The Recommendation Clause

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Article II, section 3 of the Constitution provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[1] The practical significance of the first part of the recommendation clause is evident every January, when the President addresses Congress. It also forms the basis for congressional demands for information from the President, which sometimes ignite controversies over executive privilege.[2] But the second part of the recommendation clause, although an obscure provision, has great significance for federal lawmaking.

During the Reagan presidency, Congress frequently inserted into appropriations bills specific riders prohibiting the Executive Branch or an independent regulatory agency from advocating or even studying a change in a particular policy. For example, Congress prohibited the Executive from using appropriated monies to study or propose selling the Bonneville Power Administration[3] or the Department of Energy's uranium enrichment facilities,[4] and it prohibited the Office of Management and Budget (OMB) from expending any funds to review agricultural marketing orders.[5] On another occasion, without amending the Sherman Act, Congress prohibited the ex-

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1. U.S. CONST. art. II, § 3.

2. *See* L. CALDWELL, THE ADMINISTRATIVE THEORIES OF HAMILTON AND JEFFERSON 152 (2d ed. 1988); 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 968, at 1488-91 (2d ed. 1929); Warren, *Presidential Declarations of Independence,* 10 B.U.L. REV. 1, 7-8 (1930).

3. Urgent Supplemental Appropriations Act of 1986, Pub. L. No. 99-349, § 208, 100 Stat. 710, 749.

4. Continuing Appropriations, Fiscal Year 1988: Joint Resolution Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202, § 306, 101 Stat. 1329, 1329 (1987) [hereinafter Continuing Appropriations, Fiscal Year 1988].

5. Continuing Resolution, Fiscal Year 1984: Joint Resolution Making Further Appropriations for Fiscal Year 1984, Pub. L. No. 98-151, § 575, 97 Stat. 964, 973 (1983) (incorporating by reference H.R. 4139, 98th Cong., 1st Sess. § 514 (1983)); *see also* DeMuth & Ginsburg, *White House Review of Agency Rulemaking,* 99 HARV. L. REV. 1075, 1087 (1986) (discussing appropriations rider forbidding OMB to review agricultural marketing orders). A similar prohibition appears in the appropriations legislation for fiscal year 1988. Continuing Appropriations, Fiscal Year 1988, *supra* note 4, 101 Stat. at 1329-400 (1987).

penditure of appropriated funds on "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws."[6] The rider, which was enacted after the Department of Justice had filed its amicus brief in *Monsanto Co. v. Spray-Rite Service Corp.*,[7] prevented Assistant Attorney General William F. Baxter from advocating in oral argument that the Supreme Court should adopt the rule of reason; the rider also prohibited the Antitrust Division from drafting legislation to extend the rule of reason to resale price maintenance.[8]

I call such appropriations riders "muzzling laws." More precisely, I define a muzzling law to be any legislation that impairs the Executive's ability to deploy resources to study or advocate a change in the federal government's policies on a particular issue. Muzzling laws lack the predictability of legal boilerplate. They differ in the scope of the forbidden subject matter, in the specificity with which they identify the constrained Executive Branch officers, and in the degree to which they prohibit the use of funds appropriated under other appropriations laws. Despite these differences, all muzzling laws implicate, and many violate, the principle of separation of powers. When Congress prohibits the President from studying or advocating a change in policy, it impairs the President's ability to perform his constitutional duty to inform Congress and make recommendations for its consideration.[9]

Part I of this Article examines the meaning of the recommendation clause. Part II argues that limiting principles for the clause cannot arise from Congress' appropriations power. Part III offers an economic rationale that accounts for the prevalence of muzzling laws. Part IV argues that muzzling

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6. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983) [hereinafter Commerce, Justice, and State, 1984 Appropriations Act]. President Reagan signed the appropriations bill under protest, stating: "Even as narrowly construed, . . . the provision potentially imposes an unconstitutional burden on executive officials charged with enforcing the Federal antitrust laws." 2 PUBLIC PAPERS OF THE PRESIDENTS, RONALD REAGAN 1627 (1983). A similar muzzling rider appeared in the appropriations legislation for fiscal year 1988. Continuing Appropriations, Fiscal Year 1988, *supra* note 4, 101 Stat. at 1329-38.

7. 465 U.S. 752 (1984).

8. The rider confined the permissible activities of the Justice Department to the "presenting [of] testimony on this matter before appropriate committees of the House and Senate." Commerce, Justice, and State, 1984 Appropriations Act, *supra* note 6, 97 Stat. at 1102-03; *see also* 135 Cong. Rec. S4435-36 (daily ed. Apr. 19, 1989) (remarks of Sen. Metzenbaum, describing continued need for appropriations restrictions to counteract "[t]he Justice Department's intransigence" since *Monsanto*).

9. Recent scholarship on appropriations riders ignores that they can violate the recommendation clause—perhaps because that discussion does not distinguish muzzling laws from other kinds of limitations found in appropriations bills, such as limitations on the President's ability to faithfully execute the laws. Devins, *Regulation of Government Agencies Through Limitation Riders,* 1987 DUKE L.J. 456. Nor does that discussion explore the public choice rationale for the prevalence of muzzling laws. *See* Devins, *Appropriations* Redux: *A Critical Look At the Fiscal Year 1988 Continuing Resolution,* 1988 DUKE L.J. 389.

laws violate the recommendation clause. Part V discusses the applicability of the recommendation clause to independent regulatory agencies. Finally, Part VI speculates about judicial review of a recommendation clause challenge to a muzzling law.

I. THE MEANING OF THE RECOMMENDATION CLAUSE

Justice Black wrote in *Youngstown Sheet & Tube Co. v. Sawyer*[10] that the Constitution limits the President's "functions in the lawmaking process" to two forms of action: "the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[11] The veto power was the subject of great debate during the Reagan presidency.[12] Although the struggle between Congress and the Executive over the President's role in the "recommending of laws he thinks wise" commanded less popular attention than the veto debate, the recommendation debate may well have been more significant in practical political terms.

A. THE PRESIDENT'S DUTY TO RECOMMEND MEASURES

The recommendation of measures is a duty imposed on the President, for the clause states that "he *shall* recommend."[13] James Madison's notes on the Constitutional Convention for August 24, 1787, reveal that the Framers explicitly elevated the President's recommendation of measures from a political prerogative to a constitutional duty:

> On motion of Mr. Govr Morris, "he may" was struck out, & "shall" inserted before "recommend" in the clause 2d. sect 2d art: X in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it.[14]

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10. 343 U.S. 579 (1952).

11. *Id.* at 587. *See also* 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES § 178, at 26-27 (1963); J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 702, at 469 (1870); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, app. at 345 (1803) ("the president . . . is *sub modo* a branch of the legislative department[] since every bill, order, resolution or vote, to which the concurrence of both houses of congress is necessary, must be presented to him for his approbation, before it can take effect").

12. *See, e.g.*, News America Publishing Corp. v. FCC, 844 F.2d 800, 804 n.8 (D.C. Cir. 1988) (noting, but declining to decide, argument that Congress violated the presentment clause by inserting a rider into an omnibus appropriations bill); 1987 ECONOMIC REPORT OF THE PRESIDENT 5 (request by President Reagan for legislation granting the President "the power to veto individual line items in appropriations measures"); Robinson, *Public Choice Speculation on the Item Veto,* 74 VA. L. REV. 403, 407 (1988) (concluding that the item veto would have minor effect on balance of power between executive and legislature); Note, *Is a Presidential Item Veto Constitutional?,* 96 YALE L.J. 838, 838 at n.2 (1987) (arguing that the President lacks constitutional authority to exercise a line item veto) (by P. Wolfson).

13. U.S. CONST. art. II, § 3 (emphasis added).

14. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 526 (1987 ed.)

From Madison's notes it appears that Gouverneur Morris' amendment was intended to prevent *objections* to the President's recommendations to Congress. There is no reason to suppose that the Framers were concerned that Congress would principally resent trivial recommendations, for other language in the recommendation clause imposes a limiting principle on the substantiality of presidential recommendations: the President is to make recommendations that he judges to be "necessary and expedient."[15] By implication, this limitation counsels (if not requires) the President to avoid trivial or frivolous recommendations to Congress. Presumably, the Framers considered an express prohibition of unnecessary or inexpedient recommendations superfluous, because the President would incur a political cost by making them and therefore would have little incentive to bother Congress with trivia. Consequently, the "umbrage or cavil" that Morris envisioned would be aimed at serious proposals advanced by the President. By replacing "may" with "shall," the Framers must have intended to prevent Congress from obstructing the President's study of national policy and his recommendation of serious measures to Congress.

Although Madison's notes are vague on the subject, Morris' rationale was apparently the following: If the Constitution required (rather than merely permitted) the President to recommend measures to Congress, he could point to his constitutional duty in order to deflect political criticism, rather than have to justify his particular recommendations as being a valid exercise of discretion. Consequently, partisans of congressional power could not argue that the President's participation in lawmaking was part of a scheme to usurp Congress' legislative power.[16] Whether or not this rationale is plausible after 200 years, the text of the recommendation clause disposes of the concern, for Congress has no obligation under the recommendation clause to act upon the President's recommendations. The clause requires presidential participation in initiating lawmaking, but the President submits recommendations to Congress for its "consideration"—not for its ratification as in the case of Senate confirmation of treaties or presidential appointments. As President Zachary Taylor succinctly stated in 1849: "The Executive has the authority to recommend (not to dictate) measures to Congress."[17] Nothing requires Congress

(emphasis in original); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405 (M. Farrand ed. 1911) (emphasis in original).

15. The word "expedient," as predominantly used in the 18th Century, did not necessarily connote "politic" or "opportunistic." It also meant "conducive to advantage in general, or to a definite purpose; fit, proper, or suitable to the circumstances of the case." 3 OXFORD ENGLISH DICTIONARY 426 (1970). Thomas Jefferson, for example, used this meaning of the word in his writings. *Id.*

16. Alexander Hamilton similarly observed while defending the principle of a unitary executive: "Men often oppose a thing merely because they have no agency in planning it, or because it may have been planned by those whom they dislike." THE FEDERALIST NO. 70, at 426 (A. Hamilton) (C. Rossiter ed. 1961).

17. First Annual Message of Zachary Taylor (Dec. 4, 1849), *reprinted in* 6 A COMPILATION OF

to introduce legislation, hold hearings, or vote on recommendations. In short, even though the President has the plenary power to determine what measures are "necessary and expedient" to recommend to Congress, Congress retains the plenary power to decide how it shall use the information and recommendations submitted by the President.

Since at least the mid-1800s, Presidents have asserted what the plain text of the recommendation clause implies—that Congress cannot limit the subject matter of the President's recommendations, as it could limit the subject matter jurisdiction of the federal Judiciary.[18] President Millard Fillmore, for example, told Congress: "My opinions will be frankly expressed upon the leading subjects of legislation."[19] President Ulysses S. Grant more aggressively stated: "On *all* leading questions agitating the public mind I will always express my views to Congress and urge them according to my judgment .... I shall on *all* subjects have a policy to recommend, but none to enforce against the will of the people."[20]

THE MESSAGES AND PAPERS OF THE PRESIDENTS 2547, 2561 (J. Richardson ed. 1897) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS].

Professor Woodrow Wilson wrote: "A President's messages to Congress have no more weight or authority than their intrinsic reasonableness and importance give them." W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 72 (1908). Early constitutional scholars shared this view. St. George Tucker observed that "this power of recommending any subject to the consideration of congress, carries no obligation with it. It stands precisely on the same footing, as a message from the King of England to parliament; proposing a subject for deliberation, not pointing out the mode of doing the thing which it recommends." 1 ST. GEORGE TUCKER, *supra* note 11, app. at 344. Similarly, Justice Story observed that the President's "due diligence and examination into the means of improving" the law was intended not to dictate policy choices to Congress, but to "assist their deliberations." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555, at 413 (1833). *See also* J. POMEROY, *supra* note 11, § 175, at 112 (the President "may communicate information, and recommend measures to the consideration of Congress ... but he cannot directly set in motion any scheme of legislation; he must await the definitive action of the two Houses, and add or refuse his consent to their perfected work"); *see also id.* § 702, at 469 (discussing President's role in legislative process).

18. *See* Cary v. Curtis, 44 U.S. 236, 245 (1845) (congressional authority to restrict jurisdiction of inferior courts).

19. First Annual Message of Millard Fillmore (Dec. 2, 1850), *reprinted in* 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 2613, 2615.

20. First Inaugural Address of Ulysses S. Grant (Mar. 4, 1869), *reprinted in* 8 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 3960 (emphasis added). President Grant's bravado on the recommendation side was matched by that on the veto side, as reflected by his request of Congress to pass an amendment granting him an item veto. H. LASKI, THE AMERICAN PRESIDENCY: AN INTERPRETATION 144 (1940).

Even Grant's bravado could not match that of President Franklin Roosevelt. In his first inaugural address, during the depth of the Great Depression, Roosevelt said of his authority under the recommendation clause:

> I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring speedy adoption.
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> But in the event that the Congress shall fail to take one of these two courses, and in the

Another change in wording at the Constitutional Convention reinforces the inference that the Framers intended the President's recommendations to be more than precatory statements urging Congress to work for peace and prosperity. An early draft of the recommendation clause referred to submission of "Matters," a word ultimately rejected in favor of the phrase "such Measures."[21] These "measures" are not limited to presidential recommendations for the enactment of legislation. For example, they encompass the proposal of new constitutional amendments pursuant to Congress' powers under article V, as President George Washington indicated in his first inaugural address[22] and the House of Representatives acknowledged in its reply.[23] To the extent that a "measure" connotes the formulation of a proposed solution to an identified condition, the submission of "measures" implies greater presidential participation in the lawmaking process than would the mere submission of "matters" to Congress for its rumination.[24] The greater presidential participation needed to submit "measures" implicitly presumes that there exist presidential prerogatives of investigation, inquiry, and advocacy by which to formulate and articulate such proposed solutions.[25]

Washington's observations on the recommendation clause comport with Madison's notes. Washington was, of course, the President of the Constitutional Convention of 1787 and a signatory to the Constitution. In his first inaugural address as President of the United States, delivered April 30, 1789,

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> event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

First Inaugural Address of Franklin D. Roosevelt (Mar. 4, 1933), *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 15 (S. Rosenman ed. 1938). *But see* F. HAYEK, THE CONSTITUTION OF LIBERTY 190 (1960) (criticizing Roosevelt's view that the Executive acquires unlimited powers in times of crisis).

21. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 158, 171 (M. Farrand ed. 1911).

22. First Inaugural Address of George Washington (Apr. 30, 1789), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 43, 45 [hereinafter Washington's First Address].

23. Address of the House of Representatives to George Washington, President of the United States (May 5, 1789), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 48.

24. One definition of "measure" is a "plan or course of action intended to attain some object." 6 OXFORD ENGLISH DICTIONARY 280 (1970). A common, relevant definition of "matter" is considerably more vague: "An event, circumstance, fact, question, state or course of things, etc., which may be an object of consideration or practical concern; a subject, affair, business." *Id.* at 241.

25. Constitutional scholar John Pomeroy feared that presidents would usurp Congress' legislative power through the recommendation clause. J. POMEROY, *supra* note 11, § 701, at 468 (1870). Nonetheless, he viewed the recommendation clause in the expansive terms suggested by the Framers' choice of wording: the President "may, doubtless, state facts and use arguments in support of his views; may endeavor, to the best of his ability, to show why the proposed measure is necessary or expedient. So much is plainly embraced in the word recommend." *Id.* § 700, at 468.

Washington quoted from only one provision in the Constitution—the recommendation clause: "By the article establishing the executive department it is made the *duty* of the President 'to recommend to your consideration such measures as he shall judge necessary and expedient.' "[26] Thus, the first President and the first Congress (which included many Framers among its members) were fully aware that the recommendation clause imposed an affirmative duty on the President to propose measures to Congress.[27] As it turned out, President Washington did not consider it necessary and expedient to give Congress any specific advice at the time of his inauguration:

> The circumstances under which I now meet you will acquit me from entering into that subject further than to refer to the great constitutional charter under which you are assembled, and which, in defining your powers, designates the objects to which your attention is to be given. It will be more consistent with those circumstances, and far more congenial with the feelings which actuate me, to substitute, in place of a recommendation of particular measures, the tribute that is due to the talents, the rectitude, and the patriotism which adorn the characters selected to devise and adopt them.[28]

Even these platitudes begin to delineate the original meaning of the recommendation clause, for they indicate that the first Congress and first President understood that the Constitution directed the President to take an active role in making new laws.

B. INFORMATION AND THE PRESIDENT

The recommendation clause appears in the same portion of the Constitution—article II, section 3—that contains the mandate that the President "shall take Care that the Laws be faithfully executed."[29] A reasonable inference about the textual proximity of the two clauses is that executing a particular law and recommending ways to improve that law are closely related. In economic terms, economies of scope[30] exist between these two duties and

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26. Washington's First Address, *supra* note 22, *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 44 (emphasis added).

