1628), *reprinted in* COLIN R. LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* 305 (1962).

11. In broad strokes, the English Civil War broke out in 1642 between the parliamentarians and the royalists over sustained attempts by King Charles I to rule without the Houses of Parliament. *See generally* Charles F. Atkinson, *Great Rebellion*, in Hugh Chisholm, *ENCYCLOPEDIA BRITANNICA* 403–421 (11th ed. 2011).

12. In 1660, after a period of non-monarchical rule under Oliver Cromwell, the monarchy was restored under King Charles II. *See generally* N.H. Keeble, *THE RESTORATION: ENGLAND IN THE 1660S* (2002)

13. MAITLAND, *supra* note 9, at 281.

14. Bill of Rights 1688 (Eng. and Wales); Claim of Right 1689 (Scot.); MAITLAND, *supra* note 9, at 302.

15. CANE, *supra* note 7, at 33.

16. *Moses Hinds v. The Queen* [1977] 1 AC 195 (PC) (appeal taken from C.A. of Jam.) at 212.

17. THE FEDERALIST No. 51 (James Madison).

18. *See* U.S. CONST. art. I, art. II, art. III, and art. VI, § 2.

19. *See* THE FEDERALIST No. 48 (James Madison).

20. *See* THE FEDERALIST No. 51, *supra* note 17.

In a sense, the American system was deliberately designed to produce friction and conflict, for its very premise is that it is only by the push and pull of opposing forces that power can be held in check. Yours is a system that demands tact, compromise, and a degree of negotiation if it is to work effectively; but sometimes, this will not be forthcoming, and the result – as we have seen recently – could be spectacular logjams and even the shutdown of the Federal Government.²¹ It might surprise some of you, as it did me, that this was something your Founding Fathers were not only cognizant of, but quite prepared to accept.²²

James Madison wrote in *Federalist 62* that the intricate division of powers in your Constitution “may in some instances be injurious as well as beneficial,” as it stymies the passage of legislation.²³ Gridlock was a price which your Founding Fathers were willing to pay in order to avert what they saw as the far greater danger of the accumulation of power and the beginning of tyranny.²⁴ It is a price that the United States, a vast country blessed with a wealth of natural resources, a large population base, and universities that are the envy of the world, might uniquely – perhaps exceptionally – be able to afford. But gridlocks are utterly unthinkable to a city-state like Singapore, which has no natural resources, trades on a reputation for good governance and efficiency, and relies on this for its very survival.

B. The Singapore Experience

If the American Constitution is the product of “reflection and choice,” then it may be said that the Singapore Constitution – and, indeed, our road

21. In October 2013, in the midst of a political standoff over the implementation of the Patient Protection and Affordable Care Act, 111 P.L. 148, 124 Stat. 119, the U.S. Congress refused to pass an appropriations bill for the 2014 fiscal year, leading to a shutdown of the U.S. government for sixteen days. See Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991, 994–95 (2014). More recently, a lapse of an appropriations bill in January 2018 caused a three-day shutdown. See Sheryl G Stolberg and Thomas Kaplan, *Government Shutdown Ends after 3 days of Recriminations*, NEW YORK TIMES (Jan. 22, 2018), <http://www.nytimes.com/2018/01/22/us/politics/congress-votes-to-end-government-shutdown.html>.

22. See generally Jeff Jacoby, Opinion, *Gridlock, or Democracy as Intended?*, BOSTON GLOBE (Dec. 25, 2011), <https://www.bostonglobe.com/opinion/2011/12/25/gridlock-democracy-intended/EJlqriPsRHqeW9wxIAhtMK/story.html>; David B. Rivkin, Jr. and Lee A. Casey, Opinion, *Why Gridlock in Washington Is Good*, WALL STREET JOURNAL (Feb. 22, 2010, 7:53 PM), <https://www.wsj.com/articles/SB10001424052748703787304575075503388049196>; David G. Savage, *Justice Scalia: Americans ‘Should Learn to Love Gridlock’*, LOS ANGELES TIMES (Oct. 5, 2011), <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005>.

23. THE FEDERALIST No. 62 (James Madison).

24. See Young, *supra* note 21, at 998–99 (observing that “there is a willingness among members of the US legislature to tolerate the possibility of a government shutdown, or at the very least the disabling of certain government services, that is not found elsewhere” and noting that the 2013 U.S. government shutdown cost an estimated two to six billion dollars in lost output).

to independence – was the product of “accident and force.”²⁵ Although our Founding Fathers were ardent anti-colonialists, they never in fact conceived of an independent existence for Singapore.²⁶ When we were freed of British rule in 1963, we sought secure passage to stability and prosperity as a constituent state of the Federation of Malaysia. But just two years later, on August 9, 1965, we seceded from the Federation by mutual agreement following deep and irreconcilable political and economic differences with the Federal Government in Kuala Lumpur.²⁷ That left us bereft in the world, with no easy route to survival and stability, let alone significance or influence.

Singapore’s tiny scale and immense vulnerability is probably difficult for an American audience to identify with, but let me provide you with a point of comparison. Singapore at the time of independence was a small nation of just over 224 square miles,²⁸ or about a fifth of the size of Rhode Island. Its nominal GDP per capita was about US\$500; and it had no natural resources, no hinterland, and no industry. It depended entirely on other nations for food, energy, and even that most basic of resources: water.²⁹

25. See THE FEDERALIST No. 1 (Alexander Hamilton) (drawing distinction between good governments established by “reflection and choice” versus “accident and force”).

26. As Singapore’s founding Prime Minister famously said at a press conference shortly after Singapore’s secession from the Malaysian federation: “For me, it is a moment of anguish because all my life . . . you see, the whole of my adult life . . . I had believed in Merger and the unity of these two territories. You know, it’s a people connected by geography, economics, and ties of kinship.” National Archives of Singapore. *Transcript of a Press Conference Given by the Prime Minister of Singapore, Mr Lee Kuan Yew, at Broadcasting House, Singapore, at 1200 Hours on Monday 9th August, 1965*, 21–22 <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19650809b.pdf>. See also Constance M. Turnbull, A HISTORY OF MODERN SINGAPORE 1819–2005 273 (2009); Edwin Lee, SINGAPORE: THE UNEXPECTED NATION 203–12 (2008).

27. Among other things, the leaders in Singapore were frustrated at the slow pace of the establishment of the common market while the Federal Government was unhappy with the Singapore Government’s slow response to the Federal Government’s call for revenue to be raised to fund the response to the Indonesian Confrontation and development in the states of Sabah and Sarawak. But most of all, the two sides disagreed fundamentally on the special position of the Malay community. The People Action Party, which was in power in Singapore, championed a vision of a “Malaysian Malaysia”, which discomfited leaders in the United Malays National Organisation, which viewed this vision of a non-communal Malaysia as a direct challenge to their core belief on the special position of the Malay community: See Lau Teik Soon, Malaysia-Singapore Relations: Crisis of Adjustment, 1965–68), 10 J. SOUTHEAST ASIAN HIST. 155, 159–60 (1969); R.S. Milne, *Singapore’s Exit from Malaysia; the Consequences of Ambiguity*, 6 ASIAN SURVEY 175 (1966); Edmund Lim, *Behind the Scenes: What Led to Separation in 1965*, THE STRAITS TIMES (Sing.) (Aug. 5, 2015), <https://www.straitstimes.com/opinion/behind-the-scenes-what-led-to-separation-in-1965>.

28. Government of the Republic of Singapore, *Total Land Area of Singapore*, <https://data.gov.sg/dataset/total-land-area-of-singapore>. Following extensive land reclamation works undertaken since independence, Singapore has increased its total land area to approximately 278 square miles.

29. Ravi Menon, Managing Director, Monetary Authority of Singapore, Keynote Address at the Singapore Economic Review Conference 2015, “An Economic History of Singapore: 1965–2065” (Aug.

Geopolitically, the position was precarious. Singapore had no military of its own, and it depended heavily on the British Armed Forces, both for its defense and its economy. The British bases contributed over 20% of Singapore's gross national product, and employed some 25,000 people, all of whom lost their jobs when the British military pulled out in 1971.³⁰

Constitutionally, the situation was a mess.³¹ Before Separation, the Constitution of Singapore was contained in two documents: the Federal Constitution of Malaysia and the State Constitution of Singapore.³² After Separation, the former no longer applied to Singapore,³³ while the latter was not designed for a sovereign nation-state.³⁴ It was clear that something had to be done, and so, our first Parliament passed two Acts.³⁵ The first of these enacted a series of important changes to the State Constitution of Singapore to make it fit for the purposes of a sovereign nation,³⁶ while the second, the Republic of Singapore Independence Act, provided for the continuing legal force of several provisions of the Federal Malaysian Constitution, such as those relating to fundamental liberties.³⁷

5, 2015), available at <http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2015/An-Economic-History-of-Singapore.aspx>.

