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## THE POPE JOHN XXIII LECTURE\*

### A PROPOSAL TO RESOLVE INTERBRANCH DISPUTES ON THE PRACTICE FIELD

*Paul R. Verkuil\*\**

Separation of powers and checks and balances are ritualistic phrases in our constitutional system that hardly need extended explanation. Suffice it to say we are not a government of separate powers but of shared powers. The model James Madison principally devised had more in common with the mixed English system of John Locke than the strict French separation model inspired by Montesquieu.<sup>1</sup> Intentionally, our three branches each have offices in the other. The presidential veto of legislation, the senatorial advise and consent function over executive appointments, and the split power to conduct and declare war are only three of the most obvious (and fundamental) examples of our system of shared powers.

Sharing power, nevertheless, does not make the resolution of interbranch disputes easier. As Chief Justice Burger observed in *INS v. Chadha*,<sup>2</sup> our constitutional arrangements were not designed necessarily to be easy or even efficient—they were designed to secure liberty. Moreover, in this modern era of divided government, where the executive and legislative branches are controlled by different parties,<sup>3</sup> the possibilities of friction and impasse are

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\* This Article is adapted from the annual Pope John XXIII Lecture delivered on April 2, 1991, at the Columbus School of Law, The Catholic University of America. The date is of critical importance as it speaks from the time just after the Gulf conflict when there was greater optimism in the relationship between the White House and Congress. Since the Justice Thomas confirmation hearings, however, that optimism may be misplaced. See *Bush Launches Strike at Congress: President Calls Lawmakers "Privileged Class of Rulers"*, WASH. POST, Oct. 25, 1991, at 1.

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1. See generally LOUIS FISHER, *PRESIDENT AND CONGRESS POWER AND POLICY* 1-27 (1972) (discussing the origins and history of separated powers from the French models and the Articles of Confederation to the Constitutional Convention and its subsequent ratification); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305 (1989) ("[T]he English constitutionalism . . . forms the backdrop to our own constitutional experience.").

2. 462 U.S. 919, 944 (1983).

3. Lloyd Cutler summarized the situation well:

heightened. Suggestions are even made these days that the parliamentary system, with its built-in protections against political division, might be a more sensible way to organize our own system.<sup>4</sup>

Today, we stand at a remarkable juncture in our history of interbranch relations. Having recently concluded a military engagement that for the first time since World War II involved reasoned debate and action by both political branches, the conditions for a meaningful exchange of views about separation of powers could not be better. One cannot read the extensive debates in the House and Senate on the resolution to authorize the President to enter into a military conflict in the Gulf without perceiving a strong sense of shared purpose and mutual respect.<sup>5</sup> Even those who voted not to grant the President the power to engage in the conflict united in an admirable sense of mutual purpose. Senator Gore aptly described the importance of this shared feeling when he said that "[n]ational consensus is a strategic asset."<sup>6</sup> While this kind of unity is often limited to international relations, this impressive display of interbranch cooperation may result in a better understanding of domestic matters and, specifically, the subject of interbranch relations. For these reasons, there is a higher level of mutual respect and trust between Capitol Hill and the White House than there has been in many years.<sup>7</sup> The timing, therefore, could not be better to urge interbranch cooperation and understanding concerning those internecine domestic disputes that often frustrate a mutually productive relationship between the branches. Certainly the recent struggle between the White House and the Senate over the confirmation of Clarence Thomas to a position on the Supreme Court highlights the gulf in communications that still exists. But it also demonstrates how much the branches need to work more closely on appointment matters.

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For the first 150 years, the party system had remarkable success in fostering cooperation between the branches. In thirty-five of thirty-eight elections from 1796 to 1948, the party winning the White House also won the majority of both the House and the Senate. Taylor, Hayes, and Cleveland, I think, in his second term, were the only exceptions. Now, of course, the opposite happens. Beginning in 1956, in six out of nine Presidential elections we ended up with divided government. Beginning in 1968, in five out of the last six Presidential elections, twenty of the last twenty-four years projected forward to 1992, we have had divided government.

Lloyd Cutler, *What Is Wrong with Divided Government?*, 68 WASH. U. L.Q. 563, 565 (1990).

4. *Id.*

5. See H.R.J. Res. 62, 102d Cong., 1st Sess. (1991). See generally MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990) (discussing the branches's respective constitutional roles in foreign policymaking).

6. 136 CONG. REC. S16,755 (daily ed. Oct. 26, 1990) (statement of Sen. Gore).