27. Thus, President Washington's remarks regarding the recommendation clause provide what the Court has called " 'contemporaneous and weighty evidence' of the Constitution's meaning." Bowsher v. Synar, 478 U.S. 714, 723 (1986) (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)).

28. Washington's First Address, *supra* note 22, *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 44.

29. U.S. CONST. art. II, § 3.

30. Economies of scope exist when "it is less costly to combine two or more product lines in one firm than to produce them separately." Panzar & Willig, *Economies of Scope,* 71 AM. ECON. A. PAPERS & PROC. 268, 268 (1981); *see also* Teece, *Economies of Scope and the Scope of the Enterprise,* 1 J. ECON. BEHAV. & ORG. 223, 224 (1980); Teece, *Toward an Economic Theory of the Multiproduct Firm,* 3 J. ECON. BEHAV. & ORG. 39, 53 (1982).

provide a rationale for the necessity of presidential participation in lawmaking. That the President must participate in lawmaking seemed obvious to Alexander Hamilton, who, as a leader of the Federalist movement, advocated a strong Executive Branch at the Constitutional Convention.[31] Hamilton subsequently devoted only two paragraphs of discussion to all of article II, section 3, in *The Federalist No. 77,* concluding that all of the several executive functions enumerated there were unobjectionable. He wrote that it "required . . . an insatiable avidity for censure to invent exceptions" to those presidential powers and duties.[32] The absence of a more specific analysis of the recommendation clause in the *Federalist Papers*[33] is entirely consistent with what the simple text of the clause implies: The President must participate in proposing national policy, and necessarily must assemble information relevant to that purpose.

The Constitution both gives the President the means to compile information and imposes on him the obligation to disseminate it to Congress in the form of recommendations. Article II, section 2, provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."[34] Justice Jackson called this a "trifling" power "inherent in the Executive if anything is"[35]—an assessment that belittles or ignores that the Framers quite conceivably assigned the principal responsibility for information collection to the President rather than Congress on grounds of institutional competence. It is likely to be less costly for the President to specify and monitor the production of information and opinions by his Cabinet officers than it is for multiple members of Congress to do so with respect

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31. Perhaps most notably, Hamilton's draft constitution of June 18, 1787, proposed that the head of the Executive Branch serve for life on good behavior. J. MADISON, *supra* note 14, at 136, 138.

32. THE FEDERALIST No. 77, at 463 (A. Hamilton) (C. Rossiter ed. 1961).

33. Hamilton did mention the recommendation clause elsewhere in the *Federalist Papers,* but only in passing reference to the President's enumerated powers and duties in article II. THE FEDERALIST No. 69, at 417 (A. Hamilton) (C. Rossiter ed. 1961).

34. U.S. CONST. art. II, § 2, cl. 1. *See* Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 463-64 (1855) (explaining that advice given by executive departments must "embody the individual thought of the officer giving it"). An early constitutional scholar warned that the opinions clause was not a device for the President to shirk his responsibilities. W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 194 (2d ed. 1829); *cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 337 (M. Farrand ed. 1911) (proposition submitted by Gouverneur Morris to the Committee of Detail, Aug. 20, 1787) (President "shall in all cases exercise his own judgment, and either conform to such opinions or not as he may think proper").

35. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring). There appears to be little scholarship on the opinions clause, and none from the perspective of the economics of information. *See* Proto, *The Opinion Clause and Presidential Decision-Making,* 44 MO. L. REV. 185, 195 (1979); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573, 646-48 (1984).

to even more numerous congressional staff members and hearing witnesses.[36] One reason is that the President can better preserve confidentiality in the gathering of sensitive information. Furthermore, the President can remove those who produce faulty or injudicious opinions. In short, the President seems better able than Congress to prevent principal-agent problems[37] in the production of information relevant to the execution of the laws. The Executive, therefore, has a comparative advantage over Congress in compiling and analyzing information on the difficulties that arise from executing existing laws or policies.[38]

The objective of the President's information-gathering responsibilities is clear under the Constitution. The recommendation clause establishes the President's duty to "give Congress information of the State of the Union." To be sure, Congress also has the means to compile information.[39] In addition to its power to conduct hearings, the current Congress has information-gathering arms such as the Congressional Budget Office, the Congressional Research Service, and the Office of Technology Assessment. But at the time of Jefferson's administration, Congress had to rely extensively on the information and recommendations of the President and his department heads, for Congress had no staff and its members did not even have offices.[40] This historical circumstance clarifies why article I does not impose on Congress any duty analogous to the President's to produce and disseminate information to any entity (including the President), save the ministerial duty to publish a journal of its proceedings.[41]

The view that the Framers believed in the President's comparative advantage in compiling and weighing information has some historical support. In his first inaugural address, Washington declined to make "particular recommendations . . . in which I could be guided by no lights derived from official

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36. By analogy, the chief executive officer of a corporation acquires from his experience operating the firm, information relevant to assessing alternative competitive strategies. The board of directors could not assemble and examine that information with equal dispatch and efficiency. Thus, the CEO can most efficiently provide such information to the board and thereupon recommend measures for the board's consideration.

37. *See generally* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 308-10 (1976) (discussing principal-agent problems).

38. *See* Independent Meat Packers Ass'n v. Butz, 395 F. Supp. 923, 932 (D. Neb. 1975) (recommendation clause, "by necessity, gives the President the power to gather information on the administration of executive agencies"); *see also* Diver, *Presidential Powers,* 36 AM. U.L. REV. 519, 521-26 (1987) (discussing the President's complementary roles as policy leader and manager). For a more general discussion of the efficient exploitation of information, see Friedrich von Hayek's classic essay, *The Use of Knowledge in Society,* 35 AM. ECON. REV. 519 (1945).

39. *See* Buckley v. Valeo, 424 U.S. 1, 137 (1976) (per curiam); McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927).

40. N. CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 251 (1987).

41. U.S. CONST. art. 1, § 5, cl. 3.

opportunities."[42] As the former commander of the Continental Army and the president of the Constitutional Convention,[43] Washington obviously had accumulated a wealth of "official opportunities" from which to frame recommendations for the first Congress. But in April 1789, Washington still lacked the *executive* experience gained from running a unified national government. Thus, the Framers may have believed that the President's ability to make valuable recommendations to Congress flows from executive experience, including the execution of federal laws.

Early scholars concurred that the President can most efficiently gather and analyze information with which to shape national policy. In the 1803 edition of *Blackstone's Commentaries,* St. George Tucker observed of the recommendation clause:

> As from the nature of the executive officer it possesses more immediately the sources, and means of information than the other departments of government; and as it is indispensably necessary to wise deliberations and mature decisions, that they should be founded upon the correct knowledge of facts, and not upon presumptions, which are often false, and always unsatisfactory; the constitution has made it the duty of the supreme executive functionary, to lay before the federal legislature, a state of such facts as may be necessary to assist their deliberations on the several subjects confided to them by the constitution.[44]

Tucker believed that the rationale for the recommendation clause was the superior ability of federal administrators to recognize flaws in existing laws and the need for new ones.[45]

Justice Joseph Story reached the same conclusion about information and the separation of powers. Discussing the recommendation clause in his 1833 treatise on the Constitution, he wrote:

> The . . . president's giving information and recommending measures to congress . . . is so consonant with the structure of the executive department of the colonial and state governments, with the usages and practices of other free governments, with the general convenience of congress, and with a due share of responsibility of the part of the executive, that it may well be presumed to be above all real objections. From the nature and duties of the executive department, he must possess more extensive sources of informa-

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42. Washington's First Address, *supra* note 22, *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 45.

43. W. WILSON, GEORGE WASHINGTON 179-229, 258-62 (1896); 1 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 380-405 (1854).

44. 1 ST. GEORGE TUCKER, *supra* note 11, app. at 344.

45. *Id.*; *see also id.* at 346 ("The commencement or determination of laws is frequently made to depend upon events, of which the executive may be presumed to receive and communicate the first authentic information: the notification of such facts seems therefore to be the peculiar province and duty of that department.").

> tion, as well in regard to domestic as foreign affairs, than can belong to congress.[46]

In particular, Justice Story believed that the "true workings of the laws" and "the defects in the nature or arrangements of the general systems of trade, finance, and justice . . . are more readily seen, and more constantly under the view of the executive."[47] According to Justice Story, the recommendation clause revealed a design by the Framers that Congress give due consideration to the President's expertise acquired from the execution of laws. The President becomes "responsible, not merely for due administration of the existing systems, but for due diligence and examination into the means of improving them."[48]

C. MORAL HAZARD IN LAWMAKING

The text and structure of the recommendation clause, as well as the early commentary interpreting it, suggest that economies of scope exist between the President's execution of laws and his compilation of information. In other words, the President, because of his duty to execute the laws, is a more efficient gatherer of information for improving the laws than is Congress. As discussed above, one source of economies of scope is the President's comparative advantage over Congress in specifying and monitoring the production of information by his subordinates. The hierarchical structure of the Executive Branch, as well as the President's experience in executing the law, rests ultimate responsibility with a single chief executive and provides an additional justification for the recommendation clause.

The insertion of the recommendation clause into the Constitution comports with the Framers' desire to enhance accountability and thus reduce moral hazard in lawmaking. Moral hazard arises in an organization or a contract when one party relies on the behavior of another party and the information by which to monitor that behavior is costly for the first party to acquire.[49] For example, shareholders can face a moral hazard problem because it is costly to monitor whether managers are maximizing profits for their corporation. The potential for moral hazard seems greater in government than in private enterprise because the output of government may be

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46. 3 J. STORY, *supra* note 17, § 1555, at 412-13; *see also* J. POMEROY, *supra* note 11, § 697, at 466 ("By virtue of his official position the President becomes acquainted with a vast detail of facts which are most important for Congress to know, but which that body possesses no means of knowing except through the Executive.").

47. 3 J. STORY, *supra* note 17, § 1555, at 412-13.

48. *Id.* § 1555, at 413.

49. *See* Alchian & Woodward, *The Firm Is Dead; Long Live the Firm,* 26 J. ECON. LIT. 65, 68 (1988) ("Because it is costly for the principal to know exactly what the agent did or will do, the agent has an opportunity to bias his actions more in his own interest, to some degree inconsistent with the interests of the principal.").

substantially more difficult to measure (and considerably more ambiguous) than the profitability and financial risk of a publicly traded corporation.[50] Thus, it is difficult for a diffuse electorate (the principal) to ascertain whether Congress and the Executive Branch are its faithful and effective agents. In addition, many of the self-aggrandizing accoutrements of government service—power, publicity, travel, ceremonies, and sycophants—have significant personal consumption value to the public officials involved; thus, the potential for the agent to benefit personally at the expense of the principal is significant.[51]

Moral hazard can arise in the process of initiating legislation. Congress and the President can be viewed as competing agents for a diffuse electorate. One branch may be a more faithful agent to its principal than the other, representing the collective preferences of an essentially anonymous society of voters more accurately than the other. It is, of course, a truism that the President (along with the Vice President) is the only nationally elected representative in the United States. Presumably, therefore, the President is better able than members of Congress to suppress the desire to appease the parochial interests of any one regional constituency.

But Congress' propensity to respond to special interests is not limited to the geographically defined factions envisioned in *The Federalist No. 10.* The specialization of the numerous committees and subcommittees of the House and Senate has permitted Congress to focus with greater precision on the production (or suppression) of legislation affecting interest groups that are not confined to a single state or region. There is a contemporary rationale, based on the economic theory of rent-seeking behavior and discussed in greater detail in Part II, for presuming that the Executive's recommendations are more objective than the legislation drafted independently by specialized congressional subcommittees.[52] Even in 1787, the Framers quite clearly believed that, because of his veto power, the President was better able than Congress to defend the electorate against legislation catering to factions.[53] Therefore, it is useful to ask several questions of both Congress and the President: Do the laws that the agent recommends (or declines to recommend) accurately reflect the preferences of the diffuse electorate? Do the decisions

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50. *See* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24-26 (1971); A. BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT 16-41 (1974).

51. In private firms, managers sometimes remedy the moral hazard problem of personal consumption by holding substantial amounts of the firm's stock. Demsetz & Lehn, *The Structure of Corporate Ownership: Causes and Consequences,* 93 J. POL. ECON. 1155 (1985). This combination of ownership and control, however, has no apparent analogue in the public sector.

52. *See generally* McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation,* 16 J. LEGAL STUD. 101 (1987); Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform,* 71 MINN. L. REV. 913 (1987).

53. *See* THE FEDERALIST NO. 73, at 443-44 (A. Hamilton) (C. Rossiter ed. 1961).

of the agent instead benefit a particular faction (or the agent himself) at the expense of his principal?

The hierarchical structure of the Executive is relevant to this species of moral hazard and implies a rationale for the recommendation clause independent from the President's comparative advantage in procuring and analyzing information. Hamilton's argument in *The Federalist No. 70* for a unitary Executive justifies as well why article II should contain the recommendation clause: "a plurality in the executive . . . tends to conceal faults and destroy responsibility" and "adds to the difficulty of detection" of untrustworthy conduct.[54] Hamilton elaborated:

> It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.[55]

Restated in economic terms, a plural Executive encourages moral hazard. If the Presidency consisted of a team of coequal executives, it would be difficult to monitor the performance of any one of those executives, because the team's output would be the *joint* production of decisions regarding the execution of federal laws and policies.[56] In other words, the marginal productivity of each member of the executive council would be essentially unobservable.

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54. THE FEDERALIST No. 70, at 427-28 (A. Hamilton) (C. Rossiter ed. 1961); *see also* Morrison v. Olson, 108 S. Ct. 2597, 2638 (1988) (Scalia, J., dissenting) ("The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . . ." (emphasis in original)); Proposals Regarding an Independent Attorney General, 1 Op. Off. Legal Counsel 75, 76 (1977) (arguing that the President must be able to exercise control over the Attorney General to ensure accountability).

55. THE FEDERALIST No. 70, at 428 (A. Hamilton) (C. Rossiter ed. 1961).

56. *See* Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779-81 (1972) (explaining that the cost of measuring the marginal productivity of individuals within a team encourages "shirking" by team members); *cf.* M. OLSON, THE LOGIC OF COLLECTIVE ACTION 53 (1965) (existence of multiple decisionmakers in administrative agencies causes shirking). *But cf.* Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 358-59 (1988) (political parties can minimize shirking by individual team members in legislatures by strategically ordering votes).

As Hamilton wrote: "A single man in each department of the administration would be greatly preferable . . . . Boards partake of a part of the inconveniences of larger assemblies. Their decisions are slower, their energy less, their responsibility more diffused." Letter from Alexander Hamilton to James Duane, Sept. 3, 1780, *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON, 213, 219-20 (H. Lodge ed. 1904).

An error of omission—whether caused by reticence, apathy, or poor judgment—would be particularly difficult to trace to its source. By establishing a unitary Executive in the form of a single President of the United States, the Framers reduced somewhat the potential for buck-passing.

The President's constitutional duty to recommend measures to Congress imposes a degree of accountability not only on the President, but also on Congress. It makes the marginal productivity of disparate members of the federal government at least marginally more observable throughout the lawmaking process. Foolish laws proposed by the President can be identified as such and dragged before the electorate by his adversaries. Indeed, concern of this kind over presidential accountability caused the Framers to forego any detailed explication of the Cabinet's size and function.[57]

The recommendation clause also imposes accountability on Congress. The President can blame Congress when it fails or refuses to act on sensible measures recommended by him for their consideration. Because of technological improvements in mass communications, the President's ability to appeal directly to the electorate is surely far more potent today than in 1787. If, on the other hand, the recommendation clause did not exist, the electorate would have greater difficulty in determining whether the federal government's failure to address a particular problem was the result of the President's lack of perspicacity or Congress' obstinacy.

D. THE DECLINE OF THE RECOMMENDATION CLAUSE

Shortly after ratification of the Constitution, the allocation of responsibilities mandated by the recommendation clause changed dramatically. Justice Story reported that Presidents Washington and John Adams established the custom "for the president, at the opening of each session of congress to meet both Houses in person, and deliver a speech to them, containing his views on public affairs, and his recommendations of measures."[58] Both the President and Congress took the speeches seriously: "To the speeches thus made a written answer was given by each house; and thus an opportunity was afforded by the opponents of the administration to review its whole policy in a

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57. 2 G. CURTIS, *supra* note 43, at 408-09. The Grand Committee of the Constitutional Convention, which was responsible for refining the provisions of article II, explicitly rejected a plan to define the nature of the President's "council of state . . . [because] the President of the United States, unlike the executive in mixed governments of the monarchical form, was to be personally responsible for his official conduct, and [because] the Constitution should do nothing to diminish that responsibility, even in appearance." *Id.* *See* J. MADISON, *supra* note 14, at 59-60 (debating importance of unitary executive); *see also* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 249-51 (J. Elliot ed. 1866) (explaining proposed "council of state").

