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## The Legislator-In-Chief

Vasan Kesavan

J. Gregory Sidak

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# William and Mary Law Review

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## THE LEGISLATOR-IN-CHIEF

VASAN KESAVAN\*  
J. GREGORY SIDAK\*\*

### TABLE OF CONTENTS

|   |    |
|---|----|
| INTRODUCTION . . . . .  | 4  |
| I. THE STATE OF THE UNION CLAUSE . . . . .  | 7  |
| A. <i>"He Shall": The Executive Duty Principle</i> . . . . .  | 7  |
| B. <i>"From Time to Time": The Periodicity Principle</i> . . . . .  | 13 |
| C. <i>"Give to the Congress": The Publicity Principle</i> . . . . .   | 17 |
| D. <i>"Information of the State of the Union":</i><br><i>The Public Deliberation Principle</i> . . . . .                  | 22 |
| 1. <i>The Meaning of "Information of the</i><br><i>State of the Union"</i> . . . . .                                      | 22 |
| 2. <i>The Imposition of the Duty upon the President</i> . . . . .   | 29 |
| II. THE RECOMMENDATION CLAUSE . . . . .   | 35 |
| A. <i>"And Recommend to Their Consideration": The</i><br><i>Anti-Royalty and Popular Sovereignty Principles</i> . . . . . | 35 |

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\* Vice President, Francisco Partners. B.A.S., B.S., B.A. 1995, University of Pennsylvania; J.D. 2001, Yale Law School.

\*\* F. K. Weyerhaeuser Fellow in Law and Economics Emeritus, American Enterprise Institute for Public Policy Research. A.B. 1977, A.M., J.D. 1981, Stanford University. For their helpful comments and suggestions, thanks to Bruce Ackerman, Akhil Amar, Steven G. Calabresi, Neal Devins, David Fontana, Michael J. Gerhardt, Kumar Kesavan, Michael S. Paulsen, and Saikrishna B. Prakash.

|   |    |
|---|----|
| 1. <i>The Anti-Royalty Principle</i> .....  | 35 |
| 2. <i>The Popular Sovereignty Principle</i> .....   | 42 |
| B. <i>"Such Measures": The Legislation Principle</i> .....  | 48 |
| C. <i>"As He Shall Judge Necessary and Expedient":</i><br><i>The Executive Discretion Principle</i> ..... | 55 |
| CONCLUSION .....  | 63 |

## ABSTRACT

*The State of the Union and Recommendation Clauses of Article II, Section 3 provide 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." Those thirty-one words envision the President as the lead active participant in the embryonic stages of the making of laws. Eight separate principles animate the President's legislative duties and powers before the presentment process. When the State of the Union and Recommendation Clauses are seen to have this textual and analytical subtlety, they reveal the sophistication of the Framers' design that the President, through her institutionally unique ability to acquire and analyze information valuable to the leadership of the Republic, would have significantly more to contribute to the legislative process than merely to sign off on their creation by Congress. Far from making the President a cipher in the legislative process, the Constitution created the Legislator-in-Chief.*

## INTRODUCTION

Americans today identify the President as the Legislator-in-Chief. When presidential candidates promise, We the People listen—carefully. There is much truth to the popular recognition of the President as the Legislator-in-Chief: Ever since the New Deal, we truly have had a populist, plebiscitarian presidency.<sup>1</sup>

This vision of the President may seem modern, but the Constitution itself has always recognized the President as a super-legislator. The Veto Clauses of Article I, Section 7 give the President the “last word” on all legislation, absent an override by a two-thirds supermajority of both Houses of Congress.<sup>2</sup> The President, however, sometimes has the important “first word” on legislation, too. The State of the Union and Recommendation Clauses of Article II, Section 3 provide 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 ....”<sup>3</sup> Justice Hugo Black in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>4</sup> summarized the obvious one-two punch this way: The President’s “functions in the lawmaking process” are simply “the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>5</sup>

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1. For a intriguing discussion, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67-70 (1991). For a discussion of the President’s ascendancy as Legislator-in-Chief in the twentieth century under the administrations of Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 303-17 (Randall W. Bland et al. eds., 5th ed. 1984); JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 127-54 (1981).