7. There is no way to "prove" this proposition, but the President's address to an admiring Congress on March 6, 1991, makes it hard to rebut. Jack Sirica & Gaylord Shaw, *Star of the Show; Applause for Bush in Congress*, NEWSDAY, Mar. 7, 1991, at 3.

There are two essential questions to be asked: First, what is the legal basis of separation of powers disputes? Are they *necessary* as a constitutional matter, ingrained, if you will, in tensions built into the Constitution itself, or are they discretionary or avoidable by better communications between<sup>8</sup> the branches? Second, what mechanisms or forums are available to help achieve a working understanding of when and how these disputes can be avoided? This Article proposes an analysis of the first question and a prescription for the second.

### I. NECESSARY INTERBRANCH CONFRONTATIONS

There can be no argument that the large issues of governance are meant to trigger friction and confrontation. The Framers, as Madison said,<sup>9</sup> intentionally set out to protect the liberties of the people by limiting government. Thus, debate over such basic matters as the proper roles in declaring and coordinating war will never end; nor should conflict over the budget and spending authority.<sup>10</sup> In addition, many appointments and advise and consent questions are also within territory set aside for perpetual dispute. There was, for example, practically no way to avoid the confrontation that resulted from the nomination of Robert Bork to the Supreme Court. That was an ideological debate; it served to redefine, for better or worse, the future role of the Senate in the advise and consent function.<sup>11</sup>

Likewise, there are times when the President and Congress must end up in court. When President Truman seized the steel mills to maintain production in the midst of a labor dispute during the Korean conflict, he challenged congressional authority in a way that forced confrontation with the industry itself.<sup>12</sup> In *United States v. Nixon*,<sup>13</sup> the Court was the only institution able to resolve the question whether the assertion of executive privilege by President Nixon could prevail over a judicial claim for presidential documents. But other cases, such as the legislative veto case, *INS v. Chadha*,<sup>14</sup> are less

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8. "Between" because it is the two political branches, not the judicial branch, that pose most of the separation of powers challenges. Of course it is also possible that the judiciary's interest on occasion can be involved. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that Congress's grant of specific adjudicatory authority to bankruptcy judges violated Article III of the Constitution).

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

10. See generally LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 255-75 (1990).

11. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* 267-349 (1990) (detailing the politicalization of Robert Bork's confirmation process from the victim's perspective). Ironically the Clarence Thomas nomination battle, while certainly disputatious, had less to do with ideology than character issues and how they should be addressed.

12. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

13. 418 U.S. 683 (1974).

14. 462 U.S. 919 (1983).

than inevitable. Admittedly, *Chadha* dealt with explicit constitutional provisions—the bicameralism and presentment clauses of Article I—that presidents have a constitutional duty to preserve. Politics had made the legislative veto an accepted practice for many years and the political accommodation the device signified simply evaporated when it was extended into new areas, such as rulemaking review.<sup>15</sup> That the legislative veto continues to be employed by Congress in spending matters without presidential (or legal) challenge suggests that it is not totally without redeeming value.

Other recent separation of powers cases are even more dubious when placed on the scale of “necessary” judicial challenges. *Bowsher v. Synar*<sup>16</sup> and *Morrison v. Olson*,<sup>17</sup> the Gramm-Rudman-Hollings Act and independent counsel cases, respectively, were major constitutional challenges that might have been avoided by better negotiations between the branches. Inter-branch clashes must happen only in situations where important constitutional responsibilities are expressly delegated and no compromise is contemplated by the political branches. Many other situations currently exist where clashes occur as if between enemies at night, with no real purpose or necessity, and with corrosive consequences for national consensus. These are the clashes that should be, at least as an initial matter, the focus of informal negotiation and resolution rather than judicial decree, because the political branches themselves have an obligation to interpret the Constitution and not leave that task solely to the courts.<sup>18</sup>

## II. AVOIDABLE INTERBRANCH CONFRONTATIONS

There are many situations where conflict could be avoided if the political branches would confer and compromise. There are several examples that establish this proposition. The first involves a frequent source of conflict—the production of documents by the executive branch to Congress. There is, at one level, no more routine practice than the sharing of information be-

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15. It was only when the congressional use of the legislative veto extended to oversight of policymaking and rulemaking that the practice became intolerable from the executive branch's perspective.

16. 478 U.S. 714 (1986).

17. 487 U.S. 654 (1988).