58. 3 J. STORY, *supra* note 17, § 1555, at 413 n.1.

single debate on the answer."[59] Justice Story believed Congress' preparation of written answers to the President's recommendations produced a rigorous analysis of proposed policies and imposed a degree of accountability on Congress: "The consequence was, that the whole policy and conduct of the administration came under solemn review; and it was animadverted on, or defended, with equal zeal and independence, according to the different views of the speakers in the debate; and the final vote showed the exact state of public opinion on all leading measures."[60]

In 1801, however, President Thomas Jefferson discontinued this short-lived custom of presenting recommendations to Congress through speeches.[61] In a letter accompanying his first annual message to Congress, Jefferson announced that he was discontinuing "the mode heretofore practiced" because "circumstances under which we find ourselves placed" had rendered it "inconvenient."[62] Jefferson based his decision ostensibly on legislative efficiency: "In doing this, I have had principal regard to the convenience of the legislature, to the economy of their time, to their relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs."[63] "Trusting that a procedure founded in these motives will meet their approbation," Jefferson wrote to the President of the Senate, "I beg leave, through you, sir, to communicate the enclosed message, with the documents accompanying it, to the honorable senate, and pray you to accept, for yourself and them, the homage of my high respects and consideration."[64]

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59. *Id.*

60. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 892, at 358 (1833).

61. Professor Woodrow Wilson attributed Jefferson's decision to his ineffectiveness as an orator. W. WILSON, THE STATE § 1335, at 546 (rev. ed. 1902). Other historians, however, discount Wilson's explanation and assert that Jefferson was bowing to the expectations of the Republicans to avoid a ceremony that would exalt the Presidency relative to Congress and thus resemble the practice of the British monarch addressing Parliament. 1 H. ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 262 (1891-96); L. CALDWELL, *supra* note 2, at 153; N. CUNNINGHAM, *supra* note 40, at 247. Jefferson himself subsequently wrote in 1806: "If we recommend measures in a public message, it may be said that members [of Congress] are not sent here to obey the mandates of the President, or to register the edicts of a sovereign." Letter from Thomas Jefferson to William Duane, Mar. 22, 1806, *reprinted in* 10 THE WORKS OF THOMAS JEFFERSON 240, 242 (P. Ford ed. 1905) [hereinafter JEFFERSON WORKS]. Similarly, Jefferson's *Manual of Parlimentary Practice,* which he wrote between 1797 and 1800 while serving as Vice President to John Adams (and thus President of the Senate), analogized presidential messages to Congress to "[t]he King having sent . . . letters to the Commons." Jefferson's Manual of Parliamentary Practice § XLVII, *reprinted in* CONSTITUTION, JEFFERSON'S MANUAL, AND THE RULES OF THE HOUSE OF REPRESENTATIVES, H. Doc. 99-279, 99th Cong., 2d Sess. 277 (1987) [hereinafter HOUSE RULES].

62. Letter from Thomas Jefferson to the President of the Senate, Dec. 8, 1801, *reprinted in* 9 JEFFERSON WORKS, *supra* note 61, at 321 n.1 [hereinafter Jefferson's Letter to Senate].

63. *Id.*

64. *Id.*

After Jefferson scrapped the brief custom of making presidential recommendations in person, the President's legislative role under the recommendation clause diminished. Justice Story reported that Jefferson "addressed all his communications to Congress by written messenger, and to these no answers were returned."[65] Indeed, President Jefferson proposed to the President of the Senate in 1801 that measures communicated to Congress contain the message, "to which no answer will be expected."[66] Justice Story subsequently criticized this change[67] and specifically explained the disadvantages of Jefferson's method of delivering presidential recommendations only in writing:

> By the present practice of messages, this facile and concentrated opportunity of attack or defense is completely taken away; and the attack or defense of the administration is perpetually renewed at distant intervals, as an incidental topic in all other discussions, to which it often bears very slight, and perhaps no relation. The result is, that a great deal of time is lost in collateral debates, and that the administration is driven to defend itself, in detail, on every leading motion, or measure of this session.[68]

Thus, Story's distaste for Jefferson's method of communicating proposed messages to Congress was rooted in more than simple nostalgia for the decorum accorded the recommendation messages of Jefferson's two predecessors, Washington and Adams.

Jefferson's disengagement from the formal recommendation process accompanied his reliance on his stature as leader of the Republicans to transmit recommendations to Congress informally through his party's leadership.[69] But this method proved unreliable, for it caused Republican opposition to Jefferson's measures to be voiced in a manner more embarrassing than if

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65. 3 J. STORY, *supra* note 17, § 1555, at 413 n.1 (citing W. RAWLE, *supra* note 34, at 171, 172, 173). By 1829, one commentator reported: "The course pursued at present is to refer the message to a committee, who commonly report an analysis of it, and the parts on which is appears necessary to act, are referred to other committees to prepare them for the deliberations of the whole." W. RAWLE, *supra* note 34, at 173.

66. Jefferson's Letter to Senate, supra note 62, *reprinted in* 9 JEFFERSON'S WORKS, *supra* note 61, at 321; *see also* L. CALDWELL, *supra* note 2, at 153 (addressing Jefferson's proposal to simplify communications with Congress).

67. 3 J. STORY, *supra* note 17, § 1555, at 413 n.1.

68. 2 J. Story, *supra* note 60, § 892, at 358.

69. *See* L. CALDWELL, *supra* note 2, at 153:

> The significant change which Jefferson instituted in the relations between the presidency and the legislative branch was in the substitution of party leadership as an adjunct of the executive power for the formality and constitutional prerogatives upon which the Federalists had relied to maintain the independence of the executive from legislative interference .... He could afford to be generous with the formal prerequisites of power so long as he held the ultimate power of political control.

See also N. CUNNNINGHAM, *supra* note 40, at 249-50 (discussing Jefferson's influence over Congress and his party leadership in Congress).

Jefferson had maintained the formality of the Constitution. John Randolph, the chairman of the House Ways and Means Committee, refused to be Jefferson's surreptitious messenger to Congress, decrying the "back-stairs influence . . . of men who bring messages to this House, which, although they do not appear on the Journals, govern its decisions."[70] Ironically, Jefferson, having diminished the formal significance of the recommendation process, subsequently complained that such criticism of his method of transmitting recommendations to Congress would inhibit the legislature's informed action. He wrote in 1806 that if Congress were "to know nothing but what is important enough to be put into a public message, and indifferent enough to be made known to all the world; if the Executive is to keep all other information to himself, and the House to plunge on in the dark, it becomes a government of chance and not of design."[71]

Although the recommendation clause entered more than a century of neglect, it was not entirely forgotten. In March 1861, the Confederate States of America ratified a constitution that contained a recommendation clause that differed only in referring to the "state of the Confederacy" rather than the "State of the Union."[72] In 1867, the United States House of Representative adopted (and in 1880, it amended) rules for receiving, publishing, and referring to the appropriate committee messages sent by the President.[73] By 1912, President William Howard Taft took Justice Story's criticism of President Jefferson to heart and proposed in his annual message to Congress[74] that Cabinet officers be *required,* by statute, to appear on the floor of Congress "to introduce measures, to advocate their passage, to answer questions,

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70. 15 ANNALS OF CONG. 561 (1806); *see also* N. CUNNINGHAM, *supra* note 40, at 250 (discussing how Randolph rejected the role of congressional spokesman for Jefferson).

71. Letter from Thomas Jefferson to Barnabas Bidwell, July 5, 1806, *reprinted in* 11 THE WRITINGS OF THOMAS JEFFERSON 114, 117 (A. Lipscomb ed. 1905).

72. CONFEDERATE CONST. art. II, § 3, cl. 1, *reprinted in* 1 THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY (1861-65), at 37, 49 (J. Richardson ed. 1905) [hereinafter JEFFERSON DAVIS PAPERS]. President Jefferson Davis stated in his inaugural address three weeks earlier that the Confederacy had ratified "a Constitution differing only from that of our fathers in so far as it is explanatory of their well-known intent." Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *reprinted in* 1 JEFFERSON DAVIS PAPERS, *supra,* at 32, 35. However, in at least one major respect the powers of the Confederate President differed from those conferred by the United States Constitution, for he had a line-item veto over individual appropriations contained in an omnibus bill. CONFEDERATE CONST. art I, § 7, cl. 2, *reprinted in* 1 JEFFERSON DAVIS PAPERS, *supra,* at 41.

73. Rules of the House of Representatives XXXIX, XL, *reprinted in* HOUSE RULES, *supra* note 61, at 695-96; 5 A. HIND, PARLIAMENTARY PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 6593 (1899).

74. William Howard Taft's Annual Message—Part III (Dec. 19, 1912), *reprinted in* 18 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 7811-13. Taft said: "Time and time again a forceful and earnest presentation of facts and arguments by the representatives of the Executive whose duty it is to enforce the law would have brought about a useful reform by amendment, which in the absence of such a statement has failed of passage." *Id.* at 7811-12.

and to enter into the debate."[75] Taft believed that his proposal would foster executive accountability because it "would stimulate the head of each department by the fear of public and direct inquiry into a more thorough familiarity with the actual operations of his department and into a closer supervision of its business."[76] Taft also believed that his proposal gave the President "direct initiative in legislation and an opportunity through the presence of his competent representatives in Congress to keep each House advised of the facts in the actual operation of the government."[77] Congress did not act on Taft's proposed law, nor on similar proposals in 1921 and 1924.[78]

Professor Woodrow Wilson similarly criticized the absence of cooperation between the President and Congress in initiating legislation. Wilson argued that Jefferson's reliance on written recommendations to Congress subsequently imposed a deleterious formality between Congress and the Presidency:

> Possibly, had the President not so closed the matter against new adjustments, this clause of the Constitution might legitimately have been made the foundation for a much more habitual and informal, and yet at the same time much more public and responsible, interchange of opinion between the Executive and Congress. Having been interpreted, however, to exclude the President from any but the most formal and ineffectual utterance of advice, our federal executive and legislature have been shut off from cooperation and mutual confidence to an extent to which no other modern system furnishes a parallel.[79]

Like Taft, Wilson envisioned a lawmaking structure resembling parliamentary government, in which "the heads of the administrative departments are given the right to sit in the legislative body and to take part in its proceedings," an arrangement that would permit that part of government "by which

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75. W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 31 (1916). A similar proposal had been advanced by a select committee of the House in 1864, and again by a select committee of the Senate in 1881. *Id.* at 32; *see* H.R. REP. NO. 43, 38th Cong., 1st Sess. (1864); S. REP. NO. 837, 46th Cong., 2d Sess. (1881). Evidently, the same proposal surfaced as early as 1792. *See* Letter from Thomas Jefferson to Thomas Pinkney, Dec. 3, 1792, *reprinted in* 7 JEFFERSON WORKS, *supra* note 61, at 191 (discussing Congress' success in preventing introduction of bill that would have allowed Executive Department heads to deliberate in Congress and explain their measures). Curiously, the Vice President's role as President of the Senate was not embellished to advance such a purpose. *See generally* Friedman, *Some Modest Proposals on the Vice-Presidency,* 86 MICH. L. REV. 1703, 1719-24 (1988) (discussing separation of powers concerns raised by increasing Vice President's role as an executive officer while maintaining his role as President of the Senate).

76. W. TAFT, *supra* note 75, at 31.

77. *Id.* at 31-32. Echoing Justice Story's complaint, President Taft wrote: "The time lost in Congress over useless discussion of issues that might be disposed of by a single statement from the head of a department, no one can appreciate unless he has filled such a place." *Id.* at 32.

78. H. LASKI, *supra* note 20, at 105.

79. W. WILSON, *supra* note 61, § 1335, at 546. Elsewhere, Wilson argued even more forcefully that "it is not necessary to the integrity of even the literary theory of the Constitution to insist that such recommendations should be merely perfunctory." W. WILSON, *supra* note 17, at 72.

the laws are made and the part by which the laws are executed" to "be kept in close harmony and intimate cooperation, with the result of giving coherence to the action of the one and energy the action of the other."[80] As President, Wilson immediately sought to restore some of the bygone gentility associated with the early Presidents' recommendations.[81]

Ironically, President Wilson confronted, in an appropriations bill for fiscal year 1921, a precursor to the muzzling laws of the 1980s. It provided that "no journal, magazine, periodical, or similar Government publication shall be printed, issued or discontinued by any branch or officer of the Government service unless the same shall have been authorized under such regulations as shall be prescribed by the Joint Committee on Printing."[82] Thus, the printing of all Executive Branch documents would require the prior approval of a joint committee of Congress. In an age without photocopiers, this restriction on printing would have greatly impeded the dissemination of information relevant to the workings of the federal government. President Wilson stated in his veto message that "the obvious effect of this provision would be to give to that committee power to prevent the executive departments from . . . duplicating any material which they desire, and, in that way, power to determine what information shall be given to the people of the country by the executive departments."[83] Congress would have "the power to exercise censorship over the executive departments."[84]

Foreshadowing *Youngstown*'s holding that expediency in managing the federal government is no justification for sacrificing the separation of powers, Wilson stated: "I am in entire sympathy with the efforts of the Congress and the departments to effect economies in printing and in the use of paper and supplies, but I do not believe that such a provision as this should become law."[85] He observed that the regulation on printing would affect even activities having a trivial marginal cost, including "the making of carbon copies."[86] Congress' fiscal concerns could be accommodated through a means that did not "impose a flat prohibition against the exercise of executive

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80. W. WILSON, *supra* note 61, § 1335, at 546; *see also* W. TAFT, *supra* note 75, at 4-14. *But cf.* B. SCHWARTZ, *supra* note 11, § 178, at 29 ("The President can never be the leader of the Congress in the sense in which the Prime Minister in Britain is of the House of Commons. He rarely has at his disposal the almost automatic legislative majority which is available to the latter.").

81. Address to Congress by Woodrow Wilson (Apr. 8, 1913), *reprinted in* 18 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 7871; *see also* H. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 92, at 137 (4th ed. 1927).

82. H.R. 12,610, 66th Cong., 2d Sess. § 8 (1920).

83. Veto Message of Woodrow Wilson (May 13, 1920), 17 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 8845.

84. *Id.* at 8846.

85. *Id.*

86. *Id.* at 8845.

functions":[87]

> If we are to have efficient and economical business administration of Government affairs, the Congress, I believe, should direct its efforts to the control of public moneys along broader lines, fixing the amounts to be expended and then holding the executive departments strictly responsible for their use .... The Congress has the right to confer upon its committees full authority for purposes of investigation and the accumulation of information for its guidance, but I do not concede the right, and certainly not the wisdom, of the Congress endowing a committee of either House or a joint committee of both Houses with power to prescribe "regulations" under which executive departments may operate.[88]

President Wilson's arguments apply with equal force to the muzzling laws common during the Reagan Administration, by which Congress regulated the creation as well as the dissemination of information. It is indeed ironic that President Wilson, a scholar who took great pains to revive the recommendation process, became the object of congressional attempts to restrict the Executive's dissemination of information.

II. WHAT PRINCIPLES LIMIT THE RECOMMENDATION CLAUSE?

The recommendation clause gives the President the discretion to recommend whatever measures "he shall judge necessary and expedient." Does any principle limit the President's ability to expend public funds in making recommendations? Surely, in the absence of appropriations, he cannot hire consultants in the private sector to study a panoply of subjects, obligating the federal government to millions of dollars in debts.[89] I argue that Congress' appropriations power is not the inherent limiting principle.[90] Rather, the limits on the recommendation clause are implicitly defined by the economies of scope between enforcing the law and producing information relevant to improving the law, and by moral hazard in lawmaking.

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87. *Id.* at 8846.

88. *Id.*

89. By statute, the President is authorized to procure for the White House Office, the Domestic Policy Staff, and the Office of Administration "temporary or intermittent services of experts and consultants." 3 U.S.C. §§ 105(c), 107(a)(2), 107(b)(1)(B) (1982). A similar provision applies to the Vice President. 3 U.S.C. § 106(a)(2). In addition, there is authorized to be appropriated to the President up to $1 million each year "to enable the President, in his discretion, to meet unanticipated needs for the furtherance of the national interest, security, or defense . . . without regard to any provision of law regulating the employment or compensation of persons in the Government service or regulating expenditures of Government funds." 3 U.S.C. § 108(a).

90. Given my conclusion that a provision as specific as the appropriations clause does not allow Congress to restrict the President's recommendation power, I do not address the more vague powers conferred by the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18.

A. THE APPROPRIATIONS POWER

Article I, section 9 states: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[91] Does this appropriations power authorize Congress to forbid the President to use appropriated funds to discharge his duties under the recommendation clause? It is well established that Congress can suspend or repeal substantive legislation by means of a rider to an appropriations bill.[92] Muzzling laws, however, present a more difficult case. Typically, muzzling laws do not repeal existing legislation; rather, they limit the President's ability to perform his duty to study or advocate changes in the law.

