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## RESEARCH ARTICLE

### The Separation of Powers Principle: Is it a Lynchpin or Pushpin for the Voyage of American Public?

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#### Abstract

The separation of powers principle deeply heritaged in the US constitutionalism affected and continues to influence the law and public policy in the nation. The tripartite scheme of government was quarreled over the history how we have to perceive any best adequate interaction among the Congress, Executive and Judiciary. The Constitution itself merely quibbles on this point, and the Supreme Court justices, in some cases, would not be done as a clear cut for the scope of constitutional power conferred on each branch. As the stare decisis is a rule in the common law countries, it is less prospective to anticipate that a quantum leap can be made for the new paradigm of constitutional government in the US. In this challenge, the paper deals with the sensitive area of three powers involving the issue of presidential privilege and immunity, justiceability and standing, as well as judicial control of public agencies. In the course of discussion, several landmark cases were illustrated to make a point for the angulated controversies, typically involving the pressing public issues and officers of absolute or qualified immunity. Given the diverse structure of government, the US model had been followed by many new born republics in 20<sup>th</sup> centuries. The author would wish that the paper provides a comparative lesson for the circle of those countries.

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#### An Introducing Thought

A conflict between the Congress and Executive would arise for reasons. A most important reason would lie within the structure of government (Samuels, D. J. & Shugart, M. S., 2003). The parliamentary system of government would share a political destiny by both branches where one general election would take a whole of stake to alter the congress and cabinet. The head of winning party would be nominated and eventually elected almost all cases to serve as a prime minister and leader of congress. Often the monarch would approve to finalize his inauguration though symbolic and nominal. The communist legal tradition, as we see in the former Soviet Union, would generally never permit a conflict between the executive and people's congress since the communist party would control absolutely every of state affairs. The key public policies and important decision making would be prepared by the selected communist elites in advance before the convocation of people's congress. The congressional convention merely makes it official and showcased without a due process of deliberation and free vote. They generally play a puppet role to endorse the prearranged agenda and ready-made directions, goals and decisions. In these two cases, the legislative sovereignty, as a matter of national distribution of power and except for the communist supremacy as quasi-religious in the latter case, generically preempts the executive function that the interbranch conflict would not be present as a matter of structure and authority. Then the topic dealt in this article would be, in most probabilities, interconnected with the presidential system and the types of constitution employing

the separation of powers principle (Kirwan, K. A., 1995). In this class, however, the neo-presidentialism should be revisited, which prevailed within the dictatorship of new born republics since the end of world war and later over 1950 to 1960's. This type of governmental structure would not be committed to the liberal democracy or check and balance scheme in order to prevent from an arbitrary rule and for the safeguard of human rights. The President would entertain a prerogative as comparable with the divine monarch (Lobel, J., 2008). They may lead the congress in hierarchy and spiritually while he can staff a portion of congressional seats in some cases, as in the 1970's Korean constitution. The conflict, if rare and exceptional, could occur, but not in any institutional fashion, but on the street demonstration or political struggle on the grass-root and in terms of civic priority or urgency. Given a scarce source of conflict, the judicial role to resolve it would not be eminent in nature, instead, as minimal or perfunctory. For example, over the two decades of constitutionalism for the period of 1970's and 1980's in south Korea, the Supreme Court would undertake as less than ten cases of judicial review of legislation. Therefore, we can arrive that the conflict of two political branches and the judicial role often would be predicated on the orthodoxy of presidential system, stringent tripartite government, as well as an independent and neutral judiciary as civilized. One other element has to be added that the constitution is a *Grundnorm* to be principled and structural lacking the minutes and details. It could include ambiguities and an extent of amenability to some diverse interpretive possibilities (King, K. L. & Meernik, J., 1999). That would be demonstrated in the cases of presidential immunities or privileges, foreign policy and national war response. The constitutional language often would not be definite as the *Johns, Nixon, Fritzerald, Starr, and Youngstown* evinced (Amar, A. R., 1999; Pettee, J. S., 1998)