18. A recent article emphasizes this point:

Excessive reliance upon the Court deceives us into thinking that these disputes are purely constitutional in nature and that only the Justices can resolve them. Demanding judicial resolution improperly diminishes the role of the political branches in interpreting the Constitution; emphasizing the constitutionality of a proposal diverts attention from its often dubious wisdom.

Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 33 (1991).

tween executive officials and congressional committees. Both branches have strong interests in the process; Congress to perform its oversight function and the Executive to ensure that it can perform its constitutionally assigned tasks. Nevertheless, much occurs through accepted protocols of exchange, even though document production and protection is a deeply political process that raises delicate issues of interbranch relations.

The contested cases frequently pit assertions of executive privilege against congressional demands that may involve subpoenas and contempt citations.<sup>19</sup> Indeed, the most famous recent contempt case against Assistant Attorney General Theodore Olson ended up testing the constitutionality of the independent counsel mechanism.<sup>20</sup> In this case, however, and many others, it is fair to question whether the confrontation was necessary at all. Would better negotiating procedures between Congress and the Executive have reduced the necessary confrontations between the branches on the issue of document production? An insightful study recently undertaken by the Administrative Conference of the United States<sup>21</sup> suggests that there are better ways than litigation to resolve many of these disputes. The report advocates a set of congressional rules and an Executive order that requires negotiation on document production issues. The purpose of this negotiation is to achieve compromise and to provide a mechanism for systematic recordkeeping about such disputes to help shape the future resolution of similar claims. The overriding need is to create an atmosphere of trust that is often lacking between the branches in these types of negotiations. Indeed, as part of its solution, the report even suggests that neutral third party facilitators, retired federal judges and the like, might offer an alternative means of resolving disputes and establishing trust between the branches.<sup>22</sup>

Another recurring set of clashes that might be avoided centers on legislative additions (called limitations riders) to appropriation bills. Omnibus legislation with unrelated riders passed at the end of an appropriations cycle

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19. See Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); see also Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986) (advocating the use of a special prosecutor to resolve conflicts in which the legislative demands for information are disobeyed by the executive branch).

20. *Morrison v. Olson*, 487 U.S. 654 (1988).

21. PETER M. SHANE, ADMIN. CONF. OF THE UNITED STATES, *NEGOTIATING FOR KNOWLEDGE: ADMINISTRATIVE RESPONSES TO CONGRESSIONAL DEMANDS FOR INFORMATION* 41 (1990).

22. *Id.* at 37; see also Shane, *supra* note 19, at 529-39 (referring to earlier ABA efforts).

may render the President's veto too powerful to exercise.<sup>23</sup> But even if, as Neal Devins has shown,<sup>24</sup> it is debatable whether the President is truly deprived of his veto power in such circumstances, there are sound reasons not to push policymaking to the last moments of the legislative cycle.

Moreover, some of these additions to appropriation bills often read like a form of interbranch harassment. Former Attorney General Richard Thornburgh highlighted several substantive provisions inserted in an allegedly veto-proof appropriation bill for which a valid legislative purpose was hard to divine.<sup>25</sup> For example, in the 1989 appropriation for the Department of the Interior, the following language appears: "None of the funds available under this title may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."<sup>26</sup> The point of this legislation was apparently to prevent the Secretary of the Interior, a cabinet official, from keeping track of what his own employees were saying to congressional leaders or probing into any charges of undue influence by interested members of Congress in executive decisions.<sup>27</sup> While this action failed, it occupied more time than it should have to resolve.<sup>28</sup> The whole idea of destabilizing the Executive by encouraging bureaucratic leaks to Congress is unjustifiable. One wonders how organizations like the American Civil Liberties Union (ACLU), which recently urged executive branch employees to leak information about the Gulf War to Congress, can square its actions with legitimate executive branch needs to protect national security.<sup>29</sup>

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23. See Glen O. Robinson, *Public Choice Speculations On the Item Veto*, 74 VA. L. REV. 403, 406-07 (1988). *Contra* Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L. J. 389, 412-14 [hereinafter Devins, *A Critical Look*]. Of course the whole question of whether the item veto is itself a good idea (or indeed whether it now exists) is a subject worthy of interbranch discussion. See generally Neal E. Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993 (1990).

24. Devins, *A Critical Look*, *supra* note 23, at 412-14.

25. Dick Thornburgh, *The Separation of Powers: An Exemplar of the Rule of Law*, Opening Address Before the Federalist Society Conference Symposium (Jan. 19-20, 1990), in 68 WASH. U. L.Q. 485 (1990).