The Antideficiency Act[93] enforces compliance with congressional appropriations. It prohibits, under threat of fine and imprisonment, any officer or employee of the United States from making expenditures or incurring obligations either in excess of available appropriations or in advance of appropriations, unless he has legal authorization for making them.[94] Although the Antideficiency Act is a strict liability statute,[95] intent is relevant to the statutory penalty. Unintentional violations "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office."[96] On the other hand, "[a]n officer or employee of the United States Government . . . knowingly and willfully violating" the Act "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."[97]

The Comptroller General interpreted the precursor of the current An-

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91. *Id.* art. 1, § 9, cl. 7. Legal scholarship on the appropriations power is relatively sparse. *See generally* L. WILMERDING, THE SPENDING POWER (1943); Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework,* 62 GEO. L.J. 1549 (1974); Stith, *Congress' Power of the Purse,* 97 YALE L.J. 1343 (1988).

92. *See* United States v. Dickerson, 310 U.S. 554, 555 (1940).

93. Pub. L. No. 97-258, 96 Stat. 923 (1982) (codified at 31 U.S.C. § 1341 *et seq.* (1982)).

94. "An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or . . . involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1).

The Attorney General has opined: "The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose." Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation, 4A Op. Off. Legal Counsel 16, 19-20 (1980) [hereinafter Applicability of Antideficiency Act].

95. *See* 64 Comp. Gen. 283, 289 (1985) (Antideficiency Act violated even when agency acts in good faith).

96. 31 U.S.C. § 1349(a); 35 Comp. Gen. 356, 357 (1955) (mitigating circumstances may be considered in penalizing officer charged with reporting violations).

97. 31 U.S.C. § 1350; *see* Applicability of Antideficiency Act, *supra* note 94, at 20 (discussing prosecutorial discretion regarding violations of the Antideficiency Act).

tideficiency Act[98] in a manner that would subject the President and his principal officers to criminal penalties if they had intentionally ignored a muzzling law and had expended federal funds in order to make a recommendation to Congress on a forbidden subject. In a context that did not involve muzzling laws, the Comptroller General opined:

> When an appropriations act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed as being either in advance of appropriations or in excess of the amount (zero) available for that purpose. In either case the Antideficiency Act is violated.[99]

A muzzling proviso usually specifies that "*none* of the funds appropriated by this Act may be used" to study the forbidden subject. That can be viewed as an appropriation of $0 for the particular subject. Therefore, under the Comptroller General's interpretation, *any* expenditure or obligation made by the President to study the forbidden subject would violate the Antideficiency Act.

It is antithetical to the separation of powers for Congress to threaten the President with criminal prosection for attempting to perform his constitutional duty to make such recommendations to Congress as he deems to be necessary and expedient.[100] That threat is tantamount to the threat of impeachment: even an unintentional violation of the Antideficiency Act is punishable by removal, and an intentional violation is a felony. But one might argue that the Act does not create a constitutional problem at all. The precursor to the current Act provided that an officer could make unappropriated expenditures or obligations if "authorized by law."[101] Surely, the recommendation clause is an authorization by law for the President (and his principal officers) to make such expenditures or incur such obligations as are necessary to perform the constitutional duty of providing information and recommendations to Congress.[102] Otherwise, Congress could nullify the recommenda-

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98. 31 U.S.C. § 665(a), *repealed by* Pub. L. No. 97-258, 96 Stat. 923 (1982).

99. 60 Comp. Gen. 440, 441 (1981).

100. *Cf.* H. BLACK, *supra* note 81, § 81 at 121 ("since the grant of executive powers to the President necessarily implies that he shall be enabled to exercise them without any obstruction or hinderance, it follows that he cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office").

101. 31 U.S.C. § 665(a) (repealed 1982).

102. This conclusion follows from the Comptroller General's own reasoning in numerous cases that a violation of the Antideficiency Act does not occur when a statute requires an agency to take specific actions that create obligations exceeding its appropriations. *See* 44 Comp. Gen. 89, 90 (1964); 39 Comp. Gen. 422, 426 (1959); 31 Comp. Gen. 238, 239 (1955); 28 Comp. Gen. 300, 302 (1948); *see also* Note, *Congressional Underappropriation for Civil Juries: Responding to the Attack*

tion clause through an ordinary statute. Indeed, Attorney General Benjamin Civiletti, in 1981, interpreted the "authorized by law" exception in a similar way:

> Unlike his subordinates, the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Article II, § 2, clause 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect.[103]

The Attorney General reasoned that this "minimum obligational authority" to expend public funds in the absence of appropriations was available for "initiatives . . . grounded in the peculiar institutional powers and competency of the President."[104] For the reasons presented earlier, the President's duty to gather information and to make recommendations clearly fits this description.

The text of the current Act, however, permits the "authorized by law" exception in fewer situations than did its precursor. Under the current Act, an officer "authorized by law" may make a contract or obligation "before an appropriation is made."[105] But the officer may *not* rely on the external legal authorization to justify an expenditure or obligation "exceeding an amount available in an appropriation."[106] This new version of the Antideficiency Act, when combined with muzzling legislation, might nullify the President's recommendation power. If Congress expressly prohibits the spending of any funds to examine a particular policy, then even the expenditure of a dollar by the President to recommend the prohibited policy to Congress would "exceed[ ] an amount available in an appropriation" and thus violate the Antideficiency Act.

But the structure of the Constitution does not allow the appropriations power (as implemented through an act of Congress) to override the President's constitutional duty to recommend policy measures to Congress. Otherwise, Congress could prevent the President from fulfilling *any* of his

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on a Constitutional Guarantee, 55 U. CHI. L. REV. 237, 251 (1988) (by J. Bunge) (arguing that the seventh amendment obliges Congress to appropriate funds for civil jury trials in federal court in cases where a jury trial would have been available at common law when the Constitution was ratified).

103. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1, 5-6 (1981).

104. *Id.* at 6-7. For a further discussion of "minimum obligational authority," see Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. — (forthcoming).

105. 31 U.S.C. § 1341(a)(1)(B) (1982).

106. *Id.* § 1341(a)(1)(A).

duties. If, for example, Congress could condition an appropriation on the content of the President's State of the Union Address, then the allocation of specific powers to the Executive in article II would be meaningless. The separation of powers would be subordinated to Congress' appropriations power.

President Rutherford B. Hayes argued this position, when, during 1879 and 1880, he vetoed five separate appropriations bills[107] that contained a nongermane rider that would have had the effect of prohibiting the use of appropriated funds for the deployment of federal troops to maintain peace and prevent fraud at polling places.[108] Through such appropriations riders, he argued, the House of Representatives might encroach on all other bodies of the federal government.[109] Hayes was concerned about unconstitutional conditions;[110] he believed that Congress could not legitimately refuse to fund the Executive Branch if the President declined to exercise his article II powers, such as the power to negotiate treaties and the appointments power, in the manner that Congress desired.[111] The President's recommendation duty implicates similar concerns. In *United States v. Lovett*,[112] the Supreme Court established that Congress cannot use its appropriations power to accomplish indirectly an unconstitutional objective.[113] Consequently, Congress cannot

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107. H.R. 1, 46th Cong., 1st Sess. (1879); H.R. 2, 46th Cong., 1st Sess. (1879); H.R. 2252, 46th Cong., 1st Sess. (1879); H.R. 2382, 46th Cong., 1st Sess. (1879); H.R. 4924, 46th Cong., 2d Sess. (1880).

108. Veto Message of Rutherford B. Hayes (Apr. 29, 1879), *reprinted in* 9 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 4475, 4475-80; E. MASON, THE VETO POWER 47-49 (1890); *see also* 3 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES 527 (C. Williams ed. 1924); A. HOOGENBOOM, THE PRESIDENCY OF RUTHERFORD B. HAYES 74-78 (1988); W. TAFT, *supra* note 75, at 25.

109. Veto Message of Rutherford B. Hayes, *supra* note 108, at 4483-84. Hayes ultimately triumphed over Congress, and the House of Representatives required that during 1888-1889, restrictions in appropriations bills must be relevant to the subject of the bill. E. MASON, *supra* note 108, at 49. Even under a germaneness requirement, however, Congress could still enact a muzzling law because the typical muzzling provision is, to borrow Hayes' language, "relevant to the application or expenditure of the money thereby appropriated." Veto Message of Rutherford B. Hayes (May 4, 1879), *reprinted in* 9 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 4543-44. For example, limits on OMB's study of the privatization of the Bonneville Power Administration are found in the appropriations act that funds OMB.

110. *See generally* Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988).

111. Like Hayes, President Taft feared the broader strategic implication of appropriations riders: "This use by Congress of riders upon appropriation bills to force a President to consent to legislation which he disapproves shows a spirit of destructive factionalism and a lack of a sense of responsibility for the maintenance of the government." W. TAFT, *supra* note 75, at 27-28. Taft thought appropriations riders threatened the ability of the federal government to "remain a going concern," yet he dismissed the idea of creating a line-item veto to countervail them as a quixotic attempt "to pump patriotism into public officers by force." *Id.* at 28. In what would prove by President Reagan's second term to have been an erroneous assessment, Taft wrote: "Instances of abuse of this sort by Congress . . . must be regarded as exceptional." *Id.*

112. 328 U.S. 303 (1946).

113. *Id.* at 313; *see also* Buckley v. Valeo, 424 U.S. 1, 132 (1976); Constitutionality of Proposed

use its appropriations power to relieve the President of his duty under the recommendation clause or restrict his discretion in selecting measures to recommend.

Congress' inability under the appropriations power to restrict the content of presidential recommendations does not mean that it is impotent to prevent the President from spending an inordinate amount of public funds to make recommendations. Without compromising the separation of powers, Congress could appropriate *X* dollars to the President for the specific purpose of making recommendations on all subjects. The President would then have to decide how to divide that lump sum among the various measures to study and thereafter recommend to Congress. Of course, Congress could not nullify the recommendation power by appropriating an unrealistically low aggregate amount—just as it could not appropriate only one dollar for the President to negotiate treaties. Congress' appropriations power does not include the power to refuse funding the President's performance of duties imposed by the Constitution.[114]

B. ECONOMIES OF SCOPE AND MORAL HAZARD REVISITED

The economic justification for the recommendation clause creates a limiting principle for its use. In executing the laws, the President acquires a vast quantity of information about the efficacy (or inadequacy) of existing laws. The President's marginal cost of creating recommendations from that preexisting information is very low. If the President is the low-cost provider of recommendations, then even on a forbidden subject recommendations would not burden the U.S. Treasury. Without any serious fiscal concern, Congress would lack a legitimate basis under the appropriations power to forbid the President to recommend measures.

For example, if the Director of OMB observed while preparing the federal

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Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 61 (1933); Appropriations Limitation for Rules Vetoed by Congress, 4B Op. Off. Legal Counsel 731, 733-34 (1980).

114. I find untenable the reasoning to the contrary in McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U.L. REV. 443 (1987). Professor McGarity writes: "The President has no power to initiate an appropriation, although he may certainly make recommendations to Congress. Against a sophisticated exercise of the spending power, the President's veto is practically useless." *Id.* The President's options "are to veto the entire appropriations bill, and thereby risk closing down the federal government, or to accept the congressionally imposed spending limitations." *Id.* at 473. This rationale offers no limiting principle. By what constitutional authority or political strategy could the President keep the ability to make recommendations of his choosing if his veto could be so deftly gutted? Professor McGarity's reasoning implies that Congress could permissibly vitiate the recommendation power as easily as he believes it could vitiate the veto power. He even extends his argument to the related presidential duty to faithfully execute the law: "Congress could provide . . . that agencies could not expend federal monies carrying out presidential orders . . . ." *Id.* at 474. In other words, the President's duty to execute the laws supposedly does not create an obligation for Congress "to appropriate any particular level of funding to aid the President." *Id.*

budget that the Bonneville Power Administration could operate profitably as a private firm, a memorandum to the President explaining the benefits of selling the government enterprise to a private party would hardly burden the Treasury. Indeed, based on familiarity with the regulatory structure of the Bonneville Power Administration, OMB would notice that the administrator of that government-owned business had discretion as broad as a CEO of a private firm.[115] Thus, having compiled and examined the information necessary to produce the federal budget, OMB could succinctly state the economic and fiscal rationales for privatizing government-owned businesses.

If the President and his officers have, prior to taking control of the Executive Branch, already examined particular measures, then the marginal cost of their recommending such measures may be zero.[116] No one would suggest that Assistant Attorney General William F. Baxter would have expended significant public funds to draft a presidential recommendation that the rule of reason should apply to resale price maintenance. Scholars like Robert Bork, Richard Posner, Lester Telser, and Baxter himself had refined the arguments in favor of such a policy over several prior decades.[117] The marginal cost to the federal government of exploiting their scholarship in the 1980s would be little more than the cost of photocopying a few articles in law reviews and economics journals. Indeed, Baxter's work in antitrust law, and his advocacy of the consumer welfare model for antitrust analysis, were presumably the reasons that President Reagan appointed him to manage the Antitrust Division.[118]

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115. *See* 16 U.S.C. § 832a(f) (1982) ("Subject only to the provisions of this chapter the administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."); Bonneville Power Administration—Authority to Conduct Pilot Conservation Programs (16 U.S.C. §§ 832, 838), 3 Op. Off. Legal Counsel 419, 420 (1979) (stating that Bonneville administrator may enter into necessary contracts and agreements).

116. Recommendations resulting from such intellect or insight would exemplify what Hamilton, as the first Secretary of the Treasury, described in 1798 as "the energy of the imagination dealing in general propositions"—an essential attribute of the Executive Branch that he distinguished from "the energy . . . of *execution* in *detail*." Letter from Alexander Hamilton to Rufus King, Oct. 2, 1798, *reprinted in* 10 THE WORKS OF ALEXANDER HAMILTON 321, 321 (H. Lodge ed. 1904) (emphasis in original).

117. R. BORK, THE ANTITRUST PARADOX 280-98 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 147-67 (1976); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); Baxter, *Placing the Burger Court in Historical Perspective*, 47 ANTITRUST L.J. 803, 803-18 (1979).

118. Arguably, the 1983 resale price maintenance muzzle incidentally implicated the appointments power because the proviso constrained the judgments of a presidential appointee who, after Senate confirmation, based his policies on a school of thought that was repugnant to certain members of Congress. Although the Senate did not block Baxter's confirmation, Congress attempted to constrain his discretion as an officer of the President.

In short, many recommendations of the President's officers will have a zero marginal cost. The recommendations of an outside consultant, however, would not. For example, constitutional scholar Louis Fisher observes that President Theodore Roosevelt had a "habit of appointing extralegal, unsalaried commissions to study social and economic issues,"[119] a habit for which Congress expressed its disapproval through the appropriations power:

> To publish the findings of one of his commissions he asked Congress for $25,000. Not only did Congress refuse, it enacted a prohibition against the appointment of commissions without legislative authority. Roosevelt protested that Congress had no right to issue such an order, and that he would ignore it, but he did not get the money. A private organization had to publish the study.[120]

The case of *paid* outside consultants would be an easier one than this. But even this result in Roosevelt's case seems correct if one accepts economies of scope as a limiting principle for the recommendation clause. Although the consultant might have the same experience and intellect as the executive officer, he would have no responsibility for executing the law. Therefore, the consultant would have to assimilate from scratch the information that the executive officers would have accumulated from executing the law. While the consultant might provide a fresh insight as a disinterested party, his marginal cost would be significant, especially when aggregated over all of the issues of law or policy that might warrant study and reform. Thus, the hiring of a private consultant would entail some wasteful duplication of effort. Because an outside consultant could not exploit economies of scope in information, the recommendation clause would not permit the President to contract out the formulation of recommendations if Congress muzzled the subject matter.

The concern over moral hazard in lawmaking reinforces the conclusion that the muzzling of studies by private consultants constitutionally comports with article II. If, pursuant to the opinions clause, a Cabinet secretary endorses a proposal that becomes a debacle after recommendation to Congress, the President (and his political party) will bear the political cost. The Executive Branch is thus made accountable to the electorate. If, however, the President has relied on the recommendations of an outside consultant, the President can pass the buck and shift blame to the consultant. The problem is akin to a CEO shopping for a favorable opinion from a management consulting firm or an investment bank on a strategic decision that the CEO is already predisposed to make. With the opinion in hand, the CEO is insu-

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119. L. FISHER, PRESIDENTIAL SPENDING POWER 230 (1975).

120. *Id.* (citing 20 THE WORKS OF THEODORE ROOSEVELT 416-17, 552-53 (H. Hagedorn ed. 1926)).

lated from liability under the business judgment rule.[121] If the strategy fails, he can blame the the outside consultant—or at least he can assert that disinterested experts with respected reputations executed reasonable care and did not foresee the unfortunate outcome. Similarly, if the President of the United States could blame Goldman Sachs, McKinsey & Co., or Charles River Associates for an embarrassing recommendation, he might be able to avoid responsibility for an error in judgment. The President's ability to shirk in this respect increases with the prestige and reputation of the private firm rendering consulting services. In addition, the sanction for a bad recommendation by a private firm (principally the loss of repeat business with that administration) is far less opprobrious than the sanction of removal (or induced resignation) for a poor Cabinet recommendation.[122]

C. DISTILLING LIMITING PRINCIPLES

In examining Congress' appropriations power and in working through the implications of economies of scope and moral hazard in lawmaking, several principles emerge for defining the boundary between expenditures constitutionally authorized by the recommendation power and expenditures that are limitable by the appropriations power:

1. Congress may not condition appropriations on the content of a presidential recommendation.

2. Congress may reasonably limit the aggregate appropriations for the President to study issues and thereupon make recommendations.