30. See *Lee begins talks to avert total British pull-out by 1975*, THE STRAITS TIMES (Sing.), June 27, 1967, at 18; Lee Kuan Yew, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY, 1965–2000, 32–47 (2000).

31. The history of the Singapore Constitution is somewhat convoluted, but a summary may be found in Chan Sek Keong, *Basic Structure and the Supremacy of the Singapore Constitution*, 29 SING. ACAD. L.J. 619, 637–40 (2017).

32. Agreement Relating to Malaysia, art. I, July 9, 1963, 750 U.N.T.S. 3. (“1963 State Constitution”); see also THIO LI-ANN, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW para 02.089. (2012).

33. Pursuant to the Constitution and Malaysia (Singapore Amendment) Act, a Malaysian enactment which was passed to give effect to Separation, the Malaysian Constitution ceased to apply to Singapore as at 9 August 1965 and all powers previously possessed by the Malaysian federal government were transferred to the new government of Singapore. Constitution and Malaysia (Singapore Amendment) Act (Act No. 53/1965) (Malay.).

34. Among other things, it contemplated a Legislature of limited competence that would only be able to enact laws set out in the Lists to the 1963 State Constitution. In *Essays in Singapore Law*, Hickling opines that “Singapore was cast adrift in a friendless world, with the wreckage of a constitution designed for its existence as a state within a federation.” R. H. HICKLING, ESSAYS IN SINGAPORE LAW 31 (Pelanduk Publications, 1992).

35. Constitution (Amendment) Act (Act No. 44/1965) (Sing.); Republic of Singapore Independence Act (Act No. 9/1965) [hereinafter RSIA].

36. For instance, Parliament did away with the super-majority rule for amendments to the State Constitution, in favour of amendments by a simple majority in order to facilitate speedy amendments to the Constitution where necessary. Furthermore, various other provisions, such as that providing for the calling of a by-election within three months of a casual vacancy of a seat of a Member of Parliament, were excised on the basis that they were “irksome and cumbersome.” *Singapore Parliamentary Debates, Official Report* (Dec. 22, 1965) vol. 24 at cols. 432–33 (Lee Kuan Yew, Prime Minister).

37. RSIA also re-constituted the various powers of the executive, legislative and judicial bodies for a sovereign Singapore.

In this way, the Singapore Constitution, such as it was, came to be found in three separate documents: (a) the Singapore State Constitution, (b) the Republic of Singapore Independence Act, and (c) the Federal Malaysian Constitution, insofar as it was made applicable to Singapore. Mr. David Marshall, a prominent lawyer and former Chief Minister of Singapore, once observed that Singapore had “the untidiest and most confusing constitution that any country has started life with.”³⁸ But these theoretical difficulties were of little moment to a fledgling state on the edge, struggling to survive. The exigencies of Separation had produced within our Founding Fathers a steely streak of pragmatism.³⁹ Our founding Prime Minister, Mr. Lee Kuan Yew, declared that the “main thing about the Constitution is that *it must work*.”⁴⁰ He said that the Constitution would be:

...workmanlike, with a **fair spread of the powers** of Executive authority, **checks and balances for a proper account of the use of these powers**, and, most important of all, ensure without major amendment the continuance of **good and orderly government**.⁴¹

For Singapore, “the continuance of good and orderly government” was, and still is, the prime directive. For a tiny and resource-poor country, Singapore has survived, and even thrived, because we have succeeded in harnessing all the resources of the nation towards the single goal of securing our people’s well-being.

Central to our constitutional culture, therefore, is a preference for conflict-avoidance, and “consensus over contention.”⁴² An example will illustrate this point. To set the context, I should explain that we have a Westminster system of parliamentary democracy under which the Prime

38. David Marshall, *Singapore’s ‘Untidy’ Constitution*, THE STRAITS TIMES (Sing.), Dec. 21, 1965, at 12.

39. Kevin YL Tan, *State and Institution Building Through the Singapore Constitution 1965–2005*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 77* (Thio Li-ann & Kevin YL Tan, eds., 2009).

40. *Singapore Parliamentary Debates, Official Report* (Dec. 22, 1965), vol. 24 at col. 448 (Lee Kuan Yew, Prime Minister) (emphasis added).

41. *Id.* at col. 448–49 (emphasis added).

42. See Parliament of Singapore, White Paper, *Shared Values* (Paper Cmd. No. 1 of 1991). This is the fourth of the five values promulgated in the so-called “Shared Values White Paper”, which was laid before the Singapore Parliament in 1991. A Singaporean constitutional scholar has described this White Paper as the “concrete articulation of what Asian values, away from the abstracted realms of international relations, might look like at the domestic level.” LI-ANN, *supra* note 32, paras 02.025 and 02.049–02.054. This is the fourth of the five values promulgated in the so-called “Shared Values White Paper”, which was laid before the Singapore Parliament in 1991. PARLIAMENT OF SINGAPORE, SHARED VALUES para. 52 (1991), available at https://www.academia.edu/1740666/White_paper_on_shared_values_1991. A Singaporean constitutional scholar has described this White Paper as the “concrete articulation of what Asian values, away from the abstracted realms of international relations, might look like at the domestic level.” LI-ANN, *supra* note 32, at para. 02.025; see also *id.* at paras. 02.049–02.054 (explaining the value of consensus over contention with reference to Singaporean society and policy).

Minister and his Cabinet govern, and the President, as the non-executive Head of State, must act in accordance with the advice of the Cabinet in all matters save those the Constitution reserves to her discretion.⁴³

With the introduction of the Elected Presidency, of which I will say more later, a raft of provisions was introduced into the Constitution to frame the powers of the President. Among these was Article 22H, which provided that the President may in her discretion withhold assent to a Bill that provided for the “circumvention or curtailment” of her discretionary powers.⁴⁴ Due to an error in drafting, the amplitude of the Article appeared to embrace *both* constitutional and non-constitutional provisions when it was evidently only intended to apply to the latter.⁴⁵ In July 1994, the Government of the day sought to introduce a Bill to amend Article 22H to make that clear, but the President advised the Government that because the amendment would seemingly curtail his powers, he would exercise his discretion to veto the Bill.⁴⁶ The Government, on the other hand, took the view that the President had no such discretion.⁴⁷

The stage was set for a constitutional impasse. The President said that he would abide by any ruling which the courts rendered, but in Singapore,⁴⁸ as in the United States,⁴⁹ courts do not decide hypothetical cases. The Government could have forced the issue by seeking to pass the Bill to invite a veto and in so doing create a controversy for the courts to rule on, but it did not do that. It instead chose to amend the Constitution to provide for the creation of a Constitutional Tribunal that would be empowered to give advisory opinions in response to questions referred to it.⁵⁰ A tribunal was duly set up and it eventually ruled in favor of the Government.⁵¹ The

43. Constitution of the Republic of Singapore July 1, 1999, art. 21.

44. Constitution of the Republic of Singapore March 31, 1980 art. 22H.

45. *Singapore Parliamentary Debates, Official Report* (Aug. 25 1994) vol. 63 at cols. 429–430 (BG Lee Hsien Loong, Deputy Prime Minister, Prime Minister’s Office).

46. Thio Li-Ann, *Working Out the Presidency: The Rites of Passage*, SING. J. LEGAL STUD. 509, 528–29 (1995).

47. *Singapore Parliamentary Debates, Official Report* (Aug. 25, 1994) vol. 63, at col. 431 (BG Lee Hsien Loong, Deputy Prime Minister, Prime Minister’s Office).

48. *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 S.L.R. 156 (Sing.) at [84].

49. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (holding that courts only have jurisdiction over actual cases or controversies).

50. The Constitution of the Republic of Singapore (Amendment No. 2) Act 1994 (No. 17 of 1994) introduced a new art. 100 in the Singapore Constitution which empowers the President to “refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision in this Constitution which has arisen or *appears to him likely to arise*” [emphasis added]. CONSTITUTION OF THE REPUBLIC OF SINGAPORE (AMENDMENT NO. 2) ACT 1994 (Sing.).