26. Act of Oct. 23, 1989, Pub. L. No. 101-121, 1989 U.S.C.C.A.N. (103 Stat.) 701, 722.

27. Thornburgh, *supra* note 25, at 490.

28. The aftermath of the Interior incident is instructive. The White House Counsel's office advised Congress that its provision was an unconstitutional usurpation of executive power. After this, Congress amended the provision to limit its effective date to one day—October 1, 1989. As that day had already passed, no Interior contacts were required to be logged. See Symposium, *Panel III, Congressional Control of the Administration of Government: Hearings, Investigations, Oversight, and Legislative History*, 68 WASH. U. L.Q. 595, 598, 603 (1990). Few would dispute that this pointless exercise should have been avoided.

29. The ACLU proclaimed before the Gulf War that lower level officials "have a legal right and a political responsibility" to leak in order "to ensure that Congress has the information it needs to perform its constitutional duties." Edwin M. Yoder, Jr., *Whistle-Blowing*,

With regard to the Interior incident, Attorney General Thornburgh concluded that "[s]uch provisions obviously represent petty politics at their most base."<sup>30</sup> That is a proposition with which it is hard to disagree; however, the larger question is more central. Why had the relationship of trust fallen to a level where such responses were forthcoming? Had the breakdown in communications between the branches reached the point where it had to be fought out in legislative skirmishing? This kind of non-productive exchange speaks eloquently to the need to create a forum for meeting and conferring, in which interbranch guerilla warfare over the loyalty of government employees can be avoided. An ongoing dialogue between the main players in a neutral setting where give and take is possible is certainly preferable to this public embarrassment.

Another situation where dialogue might be beneficial concerns the question of executive branch control of the agencies through the Office of Management and Budget (OMB) and the related question of agency organization, independent versus executive. During the last three administrations, attempts have been made to centralize and control the policymaking functions of the agencies through OMB's Office of Information and Regulatory Affairs. This control has been achieved through a succession of Executive Orders<sup>31</sup> that have challenged congressional assumptions about dictating agency policy and priorities through legislation, especially in regard to the so-called independent agencies. Over time, there have been accommodations on both sides that have modified the procedures whereby OMB policy control is exercised and, at the same time, have forestalled restrictive legislation that would have frustrated the Executive's need to centralize policymaking.<sup>32</sup> Nonetheless, tensions continue in this area that could be reduced by informal communication and understanding.

The continuing issue of how best to organize agencies to perform their missions is also one worth discussing in a neutral setting. Traditionally, Congress has looked to independent commissions as a mechanism for asserting more control.<sup>33</sup> But it is becoming increasingly clear that the Executive

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*ACLU-Style*, WASH. POST, Dec. 30, 1990, at C7 (quoting advertising issued by the ACLU). In this one-sided world one wonders about such other valid constitutional duties as the President's responsibility to ensure the national security.

30. Thornburgh, *supra* note 25, at 490.

31. See Exec. Order No. 12,498, 3 C.F.R. 323 (1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

32. See, e.g., S. 1080, 97th Cong. 1st Sess. (1981), reprinted in 127 CONG. REC. 7938-41 (1981).

33. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257 (explaining the potential and limitations of the independent agency as a vehicle for making government decisions).

can exert more policy control over independent agencies than was previously believed,<sup>34</sup> and that the independent commission may not be the best vehicle for Congress to influence policy.<sup>35</sup> A sensible dialogue between the branches about what each wants to accomplish with these commissions could greatly assist the future effectiveness of the administrative agency as an institution.

The question of administrative agency structure also blends easily into another area where executive-legislative dialogue would be useful—that of the delegation of legislative power and the uses of legislative history.<sup>36</sup> Vague, general grants of power to agencies (independent ones at least) are often countered with overly precise statutory requirements for decisionmaking imposed upon executive agencies. The practice of writing overly complex and detailed legislation is itself a congressional reaction to the fact that the executive branch has been in the hands of the other party for five of the last six administrations. An article in the *New York Times* outlines numerous agency laws “almost as complex as the tax code,” citing the Environmental Protection Agency’s regulations on air pollution as a prime example,<sup>37</sup> and notes: “Bush Administration officials acknowledge that they have missed many of the deadlines set by Congress for the new laws. But they say Congress is partly to blame because it writes laws of impenetrable complexity with countless mandates and gives Federal agencies insufficient time to write needed regulations.”<sup>38</sup> These problems of legislative complexity, burdensome time lines, and executive recalcitrance are ideal subjects for informal negotiation and compromise. If Congress can understand the agencies’s legitimate complaints (on such matters as rulemaking timeframes, for instance), will it not be in a better position to write sensible and more enforceable regulatory standards?