3. Congress may never forbid the President to make a recommendation having a zero marginal cost.

4. Congress may forbid the President to use appropriated funds to delegate the making of recommendations to anyone outside the Executive Branch.

As these four principles indicate, the appropriations power does not grant Congress plenary authority to confine the range of topics on which the President may compile information and make recommendations to Congress, nor does it empower Congress to override the recommendation clause by imposing terms and conditions under which it will accept the tender of presidential recommendations. The four principles distilled here are consistent with the text and structure of the Constitution. They balance Congress' power to con-

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121. *See generally* R. CLARK, CORPORATE LAW 123-40 (1986) (discussing business judgment rule); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers,* 33 STAN. L. REV. 819, 822-24 (1981) (same).

122. As Hamilton wrote: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." THE FEDERALIST NO. 76, at 455 (A. Hamilton) (C. Rossiter ed. 1961).

trol the public purse against the President's clear duty to recommend measures to Congress.

III. MUZZLING LAWS AND THE THEORY OF ECONOMIC REGULATION

Economic theory offers a rationale for the prevalence of muzzling laws. The modern theory of economic regulation—as articulated by George Stigler, Richard Posner, and other Chicagoans[123]—asserts that government does not regulate platonically in the public interest, seeking merely to remedy externalities. Rather, government responds to factions that demand favors for themselves or disfavor for their competitors. Government supplies regulatory action (or inaction) to such factions in exchange for political currency of one sort or another—be it votes, contributions, or public accolades. Conversely, government may threaten to impose regulatory costs on an industry unless it compensates lawmakers for forbearing from depleting private rents already in existence.[124]

Muzzling laws directly affect this process of rent creation and rent extraction because they vitiate one of the President's two *lawmaking* powers explicit in the Constitution. In particular, muzzling laws serve at least three economic functions. First, they reduce competition in the market for regulation. Second, they increase the value derivable from dispensing regulation by permitting Congress to withhold political action on a matter until consumer demand has ripened for some form of regulatory response and until consumers have expended resources to reveal their preferences to Congress. Third, they reduce the cost to Congress of designing regulatory products.

A. MONOPOLY IN THE MARKET FOR REGULATION

Muzzling laws restrict competition in the market for government output. They suppress the dissemination of ideas that might germinate into policy proposals that eventually would compete with other governmental outputs that Congress might supply to interest groups. If, through muzzling laws, Congress can constrain the ability of the President and the independent agencies to recommend measures to Congress, then constituents who seek regulatory products must turn to the relevant House or Senate committee, even though the various Cabinet departments and independent agencies would

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123. *See generally* Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For similar discussions by non-Chicagoans, see the essays in R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION (1983).

124. McChesney, *supra* note 52, at 102-03.

seem to be willing and efficient providers of highly specialized governmental products.

In other words, muzzling laws prevent both the Executive and the independent agencies from offering constituents a regulatory product on a particular matter—such as a rulemaking, an amicus brief, or a white paper—that might be an attractive substitute for congressionally produced regulatory products. The imposition of strict government ethics rules on the Executive Branch and the independent agencies, but not on members of Congress or their staffs, complements this effect of directing rent seekers to Congress.[125] If they are completely effective, muzzling laws create a monopoly in the grievance-redressing market. By preserving competition among producers of governmental outputs, the recommendation clause should permit rent seekers to secure legislation at lower cost. At the same time, such competition should reduce the durability of interest group legislation.

B. REVELATION OF PREFERENCES FOR GOVERNMENTAL OUTPUTS

One might presume that in a representative democracy voters decide what goods the government should supply. The first amendment could be read to support this view. Indeed, the Supreme Court's interpretation of the right to petition government seems to assume that sagacious consumers of governmental outputs convey their preferences to rather oblivious producers of such outputs.[126] However, when Professor Frank Knight addressed this question in 1921 in the context of private goods produced in the market, he argued that producers are better able than consumers to anticipate future consumer preferences.[127] The existence of the recommendation clause tends

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125. During the 1987 Christmas season, for example, the Federal Communications Commission refused to accept delivery of flowers or candy sent by regulated firms, requesting that they instead send FCC employees nothing more substantial than greeting cards. Also, during 1987 and 1988, the FCC interpreted guidelines announced by the Office of Government Ethics such that if an FCC employee were to attend a dinner hosted by the Motion Picture Association of America, he was supposed to pay the MPAA for admission if he stayed for the traditional postprandial screening of a forthcoming motion picture in the MPAA's private theater. In contrast, members of Congress lawfully may accept thousands of dollars of in-kind benefits and honoraria. *See* Doernberg & McChesney, *supra* note 52, at 940-42; *see generally* B. JACKSON, HONEST GRAFT (1988).

126. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); *see also* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine,* 45 U. CHI. L. REV. 80, 98 (1977).

127. "The essence of organized economic activity is the production by certain persons of goods which will be used to satisfy the wants of other persons. The first question which arises then is, which of these groups in any particular case, producers or consumers, shall do the foreseeing as to the future wants to be satisfied." F. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 240 (1921). Knight argued: "At first sight it would appear that the consumer should be in a better position to anticipate his own wants than the producer to anticipate them for him, but we notice at once that this is not what takes place. The primary phase of economic organization is the production of goods for a general market, not upon direct order of the consumer." *Id.*

to suggest that such an idea was extended to the President as an initiator of legislation.[128] Certainly the theory of economic regulation presupposes the ability and willingness of regulators to anticipate the future regulatory needs of interest groups.

On the other hand, some congressional action—especially oversight of the Executive and the independent agencies—can be characterized as a "fire alarm" model of response to constituent demands for governmental action.[129] This is essentially a free-rider model in which Congress does not expend its own resources to discover problems in need of governmental action. Rather, Congress relies on constituents to bear the costs of identifying such problems and subsequently reaps the credit for "doing something" about the problem by holding relatively costless hearings on the subject. In this setting, it is irrelevant that the people's right to petition the government imposes no constitutional duty on the government to actually redress the grievance,[130] since Congress incurs an opportunity cost whenever it fails to produce some sort of output in response to the revelation of a constituent preference.

This relatively simple model illustrates a second reason to restrain the President's participation in lawmaking. As in an Easter egg hunt from which older children are excluded, Congress must permit constituents (rather than the President or his advisers) to claim credit for bringing a problem to Congress' attention.[131] Information that reveals an unsatisfied demand for regulatory action by the federal government is a public good like any other variety of information.[132] If the President rather than constituents informed Congress of the existence of consumer demand for some particular regulation, it would be more difficult for Congress to arrange a *quid pro quo* for either holding the hearings or dispensing regulatory products. Hence, Congress effectively permits constituents to assert a kind of finder's right over such raw ideas and information.[133] Congress can confer this implicit right to constituents only if it restrains the President, in his capacity as an agent for

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128. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928) ("Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive . . . .").

129. *See* McCubbins & Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,* 28 AM. J. POL. SCI. 165, 166 (1984); *see also* Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion,* 57 U. CIN. L. REV. 457, 484 (1988) (discussing the relevance of "fire alarm" model to antitakeover legislation).

130. *See* Gordon v. Heimann, 514 F. Supp. 659, 661 (N.D. Ga. 1980).

131. *Cf.* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 207-59 (1957).

132. *See, e.g.,* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information,* 1981 SUP. CT. REV. 309.

133. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 36-37 (3d ed. 1986).

the diffuse electorate, from actively competing with Congress to discover unsatisfied consumer demand for new federal policies.

This fire alarm model of congressional action, however, requires reversing the relationship that Knight observed—namely, that a consumer generally does not contract for goods in advance because "he does not know what he will want, and how much, and how badly."[134] To receive credit for responding to constituents' concerns, Congress cannot produce governmental outputs (in the form of hearings, bills, resolutions, and so forth) before consumers have revealed their preferences for such outputs. The recommendation clause forces Congress to respond to a fire before constituents sound the alarm, causing the production of governmental outputs to resemble the production of private goods. It requires Congress to address the President's anticipation of consumer wants to the extent that those wants include the production of legislation or other regulatory products. The precautionary ignorance[135] from which Congress might benefit under the fire alarm model (until "informed" of some problem by constituents) is foreclosed by the President's duty to inform Congress. If the President causes Congress to respond to an issue before constituents have discovered it and have revealed their preferences by expending their own resources to inform Congress of the issue, those constituents may have a low (perhaps nonexistent) demand for a particular governmental output; hence, there may be a suboptimal payoff to Congress for redressing the issue at such a premature moment. The demand for governmental output must be politically ripe for members of Congress to benefit optimally from addressing the matter.

C. REDUCING THE COST TO CONGRESS OF PRODUCING REGULATION

1. Economic Regulation and Minimum Rationality

As a matter of judicial review, Congress has great latitude under the Constitution to enact economic regulation that benefits organized factions at the expense of a diffuse and anonymous electorate. The minimum rationality model permits economic regulation to be defended on the basis of intellectually weak premises that are presented in a statute's preamble or accompanying report as congressional conclusions of fact, or even conjured up after the fact by the reviewing court.[136] Consequently, the minimum rationality stan-

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134. F. KNIGHT, *supra* note 127, at 241. Consequently, Knight concluded, the consumer "leaves it to producers to create goods and hold them ready for his decision when the time comes." *Id.*

135. *Cf.* Sidak & Kronemyer, *The "New Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services,* 10 HARV. J.L. & PUB. POL'Y 522, 538-39 (1987) (record companies retain independent promoters under contracts with vague terms that reflect need to minimize knowledge of promoters' possibly unlawful activity).

136. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); Wickard v. Filburn, 317 U.S. 111, 128 (1942); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 & n.4 (1938); Nebbia v. New York, 291 U.S. 502, 525 (1934). *See generally* R. EPSTEIN, TAKINGS: PRIVATE

dard of judicial review reduces the cost to Congress of producing regulation demanded by interest groups. For any regulatory product that a faction demands, it requires little imagination (let alone independent research) on Congress' part to posit that such regulation has *some* legitimate purpose and that the means chosen to achieve that purpose are reasonably related to the ends.[137]

Muzzling laws help preserve for Congress its low cost of producing regulation on demand. When the Executive creates or compiles new information on the welfare effects of public policy proposals, it becomes harder for Congress to assert that a rational basis exists for a socially detrimental policy that it seeks to undertake or perpetuate. This is particularly true of scientific evidence generated by the Executive or an independent agency: empiricism is not a majoritarian process, nor one that derives its legitimacy from judicial review. Empirical findings reported to Congress by the President or an independent agency remove the ignorance behind which Congress would have a minimally rational premise for enacting a particular regulatory product that would harm a diffuse electorate. On the other hand, precautionary ignorance expands the universe of minimally rational justifications that Congress can offer for creating a particular regulatory product. Thus, muzzling laws protect the intellectual laxity that minimum rationality permits for economic regulation.[138] There is no reason to believe *a priori* that special interest legislation generates a net benefit in consumer welfare (a reasonable proxy for the aggregate welfare of the diffuse electorate). Thus, it should not be surprising that some of the most frequent and acrimonious instances of muzzling during the Reagan Administration involved OMB's procedure under Executive Order 12,291 to reject any regulation proposed by an Executive Branch agency that could not be shown to generate a net benefit in consumer welfare, such as agricultural marketing orders.[139]

Presidential research and recommendations do more than raise Congress' cost of producing new economic regulation by requiring it to be more creative in identifying a rational basis. The dissemination of new knowledge may

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PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Epstein, *The Proper Scope of the Commerce Power,* 73 VA. L. REV. 1387, 1392-93 (1987); Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures,* 74 VA. L. REV. 373, 377 (1988).

137. *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 19-20 (1972).

138. In an epistemological sense, muzzling laws lend new meaning to Descartes' satirical observation that "Good sense is mankind's most equitably divided endowment, for everyone thinks that he is so abundantly provided with it that even those with the most insatiable appetites and most difficult to please in other ways do not usually want more than they have of this." R. DESCARTES, *Some Thoughts on the Sciences,* in DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING THE REASON AND SEEKING TRUTH IN THE SCIENCES pt. 1, at 3 (1637) (L. Lafleur trans. 1960).

139. 3 C.F.R. § 127 (1981); *see* DeMuth & Ginsburg, *supra* note 5, at 1075.

also interfere with prior transactions consummated between Congress and a group of rent seekers, thereby reducing the durability of regulation that Congress has already dispensed. In other words, precocious research and recommendations by a President or independent agency may undo regulation that has already been dispensed.[140] This problem is analogous to a breach of warranty; it makes Congress' future regulatory products less valuable to rent seekers. Moreover, the lack of durability of regulation in one field (such as tax law) may drive down the price that rent seekers will be willing to pay for an entirely different variety of regulation, since it may signal that Congress cannot credibly guarantee the durability of future regulation.[141]

This view of muzzling legislation and of the recommendation clause highlights the neglected role of empiricism in judicial review of economic regulation. For an economic theory to be accepted as more than simple conjecture, it must be capable of predicting outcomes of actual events.[142] The theory must survive attempts at refutation through the empirical testing of a hypothesis—the strict view being that empiricism can refute, but never verify, a theory.[143] Traditional legal scholarship and judicial reasoning, however, do not rest on the scientific method of hypothesis testing, but rather on doctrinal analysis which, until relatively recently, has not attempted explicitly to incorporate modes of analysis from other intellectual disciplines.[144] The creation of empirical evidence relevant to matters of public policy, though neglected by courts in reviewing economic regulation, appears to have motivated efforts by Congress to muzzle the President and independent agencies.

2. An Example of the Suppression of Empiricism: Corporate Takeovers

Epistemology and Corporate Governance. Laws that restrict corporate takeovers provide a dramatic example of how information—in particular, newly discovered scientific evidence relevant to an important public policy—is produced by an independent agency that has special expertise; used by the President in making a recommendation to Congress; ignored by the Supreme Court while reviewing economic legislation under the minimum rationality

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140. Possible examples include the efforts by OMB and the Department of Transportation to study privatizing Amtrak, and the FCC's attempts to reexamine its policy on racial and gender preferences in broadcast licensing and its policy on cross-ownership of newspapers and broadcast stations.

141. *See generally* Doernberg & McChesney, *supra* note 52.

142. *See generally* M. FRIEDMAN, *The Methodology of Positive Economics,* in ESSAYS IN POSITIVE ECONOMICS 4 (1953).

143. K. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 360-61 (rev. ed. 1979).

144. *See* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987,* 100 HARV. L. REV. 761, 762 (1987); Posner, *The Present Situation in Legal Scholarship,* 90 YALE L.J. 1113, 1113 (1981).

standard; and subjected to attempts by Congress to use its appropriations power to suppress the further creation of similar information.

In its April 1987 decision upholding Indiana's antitakeover statute, *CTS Corp. v. Dynamics Corp. of America,*[145] the Supreme Court said: "The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.' "[146] These sentences, harkening to Justice Holmes' famous dissent in *Lochner v. New York* that "a Constitution is not intended to embody a particular economic theory,"[147] convey different meanings to theory and empiricism than would someone who uses the scientific method to test empirically a hypothesis in order to accept or reject a particular theory. The Court uses "theory" to mean a point of view or *Weltanschauung,* and "empirical judgment" to mean a deliberative consensus following the open discussion of differing points of view. In the Court's conception of "theory" and "empiricism," the scientific method is immaterial.

This difference between legal reasoning and economic reasoning explains why the Court would make the demonstrably false assertion in *CTS* that there is "no reason to *assume* that [tender offers] . . . [will] be beneficial to shareholders,"[148] when the preponderance of empirical evidence in the literature of corporate finance indicates just the contrary.[149] This difference also explains why the Court would similarly assert: "The divergent views in the literature—and even now being debated in the Congress—reflect the *reality* that the . . . utility of tender offers var[ies] widely."[150] The Court's reasoning is easy to attack on epistemological grounds—it is equivalent to saying that the divergent views at the time of Galileo about the laws of motion reflected the "reality" that, when two steel balls are dropped simultaneously from the same height, the heavier ball might hit the earth first, but then again it might not. The "divergent views" about the probable outcome of Galileo's famous experiment in physics motivated contradictory hypotheses about the laws of motion; yet once the outcome of his empirical research was known, incorrect hypotheses could be rejected once and for all, as could the subset of "divergent views" from which they were distilled.[151]

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145. 481 U.S. 69 (1987).

146. *Id.* at 92 (quoting Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring)).

147. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). *See* R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP 281-89 (1988).

148. 481 U.S. at 92 n.13 (emphasis in original).