### **The Youngstown Steel Case**

In the Youngstown case, the Court was called upon the question how to define the limits and exceptions of emergency power not expressly vested within the Executive. The case arose in the war situation of two Koreas in 1950, and President Truman ordered to seize the assets and properties of steel companies to effectively respond with the war emergency. Unlike the new shape of numerous modern constitutions as exemplified in the current Korea's, the classic constitution has not lent an independent place for the emergency power of president. The executive order in this case involves a serious issue of property rights which would be classic and foundational as we learn in the plutocracy view of US constitutionalism. The founders of new republic in this continent would deal with the popular democracy or social contract theory in any less practical effect, but treated as merely idealistic. Intricacies and wisdom were poured to ensure a delicate and mosaic of system for the check and balance scheme, as illustrated in the bicameralism and tripartite branches. Such high brows would anticipate a sacred role of judiciary to ensure their property and commercial interests. Their distrust of politics and general people perhaps should be traumatic, hence, intended on a scheme to shackle any one branch dominance between the Congress and Executive. The conflict, nonetheless, would never be their wishes given the basic needs and commitment of national government could not be dispensed away (Conkle, D. O., 1998). This leads to the necessities of prudent process for the property interests and freedom of contract, which could only be framed or implemented on the basis of congressional act. This theme was broken in face with the war emergencies of South Korea, which had been contested in the judicial terms. The judiciary would be called to define the scope of war power for the presidency and additionally as the commander in chief, but should never intermeddle his authority and power to respond with the war needs.

The Government argued that the order was made on findings of the President that his action was necessary to avert a national catastrophic which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the armed Forces of the United states (Devins, N. & Fisher, L., 2002). In fact, the union would struggle with their employers over the terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. The mill owners argued that the presidential order amounts to a lawmaking, a legislative function which the Constitution expressly confided with the congress, not to the president (2002). The Government furthered that the indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that the governmental seizure of the steel mills was necessary in order to assure the continued availability of steel (2002).

Justice Black, for the majority court, delivered the Court opinion. First, The President's power, if any, to issue the order must stem from either from an act of Congress or from the Constitution itself (2002). There is no statute

that expressly authorizes the President to take possession of property as he did here. Second, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. Third, the order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. Fourth, the seizure order cannot be sustained because of several provisions that grant executive power to the President (2002). Fifth, the President's order does not direct that a congressional policy be executed in a manner prescribed by Congress-it directs that a presidential policy be executed in a manner prescribed by the President. Sixth, The Founders of this Nation entrusted the lawmaking power the Congress alone in both good and bad times (2002).

### **The Constitution and Structure of Government**

The court would be designed to play a role to resolve the conflict between the Congress and Executive. The Constitution must certainly be an enabling document to frame the civil and liberal democracy on which the public and private values would be contested, but generally in terms of structure and authority (Harrington, C. B. & Carter, L. H., 2009). In other words, its primary role would underlie creating of the foundational order for the structure and function of government. The main text of seven articles was to be devoted to the necessities in the newly born independent republic. The bill of rights would follow to deal with the new paradigm of human and philosophically indispensable value, but in the form of amendments. Now the people would be an essential ingredient with the surge of popular sovereignty for the replacement of divine monarch. They must be supreme and such ultimate destination to be idealized on one hand as we see a corner of Constitution, "We the people...", "heavenly bestowed...inalienable fundamental rights," "life and limb, and liberty..." "to promote the general welfare and happiness..." In other dimension, they are subjects to be ruled by the government and must respect the laws and national policy, but in the check and balance from the separation of powers principle. Most notably, they could be criminally penalized or administratively regulated to comply with. In the cases, we see two cases in some mediate status. A proposition in the *Johns*, "nobody would be beyond the law," would then be predicated on a delicate basis that Clinton never acted as a ruler, but privately (Petee, J. S., 1998). *Johns* would not represent politically the popular will since the popular will is hyped and merely a collective identity to idealize the constitutionalism, but can be traced in places of Constitution. She is, nonetheless, not to be put to the context of subjects for the attribute of Clinton's action. Otherwise, the *Fitzerald* would be predicated on the official conduct of Nixon, but not related with the "rule and ruled" concept, but for their internal matters (1998). Nixon would not rule, but order and command to attain his goals of branch. Therefore, the court resolution would get less straight for all of two cases. One case is considered to generally deny the absolute presidential privilege in the civil actions, but the President merely paid the damages with a generous comment and no forcible court order to subpoena or make him present. The *Fitzerald* court also was split to grant the reversal of his dismissal as a civil servant. In the main, the Constitution is a resort place, however, perhaps any most authoritative and resilient over history and comparable to a counterpart on the Marxist theory, that we awe and incessantly legitimate our public action to interact with the civil society. Actually, the structural dilemma and ambiguities as unspecified from the constitutional language also arouses a rather complicated vision, under which three branches would involve an enthusiasm to increase or a defense for their constitutional powers and responsibility (Harrington, C. B. & Carter, L. H., 2009).