An understanding of how the Executive can best implement congressional dictates requires a sharing of experiences on both sides. We need to do what Michael Davidson, Counsel, United States Senate, has recently suggested—

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34. *Id.*

35. Recently congress itself has considered converting one of its independent commissions, the Nuclear Regulatory Commission, into an executive, single-headed agency much like the Environmental Protection Agency. This willingness on Congress’s part to rethink the organization of agencies in order to make them more effective can only be applauded. *Id.* at 274-75.

36. See generally Symposium, Panel II, *Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority*, 68 WASH U. L.Q. 533 (1990).

37. Robert Pear, *U.S. Laws Delayed by Complex Rules and Partisanship*, N.Y. TIMES, Mar. 31, 1991, at 1.

38. *Id.*

namely, to find a "common table" for Congress and the White House to resolve these matters.<sup>39</sup>

### III. THE EXISTING MECHANISMS FOR RESOLVING DISPUTES

Both the executive and legislative branches have institutional mechanisms to assist in the resolution of separation of powers disputes. They tend, however, to be branch-identified and, thereby, to foster the very lack of trust that frustrates the resolution of "avoidable" separation of powers disputes. The Office of Legal Counsel (OLC) at the Department of Justice is the executive branch repository of wisdom on separation of powers matters. Long headed by astute legal advisors, including two current Supreme Court Justices, this office prepares opinions for the Attorney General and mediates ongoing disputes over matters such as document production to Congress. The Office of the White House Legal Counsel also works to present the Executive position on separation of powers disputes and, when matters reach the court, the Solicitor General's office provides the most unbiased perspective of all. But none of these Executive institutions has the capacity to serve as effective facilitator of interbranch conflict resolution.

There is, however, an independent agency which has been increasingly successful in securing the participation of all three branches in its deliberations. The Administrative Conference of the United States (ACUS) exists to improve the decision process of the administrative agencies. While its mandate is limited to matters of procedure, it is one of the few places where government brings together members of all three branches for discussion of resolutions that can involve settlement of interbranch conflicts.<sup>40</sup>

On the congressional side, the institutional arrangements are similar. Both the House and Senate have legal counsel who, like the OLC, represent their clients well. For longer term research projects the Congressional Research Service (CRS) provides astute reports and expert advice. The executive branch probably lacks confidence in CRS as an institution, however, since its name alone expresses an identification with the congressional branch. The Government Accounting Office (GAO) also has similar strengths and, after *Bowsher v. Synar*, it has the comparable weakness of being labelled a legislative creature.

It should not be surprising that the separate branches have created separate institutions to advise them. The difficulty is that these branch-identified institutions are not constituted to bridge the gap between the branches any

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39. Symposium, *supra* note 28, at 609.

40. Indeed the report prepared for ACUS by Peter Shane, see *supra* notes 21-22, includes recommendations for interbranch dialogue.

more than are the branches themselves. Institutions that are by inclination and organization meant to have single branch loyalties are simply not focused on the issues of negotiation and compromise of representation of proven conflicts.

There are, of course, several non-governmental organizations that can provide less branch-identified settings for research and discussion. The most well established is the Brookings Institution (Brookings) which sponsors conferences, conducts research, and speaks out on important issues. This is perhaps the most effective private organization currently at work in this regard.<sup>41</sup> Brookings has regular seminars for senior executive officials, members of Congress, and judges that are excellent forums for informal discussion.<sup>42</sup> Clearly, however, there is room for other organizations that can offer neutral settings for discussion of interbranch problems. One can conclude this simply by observing that the intensive conflicts described above have not been ameliorated by existing mediating institutions.

#### IV. NEW POSSIBILITIES FOR RESOLVING INTERBRANCH DISPUTES: SETTING THE COMMON TABLE

The political branches themselves are undoubtedly aware of the desirability of resolving disputes in informal ways. The tensions of the last decade have made it plain that separation of powers problems are increasingly friction prone. President Bush has toned down the rhetoric of the Reagan administration and made efforts to meet with the leadership in Congress, even before the Gulf situation. He of course has more work to do in the aftermath of the Thomas Confirmation. Congress itself also has recognized the need for dialogue about the confirmation process.