51. Constitutional Reference No 1 of 1995 [1995] 1 S.L.R.(R) 803. This decision was examined in two lengthy law review articles published by members of the two legal teams. The first was by Ms Thio Li-Ann, then a lecturer at the National University of Law and who assisted in the preparation of the

President accepted the ruling, and the matter was resolved in an orderly and eventually non-adversarial manner.

Of course, the instinct for conflict-avoidance does not mean that the Singapore Constitution is unconcerned about the accumulation of power. Instead, it seeks to constrain that power in two main ways. The first is through a system of intra-branch controls which achieves a “fair spread of executive authority,” the second is through a system of “checks and balances,” the most prominent of which is judicial review. I will discuss each in turn.

II. INTRA-BRANCH CONTROLS

Let me start with intra-branch controls. A central paradox of the Westminster model of parliamentary democracy is the fact that even though it separates the powers of the state between the three branches, it also contemplates what has been famously described as the “close union, the nearly complete fusion of the executive and legislative powers.”⁵² In the Westminster system, the executive power of the state is largely exercised by a Cabinet of ministers drawn from the majority party in Parliament. What this means, at least theoretically, is that the Cabinet will almost always be able to implement its policies through the passage of legislation in Parliament. This is the so-called “efficient secret” of the English Constitution,⁵³ and it may be contrasted with the American presidential system, where the Legislature and the Executive are distinct entities, each with its own democratic mandate.⁵⁴

To check the power of the so-called “Parliamentary Executive,”⁵⁵ the Singapore Constitution diffuses certain powers within the executive branch by distributing it to different offices, each of which may enjoy a measure of autonomy from the Cabinet.⁵⁶ This takes place in two principal ways. The first, which I term “hard diffusion,” involves the creation of independent executive offices that are vested with exclusive authority over certain

Presidency’s case. *See generally* Thio, *supra* note 46. The second was by the then Attorney-General himself, Mr Chan Sek Keong, who acted for the Government. *See generally* Chan Sek Keong, *Working Out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal*, SING. J. LEGAL STUD. 1 (1996).

52. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 9 (Cambridge University Press, 2012).

53. *Id.* at 8.

54. MICHAEL ROSENFELD & ANDRAS SAJO, *OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW* 553–54 (Oxford University Press, 2012).

55. A TREATISE ON SINGAPORE CONSTITUTIONAL LAW, *supra* note 32, at 161.

56. *See* CANE, *supra* note 7, at 8–10 (distinguishing between systems of “concentration,” which control power through accountability mechanisms, and systems of “diffusion,” which control power through checks and balances that require collaboration between actors).

executive functions. The second, which I call “soft diffusion,” involves the attenuation of power by giving more than one office in the executive branch a share in its exercise. To illustrate each of these, I will briefly discuss the offices of the Attorney-General and the Elected Presidency.

A. The Attorney-General

Robert Jackson, a former Attorney-General of the United States and later an Associate Justice of the Supreme Court, once said that a prosecutor “has more control over life, liberty, and reputation than any other person in America.”⁵⁷ There is perhaps some hyperbole in that statement, but it is not far off the mark. The independence of the prosecutorial function is critical, because it prevents the awesome power of the state from being manipulated for partisan ends and ensures the fair application of the criminal law.⁵⁸ In Singapore, the prosecutorial function – despite being an incident of executive power⁵⁹ – is completely divested from the Cabinet and constitutionally vested solely in the Attorney-General, who has full power to decide all matters concerning the institution, conduct, and termination of prosecutions.⁶⁰

It is critical to note that under our Constitution, the Attorney-General is neither a member of the Cabinet nor a politician,⁶¹ but a professional lawyer who is appointed by the President, serves until retirement or for the duration of his term, and can only be removed for cause.⁶² He wears two hats. First, he is the Government’s legal advisor, and in that role, his relationship with

57. Robert H. Jackson, *The Federal Prosecutor*, 31 J. OF AM. INST. OF CRIM. L. AND CRIMINOLOGY 3 (1940).

58. Kumaralingam Amirthalingam, *Prosecutorial Discretion and Sentencing in Singapore* NUS L. WORKING PAPER 1, 2–3 (2016).

59. Ramalingam Ravinathan v. Attorney-General [2012] SGCA at 44 (Sing.).

60. CONSTITUTION OF THE REPUBLIC OF SINGAPORE art. 35(8) (Sing.); *see also* 68 Criminal Procedure Code § 11(1) (2012) (Sing.).

61. When self-government for Singapore was imminent, a Constitutional Commission set up to prepare a constitution for federal Malaya made a conscious choice to depoliticize the Attorney-General’s office and convert it into a purely professional office. The concern was that it would be too challenging for an inexperienced new government to keep the Attorney-General’s professional functions distinct from other core executive and legislative roles previously performed by him. *See REP. OF THE FED. OF MALAYA CONST. COMM’N* para.127 (1957). Similar apolitical prosecutorial offices of the Attorney-General can be found in Cyprus, Malaysia, Malta, Pakistan, and Sri Lanka.

62. The nominees for the position of Attorney-General are chosen by the Prime Minister, who must consult the current office-holder, the Chief Justice, and the Chair of the Public Service Commission in deciding on the nominees. However, the appointment is made by the President, who acts in his discretion in deciding whether to concur with the advice of the Prime Minister. CONSTITUTION SING., *supra* note 60, at art. 22(1), 35(1)–(2). The Attorney-General can only be removed for cause by the President on the advice of the Prime Minister, but only if the President and an independent judicial tribunal concur. *Id.* art. 35(6). His remuneration is determined by the President and cannot be amended to his disadvantage during his tenure. *See id.* art. 35(11)–(12).

the Government is that of attorney and client,⁶³ advising and acting for the Government in a range of legal matters. Second, he is also the Public Prosecutor and in that capacity acts independently in deciding who to prosecute, and what charges to bring.⁶⁴

The vesting of prosecutorial power exclusively in the Attorney-General is a form of a “hard diffusion” because it places a pocket of executive power completely outside the reach of the Cabinet. The fact that the Attorney-General’s power over prosecution stems from an independent constitutional grant is critical to this arrangement. Our apex court has described the office of the Attorney-General as a “high constitutional office[]”⁶⁵ equal in status with that of the Judiciary.⁶⁶ It is a matter of settled law and practice that the Attorney-General takes all prosecutorial decisions without executive interference⁶⁷ and his decisions are only subject to judicial review on the grounds of abuse, malice and bad faith.⁶⁸

The position in the United States, as I understand it, is somewhat different. At least since Watergate, successive US Presidents have recognized the importance of prosecutorial independence and have established policies to avoid inappropriate contact between the White House and the Department of Justice.⁶⁹ However, as contemporary events have revealed, it is at least an open question whether it would actually be *illegal* for the Presidency to interfere with the prosecutorial process.⁷⁰

The difference is that Art II of the US Constitution vests the “executive Power [of the United States] in *a* President of the United States of America”⁷¹ who has the constitutional obligation to “take Care that the Laws be faithfully

63. *Id.* art. 35(7).

64. Ramalingam Ravinthran v Attorney-General [2012] 2 S.L.R. 49 (Sing.) at [53]; see Attorney-General Lucien Wong, Singapore Law Review Lecture 2017: Prosecution in the Public Interest (Oct. 19, 2017), <http://www.agc.gov.sg/docs/default-source/default-document-library/singapore-law-review-annual-lecture-2017—prosecuting-in-the-public-interest.pdf>.

65. Yong Vui Kong v Attorney-General [2011] 2 S.L.R. 1189 at 139 (Sing.).

66. Ramalingam Ravinthran v Attorney-General [2012] 2 S.L.R. 49 (Sing.) at [43] (citing Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 S.L.R.(R) 239 (Sing.) at [144]).

67. Past Attorneys-General have all attested to the fact that Cabinet Ministers and officials in the Civil Service are respectful of the independence of the Attorney-General in this area and do not seek to influence his decisions. See AG Lucien Wong, *supra* note 64, paras. 18, 20; Prime Minister Lee Hsien Loong, Speech at the 150th Anniversary of the Attorney-General’s Chambers (Mar. 31, 2017); Attorney-General V K Rajah, Speech at the Opening of the Legal Year 2017 (Jul. 31, 2017), para. 21.

68. Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 S.L.R.(R) 239 (Sing.) at [148]–[49]; *Ramalingam Ravinthran v Attorney-General* [2012] 2 S.L.R. 49 (Sing.) at [17].

69. Andrew M Wright, *Justice Department Independence and White House Control*, 121 W. VA. L. R. 100, 103 (2018).

70. See generally, Bruce A Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1, 1–3 (2018) and the authorities cited therein.

71. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

executed.”⁷² Unlike in Singapore, federal prosecutors derive their power not from an independent constitutional grant but from an Act of Congress, namely, Section 35 of the Judiciary Act of 1789.⁷³ Thus, strong proponents of a unitary Executive contend that the Attorney-General and the Department of Justice which he heads are but the “hands of the President”⁷⁴ and are subject to his direct supervision and control.⁷⁵ This extends, they would say, not only to the power to remove any office holder,⁷⁶ but also to substitute and nullify subordinate decisions, including prosecutorial decisions made in individual cases.⁷⁷ As against this, there are those who argue that the picture is less than clear, and that reasons of history, precedent, and policy suggest that the prosecutorial function is independent of Presidential direction.⁷⁸

It is quite beyond the scope of this Lecture to wade into this debate about the proper interpretation of the Vesting and Take Care clauses, and I do not think it my place to do so. However, I will offer two observations. First, I suggest that it might be helpful to develop an expanded taxonomy of power. While the trinitarian separation of legislative, executive, and judicial powers continues to be fundamental, it may well be insufficient. Given the enormous growth in the size and complexity of the modern administrative

72. U. S. CONST. art. II, § 3.

73. The Judiciary Act of 1789, 1 Stat 73 ch. 20 (1789); *see also* 28 U.S.C. § 503 (1966) (establishing the US Attorney-General as head of the Department of Justice and an appointee of the U.S. President with the consent of the Senate).

74. *Ponzi v. Fessenden*, 258 U.S. 254, 261 (1921).

75. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (the Attorney General and U.S. Attorneys were described as being “designated by statute [*ie*, the Judiciary Act of 1789] as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed’.” In this regard, *see also* The Memorandum of the Office of Legal Counsel, Proposals Regarding an Independent Attorney General (Apr. 11, 1977) (advising that legislation providing for the US Attorney-General to be appointed for a definite term and removed from office only for malfeasance would be unconstitutional). For a contrary view, *see* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 YALE L.J. 2246 (2006) (proposing a constitutional amendment for the US Attorney-General to be independently and directly elected).

76. *Myers v. United States*, 272 U.S. 52 (1926).

77. STEPHEN G. CALEBRASI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); *cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (despite arguing for robust Presidential management over the administration, Kagan draws the line when it comes to criminal prosecutions due to the need for insulation from personal or political interests); Luke M. Milligan, *The “Ongoing Criminal Investigation” Constraint: Getting Away With Silence*, 16 WM & MARY BILL RTS J. 747, 756 (2008).

78. *Wright*, *supra* note 69, at 37–42 (arguing that the President’s Take Care obligations are defined by the particular enactments at issue; and that while some laws require a pure line of presidential authority for their faithful execution, others, including those providing for the institution of criminal prosecutions, call for presidential faithfulness in the form of circumscribed interference); *see also* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. (forthcoming) (arguing that the President’s power to hire and fire executive branch officials is disaggregated from the power to instruct them).

state, some have suggested that there is value in reflecting more deeply about the breadth of the functions that the executive branch performs today, and in considering whether it is necessary for some of those to be devolved to autonomous agencies or offices that operate either outside the control of the political center of executive power,⁷⁹ or in such a way that control is attenuated.

Second, and relatedly, I suggest that the identification and selection of such powers as might be so devolved is one for each polity to make, in the light of its own experiences and particular policy imperatives. In Singapore, aside from securing the constitutional independence of prosecutorial discretion, the need to safeguard our national reserves and the integrity of the public service are examples of areas seen as being of such importance that it has led to changes in the allocation and distribution of executive power through the introduction of the Elected Presidency, to which I shall now turn.

B. The Elected President

Before 1991, the Presidency, or – as it was known before Separation – the office of the Yang di-Pertuan Negara, was, in the Westminster tradition, a symbolic office.⁸⁰ In 1988, a White Paper proposing the transformation of the Presidency was laid before Parliament.⁸¹ Its authors noted that at the time, the Singapore Constitution granted the Prime Minister and the Cabinet “complete legal access to all the levers of power and decision-making”⁸² and did not incorporate some of the checks and balances that are commonly found in other nations, such as the presence of a second legislative chamber with powers of veto and delay.⁸³ To address this, they proposed two changes.

First, they proposed that the Presidency be converted from an appointed office to an elected one, which would endow the President with an independent democratic mandate and thus the moral authority to stand up to a popularly-elected Government. Second, they proposed that the President be granted powers to check the Government’s management of two key strategic national assets, namely, our accumulated financial reserves and the public service. It was suggested that where the Government sought to draw down on the “past reserves” – that is, reserves accumulated outside the term

79. See Neal Katyal, *Internal Separation of Powers*, 115 Yale L.J. 1314 (2006); see also Green & Roiphe, *supra* note 78, at 70.

80. *A Treatise on Singapore Constitutional Law*, *supra* note 32, para 9.006.

81. Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services (Cmd 10 of 1988, 29 July 1988) (“First White Paper”) para. 18.

82. First White Paper, para. 12.

83. First White Paper, paras. 13–14.

of office of the Government of the day – or to appoint someone to high public office, the independent concurrence of the President should be obtained.

The White Paper described this as a “two-key” system in which.⁸⁴

The Prime Minister and Cabinet will possess one key and will take the initiative. For their decision to be valid, the second key must be used; namely, the President must concur.

Those recommendations were largely accepted, and in 1991, the institution of the Elected Presidency was born. After more than two decades of fine-tuning, the Elected President’s custodial powers today fall into three broad categories. First, she is the fiscal guardian of Singapore’s past reserves and can veto any supply bill, transaction, guarantee, or loan that the Government proposes to enter into and which is likely to draw down on past reserves.⁸⁵ Second, she is the custodian of the integrity of the public service and in that capacity exercises a veto over key public service appointments, including that of the Chief Justice and Judges, the Attorney-General, and the Chairman and members of the Public Service Commission.⁸⁶ Finally, she oversees the protection of fundamental liberties in certain areas of executive action that are not easily reviewable by the other branches, such as detentions under the Internal Security Act, which is deployed to counter terrorism.⁸⁷

In exercising her custodial powers, the Elected President acts independently. She is constitutionally barred from being a member of a political party⁸⁸ or Parliament as well as from holding any other constitutional office. To secure her independence, her remuneration is protected during the duration of her term,⁸⁹ and she may only be removed

84. First White Paper, para. 34.

85. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, arts. 22B, § 6, 22D, § 6, 144, § 2, 148A, § 1, 148G, § 3 (Sing.).

86. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 22, § 1 (Sing.) (“The full list of appointments comprises: (a) the Chief Justice, Judges of the Supreme Court, and the Judicial Commissioners, Senior Judges and International Judges of the Supreme Court; (b) the Attorney-General; (c) the chairman and members of the Presidential Council for Minority Rights; (d) the chairman and members of the Presidential Council for Religious Harmony; (e) the chairman and members of an advisory board constituted to advise on detentions under the Internal Security Act (Cap 143, 1985 Rev Ed); (f) the chairman and members of the Public Service Commission; (fa) a member of the Legal Service Commission (other than an ex-officio member); (g) the Chief Valuer; (h) the Auditor-General; (i) the Accountant-General; (j) the Chief of Defence Force; (k) the Chiefs of the Air Force, Army and Navy; (l) a member (other than an ex-officio member) of the Armed Forces Council; (m) the Commissioner of Police; and (n) the Director of Corrupt Practices Investigation Bureau.”)

87. See CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 151, § 4 (Sing.) (where the Government proposes to detain someone under the Internal Security Act against the recommendations of a specialist advisory board chaired by a Judge, the President may concur with the board and require the person’s release).

88. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 19, § 2(f) (Sing.).

89. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 22, § J(2) (Sing.).

from office on stringent grounds, after a rigorous process involving all three branches has run its course.⁹⁰ But independence does not mean that she acts with a free hand. The President receives the benefit of advice from an independent body known as the Council of Presidential Advisers.⁹¹ And in certain areas, when she acts against the advice of the Council, her decision is subject to a Parliamentary override,⁹² at which point any difference in views between the President and the Cabinet must be aired and resolved in Parliament.⁹³

Let me offer three reflections on the Elected Presidency. First, the Elected Presidency addresses Singapore's vulnerabilities as a small and resource-poor nation. As I have said, Singapore is not blessed with any natural resources, but through careful stewardship, we have been able to build up substantial reserves which enable us to weather storms and undertake initiatives for the national good. This is the nation's patrimony, and its accumulation has only been possible because of the quality and integrity of her Public Service. It is therefore no exaggeration that our national reserves and the integrity of our Public Service, the assets safeguarded by the President, are of existential significance to the success of our nation.⁹⁴

Second, the custodial role played by the Elected President is one which she is uniquely suited to play because the matters placed under her custody involve matters of political rather than legal judgment that are not, or at least not easily, amenable to judicial review. As then Deputy Prime Minister Mr. Goh Chok Tong observed during the passage of the amendment bill which provided for the creation of the Elected Presidency:⁹⁵

... [W]here the Government acts unlawfully, ultra vires the Constitution or the laws, one can have recourse to the courts. But our Constitution does not provide any checks on lawful Government decisions or conduct which are excesses against the best interest[s] of our nation...

Finally, the Elected Presidency, which was the outcome of a careful process of institutional design, was not meant to change the fundamental structure of

90. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 22, § L (Sing.).

91. See CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 37, § B (Sing.) (the Council of Presidential Advisers comprises eight members, variously appointed by the President, the Prime Minister, the Chief Justice and the Chairman of the Public Service Commission, who serve terms of six years on a staggered basis).

92. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 37IF (Sing.).

93. REPUBLIC OF SINGAPORE, REPORT OF THE CONSTITUTIONAL COMMISSION 2016 102-103, 105-106 (2016).

94. *Id.* at 10-11.

95. *Singapore Parliamentary Debates, Official Report* (Oct. 4, 1990); Constitution of the Republic of Singapore (Amendment No 3) Bill, 7th Parliament (1991) (statement made by Goh Chok Tong, Deputy Prime Minister), vol 56 at col 461 (Goh Chok Tong, Deputy Prime Minister).

parliamentary democracy in Singapore, but to augment it by introducing a further mechanism of control. Although the President enjoys a separate democratic mandate, her constitutional role is not to govern, but to counsel and to restrain. She is not empowered to initiate executive action, and may only block the Government's proposals insofar as they concern the national reserves and the Public Service. The Cabinet's freedom to govern is preserved in other areas, subject to the existing intra or cross-branch checks and balances in the Constitution.⁹⁶

The Elected Presidency is, in many ways, an exemplification of the point I made at the start of the lecture, which is that the model of control in each nation must be uniquely fine-tuned to suit the needs of its people. Even today, further refinements are being made to the office as it evolves to meet our needs.⁹⁷

Both of the independent offices I have discussed represent different modalities of intra-branch control. The independent prosecutorial office of the Attorney-General illustrates the value of fragmenting power and withdrawing certain executive powers from political contestation. The Elected President illustrates how power may be shared between institutions within the executive branch so as to produce sufficient friction and supervision without necessarily engendering a sense of rivalry. The systemic discipline imposed by these sorts of internal controls should not be underestimated. And although the modalities are different, the need for such particular control stems from a recognition of the special significance and nature of the affected powers.

But internal constraints are not always a substitute for controls by the other branches of government, which exercise powers of a different pedigree and therefore exert unique forms of control. With this, I turn to the subject of judicial review and focus in particular on what we have found to be vital to its effective exercise.

III. JUDICIAL REVIEW

Judicial review is the sharp edge that keeps government action within the limits of the law. Our Constitution, like yours, does not establish an

96. The late Mr S.R. Nathan, who served two terms as President, put it this way in his memoirs, "[The President] has to act within the constraints laid down by the constitution, and needs to have a good working relationship with the executive arm of government. The president of Singapore is not an executive president like that of the United States. His role is to stand apart from the executive and be above political parties. He must be free to think in terms of the nation as a whole and have the right to exercise his discretion; but he must not trespass on the prerogative of the executive arm of government": S.R. NATHAN, AN UNEXPECTED JOURNEY: PATH TO THE PRESIDENCY 618 (2011).

97. See I-CONNECT-CLOUGH CENTER, 2017 GLOBAL REVIEW OF CONSTITUTIONAL LAW 244 (Richard Albert et al. 2018).

express power of judicial review, but our courts have held, in the words of the first Chief Justice of independent Singapore, Mr. Wee Chong Jin, that “[a]ll [legal] power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”⁹⁸

That statement supplies both the juridical basis as well as the normative philosophy for judicial review in Singapore. As a juridical principle, it encapsulates what my predecessor as Chief Justice, Mr. Chan Sek Keong, described extra-judicially as the “principle of legality.”⁹⁹ It locates the power of judicial review in the rule of law, which holds that every exercise of executive power must be authorized by law.¹⁰⁰ Like the so-called *ultra vires* theory of judicial review in the United Kingdom, it is built on the “simple proposition that a public authority cannot act outside its powers,”¹⁰¹ but with one important difference: in Singapore, unlike in the United Kingdom, it is the Constitution, not Parliament, which is supreme.¹⁰² Thus, the legality of every exercise of power is ultimately referable to the Constitution, which, in the words of your Supreme Court in *Marbury v. Madison*, “is emphatically the province and duty of the Judicial Department” to explicate.¹⁰³

As a judicial philosophy, the principle of legality informs the approach that we in Singapore take towards judicial review. If all legal powers have legal limits, then it must follow that the judicial power, which too is a legal power, has constitutional limits. And what limits are these? I suggest that they are to be found, first and foremost, in remembering that it is not the role of the judicial branch to govern or to formulate policy, but simply to “say what the law is.”¹⁰⁴ This means, among other things, that judges declare what the law is impartially, and make their decisions based only on what they understand the law provides, and not on their idiosyncrasies or personal preferences.

It means, also, that the Judiciary must respect the prerogatives of the other branches. Our Constitution, like yours, divides the powers of the state

98. *Chng Suan Tze v. Minister for Home Affairs* [1988] SGCA 16 at [86] (Sing.). The gloss “legal” was added in the subsequent cases of *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R) 239 (Sing.) at [149], and cited again in *Yong Vui Kong v. Attorney-General* [2011] 2 S.L.R. 1189 (Sing.) at [78].

99. Chan Sek Keong, *Judicial Review – From Angst to Empathy*, 22 SAclJ 469, 472 (2010).

100. *Id.* at 472–73.

101. H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 27 (Oxford University Press, 11th ed., 2014).

102. Proponents of the *ultra vires* theory see the function of the courts as policing the boundaries stipulated by Parliament, which, in British constitutional law, is supreme. See Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 C.L.J. 63, 65 (1998).

103. *Marbury v. Madison*, U.S. 137, 177 (1803).

104. *Id.*

into three coordinate arms and assigns different roles to each. While it is the Judiciary's responsibility to pronounce on the legality of governmental action, that does not exalt it above the other branches, for all the branches are equal both in dignity and in their subjection to the Constitution.¹⁰⁵ Whether one chooses to label this as judicial deference,¹⁰⁶ an attitude of judicial modesty¹⁰⁷ or a form of judicial self-restraint¹⁰⁸ does not, I think, ultimately matter. What does matter is that it is founded, at the end of the day, on respect for the rule of law and the Constitution and the way in which it has divided the exercise of state power amongst the various branches of government.

This manifests in a changed attitude of mind. First, it means that courts should not see themselves as antagonists whose role is to obstruct governmental action, but rather as equal partners with the other branches in the common project to promote efficient administration and good and proper governance, which the Judiciary contributes to by upholding the rule of law.¹⁰⁹ Second, it means that the Judiciary should not be diffident about performing its constitutional role when called upon to invalidate unlawful action. If courts conceive of themselves as neutral umpires whose role is merely – as Chief Justice John Roberts has said – “to call balls and strikes”,¹¹⁰ then there is no need to shy away from saying what the law requires. When a court strikes down an executive order for falling outside the boundaries of an enumerated power, there is no “conflict” between the branches *per se*, because an act that is taken without proper authorization is a nullity, which it is the court's duty to call out.¹¹¹

105. Tan Seet Eng v. Attorney-General [2016] 1 S.L.R. 779 (Sing.) at 90.

106. See, e.g., Aileen Kavanagh, *Defending Deference in Public Law and Constitutional Theory*, 126 L. Q. REV. 222 (2010).

107. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Martin Shapiro, *Judicial Modesty Political Reality and Preferred Position*, 47 CORNELL L. REV. 175 (1962).

108. See, e.g., Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

109. In British constitutional literature, this is sometimes presented as the difference between the “red-light” and “green-light” views of administrative law. See Carol Harlow & Richard Rawlings, *Red and green light theories*, in LAW AND ADMINISTRATION 1–44 (3d ed. 2009). In a recent article, a Singapore academic explained that judicial review in Singapore was informed by the notion of the “co-equality” of the branches. Swati Jhaveri, *Localising Administrative Law in Singapore: Embracing Inter-branch Equality*, 29 SACLJ 828, 834 (2017).

110. *Roberts's Opening Statement Before Senate Panel* [transcript], N.Y. TIMES (Sept. 12, 2005), <https://www.nytimes.com/2005/09/12/politics/politicsspecial/robertss-opening-statement-before-senate-panel.html>.

111. Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 S.L.R.(R) 239 (Sing.) at [144]. See, Jaclyn L Neo, “All Power Has Legal Limits:” *The Principle of Legality as a Constitutional Principle of Judicial Review*, 29 SING. ACAD. L.J. 667, 688–89 para. 55 (2017).

The difference is between a paradigm of confrontation and containment informed by mutual distrust and self-preservation and one of partnership and cooperation within a framework of governance and legality. For the rest of this lecture, I want to consider the reasons of principle and prudence that undergird this approach to judicial review.

A. To say what the law is

Let me start with what I think it means for judges to limit themselves to saying what the law means. As a starting point, it is useful to recall the words of Lord Scarman in the *Duport Steels* case, where his Lordship wrote:

... the judge's duty is to **interpret and to apply the law, not to change it** to meet the judge's idea of what justice requires. ... If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But **he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because [the judge thinks that] it is unpalatable...**¹¹²

Although this was said in the context of a case about statutory interpretation, I think it is of wider relevance, because so much of the work that judges do – including in the field of judicial review – revolves around the interpretation of statutes. To be sure, it is not always clear where interpretation ends and law-making begins, but one useful touchstone suggested by the late Justice Scalia is this: “The judge who always likes the results he reaches is a bad judge.”¹¹³ Those of us who are judges will readily identify with this. I can think of a number of cases where I wished that the law was other than what I concluded that it was and that a different result could be reached, but whenever I catch myself thinking in this way, I remind myself that it is neither my role nor do I have the constitutional mandate to say what the law *ought* to be, only to say what it is.¹¹⁴

In this regard, one important difference between your Constitution and mine lies in the subject of unenumerated rights. Your Ninth Amendment expressly provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹¹⁵ The meaning of these somewhat elliptical words has been

112. *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 S.L.R.(R) 461 (Sing.) at [60] (citing *Duport Steels Ltd v. Sirs* 1 All ER 529, 551 (Eng. 1980)) (emphasis added).

113. Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 29 (2016) (quoting Justice Scalia).

114. This calls to mind Justice Potter Stewart's famous dissent in *Griswold* in which he described the law in question as being “uncommonly silly” but still dissented from the court's decision on the ground that it was not the place of the courts to strike it down. See *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

115. U.S. CONST. amend. IX.

endlessly debated,¹¹⁶ but there is no questioning their significance, particularly after their contemporary renaissance in *Griswold v. Connecticut*,¹¹⁷ which is undoubtedly one of the most consequential, if also one of the most controversial, Supreme Court decisions of the last 60 years.¹¹⁸ Whatever one's opinion of the decision is, there is no question that it has had the effect of moving the Supreme Court to the center of the culture wars, and therefore to the center of American political life, which may not be a comfortable place for every court.¹¹⁹

The difficulty, as I see it, is that the whole purpose of the judicial process is to bring disputes “to an end by determining whether the plaintiff or the defendant [has] prevailed.”¹²⁰ The adjudicative process, by its nature, is a rule-bound, time-limited, zero-sum game in which winners and losers are produced at the conclusion of an adversarial process.¹²¹ This model may be well suited for the resolution of disputes over contractual entitlements, but it is manifestly unsuitable as a means for the resolution of sincere disagreements over deep matters of social conscience in which what is at stake are different and incommensurable competing conceptions of the “good”. The more the Judiciary is resorted to for the resolution of matters of searing social controversy, the more the line between legal and political questions will be blurred and the more likely citizens will begin to see the courts as a forum for the continuation of politics by other means.

By contrast, my Constitution does not have a savings clause that contemplates the possibility of unenumerated rights. It was for that reason that we have tended to be leery of going outside the confines of the text of

116. See generally Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983) (discussing the meaning of the Ninth Amendment); Wilfred J. Ritz, *The Original Purpose and Present Utility of the Ninth Amendment*, 25 WASH. & LEE L. REV. 1 (1968) (same); Geoffrey G. Slaughter, *The Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence*, 64 IND. L.J. 97 (1998) (same).

117. *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

118. From the fountainhead of the constitutional right of privacy has sprung some of the most important, albeit also hotly debated, decisions of the US Supreme Court of the past 60 years. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (legalizing same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558 (2003) (legalizing same-sex sexual activity); *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion).

119. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). For just two examples of recent opinions on this subject, see, e.g., Tyler Cowen, *America's Unhealthy Obsession with the Supreme Court*, BLOOMBERG (Jul. 3, 2018), <https://www.bloomberg.com/view/articles/2018-07-03/congress-needs-more-scrutiny-than-supreme-court-does>; Linda Greenhouse, *The Supreme Court and the New Civil War*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/opinion/supreme-court-new-civil-war.html>.

120. Simon Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 101 (1976).

121. James Marshall, *Lawyers, Truth, and the Zero-Sum Game*, 47 NOTRE DAME L. REV. 919, 919 (1972).

the Constitution to find rights which petitioners have sought to assert. For instance, in a 2015 case, a plaintiff asserted that corporal punishment was a form of torture prohibited by the Constitution, even though there is no explicit prohibition against torture as such.¹²² We rejected the argument on the basis that the acts he complained of would not in fact amount to torture.¹²³ But we also held that even if we assumed for the sake of argument that the acts in question did amount to torture, “where a right cannot be found in the Constitution (whether expressly or by necessary implication), *the courts do not have the power to create such a right out of whole cloth simply because they consider it desirable*”.¹²⁴ We warned that “reading unenumerated rights into the Constitution would entail judges sitting as a super-legislature and enacting their personal views of what is just and desirable into law, which is not only undemocratic but also antithetical to the rule of law”.¹²⁵ There is, after all, a distinction between the rule of law and the rule of judges.

I suggest that these two points – the rule of law and the nature of the judicial power in the context of our Constitution – provide cogent reasons of principle for why our courts have adopted a calibrated approach towards judicial review. A different approach can be seen in the example of India.

Since a 1993 decision, appointments to the Indian Supreme Court have been determined by the so-called “collegium” system, under which the Chief Justice and the most senior members of the Judiciary have the final say in the appointment of judges.¹²⁶ In 2014, the Indian Parliament passed an amendment to the Indian Constitution to provide for the creation of a six-man “National Judicial Appointments Council” which would have the final

122. *Yong Vui Kong v. Public Prosecutor* [2015] 2 S.L.R. 1129 (Sing.) at [73], [75] (emphasis in original).

123. *Id.* at [83]–[99].

124. *Id.* at [73] (emphasis in original).

125. *Id.* at [75].