### **A Case, Justiceability and Reflection**

#### ***Massachusetts and the Court***

In the *Massachusetts v. EPA*, several states challenged that EPA is required to make a rule to regulate the greenhouse gas emission standard for the new motor vehicles (Harrington, C. B. & Carter, L. H., 2009; O'Leary R., 1993). It would fall within the responsibility of agent who has to consider prudently the scope and exact nature of congressional authorization and generally in terms of APA provisions or principles as well as the specific statute enabling their rulemaking power. The "plain language" rule often would be emphasized in any intensity by the Court so that the case poses a question of how to cognize the term "air pollution." The state of Massachusetts claimed that they are a guardian of their citizens' property interest of coastal land, hence, *parens patriae*, to invoke a federal jurisdiction and in the purpose to redress from the inaction of EPA (2009; 1993). It argued that the inaction of EPA failed to adequately respond with the climate change and its fatal consequence of sea rising. It eventually

eclipses a serious amount coastal part of land although the present damage would be a piecemeal and not readily discernible. The Court granted the standing as constitutional on the ground that the “special solitude” needs to be contemplated from other class of parties, such as private enterprises or civil pressure group. A quasi-sovereignty to protect the public health or general welfare of state citizens deserves a special context of treatment in finding the constitutional basis to legitimate their claim. The Court also illuminates on the component of traditional frame which dealt with the injury in fact, causation, and availability of remedies (2009). The Court found in the affirmative and rejected the list of declarations which were filed to support the EPA’s inaction decision. The injury in fact often requires concrete harms or loss of legal rights and interests. An imminent danger or impending harm could suffice in the general purview but a particularized status has to be identified which means a loss or harm generally shared by or incurred against the public at large would not qualify to ground the competent jurisdiction. While the research and administrative assessment would ascribe it as remote in terms of the time and pattern of harm, the Court would consider the evils of inaction more seriously in balance with the scale of losses or damage for the citizens of Massachusetts. The causation may not posit a definite framework, which is to be frequently faced with in other actions. It would not be generally disputed that the greenhouse gas emission is a primary contributor to the climate change and global warming. The global warming, in turn, should be found in a decisive correlative with the sea rising level, which merits a rejection of EPA’s contention (2009; 1993). EPA also raises the multiplicity of factors which leads to a blurred line between the international emission, notably China or India, and national one. In this peculiar situation, the imprudent response would not be adequate as a national policy maker. The context may go international beyond the control of national agencies, which would be attributable as Nature or force majeure to make it wise on the status quo. The Court denied this argument because the national emission is sufficient to be captured as one important culprit of this territorial disfiguration. The US part amounts to 6 percent of total global emissions only outpaced by the EU and China, which ranks the nation at the third place (2009). Then the Court saw that the EPA overstated their case. EPA also contended that their inaction would be appropriate to progress on the concerted response in the initiative of president. It would plan to enforce a scope of effective programs involving a grant and financial incentive, which would be comprehensive to ensure the organizational integrity and comport within the Executive (Johnson, S.M., 2008). This assertion was fleshed out by the dissenting opinion to critique the majority opinion, but the Court would rather conceived it a piecemeal or less consequential since the specific regulatory measure could instantly be embodied and also specifically would be more practical.

### *Revisiting the Characteristics of Justiceability*

We may now be poised to conduct ruminations why the Court would elaborate on the question of reviewability. I may propose several points from the practice of justice, which is thought to bear implications. A reviewability, justiceability for some, is a threshold issue to enter the adjudicatory phase of subject matter so that it involves a structural issue among the tripartite branches of government (Woolf, L. & Jowell, J., 1995).