Recently, even the House has advocated the creation of new mechanisms to help solve the problems of communication. In July 1989, the Committee on Legislative Appropriations, chaired by Congressman Vic Fazio, invited new ideas for resolving old problems:

The Committee is concerned about a number of issues the Congress must address involving constitutional process and policy. Issues of this type include impeachment, the budget process, the advise and consent role, constitutional amendment procedures, war powers, and the legislative veto. Because of this concern, the

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41. Other valuable organizations include the Center for the Study of the Presidency in Charlottesville, Virginia, and the Carl Albert Center in Oklahoma.

42. Brookings does have something of a reputation as a government in exile which conceivably affects its position as a neutral organization. The presence of other organizations such as the American Enterprise Institute, and the practice of jointly sponsoring projects between them, however, make that a limited concern.

Committee believes there is a need to have a central point of analysis and review of matters affecting Congress and the constitutional process. . . . [T]he Committee will review this need and consider approaches to providing the necessary independent analysis to the Congress.<sup>43</sup>

The importance of responding to these concerns has been recognized by several organizations.<sup>44</sup> The Catholic University of America, Columbus School of Law, and the College of William and Mary, Marshall-Wythe School of Law, have proposed a collaborative venture—the Center for Interbranch Relations and the Constitutional Process. The Center plans to draw upon the resources of the combined universities to engage in the following activities:

1. Task forces to examine instances of interbranch conflicts that are susceptible to effective negotiation. These task forces will involve affiliated scholars, students, and government officials.
2. Seminars and conferences on contentious issues of separate and shared powers. What better time, for example, to discuss the future of the war powers amendment in light of the Gulf experience and to compare it to the experience of Iran-Contra?
3. Internships for students with members of Congress and the executive branch relating to interbranch problems.
4. Research and data collection in both law school libraries, publication of significant findings in the two law schools's law reviews and, as appropriate, in the *Administrative Law Review* which is housed at the Marshall-Wythe School of Law.
5. Provision of a "practice field," a neutral setting for exploring and negotiating interbranch disputes and settling them, if at all possible, in private, rather than in court. This is a prime function of the Center, and it cannot come about overnight. It will only happen as the Center

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43. H.R. REP. NO. 179, 101st Cong., 1st Sess. 2 (1989).

44. The Catholic University of America, Columbus School of Law, and the College of William and Mary, Marshall-Wythe School of Law, have joined to establish the Center for Interbranch Relations and the Constitutional Process. The Catholic University Center will be devoted to helping Congress resolve extraordinary interbranch clashes, such as those that Congressman Fazio described. Congressman Fazio cites several examples of what I have labelled here as unavoidable conflicts, but the process of categorization is itself part of the challenge of any interbranch dispute resolution center. The Center will serve as a resource center, a source for expert testimony, and a setting for consultation with congressional officials. The thrust of the William and Mary Center will be long-term research, document collection and retention, a conference capacity, and a visiting fellows program. A center with instant access and one that offers the opportunity to reflect, provides an ideal environment for quick, as well as educated, decisionmaking.

gains credibility within the political branches as a forum for neutral and objective research.

In addition, there is an international dimension to the Center's work that grows in importance with events that are unfolding in Eastern Europe. Congress has recognized the need to support emerging democracies in Eastern Europe through the establishment of its Support for Emerging Eastern European Democracies (SEED) program. Similarly, the American Bar Association (ABA) has taken the lead in providing legal advice on constitutionalism to the Eastern European countries through its Central and East European Law Initiative (CEELI) program. The United States is in a unique position to play an important role in shaping the democracies of the future. One fascinating element in the constitution drafting that is now occurring is the preoccupation with separation of powers. In countries where all functions of the state were in the hands of the Communist leadership, the need for offsetting and balancing political branches is fundamental to reform. The work of the Center could be invaluable in helping these countries understand the significance and limitations of separation of powers in the presidential or even parliamentary setting. By working closely with established organizations like the ABA, Brookings, the CRS, and other related entities, the Center for Interbranch Relations and the Constitutional Process can serve a valuable educational function at this critical time in world affairs.

#### V. CONCLUSION

These are ambitious goals for any organization, but especially for a neophyte group. Fortunately, the Center for Interbranch Relations and the Constitutional Process benefits greatly from the quality of individuals who have agreed to serve as participants and advisers. The Center is capable of making a difference in increasing the effectiveness of decisionmaking in our national political system, both here and in the creation of new systems abroad. Indeed, its research efforts will be of relevance to state governments as well. All in all, these are formidable challenges, but the need for a neutral, non-governmental "practice field," where debate between the branches can occur without penalty or posturing, has never been greater.