126. The development of Indian jurisprudence on this is complex. Article 124 of the Indian Constitution provides that the judges of the Indian Supreme Court are to be appointed by the President after “consultation” with the Chief Justice. In *S. P. Gupta v. Union of India*, (1978) 1 SCR 423 (the “First Judges’ Case”), the court held that the opinion of the Chief Justice in the appointments process was *mandatory but not* determinative. However, 11 years later, the Indian Supreme Court reversed itself when it held, by a margin of 5–4, that “no appointment of any judge to the Supreme Court . . . can be made unless it is in conformity with the opinion of the Chief Justice of India.” See *Supreme Court Advocates-on-Record Ass’n v Union of India*, (1993) 4 SCC 441 (the “Second Judges’ Case”). This marked the inauguration of the collegium system, which was refined in *Special Reference No. 1 of 1998*, (1996) 7 SCC 739 (the “Third Judges’ Case”), where the Supreme Court held that the Chief Justice would have to consult the four most senior judges of the Supreme Court in respect of appointments to the Supreme Court, and two of the most senior members of the High Court in respect of appointments to the High Court. It should be noted that Article 124 of the Indian Constitution does *not* make mention of any such collegium. For an excellent summary, see Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Inquiry*, 5 INDIAN J. CONST. L. 99 (2011) (written before Fourth Judges’ Case).

say in such appointments.¹²⁷ This Council was to comprise (a) the Chief Justice, (b) two senior members of the Supreme Court, (c) the Union Minister for Law & Justice, and (d) two “eminent persons” nominated by a committee comprising the Prime Minister, the Chief Justice, and the Leader of the Opposition.

A challenge was brought, and the amendment was struck down by the Indian Supreme Court by a margin of 4-1 on the ground that it violated the so-called “basic structure” of the Indian Constitution by interfering with the independence of the Judiciary.¹²⁸ A great deal has been written about the doctrinal and historical merits of the decision,¹²⁹ and I do not want to add to that today save to make two observations. The first is that to many this would have been a surprising result because it meant that a bill passed by more than two-thirds of the elected representatives of the people, that was ratified by more than half of the State legislatures, and assented to by the President of the Union, to amend *the constitution* on the subject of how the nation’s judges were to be appointed was found by the judges to be illegal. The second concerns the suggestion in the opinions of the majority that judicial independence can only be secured by excluding the Executive from the appointments process.¹³⁰ As Justice Chelameswar, the sole dissenting judge, pointed out, the exclusion of the Executive from the appointments process not only sits uneasily with the language of Article 124 of the Indian Constitution, which governs the appointment of Supreme Court Judges, but also appears to be “inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people”.¹³¹

The second reason for restraint arises from the institutional limits of the court. However well-versed the courts might be in matters of law, it is not especially well placed to answer all manner of social, economic and political questions. Legislatures can commission studies, consult with elected members and their constituents, and have at their service all the powers of the civil service to research, advise, and draft laws. More importantly, they have a great deliberative chamber in which competing visions of the good may be discussed and compromises reached. Even if the result is not to

127. The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, No. 97-C (India).

128. Supreme Court Advocates-on-Record Association v Union of India (2016) 5 SCC 1 [hereinafter Fourth Judges Case].

129. See generally, Khagesh Gautam, *Political Patronage and Judicial Appointments in India: A Comment on the Fourth Judges Appointments (NJAC) Case*, 4 *INDON. J. INT’L & COMP. L.* 653 (2017); Harunrashid A Kadri, *Judicial Appointments Mechanism in India and Independence of Judiciary – A Critical Analysis*, 16 *NAT’LCAPITAL L. J.* 1 (2017); Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia*, (2017) 29 *SACLJ* 719 (2017).

130. Fourth Judges Case, *supra* note 128, ¶ 708.

131. *Id.* ¶ 792.

everyone's satisfaction, there is at least the benefit that all who wish to speak up may do so, whether personally or through their elected representatives. These are advantages which the courts do not generally have.¹³²

Unlike the Legislature and the Executive, the Judiciary is generally constrained not only in terms of the information which it receives – which is determined by the disputing parties – but also in terms of the function that it plays. The role of the Judiciary is to deal with the retrospective adjudication of rights and liabilities arising out of a *past event*,¹³³ rather than with the creation of policies to govern future conduct, even if the latter might sometimes be an inevitable consequence of the former. These differences between the Judiciary and the other two branches mean that the Executive and the Legislature will generally be better placed to deal with polycentric questions of policy. What is more, when courts decide achingly difficult socio-political questions, they effectively *remove* these questions from the realm of democratic decision, with all the advantages that it proffers.¹³⁴

B. Neither force nor will, but only judgment

Apart from these reasons of principle, I think that there are also important prudential reasons that have informed our approach to judicial review. In *Federalist No. 78*, Alexander Hamilton described the Judiciary as the “least dangerous” of the branches because it has “neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”¹³⁵ In a sense, this is of course true, for judgments are not self-executing, and courts must depend on the assistance, and sometimes even the voluntary compliance, of the other branches.

I do not suggest, for a moment, that the courts should bow to pressure from the other branches, for that would be an abdication of their constitutional role, and will – in the long run – only lead to the institutional irrelevance of the Judiciary. Rather, my point is that in a clash between the branches, no side comes out the victor. Take, for instance, President Roosevelt's ill-fated “court-packing plan”. The contours of the story should be familiar to most in this audience. Beginning in the spring of 1935, the Supreme Court began issuing a series of negative rulings on the President's

132. See Beverly McLachlin, *Judicial Power and Democracy*, 12 SING. ACAD.L.J. 311, 322 (2000).

133. Lilian R. BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 Harv. J. L. & Pub. Pol'y 7, 12 (1994).

134. *Obergefell*, 135 S. Ct. at 2611–12 (Roberts, C.J., dissenting).

135. THE FEDERALIST NO. 78 (Alexander Hamilton).

New Deal proposals.¹³⁶ Frustrated, President Roosevelt, flush from a resounding victory in the election of 1936, announced his intention to pass a law granting the President the authority to appoint an additional justice for every sitting one who was over the age of seventy, which would have entitled him to some six nominations. This was seen as an attempt to procure a court that would side with the New Deal, and the plan eventually failed, but not before the clash between the branches tarnished both the Presidency and the Court.¹³⁷

I suggest that if the courts are respectful of the constitutional roles of the other branches a culture of trust and respect will develop, and this will ultimately strengthen the effectiveness of the courts.

Take the decision of the UK Supreme Court in the Brexit case, for example. Soon after the British people voted to leave the European Union in a national referendum, a challenge was brought as to whether the Government could withdraw from the European Union without Parliamentary authorization. On this, the Cabinet and Parliament were divided, with the former taking the position that it could, and the latter saying it could not. What is notable is that when the matter came before the UK Supreme Court, neither side questioned that the Court had the jurisdiction to rule on the legal question at issue, and neither sought to canvass the *political merits* of withdrawal, which everyone accepted was not at issue.¹³⁸ As is well known, the Court ruled against the Government, which readily accepted its authority as well as its adverse ruling and went on to seek authorization through an Act of Parliament. This had the salutary effect of allowing the political issues to be properly canvassed in the proper forum by the elected representatives of the people.¹³⁹

136. National Industrial Recovery Act of 1933, 73 Cong. Ch. 90, 48 Stat. 195 (1934) (setting industry-wide wage and price codes); Agricultural Adjustment Act of 1933, 73 Pub. L. 10, 48 Stat. 31 (1933) (providing for subsidies to farmers to limit production); Bituminous Coal Conservation Act of 1935, 74 Pub. L. 402, 49 Stat. 991 (aiming to set voluntary standards for minimum wages) – Each of these were struck down, *see* A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495 (1935); United States v Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

137. William H. Rehnquist, *Judicial Independence: Symposium Remarks Dedicated to Chief Justice Harry L. Carrico*, 38 U. RICH. L. REV. 579, 595 (2004); Michael Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 737 (1983);, cited in Gregory A. Calderia, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan* 81 AM. POL. SCI. REV. 1139, 1140 (1987) (citing JAMES M BURNS, ROOSEVELT: THE LION AND THE FOX (Harcourt, Brace & World, 1956..

138. Brexit Decision, *supra* note 6, ¶ 3.

139. European Union (Notification of Withdrawal) Act 2017, c. 9 (UK); Lady Hale, *The United Kingdom Constitution on the move*, (July 7, 2017), at 15, <https://www.supremecourt.uk/docs/speech-170707.pdf>.

Another example is the decision of the Singapore Court of Appeal in the case of *Tan Seet Eng v. Attorney-General*.¹⁴⁰ The appellant, Mr. Tan, who was named by Interpol as “the leader of the world’s most notorious match-fixing syndicate.”¹⁴¹ had been detained under an executive order pursuant to a statute which allows for detention without trial in exceptional circumstances where the Minister of Home Affairs is satisfied that the detainee had been associated with activities of a criminal nature, and the detention was “in the interests of public safety, peace and good order.” Mr. Tan moved for habeas corpus and challenged his detention. After studying the history and purpose of the statute, we decided that detention was only permitted for activities of a sufficiently serious nature which were harmful to public order *within* Singapore. The Minister’s grounds for Mr. Tan’s detention were brief and did not disclose how his activities had caused harm *in Singapore*.¹⁴² Therefore, we ordered that Mr. Tan be freed.