A justiceability would originate theoretically from the earlier espousing of legal philosophers and realized in the scheme of US Constitution. It was implanted for reasons and to organize the federal union as we affirm in a number of federalist papers, which responds with the need to construct any altered paradigm, what we now call the modern constitutionalism (1995). The Constitution is a unique source of governmental power in contrast with the divinity of monarch or Catholic supremacy since our inauguration in the new lands. Although the federal supremacy was elicited in express language, the hierarchy of norm failed to be defined explicitly. The higher law concept, as expounded by *Blackstone*, would be resilient to impact the case, *Marbury v. Madison*, which has continued to be argued by the scholarly circle about its anti-majoritarian difficulty (1995). The separation of powers principle perhaps would be assured most practically by the judicial branch so that we may not falter if to ascribe them as a bulwark of the federalism and constitutionalism. Hence, a self-reflection or definitional work would be pivotal if we exercise the dimension of ultimate authority at the top of Constitution. Some presidents would argue on the autonomy of respective branch involving a constitutional interpretation while others would be generous or favorable to interact with the judicial organ. The self-restraint or political question doctrine discloses the inextricable constraints of which the judiciary could not be derogatory. The case or controversy requirement had been ordained and the original jurisdiction was pronounced to define the essence of judicial power (1995). It would be an inviolable mandate of constitutionalism that the judicial branch exerts to maintain the national integrity and system. It would be an idealistic organ to afford the virtue of human rights given it is specific and enforceable to create a distributive justice and in terms of the Plato’s. Nonetheless, its power is conditioned on the constitutional theory and

terms to be shared for the uniform national response and plurality of interests, but should be checked and balanced to respond with the universal virtue of human rights. The human rights would be an ultimate destination toward which the scholarly and governmental goals or direction would be steered. The complicacies of reviewability would be waged in this framework.

In sum, the first point underlies within the theoretical and constitutional mandate whether to grant the reviewability or not. The agencies share this concern to procure a workable government with respect to the constitutional structure and authority, who would be an indispensable party of administrative law cases.

The second point involves the public policy making role of judicial branch in collaboration with the agencies. Both organs would impose a separate level of administrative rules or extent of implementation in consideration of the cost and benefit analysis or fiscal capabilities of government. The activism of Court and bureaucratic practices would facilitate the general welfare or public health of citizenry. It, nonetheless, requires a costly response and expensive institutions that have to be weighed so as to determine the legality of administrative action or inaction. For example, a regulation to prevent some level of greenhouse gas emission would reduce the air pollution, but could compel the costly resources to enforce the rule. The statutory language and goals, legislative intent and history as well as other many factors would be evaluated in the balancing test and to define the proper scope of agencies' responsibility.

The third point would be concerned of brother branches' role or interplay in terms of the judicial oversight and administrative autonomy or insularity (Kerwin, C. M. & Furlong, S.R., 2011; Shapiro, S. A., & Levy, R. E., 1995). The check and balance scheme of Constitution necessitates the judicial review of administrative action or inaction in which the Court would entertain a final say about the destiny of public programs and judicial standard to be respected by the agencies. However, the judicial branch would be constrained by the Constitution and congressional acts, which are considered as the political expression of nation. The ground rules impose a limitation and the scope of review should be neither arbitrary nor extensive. As the rule of law ideals would govern, the judicial branch has to be placed as central to sustain the civil virtue. The intricate system of federal union and constitutional case law would certainly be consequential to make the US distinct from other modern democracies. An increased profile of judicial branch in this respect tends to fuel producing a web of constitutional theories and laws, which pertains to their oversight role of agencies. Besides the standing requirement, they invented an important concept, what we term as "zone of interest," if to grant or deny the reviewability. In the *Data Processing*, the majority court applied this theory, and granted the plaintiff's standing who claimed the agencies' action on the Bank Service Corporation Act (Harrington, C. B. & Carter, L. H., 2009). The majority court ruled that there is no presumption against the judicial review and in favor of administrative absolutism. In the *Abbot Laboratories, Inc.*, the Court found affirmatively that the ripeness doctrine supported the case as eligible for judicial resolution (2009). It also addressed the issue of whether it met the requirement of "final agency action" within the meaning of statutory language set forth in the Art. 702 of APA. Actually the FDA did not complete a rulemaking in which phase the regulation would not enter any legal force. This status, therefore, could not bring any concrete harm or loss, for example, imposition of criminal penalties or other administrative sanction. It would, nonetheless, imminent or impending, and the prospect that the agencies would be coercive civilly, if not criminally, to pose an immediate threat to their legal interests. The judicial review would be permissible in this situation.