149. *See* Fischel, *From* MITE *to* CTS: *State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading,* 1987 SUP. CT. REV. 47, 58; Romano, *State Takeover Laws: Constitutional but Dumb,* Wall St. J., May 14, 1987, at 28, col. 4.

150. 481 U.S. at 92 n.13 (emphasis added).

151. *Cf.* B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 834 (1945) ("Modern analytical

The welfare effects of economic regulation *are* often measurable; thus, legislation predicated on an economic hypothesis that has been empirically refuted can be shown to lack a rational basis. The *Carolene Products* Court said as much: "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[152] But in *CTS*, the Court refused to reject an empirically refuted hypothesis. Through its seemingly magnanimous conjecture that the empirical evidence regarding tender offers may support a healthy diversity of viewpoints about whether tender offers are good or bad, the Court ignored that the preponderance of scientific evidence on the welfare effects of takeovers would support the Court in rejecting the economic hypothesis underlying the statute, namely that tender offers harm shareholders.[153]

The fallacy of the Court's analysis is not just an abstract epistemological issue, for it affects in very practical terms how costlessly a legislature can produce regulatory products that impose substantial social costs on a diffuse and anonymous electorate. In essence, the *CTS* Court gave legislatures (both state and federal) a green light in April 1987 to offer regulatory products that would impede corporate takeovers and to claim that the rational basis for doing so was to protect shareholders or to maintain neutrality between bidders and incumbent managers. In other words, the Supreme Court said that it would not stand in the way of legislatures, including Congress, that dispense regulations that a preponderance of the available empirical evidence indicated would more likely reduce shareholder wealth than increase it. The more extreme the degree of judicial deference to such economic legislation,

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empiricism . . . differs from that of Locke, Berkeley, and Hume by its incorporation of mathematics and its development of a powerful logical technique. It is thus able, in regard to certain problems, to achieve definite answers, which have the quality of science rather than of philosophy.").

152. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) (citations omitted). Writing two years earlier, Justice Harlan Stone, author of the majority opinion in *Carolene Products,* stated:

> In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken. Action plainly unreasonable at one time and in one set of conditions may not be so in other times and conditions. The judge, then, who must say whether official action has passed the limits of the reasonable, must open his eyes to all those conditions and circumstances within the range of judicial knowledge, in the light of which reasonableness is to be measured.

Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 24 (1936).

153. *See, e.g.,* R. GILSON, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 430-32 (1986); Jarrell, Brickley & Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980,* 2 J. ECON. PERSPECTIVES 49 (1987); Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence,* 11 J. FIN. ECON. 5 (1983).

the greater the significance that attaches to embarrassing scientific evidence on corporate takeovers generated by the Executive or the independent agencies, and the greater the significance that attaches to presidential recommendations to Congress that use such new knowledge.

The Attempted Muzzling of the SEC. During President Reagan's second term, the Office of the Chief Economist (OCE) at the Securities and Exchange Commission generated numerous empirical studies that measured the effect on shareholder wealth of various corporate governance rules and financial transactions, such as poison pills, hostile takeovers, greenmail, and state antitakeover laws.[154] These papers employed "event studies," an econometric methodology that has been accepted in scholarly research on corporate finance for two decades.[155] The OCE studies generally supported the conclusion that legislation proposed by the Senate Committee on Banking and Urban Affairs, which would have increased federal regulation of securities markets and the market for corporate control, probably would reduce shareholder wealth, and that many phenomena perceived by Congress to be detrimental to shareholders did not reduce shareholder wealth at all. In June 1987, the Chairman of the Council of Economic Advisers, testifying before the Senate Banking Committee on behalf of the Reagan Administration, cited a number of the OCE studies in opposition to several Senate bills on corporate takeovers, including one bill sponsored by the Committee's chairman.[156] An abbreviated version of his testimony appeared several weeks later as the lead editorial in the *Wall Street Journal*.[157]

During the appropriations process in the fall of 1987, the Senate Banking Committee threatened to remove all funding for OCE unless it began publishing notice of each new proposed study and invited the public to comment on whether OCE should conduct the study and whether it should employ the proposed empirical methodology.[158] Such a procedure would resemble the proposal during the Wilson Administration to permit a joint congressional committee to regulate the printing of Executive Branch documents. Whereas

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154. These studies are summarized in Jarrell, Brickley & Netter, *supra* note 153, at 49.

155. For discussion of the application of event studies, see Fama, Fisher, Jensen & Roll, *The Adjustment of Stock Prices to New Information*, 10 INT'L ECON. REV. 1 (1969); Schwert, *Using Financial Data to Measure Effects of Regulation*, 24 J.L. & ECON. 121 (1984).

156. *Regulating Hostile Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 80-88 (1987) (statement of Beryl W. Sprinkel, Chairman, Council of Economic Advisers).

157. Sprinkel, *The Real Issue in Corporate Takeovers*, Wall St. J., July 17, 1987, at 18, col. 3.

158. *Securities and Exchange Commission Authorization of Appropriations and Technical Amendments to the Securities Laws*, S. REP. NO. 105, 100th Cong., 1st Sess. 13 (1987) [hereinafter SENATE REPORT] ("Absent significant movement by the Commission, as described above, in the management and operation of functions currently executed by Economic and Policy Analysis, the Subcommittee will consider specifically declining to authorize any funds for the operations of this program in the next budget authorization.").

that 1920 proposal would have impaired the Executive's ability to *disseminate* information that Congress found objectionable, the notice and comment requirement for OCE studies would have impaired the SEC's ability even to *produce* scientific evidence that the Committee did not want to see. The notice and comment procedure would insinuate the Committee, and the special interests appearing before it, into the internal management of the SEC's research department. The result would encourage objections to be lodged not at the stage of policy formulation, but at the earlier stage during which evidence is weighed and new knowledge is created.[159] Precisely because the raw data used for event studies are readily available on computer tapes from the Center for Research in Security Prices at the University of Chicago, it is entirely plausible that a special interest group could hire a financial economist to conduct OCE's empirical test during the comment period (that is, *before* OCE would be permitted to do so); if the hired economist's dry run indicated that OCE's study would generate empirical evidence unfavorable to that interest group, the group could then expend substantial resources in the hope of suppressing, ostensibly on scholarly grounds, OCE's discovery and dissemination of new evidence on the welfare effects of a particular governance rule or transaction.

The Senate Banking Committee complained that OCE's studies "rely primarily on econometric approaches based on quantitative data,"[160] and recommended that the Commission "should solicit public comment *on their design* before they proceed."[161] The Committee's own remarks, however, suggested a congressional motive other than scholarly disagreement with OCE's econometric methods:

> Economic analysis is a useful regulatory tool—but one with inherent dangers and limitations. The Subcommittee is concerned that, first, the Commission does not have in place procedures that assure the integrity and soundness of its staff's economic studies, and that, second, the Commission may have allowed the limitations inherent in an econometric approach to regulatory matters *to erode its willingness to use the authority conferred by the federal securities laws to address problems that are not amenable to*

159. *Cf.* Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632, 642 (1982) [hereinafter Direct Reporting to Congress] (Congress violates the principle of separation of powers "[b]y enacting a blanket statutory mechanism that would require automatic submission to Congress of preliminary and not fully developed Executive Branch positions"). OMB's cost-benefit review of rulemakings by Executive Branch agencies has a similar effect, but one that is salutary because it harmonizes the policy decisions reflected in those rulemakings with the predilections of the President—who, after all, was elected to run the Executive Branch. DeMuth & Ginsburg, *supra* note 5, at 1087; *see also* Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59, 60-61 (1981).

160. SENATE REPORT, *supra* note 158, at 11.

161. *Id.* at 12 (emphasis added).

econometric measurement.[162]

Naturally, ignorance is expedient when Congress seeks to dispense regulatory products that address problems in the capital markets that are "not amenable to econometric measurement" in the sense that they are either nonexistent or, if extant, not likely to be rectified by such regulation. Although the creation of scientific evidence incompatible with the Committee's regulatory agenda was a voice that at least some in Congress would benefit from silencing,[163] the Senate Banking Committee ultimately declined to impose notice and comment requirements on OCE studies because five Senators on the Committee strenuously objected.[164] Still, the withdrawal of such a threat does not mean that it would not be made again, nor does it rule out the possibility that a side agreement was consummated between the Committee and the SEC defining the extent of future research and policy proposals (particularly in light of the October 1987 stock market collapse). Thus, the Committee's threat still might have skewed research at the SEC. Although this episode is an egregious attempt at muzzling, it is not an isolated instance.[165]

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162. *Id.* (emphasis added).

163. For a denunciation of the Senate Committee's proposal, see Professor Jonathan Macey's editorial, *Senators Would Shoot the SEC Messengers,* Wall St. J., Sept. 10, 1987, at 32, col. 3. Macey writes:

> The studies are politically inconvenient for a banking committee determined to enact regulation to protect special interests from market forces. Those who want the government to intervene in financial markets are naturally distressed to encounter scientific methodology showing that governmental tinkering with the operation of the capital markets often imposes large costs on society . . . . The integrity of such an [event] study makes it very difficult for politicians to defend some of their more outrageous policy decisions on grounds of shareholder welfare.

Id.

164. SENATE REPORT, *supra* note 158, at 42-43 (additional views of Senators Garn, D'Amato, Hecht, Bond, and Karnes).

165. Similarly, Congress halted the FCC's empirical analysis of racial and gender preferences in broadcast licensing, which would have relied on multivariate regression analysis. Such a methodology would have determined whether, having controlled for demographics and other local demand characteristics, station ownership by minorities and women produces more programming aimed at minority and female audiences. FCC Chairman Dennis Patrick criticized the analysis of the same raw data ultimately performed by the Congressional Research Service because it "contains only a sample comparison of percentages of stations in various minority ownership groups that air minority programming and performs no tests of statistical significance." Commission Instructions Concerning Court Brief, in Winter Park Communications, Inc. v. FCC, Nos. 85-1755, 85-1756 (D.C. Cir.), FCC Public Notice No. 88-296 (Sept. 16, 1988), 65 Rad. Reg. 2d (P & F) 424, 425 (1988) (dissenting statement of Chairman Dennis R. Patrick).

Chairman Patrick's rebuke of congressional interference with the FCC's econometric analysis rested on the same concern that caused the Framers to insert the recommendation clause into the Constitution: "It is likely that the questions raised in this case will, one day, be more definitively resolved by the Court of Appeals, *en banc,* or the U.S. Supreme Court. I am sorry the history of events in this proceeding preclude the Commission from making a more definitive contribution to the resolution of the issue at this time." *Id.* As an aside, it is curious that Chairman Patrick did not simply order the FCC's lawyers to file a brief containing his interpretation of the law, for the Com-

IV. WHY MUZZLING LAWS VIOLATE THE RECOMMENDATION CLAUSE

The recommendation clause imposes a duty on the President to compile, create, analyze, and disseminate information. To what extent may Congress interfere with the President's performance of that duty? In Part II, I argued specifically that the appropriations power does not grant Congress broad authority to regulate Presidential recommendations. Here, I argue more generally that suppressing the creation of new information is an illegitimate basis for legislation, even if such legislation is characterized as economic regulation subject to judicial review under the minimum rationality standard. Next, I argue that, for the recommendation clause to amount to more than precatory verbiage, it implicitly must require Congress to listen to what the President thinks is important enough to recommend to Congress. The recommendation clause does more than simply grant the President the explicit plenary power to select the measures that he will recommend to Congress; it also requires Congress to accept the President's tender of those recommendations.

A. MAY CONGRESS SUPPRESS THE CREATION OF NEW INFORMATION?

Muzzling laws repudiate the principles that guided the first Congress and the Framers who served in it. The Framers could not have envisioned it to be a legitimate objective of legislation to suppress the creation of new knowledge relevant to public policy. From at least 1779, it had been a tenet of Jefferson's vision of republican democracy that the government should promote "the more general diffusion of knowledge."[166] Jefferson's views on religious freedom contain a similar theme. Writing in his *Notes on the State of Virginia* in 1782, Jefferson said:

> Reason and free inquiry are the only effectual agents against error . . . . Galileo was sent to the Inquisition for affirming that the earth was a sphere; the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error. This error, however, at length prevailed; the earth became a globe, and Descartes declared it was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction, or we should all have been involved by authority in vortices. In fact, the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in and make it a necessary article of faith. Reason and experi-

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munications Act provides that the chairman is to be "the chief executive officer of the Commission" and shall have the duty "to represent the Commission in all matters requiring . . . communications with other governmental departments." 47 U.S.C. § 155(a) (1982).

166. A Bill for the More General Diffusion of Knowledge (1779), *reprinted in* 2 JEFFERSON WORKS, *supra* note 61, at 414.

> ment have been indulged, and error has fled before them. It is error alone which needs the support of government. Truth can stand by itself.[167]

Sixteen years later, in his first inaugural address, Jefferson again described the "diffusion of information and arraignment of all abuses at the bar of the public reason" to be one of "the essential principles of government and consequently those that ought to shape its Administration."[168] And yet another fifteen years later, in 1816, Jefferson wrote, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."[169]

Although Jefferson was in France during the Constitutional Convention, the influence of his belief that the diffusion of knowledge and freedom of rational inquiry are fundamental to representative democracy is apparent in the work of the Framers, for the Constitution expressly seeks to stimulate the production and dissemination of information. Article I instructs Congress to encourage scientific research by protecting intellectual property.[170] More to the point, the first amendment guarantees private citizens the right expressly to inform the federal government of their demand for collective action: "Congress shall make no law . . . abridging the right of the people . . . to petition the Government for a redress of grievances."[171] Through his performance of the duty to recommend measures to Congress, the President functions as the agent of a diffuse electorate who seek the redress of grievances. To muzzle the President, therefore, is to diminish the effectiveness of this right expressly reserved to the people under the first amendment.

President George Washington, whom Jefferson served as the first Secretary of State, shared the belief that new ideas nurtured democracy. In his first annual address to Congress in January 1790, Washington told the legislators that "nothing . . . can better deserve your patronage than the promotion of science and literature."[172] He conveyed the typically Jeffersonian notion that

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167. Notes on the State of Virginia, Query XVII (1782), *reprinted in* 4 JEFFERSON WORKS, *supra* note 61, at 78; *cf. The Science Police,* Wall St. J., May 15, 1989, at A8, col. 1 (discussing congressional investigation into "scientific fraud").

168. First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 17, at 309, 311.

169. Letter from Thomas Jefferson to Charles Yancey, Jan. 6, 1816, *reprinted in* 11 JEFFERSON WORKS, *supra* note 61, at 493, 497.

170. "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

171. U.S. CONST. amend. I. In a related vein, of course, Thomas Jefferson asserted in the Declaration of Independence: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." 2 JEFFERSON WORKS, *supra* note 61, at 199, 212.

172. Washington's First Address, *supra* note 22, *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENT, *supra* note 17, at 58.

the creation of knowledge contributes to the viability of representative government and to the personal liberty it promises:

> Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community as in ours it is proportionably essential. To the security of a free constitution it contributes . . . by convincing those who are [e]ntrusted with the public administration that every valuable end of government is best answered by the enlightened confidence of the people, and by teaching the people themselves to know and to value their own rights . . . .[173]

Congress concurred. Three days later, the Senate responded: "Literature and science are essential to the preservation of a free constitution; the measures of Government should therefore be calculated to strengthen the confidence that is due to that important truth."[174]

It is hard to reconcile these remarks by the persons who drafted the Declaration of Independence and the Constitution with Congress' current predilection for suppressing the President's creation of new learning relevant to the policies of the federal government when such learning displeases the Legislature. When, during Huey Long's tenure, the Louisiana legislature imposed a tax of two percent of gross receipts on newspapers having a weekly circulation exceeding 20,000, the Supreme Court in *Grosjean v. American Press Co.*[175] promptly analogized the duties to "taxes on knowledge" whose "dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs."[176] The Court struck down the tax under the first amendment, calling it "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[177] In a similar manner, the recommendation clause surely must protect a President who seeks answers to questions that Congress chooses not, in Washington's words, to put to "the enlightened confidence of the people." To conclude otherwise is to repudiate an important premise of Jefferson's vision of republican democracy.

B. MUST CONGRESS LISTEN TO THE PRESIDENT?

Nothing in the Constitution empowers Congress to cover its ears and refuse to accept, except upon such terms and conditions as it shall define, the

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173. *Id.*

174. Address of the Senate to George Washington, President of the United States (May 7, 1789), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENT, *supra* note 17, at 54.

175. 297 U.S. 233 (1936).

176. *Id.* at 246-47.

177. *Id.* at 250.