In the wake of the decision, the Ministry of Home Affairs released Mr. Tan and said in a statement that it would study the judgment carefully.¹⁴³ Some days later, Mr. Tan was detained again, this time apparently with detailed grounds justifying that his conduct would cause harm of a sufficiently serious nature *within* Singapore. The Ministry of Home Affairs clarified in a second statement that it respected and accepted the court’s judgment, but considered that there were sufficient grounds for a detention order to be re-issued within the legal boundaries drawn by the Court.¹⁴⁴ Notably, Mr. Tan did not bring a further challenge, but what is perhaps even more striking is that a few weeks later, the Ministry decided, of its own motion, to release three other detainees without any application having been filed by them. The Ministry explained in a third statement that it had taken

140. *Tan Seet Eng v. Attorney-General* [2016] 1 S.L.R. 779 (Sing.) (hereinafter *Dan Tan*).

141. Danson Cheong, *Alleged match-fixer Dan Tan ‘just wants a quiet life now’; ex-wife wants to see him one more time*, *The Straits Times* (Sing.) (Nov. 27, 2015), <https://www.straitstimes.com/singapore/courts-crime/alleged-match-fixer-dan-tans-ex-wife-denies-lying-to-cpib-officer>.

142. The grounds for Mr Tan’s detention stated only that he had recruited runners and agents from Singapore over a 13-month period that ended nearly two and a half years before he was served with a detention order, and that he led a match-fixing syndicate that was engaged in financing and/or directing unspecified match*fixing activities in various parts of the world. We held that from the grounds of the detention it appeared (a) that his activities were not sufficiently serious to fall within the scope of the Act and (b) that even taking them at their highest, they showed that Mr. Tan carried out criminal activities *from* Singapore, but there was little indication that those activities had a bearing on public safety, peace and good order *within* Singapore. *Dan Tan*, *supra* note 140, ¶¶ 131–32, 146–48.

143. Press Release, Ministry of Home Affairs, MHA Statement on Court of Appeal’s Judgement on *Dan Tan*’s Appeal (Nov. 25, 2015), <https://www.mha.gov.sg/newsroom/press-release/news/mha-statement-on-court-of-appeal-s-judgement-on-dan-tan-s-appeal>.

144. Ministry of Home Affairs, MHA Statement on Detention of *Dan Tan Seet Eng* (Dec. 5, 2015), <https://www.mha.gov.sg/Newsroom/press-releases/Pages/MHA-Statement-on-Detention-of-Dan-Tan-Seet-Eng.aspx>.

the initiative to review its detention orders in the light of our decision and concluded that those orders did not pass muster.¹⁴⁵ Further down the line, in response to our analysis of the degree of latitude given to the Minister, the Government tabled amendments to the relevant statute to narrow its scope.¹⁴⁶

This vignette reveals that an Executive that is respectful of the Judiciary and is committed to abide by the law as pronounced by it will voluntarily review its policies and adjust its conduct in the light of the guidance given, even without the need for a formal challenge. Building a self-regulating executive branch depends partly on governmental attitudes, but also partly on the Judiciary securing the respect of the other branches through honest, competent, and independent judgment that is respectful of the constitutional prerogatives of the other branches.

IV. CONCLUDING THOUGHTS

Let me conclude with a few brief thoughts. At the start of this lecture, I suggested that striking the balance between empowering governments to act decisively in the public interest on the one hand and enacting safeguards against governmental excess on the other is an intensely difficult exercise. The precise balance may vary from one polity to the next, as may its modalities of control and restraint. Our experience has taught us many things but I want to leave you this afternoon with two thoughts in particular.

First, the separation of powers has been and still is seen as one of humanity's great devices to control the exercise of governmental power. And that it undoubtedly is. But the separation of powers also contemplates that the branches must be allowed fully and fairly to exercise the powers they have been allocated. This calls for each branch to respect and recognize the legitimate prerogatives of the others. It is fitting here to recall these words from President George Washington's farewell address:¹⁴⁷

... the habits of thinking in a free country should **inspire caution** in those entrusted with its administration, to **confine themselves within their respective constitutional spheres**, avoiding in the exercise of the powers of one department to encroach upon another. **The spirit of encroachment**

145. Ministry of Home Affairs, MHA Statement on Three Members of Match-fixing Syndicate Released from Detention and Placed on Police Supervision Orders (Jan. 18, 2016), <https://www.mha.gov.sg/newsroom/press-release/news/mha-statement-on-three-members-of-match-fixing-syndicate-released-from-detention-and-placed-on-police-supervision-orders>.

146. Kasiviswanathan Shanmugam, Minister for Home Affairs and Minister for Law (Feb. 6, 2018), Speech Regarding the Second Reading of the Criminal Law (Temporary Provisions) Amendment Bill. The amendments introduced a list of criminal activities which could form the basis of such detention or supervisory orders.

147. George Washington, Washington's Farewell Address to the People of the United States (Sep. 19, 1796), *reprinted in* Senate Doc. No. 102-21.

tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism...

Your Founding Fathers were persons of almost preternatural energy, imagination, and courage, and their vision of a United States that would forever and always set its face against the tyranny that is the “accumulation of all powers ... in the same hands” is one that has inspired, and continues to inspire, many around the world.¹⁴⁸ President Washington’s concern over the need to confine each branch to its proper sphere so as to avoid tyranny remains critically relevant even today, when we live in an age in which demagoguery, ultra-nationalism (and its ugly cousin, nativism), and polarization have prompted a retreat from multilateralism and seduced some into favoring the greater centralization of power. We must continue to guard against this, but not at the cost of preventing any branch from acting within its legitimate sphere, and certainly not through an unduly expansive vision of the judicial power, which is itself subject to those same constraints and cautions.

My second concluding thought is this: full respect for each branch’s constitutional space does not leave us short of tools either to control power or to assure effective governance. In Singapore, we have endeavored to develop our own models of control that have been informed by three cardinal principles: differentiation, co-equality, and respect. Like you, we began with the traditional trinitarian separation of powers, but we moved beyond that in our system of intra-branch controls by developing different systems of diffusion – hard and soft – to provide for different modalities and intensities of control as best befits the particular character and importance of certain powers. And in thinking about judicial review, our approach has been informed by the belief that the various branches of government are equal partners in a common venture, which is to advance the best interests of the nation, but with differentiated responsibilities. This entails mutual respect for the boundaries of all the constitutional offices, including the court’s own, and it has driven our belief that judicial review is most effective when an environment of trust and respect prevails such that the other branches pay careful heed to the Judiciary’s view.

This is not always easy to secure in practice, as the examples of *Korematsu* and *Liversidge v. Anderson* have taught us. But today, *Liversidge* is remembered not for the result that was reached by the majority, but for the judicial courage of Lord Atkin, who in his lone dissent, wrote that “... [even] amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.”¹⁴⁹ We do not need to be

148. THE FEDERALIST NO. 47 (James Madison).

149. *Liversidge v. Sir John Anderson and another* [1942] AC 206 at 244.

Japanese Americans living on the West Coast of the United States in the shadow of Pearl Harbor, or citizens of the United Kingdom surrounded by the rubble of the Battle of Britain, to feel the force and power of those words, which continue to resonate so many decades later. Lord Atkin was acting entirely within his proper province and was doing nothing more than being a robust, honest and tough umpire who called a ball out even though the crowd might have been roaring for a different result. That was a discharge of the judicial vocation in its highest and purest form; and history has been his vindication.

The Singapore model, like our Constitution and the history of our nation, is a palimpsest that betrays its unique multiplicity of influences and traditions. I harbor no illusions that it is one which all countries need, nor necessarily can, emulate. Ultimately, the particular constitutional arrangement that comes to prevail in a country will be a product of “its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions.”¹⁵⁰ In sharing the Singapore story with you, my modest intention has been to share some of our experience and therefore to contribute to the transcontinental constitutional dialogue that so enriches us all. And the continuation of such a dialogue is itself a critical statement of how we, as a community of those bound to uphold the rule of law, can and will stand together for the values of fairness, respect and diversity, especially when faced with the noise of division, exclusion and suspicion.

Thank you all very much.

150. *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 672 (CC) para. 31 (S. Afr.).