Fourth, the point of consideration would involve a citizen initiation or democratic monitor of the governmental process, which could thrust the ingenious context of lawsuits uncharted in the liberal framework of litigation. For example, the taxpayers would consolidate to challenge the agency action or inaction, and non-profit organizations of public nature, such as the environmental groups or association of fair representation would actively engage to seek the social justice in the judicial confines (1995). This contributes to the increasing intensity of judicial deliberation whether it conforms to the embedded concept of justice administration, such as adversarial proceedings, ripeness or causation and redressibility. The "zone of interest" principle also comes from that standpoint of view. The Court would deny or grant the reviewability over a scope of public suits in that perspective and theories as we confirm in the *Sierra v. Morton*, *Bennet v. Spear*, *Lujan v. Defenders of Wildlife* and so on (2009; Federal Administrative Law, 2014; O'Leary R., 1993). However, an individual may pursue to restore their private interests as in the case of *Defunnis*. In that case, *Defunnis* was finally conferred a law degree in the University of Washington Law School which actually rendered it moot his case of discriminatory admission decision by the state agency (2009).



### **The Public Administration: An Insight from the Judicial Practice**

In a plethora of factors or variables, the pervasive mental gears from the judicial practice tend not to neglect on the classic concept and notion, to say, their crucial commitment to safeguard the property rights, interbranch solitude and mutual respect of insularity or autonomy. In the *Massachusetts*, the suit bears a resemblance with the challenge of environmental claim, but survived in terms of reviewability provided that the claim eventually asserts the loss of property interests for the coastal land, not merely the degradation of environmental quality. The land ownership is traditional and possesses any retrenched quality of proprietary interest since the feudal times which would not be compatible with the loss of decent lives or mental distress. It would be concrete and well based to claim invoking a judicial intervention. In the *Laidlaw Environmental Services*, the Court ruling would be viewed in fair contrast. In that case, the Court held that the preliminary measure of administrative sanction or settlement effective to afford the agencies' response should be as viable, and not be tainted by the judicial intervention. The administrative techniques, for example, civil penalties and reform settlement, would fall within the exclusive preserve of agencies and to increase a regulatee's compliance (Kerwin, C. M. & Furlong, S.R.,2011). The Court would be courteous to deny the action of environmental group, which would go deferential and respectful to the option of agencies. We will a bit further on this point below.