President's tender of a recommendation that he deems to be necessary and expedient. Three arguments support this conclusion. First, even if Congress is not interested in hearing the President's views on a particular matter, it has no authority to release the President from his duty under the Constitution to make recommendations "necessary and expedient" to changing law or policy. That duty cannot be waived by Congress, by the President, or by anyone else—short of a constitutional amendment.[178]

Second, as explained in Part I, the recommendation clause obviously contemplates that the President is the sole judge of what measures he will submit to Congress. The universe of possible recommendations consists of those specifically envisioned by the President and those that he has not yet distilled into tangible form. Congress would usurp the President's discretion if it constricted either subset of topics that the President might judge to be necessary and expedient to recommend to Congress.[179]

Third, the recommendation clause states that the President shall recommend measures to Congress for "their Consideration." This provision imposes only a very minor burden on Congress. Congress must consider the President's recommendations, just as the Supreme Court must consider petitions for certiorari; but, like the Court, Congress need not grant a hearing on a particular matter. Needless to say, Congress need not take additional steps to transform the President's recommendations into law. Still, Congress must at least accept tender of the recommendations and examine them. Indeed, the plain meaning of "consideration" entails contemplation, attentive thought, and reflection.[180] The Framers thought that the President's participation in initiating lawmaking was important enough to make it a duty; it would defeat the purpose of the recommendation clause for Congress not to have a corresponding duty to listen. To take an extreme example, Congress could not boycott the President's State of the Union Address and refuse to accept delivery of the transcripts of his remarks.

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178. *Cf.* Proposal Regarding an Independent Attorney General, 1 Op. Off. Legal Counsel 75, 77 (1977) (President's "constitutional responsibility for the execution of laws shall not be waived").

179. Conversely, Congress cannot override the President's discretion to select the measures that he will recommend by requiring a subordinate executive officer to transmit legislative recommendations directly to Congress at the same time he transmits them to the President—that is, before the President has had the opportunity to approve or disapprove the recommendations. Congress legislated such a procedure in § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 507, 96 Stat. 324, 679 (1982), by requiring the Administrator of the Federal Aviation Administration (who reports directly to the Secretary of Transportation) to submit his recommendations simultaneously to Congress. The Department of Justice opined that the practice violated the principle of separation of powers. Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632 (1982).

180. 3 OXFORD ENGLISH DICTIONARY 858 def. 1, 2 (1970). Other definitions common to 18th-century usage include "the action of looking at or surveying with the bodily or mental eyes" and "the keeping of a subject before the mind." *Id.*

Congress cannot avoid the infirmities in muzzling laws by specifying only the time, place, and manner of the President's recommendations, as if he were applying for a permit to speak in a public forum. For example, in the case of the *Monsanto* muzzle, Congress confined the President's ability to recommend the adoption of the rule of reason for resale price maintenance to "presenting testimony on this matter before appropriate committees of the House and Senate."[181] Obviously, if Congress could legitimately tell the President that he may offer advice on a subject only when Congress has decided to hold hearings on it, then Congress could vitiate the President's ability to make recommendations simply by refusing to schedule any hearings. If the phrase "from time to time" appearing at the beginning of the recommendation clause is read to modify not only the President's giving of information to Congress, but also his making of recommendations, then it becomes even clearer that Congress lacks any constitutional authority to impose *Monsanto*-like constraints on *when* the President may tender his recommendations.

Nor is it constitutionally permissible for Congress to prohibit certain kinds of recommendations on a particular problem (but to permit other kinds of recommendations on that same problem that happen to be more appealing to Congress) until such time as Congress grants the President a full spectrum of choices from which to make recommendations. For example, the Urgent Supplemental Appropriations Act of 1986[182] prohibits the use of appropriated monies to study or propose the privatization of the Bonneville Power Administration. The statute states that no federal funds appropriated in the public act of which it is a part, or in "any other Act," may be "used by the executive branch for soliciting proposals, preparing or reviewing studies or drafting proposals designed to transfer out of Federal ownership, management or control . . . the Federal power marketing administrations . . . until such activities have been specifically authorized . . . by an Act of Congress hereafter enacted."[183] This typical language forbids the President to study or submit policy recommendations *unless authorized by Congress*: he may select certain measures to recommend to Congress only when informed by Congress that it will consider such measures. That the President still may submit some proposal that does not violate Congress' limitation on the use of funds—for example, to *expand* federal subsidies to the Bonneville Power Administration—does not cure the constitutional flaw. *United States v. Klein*[184] implies as much in its analogous conclusion that it is unconstitutional for Congress selectively to withdraw a court's jurisdiction to decide a

181. Commerce, Justice, and State, 1984 Appropriations Act, *supra* note 6, 97 Stat. at 1102-03.
182. Pub. L. No. 99-349, 100 Stat. 710 (1986).
183. *Id.* § 208, 100 Stat. at 749.
184. 80 U.S. (13 Wall.) 128 (1871).

case in a particular manner.[185] The President *alone* shall decide what measures are necessary and expedient to recommend to Congress.

C. DOES MUZZLING LEGISLATION INTERFERE WITH THE RECOMMENDATION DUTY TO AN IMPERMISSIBLE EXTENT?

Muzzling legislation clearly contradicts the plain text of the recommendation clause, but is this incursion by Congress an unconstitutional violation of the principle of the separation of powers, or does it merely exemplify the "interdependence" and "reciprocity" between the separate branches of which Justice Jackson spoke in *Youngstown*?[186] Is there a permissible degree to which Congress may muzzle the President?

The Supreme Court, in *Bowsher v. Synar,* stated that the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts";[187] for Congress to order the Executive to refrain from "executing the laws in any fashion found to be unsatisfactory to Congress" is to exert the "kind of congressional control over the execution of the laws [that] *Chadha* makes clear . . . is constitutionally impermissible."[188] Extending this argument to the recommendation clause does not produce a perfect analogy because the Constitution obviously does contemplate an active role for Congress in the enactment of new laws. Nonetheless, muzzling legislation describes an analogous form of interference with an executive duty: if Congress can thwart the President's ability to recommend measures that Congress finds unsatisfactory, then Congress in effect can control the President's ability to study and formulate policy. A muzzling law, therefore, would seem to exemplify what the Court in *Schor* called "the aggrandizement of congressional power at the expense of a coordinate branch."[189]

Even when the Supreme Court denied President Nixon's claim of executive privilege over discovery of the Watergate tapes, the Court acknowledged

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185. *Id.* at 147. Judge Silberman recently remarked on the relationship of *Klein* to the muzzle imposed on the FCC with respect to reexamination of the Commission's policies favoring women and minorities in broadcast licensing proceedings, *supra* note 165. *See* Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902, 925 n.39 (D.C. Cir. 1989) ("Congress' action . . . carries serious constitutional implications, because there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court.").

186. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion) (observing that "the Constitution . . . contemplates that practice will integrate dispersed powers into a workable government").

187. 478 U.S. 714, 722 (1986); *cf.* Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 202 (1928) (" 'legislative power' as distinguished from 'executive power' is authority to make laws, but not to enforce them.").

188. 478 U.S. at 726-27; *see also* Mistretta v. United States, 109 S. Ct. 647, 675 n.35 (1989).

189. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986).

that the "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way that many would be unwilling to express except privately."[190] Of course, the President generally is not concerned about privacy in the recommendation clause context, for his objective is to share with Congress and the electorate the information that he has compiled and analyzed on policies that he considers important to pursue. He seeks to disclose and disseminate information, not to suppress it. Surely, if the Constitution protects the President's right to explore policy alternatives in secret, it must also protect his right to explore policy alternatives in the open.

The Supreme Court's 1988 decision in *Morrison v. Olson*[191] clouds the meaning of separation of powers, for it establishes that some degree of congressional interference with the President's performance of his duty to faithfully execute the law is permissible.[192] That some congressional interference with the recommendation duty is permissible seems plausible after *Morrison,* particularly in light of the textual and structural contiguity between the President's duty to faithfully execute the law and his duty to provide information and recommend measures to Congress by which to improve the laws. Nonetheless, even under *Morrison,* the typical muzzling law encountered during the Reagan administration violates the principle of separation of powers.

Morrison nominally uses a disjunctive two-prong test to determine whether an exercise of executive power by Congress violates the principle of separation of powers. The first question is whether the law "impermissibly undermines" the powers of the Executive Branch.[193] The meaning of this conclusory phrase, as Justice Scalia pointed out in his dissent, is anyone's guess, for its negative implication is that Congress may, in certain cases, "permissibly undermine" the President's article II powers.[194] The second question is whether the law prevents the Executive Branch from "accomplishing its constitutionally assigned functions."[195] The typical muzzling law impedes the President's ability to perform his constitutional duty to make recommendations to Congress far more than the Ethics in Government Act

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190. United States v. Nixon, 418 U.S. 683, 708 (1974); *see also* Direct Reporting to Congress, *supra* note 159, at 642.

191. 108 S. Ct. 2597 (1988).

192. *Id.* at 2621 (restrictions on Executive discretion in removal of independent counsel not unconstitutional since they do not prevent Executive from "accomplishing its constitutionally assigned functions").

193. *Id.* (quoting *Schor,* 478 U.S. at 856).

194. *Id.* at 2641 (dissenting opinion) (asserting that majority opinion sets up no rule of decision, but rather leaves issue of fragmentation of executive power to be determined by ad hoc judgment); *see generally* Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong,* 38 AM. U.L. REV. 313 (1989).

195. 108 S. Ct. at 2621 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977)).

of 1978[196] interferes with the President's faithful execution of law by creating an independent counsel. It could hardly be asserted, as the Court concluded of the independent counsel law in *Morrison,* that a muzzling law "does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."[197] The obvious effect of a muzzling law is to deny the President one of his two means of participating in the lawmaking process, in contravention of an article II duty imposed on the Presidency.

Furthermore, although the *Morrison* Court found that the Ethics in Government Act contained "features . . . [that] give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties,"[198] three distinguishing features that contributed to the *Morrison* Court's conclusion are missing from the typical muzzling legislation. First, under the Ethics in Government Act, "Congress retained for itself no powers of control or supervision over an independent counsel."[199] But under a typical muzzling law Congress retains for itself explicit power to control and supervise the recommendation of measures by the President. As in the case of the *Monsanto* and OMB muzzles, Congress expressly defined the terms under which it would permit the President to submit further recommendations on particular subjects.

Second, Congress' role under the Ethics in Government Act "is limited to receiving reports or other information and oversight of the independent counsel's activities," which the Court considered to be "functions . . . recognized . . . generally as being incidental to the legislative function of Congress."[200] Under a typical muzzling law, however, Congress tells the President not only that it does not want to receive his recommendations, but also that the Executive is expressly prohibited from using public funds to study an issue. In effect, if Congress does not want the results of a study undertaken by the President, Congress makes it *unlawful* for him to produce and disseminate them. This prohibition intrudes more into executive functions than what the Court permitted in *Morrison,* for at least in that case Congress claimed no power to prevent the independent counsel from completing an investigatory report.

Third, the Ethics in Government Act "gives the Executive a degree of control over the power to *initiate* an investigation by the independent counsel."[201] In contrast, a muzzling law deprives the Executive of *all* power to initiate an investigation of a particular public policy. Indeed, muzzling laws

196. Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended at 28 U.S.C. § 591 *et seq.* (Supp. V 1987)).

197. 108 S. Ct. at 2620.

198. *Id.* at 2622.

199. *Id.* at 2620.

200. *Id.* at 2621 (citation omitted).

201. *Id.* (emphasis added).

that terminate studies in progress seek to nullify the power retroactively. In the case of ongoing investigations that are terminated by Congress, there would seem to be an irrebuttable presumption that the President (or one of his officers) specifically concluded that the information to be derived from the investigation is essential to the President's ability to perform his recommendation duty.[202]

D. POLITICAL QUESTIONS AND UNLAWFUL DELEGATION

One could argue that the insertion of a muzzling law into an omnibus appropriations bill does not violate the recommendation clause at all. The argument is as follows: The inclusion of a muzzling proviso in an appropriations bill reflects the adversarial relationship between Congress and the President, and when the President signs an appropriations bill containing a muzzling provision, he has struck a bargain with Congress. The price of securing the President's acquiescence to the muzzle is the inclusion of enough other provisions that the President values more highly than relinquishing his ability to advance certain policy goals during the term envisioned by the spending bill. If Congress does not meet this price, the President can veto the omnibus package. Therefore, a court's invalidation of a muzzling proviso after the fact would give the President an additional lawmaking power not envisioned by the Constitution, thereby tilting the separation of powers in the President's favor at Congress' expense. Otherwise, the President could make agreements in which Congress approves the President's pet legislation (military aid to the *contras,* for example) in exchange for restrictions on the President's ability to initiate new policy elsewhere; yet, after Congress had enacted the desired legislation, the President could excise whatever muzzling provisions he disliked. This result would be the political equivalent of opportunistic behavior by one party to a contract.[203] Consequently, this argument would conclude, it must be a nonjusticiable political question when the President has signed omnibus legislation containing a muzzling provision and then complains that the muzzle restricts his ability to study particular policy initiatives that he considers necessary and expedient.[204]

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202. INS v. Chadha, 462 U.S. 794, 919 (1983) ("When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II."); *see also* United States v. Nixon, 418 U.S. 683, 703 (1974).

203. *See generally* Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance,* 89 J. POL. ECON. 615 (1981); Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,* 21 J.L. & ECON. 297 (1978); Muris, *Opportunistic Behavior and the Law of Contracts,* 65 MINN. L. REV. 521 (1981).

204. In United States v. Lovett, 328 U.S. 303, 313 (1946), the Court rejected the argument that a provision in an appropriations act that created a bill of attainder was "a mere appropriations measure, and that, since Congress under the Constitution has complete control over appropriations, a

Central to the justiciability of political questions is whether there has been "a textually demonstrable constitutional commitment of the issue to a coordinate political department" rather than to the Judiciary.[205] Although it may be a political question to ask whether the President has properly exercised his discretion under the recommendation clause by choosing to recommend particular measures, it is *not* a political question to ask whether a muzzling law interferes with the President's ability to discharge his duty under the clause. The recommendation clause gives the President the plenary power to decide which measures to recommend to Congress. In other words, the clause contains a "textually demonstrable constitutional commitment" *to the Executive* of the issue of what recommendations the President should make to Congress. To argue that a court may not review a muzzling law by which Congress interferes with the President's recommendation duty would be tantamount to transferring to Congress the discretion that the President enjoys to select the subject matter of his recommendations.

Moreover, the nonjusticiability argument ignores that the President has the *duty,* not merely the right, under the recommendation clause to propose measures to Congress. By comparison, although the President has the right to veto any bill, the Constitution does not impose any duty on him to exercise that right, except in the case of legislation that obviously violates the Constitution.[206] The President is free under the Constitution to use his veto threat as a bargaining chip in the lawmaking process. He can agree with Congress to withhold a veto of one bill in order to secure their passage of a different bill he values more. This is merely an example of logrolling, or vote trading, between Congress and the President.[207] And, if Congress and the President seek to ensure their mutual performance of such an agreement by bundling the two unrelated bills into a single piece of legislation to be presented to the

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challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say."

205. Baker v. Carr, 369 U.S. 186, 217 (1962). *Baker* listed other factors relevant to justiciability, such as "a lack of judicially discoverable and manageable standards for resolving" the issue. *Id.* But these additional factors have less to do with the separation of powers than with judicial efficiency; thus, they seem to be less at the heart of the constitutional problem posed by justiciability if any weight is to be given to the Court's statement that "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. *Cf.* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 9 (1959) ("the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts").

206. As President Taft pointed out, to sign a bill that the President considers to be unconstitutional would violate his oath under article II, section 1, "to preserve, protect, and defend the Constitution of the United States." W. TAFT, *supra* note 75, at 19. *See also* THE FEDERALIST NO. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961) ("No legislative act . . . contrary to the Constitution . . . can be valid.").

207. *See* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 131-45 (1962); Tullock, *Some Problems of Majority Voting,* 67 J. POL. ECON. 571 (1959).

President for his signature, the presentment clause creates no constitutional impediment. Viewed in economic terms, such bundling permits the President to assign his intensity of preference (either positive or negative) to a particular vote, rather than treat all opportunities to exercise his veto power as choices reflecting equal intensities of preference.[208]

The recommendation clause places a higher responsibility on the President than does the presentment clause. The President cannot decline to recommend policy measures that he believes are necessary and expedient, because the Constitution establishes that the responsibility of recommending measures is an obligation of the Executive. Naturally, therefore, the President cannot negotiate away his recommendation duty. The Constitution does not grant the President the discretion to offer such a forbearance as the consideration for legislative dealmaking.[209] To do so would be an unlawful delegation of executive power to the Legislature.

Historically, of course, concern over unlawful delegation has arisen from the transfer of legislative authority by Congress to the President,[210] not from the transfer of executive power from the President to Congress. But the injury to the separation of powers is similarly implicated when it is the President who gives away the store. As Professor Gerald Gunther has observed: "Delegation problems involve not conflicts between President and Congress but, if anything, excessive harmony: the charge is not that Congress has usurped presidential powers but rather that Congress has sought to give to the executive too much of its own powers."[211] It is the converse of this problem that arises when the President uses his acquiescence to muzzling legislation as consideration in a political deal with Congress over omnibus legislation.