### **Judicial Review and Some Structural Thought**

The judicial review is an institution in which we contested the national policy and public good. Typically, it would be a forum enabling that the abstract nature of public standard and political expression could be converted in any definite way about the public lives. Hence we would recognize in dual virtues. On one hand, it would function to protect the insular and discrete minorities. On the other, it formulates a judge-made law to give the standard and complements with the general direction and intent of political branches. It would be a useful classroom that the policy administrators could be inculcated to steer and practice their commitment. For its intrinsic and attributes, the court could be more than an effective agent. They could be more concrete and practical with the material presence of issues and disputes. While the political branches could exploit the science and expert information, the judiciary could be aided, in addition to the expert testimony and any available evidence, with the presence of aggrieved humans and specific situation or context to materialize an issue or contention. They could not only meditate on the fiscal capabilities of nation, but also an impact from the agencies' inaction through the terminal policy addresses, such as the proprietary people of the coastal land in Massachusetts (Harrington, C. B. & Carter, L. H., 2009). Provided if the statutes and congressional acts are not crystal-clear and often pose a leeway of interpretive possibilities, the judicial process and interactive lesson among two agents consequentially would develop a general merit to create the standard of practice for the public agents. As Ackerman illuminated, the Court would be a least dangerous branch which could deliberate the constitutional issues and basic national policy. They are generally insulated from the political influence and afforded with a plenty of leisure time to think about the controversies in a scholarly way. Beyond it, the judicial style of Court is distinct among three coordinate branches where they even do not mind to become a storyteller with the facts and sociological ways of deliberation to assess the impact of their decision within the society. A wisdom from the separation of powers principle, nonetheless, delimits the constitutional structure of government and authority. The principle could be shed in light of the human rights which could, for example, work to prevent the kind of judicial tyranny, such as the Star Chamber in the medieval monarchy and legislative derogation in the colonial period. As for its importance as a threshold issue, the standing requirement is dealt not only importantly but also scrupulously over the cases. The tendency of Court may not be consistent, however. The Court, in some cases, may prefer as less as a gate keeping role, but in other cases, may be generous to be deeply involved in the subject matters (2009). As the workload of Courts should never be impractical, the kind of certiorari system, for example, would also militate against the more comprehensive role of Courts as a policy maker. It would, in any way, not be deniable that the principle of cases or controversies would extensively face with the challenges of standing (Shapiro, S. A., & Levy, R. E., 1995; Woolf, L. & Jowell, J., 1995).

### **Standing, Its Standard and Implications**

We can ascertain two possible attitudes or tenets where the standard could be shaped. One would be the private law model. The leading advocacy in this stream may be found in many opinions of Justice Scalia. The other views

would support the public law model which would most notably be argued by Fletcher. The private model espouses the view that a justiceability could only be granted in cases where the personal rights and interests are harmed or damaged. The scope of them would include the property, contract, tort and statutorily conferred privilege. This theory focuses on the contractual framework of modern democracies so that the public intervention has to be minimized upon the voluntary consent of regulatee's (Kerwin, C. M. & Furlong, S.R., 2011). The common law of property and contractual rights would determine their extent free from the state and other persons. The public interest would ebb in this view, but the least necessary regulation falls within the responsibility of administrative agency. This framework would retain a persuasion in response with the administrative state and professionalism of public administration. The judicial review, in this social aura, would set back from the active oversight of administrative agencies, and largely defers to their expertise or autonomy. Justice Scalia argued in his article published in 1983, who pointed to the constitutional role of judiciary (Harrington, C. B. & Carter, L. H., 2009). He founded on the Art. III Sec. 2 of Constitution, which should be churned to respect the separation of powers principle in caution of possible overjudicialization. The Court would class two grounds as differs in its meaning about the justiceability, which is "constitutional and prudential." The constitutional element should not be impaired absolutely whereas the prudential strands may be malleable to the wisdom of Court and Congress. For example, imagine that other person built a gas station in violation with the urban planning statutes. It would entirely depend on the Congress or Courts whether he directly sues for the violation or if the agencies could only be competent to implement for cure of such violation. In contrast, the personal injury in fact would be constitutional that could not be transgressed either by Congress or Judiciary itself. The problem, then, turns to the point of how to define the personal rights, interests and privileges, which have grown conceptually. Nowadays, the environmental interest or aesthetic value would be cognized by the judiciary. The APA 702 (a) can be construed to incorporate this perspective as stated "any person suffering from legal wrong...adversely affected or aggrieved by such action..."

The public law model puts an emphasis on the oversight role and effective control of agencies by the judiciary, who arguably can be seen to lose their status as an authority on the public representation (Kerwin, C. M. & Furlong, S.R., 2011). Provided if, as a consequence, the Constitution and congressional acts authorize a cause of action for the public interest, the Court could adjudicate regardless of the impairment of personal rights. The view, therefore, generally considers the Court as an ultimate watchdog of public policies. Given a clear basis of statutory cause of action, the standing could not forestall the judicial process whether or not the persons and groups incur any concrete loss or harm discernible from the traditional notion of personal interest. The public law model would expect the Congress to act like the private attorney general, who can shape the scope of standing on their own value assessment. It has a historical trace in the informant suit or *qui tan actions* in the British and earlier US laws. Fletcher counters that, the injury in fact, though asserted as polar in the polemics of private model, would not serve the separation of powers principle. The advocates of private model would view that the word, "in fact" would comfort an independent basis for the judicial authority. Nonetheless, it overlooked that the judicial speculation eventually comes to involve a normative dealing to see whether the rights or interests could be ascertained in terms of common law. The APA 702 (a) can support this view, "...within the meaning of any relevant statute." One excellent example would be *Geraghty* where he filed a class action to challenge the federal parole regulation with his inmates. Pending that action, he was set free, but the Supreme Court could continue to complete his action to decide if the regulation could be sustainable since his cause is public, beyond his private interest. This ruling might be an exception since he represents their class interest legitimated in the Federal Rules of Civil Procedure. The public model, on the other, illustrates the rule of advisory opinion on its basis, one theoretical support for the private model. It elicited that it is not necessarily governing from the historical and practical view of rationale

### **The *Laidlaw* and Its Implications**

Between the Executive and Judiciary, I could introduce the *Laidlaw* in terms of administrative insularity and autonomy concerning the enforcement technique, say, civil penalties (Kerwin, C. M. & Furlong, S.R., 2011).. In this case, the plaintiff, environmental group titled the Friends of the Earth and in association with other civil groups, sued the Laidlaw Environmental Services which purchased the wastewater treatment facilities and allegedly violated the limit of toxic pollutants into the waterway of North Tyger River. The Department of Health and the Environment (DHEC) of South Carolina granted a permission to leak the mercury and legalized the facilities according to the Clean Water Act. The plaintiffs argued that the defendant had a track record of river pollution about 495 incidents from 1987 through 1995. The environmental groups gave a notice that it initiated an injunctive relief upon a lapse of 60 days from the date of notice. The defendant petitioned that the DHEC immediately would respond with the

administrative suit. In the proceeding, the defendant and DHEC reached the contract settlement about the civil penalties, 100,000 dollars, and to refine the facilities to comply with the permission of mercury leakage. The environmental groups did not consider that the state government diligently implemented the administrative remedies, and brought a controversy to the federal court. The trial court denied their claim and the appellate court affirmed. Pending the Supreme Court, the case went moot that the defendant business turned to be closed down.

The *Laidlaw* Court generally can be considered as activism of judiciary, which would be one co-equal branch to collaborate and to forge the administrative goals. It shares the effective role of civil penalties to attain the public goal. The Court, on the other, disfavored the traditionally stern review of standing, but applied the relaxed standard on the injury in fact and redressibility. The plaintiffs alleged that the citizen could no longer entertain the North Tyger River from the fear of mercury- polluted waterways. They no longer wished to purchase the adjacent land parcels. The defendant argued by countering that no evidence supported the level of pollution to harm the public health, and the fact alone could not meet the traditional injury in fact test. The Supreme Court opined that a discontinuance to entertain the river or in use for a repose and recreation could simply verify a decrease of its aesthetic and recreational value. The fact presented for the court review would suffice to find that the injury in fact was incurred. The attitude of Court seems to change a little from the previous rulings, such as *Lujan v. Defenders of Wildlife*. In *Lujan*, the Court rejected the argument on the ground that the injury in fact could not be established or that the causation was so remote (O'Leary R., 1993). In that case, two members of environmental group asserted that the US aid to the foreign nations would foster an exploitation of natural resources and that they would lose the chance of fantastic eyesight for the rare species and animals. The *Laidlaw* rule could likely apply to *Akins* where the Court respected the statutory scheme of FECA to specify the extent of concrete injury. Upon the denial of petition to request the public disclosure of campaign fundraising record, the civic group filed a suit and the Court granted a standing (Harrington, C. B. & Carter, L. H., 2009). This implies the Court would turn to see more favorably the public law model. Before the *Landlaw*, the federal courts continued to deny a redressibility in the case where the civil penalties were to be sought. It does not consider it as one of private remedies for the persons or groups. In the *Steel Co.*, the Court emphasized that the violation has already ceased, and the civil penalties would be destined to the account of Treasury Department. The framework has shifted to follow the public law model in *Laidlaw* that the civil penalties sought as a final remedy by the plaintiffs were viewed to effect on the higher compliance of industries. It could fit within the purview of redressibility, and the standing could be granted. The *Laidlaw* would impact significantly to enlarge a judicial intervention through the civil penalties on the selected public statutes. A scope as permissible to pursue the administrative responsibility, however, was confined to the injunctive relief only. A reformulation of the legislative and judicial policy over the cases would transform toward some of collaborative shape on the paradigm of public law model. On the other, we can note that the lower courts of *Laidlaw* uphold the traditional division between the private remedies and enforcement sanctions.