V. RECOMMENDATIONS FROM INDEPENDENT REGULATORY AGENCIES

Congress also aims muzzling legislation at independent agencies. For example, one rider to the omnibus appropriations legislation for fiscal year 1988 imposed three restrictions on the Federal Communications Commis-

208. *See* J. BUCHANAN & G. TULLOCK, *supra* note 207, at 125-26.

209. *See* McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies From Political Change*, 1987 U. Chi. Legal F. 295, 319-20. Thus, the President's failure to veto an omnibus bill containing a muzzling provision would not constitute evidence that the muzzle did not violate the principle of separation of powers. *Cf.* Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182-83 (2d Cir. 1967).

210. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Co. v. United States, 295 U.S. 495 (1935); *see also* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring); J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980). Recently, of course, the Court addressed in Mistretta v. United States, 109 S. Ct. 647 (1989), whether Congress had unlawfully delegated lawmaking power to the Judiciary.

211. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 424 (9th ed. 1975).

sion's use of funds in matters involving racial and gender preferences contained in the agency's broadcast licensing policies.[212] First, Congress in effect prohibited the FCC, during the term of this appropriations legislation, from repealing, changing, or reexamining its policies on racial and gender preferences that were in effect before September 12, 1986. Second, Congress ordered the FCC to terminate a study ordered by the United States Court of Appeals for the District of Columbia Circuit that sought to establish whether a rational basis existed for the supposition underlying the FCC's establishment of the preferences—namely, that increasing station ownership by women and minorities would enhance diversity of expression by producing more programming responsive to women and minority audiences. Third, Congress instructed the FCC to allow the continuation of stayed proceedings in which the gender or racial preferences were involved.

Before one can determine whether the FCC's muzzling law violates the recommendation clause, one must ask whether that agency wields any executive power in the first place. If an agency does not exercise executive power, then Congress cannot possibly be interfering with the performance of an article II duty when it tells the agency not to recommend changes to the law within the agency's area of expertise. *Humphrey's Executor v. United States,* of course, asserted that all functions performed by an independent agency are either "quasi-legislative" or "quasi-judicial."[213] But in *Morrison v. Olson*[214] the Court said that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."[215] Moreover, scholars like Professor Geoffrey Miller argue that "the functions which in the early days of administrative law were conceptualized as 'quasi-legislative' or 'quasi-judicial' are for the

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212. "That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. § 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, . . . which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending conclusion of the inquiry . . . ." Continuing Appropriations, Fiscal Year 1988, *supra* note 4, at 1329-31 (citations omitted). A similar prohibition appears in the appropriations legislation for fiscal year 1989. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

213. 295 U.S. 602, 610-11 (1935).

214. 108 S. Ct. 2597 (1988).

215. *Id.* at 2618 n.28. My purpose in discussing the Communications Act is to determine whether it delegates executive power to the FCC, not to determine whether the removal provisions for FCC commissioners are constitutional. Therefore, it is irrelevant to my purpose whether (or to what degree) *Morrison,* 108 S. Ct. at 2618-19, discards the "quasi-judicial" and "quasi-legislative" paradigm of *Humphrey's Executor.*

most part nothing more than highly developed aspects of traditional executive action."[216]

Indeed, the plain language of the enabling legislation for many independent agencies says as much. The Communications Act, for example, explicitly states that Congress was creating the FCC "for the purpose of securing a more effective *execution* of [communications] policy,"[217] that "[t]he member of the Commission designated by the President as chairman shall be the chief *executive* officer of the Commission,"[218] and that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary *in the execution of its functions.*"[219] Who conferred all of this executive power on the FCC? Certainly not Congress—for Congress cannot delegate executive power that it cannot exercise on its own. As the Court said in *Bowsher*: "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."[220] Only the President, *through his ratifying signature* on a piece of enabling legislation such as the Communications Act, can authorize the delegation of executive power to an independent agency.[221]

That being the case, how then could the President delegate to an agency the prerogatives of the Executive without also imposing on it the duties of the

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216. Miller, *Independent Agencies,* 1986 SUP. CT. REV. 41, 66. He further writes: "Today administrative agencies routinely operate under broad grants of delegated authority. It is not nearly as difficult to understand that their actions under these statutes can be purely executive in nature. The agencies are simply executing broad and general, rather than narrow and detailed, statutory instructions." *Id.*

217. 47 U.S.C. § 151 (emphasis added).

218. *Id.* § 155 (emphasis added).

219. *Id.* § 154(i) (emphasis added). These provisions regarding the FCC's executive functions are far more explicit, for example, than the analogous language concerning the jurisdictional mandate of the Federal Trade Commission, which the Court described in *Humphrey's Executor* as being created by Congress just to "fill[] in and administer[] the details" of the FTC Act. 295 U.S. at 628.

220. 478 U.S. at 726.

221. *See* 3 U.S.C. § 301 (1982) (general authorization of President to delegate to "any official . . . who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law . . . ."); *cf.* Mistretta v. United States, 109 S. Ct. 647, 678 n.2 (1989) (Scalia, J., dissenting).

This defense of the constitutionality of independent agencies against the charge of unlawful delegation raises an interesting question: If the enabling legislation creating the independent agency were enacted by means of a congressional override of a presidential veto, would the law's delegation of executive power to the agency be valid? I argue that it would not—a conclusion that requires embracing the broader proposition that legislation delegating executive power requires the President's approval, even though the presentment clause does not require his approval of an ordinary bill as long as Congress has enough votes to override his veto.

I do not suggest that my theory of the delegation of executive power to independent agencies disposes of whether it is unconstitutional to commingle that power at the agency with judicial or legislative power.

Executive? The accountability intended by the separation of powers would be eroded if the President could delegate the execution of particular laws to an independent agency, yet leave that agency free from the executive duty to recommend changes in those laws that it concluded were necessary and expedient based on its experience in executing them. Indeed, this would seem to be the rationale for the provision in the Communications Act that states that the FCC "shall make an annual report to Congress . . . [which] shall contain specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."[222] The statutory duty imposed on the FCC merely restates what the Constitution already requires: imposing on an independent agency the duty to make recommendations to Congress is essential to preserving economies of scope in information and to ensuring that the political power delegated to the agency be exercised in a democratic manner.[223]

Thus, Congress can no more abridge the FCC's ability to obey the recommendation clause than it can abridge the President's ability to do so. If the President has delegated to the FCC the power to "secur[e] a more effective execution of [communications] policy," then Congress cannot muzzle the FCC when, in carrying out the duty of making recommendations to Congress, the FCC undertakes to study whether certain changes in communications law are necessary and expedient. If the FCC's exercise of executive power has any constitutional legitimacy, then the Commission must be subject to the same protections from congressional interference with the performance of executive duties that the Constitution provides for the President himself. This means, for example, that Congress cannot tell the FCC that it may not study whether a rational basis exists for the gender and minority preferences contained in its broadcast licensing policies.

As in the case of presidential recommendations, Congress' lack of interest in the FCC's views on a particular communications matter does not justify muzzling legislation. Although Congress can tell the FCC what criteria it must use in determining, for example, how to select a licensee for a broadcast station, *Chadha* makes clear that "Congress must abide by its delegation of authorization until that delegation is legislatively altered or revoked."[224] That delegation consists of legislative authority from Congress *and* executive authority from the President. And, because the Constitution establishes that recommending changes in law is a duty of the Executive, the Communications Act confers this constitutional recommendation duty on the FCC when it formally delegates the President's executive functions to that agency.

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222. 47 U.S.C. § 154(k)(5) (1982).

223. *Cf.* Morrison v. Olson, 108 S. Ct. 2597, 2638-40 (1988) (Scalia, J., dissenting) (clear delineation of executive duties necessary to preserve accountability).

224. 462 U.S. at 955.

Therefore, the FCC has the duty to recommend measures to Congress that the agency, as a result of its execution of laws, determines are necessary and expedient to changing communications law. Neither the President nor Congress can tell the FCC not to recommend specific reforms in communications law that it believes are necessary and expedient. If the President no longer wishes the FCC to exercise executive powers, his option (as *Chadha* suggests by its analogous discussion of legislative delegation)[225] is to rescind that delegation formally, not to withdraw it with respect to the recommendation duty on a piecemeal basis. It follows a fortiori that, if the President cannot withdraw the FCC's executive powers piece by piece, Congress cannot take it upon itself to incrementally withdraw such executive power either.

VI. RESUSCITATING THE RECOMMENDATION CLAUSE

What will it take to bring the recommendation clause back from the dead? Two scenarios that involve private parties and implicate the recommendation clause could become ripe for resolution by the Supreme Court. Under a third scenario, a future President who shares President Hayes' fortitude could stand his ground against congressional interference with the performance of the recommendation duty.

The most obvious scenario in which the Supreme Court could visit the recommendation clause is when a private party is injured by the law that the President is precluded from changing after he has signaled an intention to change the law. Rupert Murdoch's celebrated case, *News America Publishing, Inc. v. FCC*,[226] is one in which a recommendation clause argument could have been made. An appropriations rider precluded the use of funds appropriated under the statute—by anyone, including the President—"to begin *or continue* a re-examination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station."[227] News America could have argued that the rider was unconstitutional because it interfered with the President's performance of his duty (as well as the FCC's performance of its duty) under the recommendation clause to study and recommend changes in the newspaper-television cross-ownership rules.

A second way in which the Court could address the recommendation

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225. *Id.*; *see also id.* at 953-54 n.16 ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.").

226. 844 F.2d 800 (D.C. Cir. 1988).

227. Continuing Appropriations, Fiscal Year 1988, *supra* note 4, at 1329-32 (emphasis added); *see also* Making Further Continuing Appropriations for the Fiscal Year Ending September 30, 1988, H.R. Rep. No. 498, 100th Cong., 1st Sess. 34 (1987).

clause is for a party to petition the Executive to study and formulate policy recommendations on a matter that the Executive previously had identified as an important policy objective, but the study of which is now prohibited by a muzzling law. During the Reagan Administration, privatizing the Bonneville Power Administration could have provided such an example. This policy surely was a measure that President Reagan deemed necessary and expedient to recommend to Congress for its consideration. Acting through OMB, President Reagan explicitly proposed privatizing these assets, partly as a means of reducing the federal budget deficit.[228] However, Congress precluded the Executive from spending funds to study the idea, and thereafter President Reagan's legislative proposals on privatization no longer mentioned the Bonneville Power Administration.[229] Therefore, a private party (such as a taxpayer interested in deficit reduction or a power company interested in buying these government assets) could have sought a writ of mandamus[230] ordering the President to cease violating his constitutional duty to provide Congress information and recommendations as to the feasibility and structure of the sale of the Bonneville Power Administration.[231] In addition, the same aggrieved party could have sought a declaratory ruling that the muzzling law was null and void because it violated the recommendation clause.[232]

Undoubtedly, a court would want to avoid having to address the merits of such a case, for it would make the Judiciary the umpire in what would essentially be a dispute between two coequal branches.[233] Therefore, this second scenario seems less likely to result in judicial review on recommendation clause grounds than does the first scenario. Nonetheless, a lawsuit that sought to order the Executive to desist from neglecting the performance of a

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228. Office of Management and Budget, Budget of the United States Government: Fiscal Year 1987, at 5-35 ("The budget assumes privatization of the Bonneville . . . Power Administration[] will occur in 1988 . . . .").

229. Office of Management and Budget, Budget of the United States Government: Fiscal Year 1988, at 2-46 to -47; *see also* 1987 ECONOMIC REPORT OF THE PRESIDENT 7, 74 (discussing privatization of the Naval Petroleum Reserve and the Alaska Power Administration, but *not* mentioning privatization of the Bonneville Power Administration).

230. 28 U.S.C. § 1361 (1982); *cf.* National Wildlife Fed. v. United States, 626 F.2d 917, 923-24 (D.C. Cir. 1980) (court declined to issue writ of mandamus so as not to intervene between legislative and executive branches in the budget formation process).

231. Such a taxpayer would not lack standing under Frothingham v. Mellon, 262 U.S. 447, 486-88 (1923) (individual taxpayer has no standing to sue to enjoin the execution of a federal appropriations act when Congress is acting within its constitutional powers). For the reasons discussed in Part IV of this Article, the muzzling law he would be challenging would not be a valid exercise of Congress' taxing and spending power, just as Congress' violation of the establishment clause was not a valid exercise in Flast v. Cohen, 392 U.S. 83, 105-06 (1968) (taxpayer has standing to sue when congressional action exceeds its taxation power).

232. 28 U.S.C. § 2201 (1982).

233. *See* Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting).

constitutional duty would not necessarily be barred by the general principle announced in *Marbury v. Madison*[234] that the President cannot be compelled by a writ of mandamus to perform an act in which "the executive possesses a constitutional or legal *discretion*."[235] To defend himself against a request for such a writ, the President would have to argue that he subsequently determined that it was neither necessary nor expedient to continue the investigation and that he *voluntarily* reached that change of heart—independent of the pressure imposed on him by the muzzling law.[236] Such an argument would require the President to embrace an embarrassing, if not disingenuous, position. Under these circumstances, a lawsuit seeking a writ of mandamus to compel the President to perform his recommendation duty would have a stronger legal foundation than have the successful lawsuits under the Administrative Procedure Act ordering agency action in matters committed to the agency's *discretion*.[237]

The third way in which the Court could visit the recommendation clause would be for the President to flout the provisions of the muzzling law by requiring, pursuant to article II, section 2, "the Opinion, in writing, of the principal Officer" in the relevant executive department on the subject prohibited by the muzzling law. For example, President Reagan could have ordered the Director of OMB to submit to him a written report on privatizing the Bonneville Power Administration.[238] The same strategy would have worked with an independent agency: President Reagan could have ordered the Chairman of the FCC to report in writing on whether the racial and gender preferences in the agency's licensing policies violated the equal protection clause as applied to the federal government through the fifth amendment.[239]

If the OMB Director or the FCC Chairman refused or failed to obey such a presidential order, the President could remove him for cause.[240] That simple conclusion would not change if the Director or Chairman justified his

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234. 5 U.S. (1 Cranch) 137 (1803).

235. *Id.* at 166 (emphasis added).

236. *See* Wilbur v. United States, 281 U.S. 206, 218 (1930) (mandamus can be used to compel action even in matters concerning judgment or discretion, but it cannot be used to direct the exercise of judgment or discretion in a particular way).

237. *See* 5 U.S.C. § 706(1) (1982); American Broadcasting Co. v. FCC, 191 F.2d 492, 502 (D.C. Cir. 1951) (court has power under the Act to provide a "remedy against inaction" and order FCC to exercise its discretion).

238. "[T]he President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action." Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59, 62 (1981).

239. For a discussion of the applicability of the opinions clause to independent agencies that does not rely on my argument that the President delegates executive powers and duties to such agencies, see Strauss, *supra* note 35, at 646-48.

240. A recent student note, however, expounds the silly theory that "the opinion in writing clause exists because it was not assumed, or at the very least not obvious, that the President had

refusal by citing the Antideficiency Act and the muzzling law that forbade the expenditure of appropriated funds to study the matter. Certainly, a Cabinet officer's refusal to deliver a satisfactory opinion to the President on these grounds is not a refusal to perform "a mere ministerial act,"[241] and thus not subject to Congress' command. Congress would have no constitutional authority to order the Cabinet officer to disobey the President's order under the opinions clause; thus the officer could not justify his disobedience to the President by citing his obedience to Congress. In *Bowsher,* the Supreme Court stated: "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto."[242] If the President could not order and receive a written report on a legitimate topic within the expertise of one of his principal Cabinet officers or independent agency chairmen, that officer would be controlled, in significant degree, by Congress—a condition that for all practical purposes would grant Congress a veto over not only the President's formulation of policy, but also his ability to stay informed of matters relevant to his faithful execution of existing laws and to his various executive duties.

VII. CONCLUSION

For Congress to outlaw the thinking of certain thoughts by the Executive debases the separation of powers. The Framers could not have intended to suppress the cultivation and dissemination of new knowledge relevant to good government when they divided power between the three branches. Nor does the history, structure, or plain language of the recommendation clause permit such suppression.

For good reasons, the Framers required the President to participate in the initiation of new laws. Yet, neither Congress nor the President obeyed the Constitution during the Reagan presidency as far as the recommendation clause was concerned. Congress repeatedly interfered with the President's performance of an explicit constitutional duty to provide information and make recommendations to Congress. President Reagan's acquiescence to muzzling laws was itself unconstitutional, for the President may not negotiate away his performance of an article II duty. Preserving harmony with Congress cannot justify permitting the separation of powers to erode. Most, if not all, of the numerous muzzling laws born of this lapse in constitutional principles are void and unenforceable.

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absolute power over the Heads of Departments." Note, *In Defense of Administrative Agency Autonomy,* 96 YALE L.J. 787, 800 (1987) (by M. Froomkin).

241. Kendall v. United States, 37 U.S. (12 Pet.) 524, 614 (1838) (defining "mere ministerial act" as one in which there is no room for the exercise of any discretion).

242. 478 U.S. at 726.