## Conclusion

The separation of powers principle deeply heritaged in the US constitutionalism affected and continues to influence the law and public policy in the nation. The tripartite scheme of government was quarreled over the history how we have to perceive any best adequate interaction among the Congress, Executive and Judiciary. The Constitution itself merely quibbles on this point, and the Supreme Court justices, in some cases, would not be done as a clear cut for the scope of constitutional power conferred on each branch. As the stare decisis is a rule in the common law countries, it is less prospective to anticipate that a quantum leap can be made for a new paradigm of constitutional government in the US. In this challenge, the paper deals with the sensitive area of three powers involving the issue of presidential privilege and immunity, justiceability and standing, as well as judicial control. In the course of discussion, several landmark cases were illustrated to make a point for the angulated controversies, typically involving the pressing public issues and officers of absolute or qualified immunity. Given the diverse structure of government, the US model had been followed by many new born republics in 20<sup>th</sup> centuries. The author would wish that the paper provides a comparative lesson for the circle of those countries.

## Reference

- Harrington, C. B. & Carter, L. H. (2009). *Administrative law and politics: cases and comments* (4th ed.). Washington, DC: CQ Press.



- Amar, A. R. (1999). Nixon's shadow (Symposium: United States v Nixon: Presidential power and executive privilege twenty- five years later). *Minnesota Law Review*, 1405–1420.
- Conkle, D. O. (1998). Congressional alternatives in the wake of *City of Borne v Flores*: The (limited) role of Congress in protecting religious freedom from state and local infringement. *University of Arkansas at Little Rock Law Journal*, 20, 633.
- Devins, N. & Fisher, L. (2002). The steel seizure case: one of a kind? (Youngstown at fifty: a symposium). (President Trumans' 1952 seizure of U.S. steel mills). *Constitutional Commentary*, 19, 63.
- Kerwin, C. M. & Furlong, S.R., (2011). *Rulemaking: How government agencies write law and make policy*. Washington, DC: CQ Press.
- King, K. L. & Meernik, J. (1999). The Supreme Court and the powers of the executive: the adjudication of foreign policy. *Political Research Quarterly*, 52(4), 801–804.
- Kirwan, K. A. (1995). The use and abuse of power: The Supreme Court and separation of powers. *The Annals of the American Academy of Political and Social Science*, 537(1), 76–84.
- Lobel, J. (2008). Conflicts between the commander in chief and Congress: Concurrent power over the conduct of war. *Ohio State Law Journal*, 69, 1–15.
- O'Leary R. (1993). *Environmental Change: Federal Courts and the EPA*, Philadelphia. PA: Temple University Press.
- Pettee, J. S. (1998). *Clinton v Jones*: The Supreme Court refuses to expand the Doctrine of Presidential Immunity to encompass a President's unofficial acts. *Journal of Contemporary Law*, 24, 206.
- Samuels, D. J. & Shugart, M. S. (2003). Presidentialism, elections and representations. *Journal of Theoretical Politics*, 15(1), 33–60.
- Shapiro, S. A., & Levy, R. E., (1995, April). Judicial incentives and indeterminacy in substantive review of administrative decisions. *Duke Law Journal*, 44(6), 1051-1080.
- Stone, G.R., Seidman, L.M., Sunstein, C.R., Tushnet, M.V. (1991). *Constitutional Law*, Boston. MA: Little Brown and Company.
- Wolf, L. & Jowell, J. (1995). *Judicial Review of Administrative Action*, New York. NY: Thomson Professional Pub Cn.
- Ethics in Government Act of 1978
- Morrison v. Olson, 487 U.S. 654 (1988)
- United States v. Curtiss-Wright, 299 U.S. 304 (1936).