2. See U.S. CONST. art. I, § 7, cls. 2, 3. The fact that the Veto Clause is located in Article I and not Article II further signifies the legislative contour of the President’s “last word.” Professor Amar has called this type of textual argument from the location of a clause in the Constitution “organization-chart textualism.” See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 797 n.197 (1999); see also Akhil Reed Amar, *Architexture*, 77 IND. L.J. (forthcoming 2002). This species of textual argument is also the subject of a forthcoming work by one of the authors. See Vasan Kesavan, *Organization-Chart Textualism* (unpublished manuscript, on file with author).

3. U.S. CONST. art. II, § 3.

4. 343 U.S. 579 (1952).

5. *Id.* at 587. For a criticism of this famous sentence as being too simplistic, see J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST.

Although much has been written about the Veto Clauses,<sup>6</sup> the State of the Union and Recommendation Clauses remain embarrassingly underexamined in legal scholarship.<sup>7</sup> The problem is not merely one within the legal academy. Contemporary accounts suggest that these clauses were underexamined at the Founding because they were uncontroversial. There is no recorded debate on

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COMMENT. (forthcoming 2002).

In addition to the President's "first word" and "last word" in the process of law making, the President is also the lead constitutional actor in the process of treaty making. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."). To the extent that the treaty-making power is properly characterized as legislative in nature (a subject of academic dispute especially given its placement in Article II and not Article I, see, for example, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1967 (1999)), the President is the Legislator-in-Chief of the process of treaty making as well as that of law making. Indeed, the President is the lead constitutional actor in the process of treaty making more so than that of law making: No treaty may be made without the President, whereas a bill becomes law over a presidential veto if there is a two-thirds supermajority in each House of Congress. See U.S. CONST. art. I, § 7, cls. 2, 3.

6. For a partial sample, see Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735 (1993); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001); Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771 (1997); J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990) [hereinafter Sidak & Smith, *Four Faces of the Item Veto*]; J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39 (1992).

7. A search for the phrase "State of the Union Clause" on the Westlaw database yielded a paltry four results. Search of WESTLAW, JLR Library (Dec. 31, 2001). The four results, however, were from a distinguished group of scholars. See Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996) [hereinafter Amar, *Some Opinions*]; Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

A search for the phrase "Recommendation Clause" yielded significantly more results—twenty-eight to be exact. Search of WESTLAW, JLR Library (Dec. 31, 2001). Eighteen results, however, are references to an article written by one of us, see J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989) [hereinafter Sidak, *Recommendation Clause*], and one reference is erroneous. For subsequent, useful articles mentioning the Recommendation Clause, see Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 1 (1994) and Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History,"* 89 MICH. L. REV. 399 (1990).

these clauses at the Philadelphia Convention of 1787. In *The Federalist No. 77*, Alexander Hamilton simply observed that "no objections ha[ve] been made to this class of authorities; nor could they possibly admit of any."<sup>8</sup> Notable early commentators on the Constitution echoed this sentiment.<sup>9</sup>

Notwithstanding such neglect, benign or otherwise, the State of the Union and Recommendation Clauses stand atop Article II, Section 3 as grand contours of the "executive Power" vested in the President by means of the Vesting Clause of Article II.<sup>10</sup> As such, they are no less important than the other clauses of Article II. The Supreme Court has listed the State of the Union and Recommendation Clauses as some of the "awesome" powers entrusted to, and duties imposed on, the President.<sup>11</sup> Alexander Hamilton thought these clauses important enough to place them first among all clauses specifying the contours of executive power in his private, unadopted draft of the Constitution.<sup>12</sup>

This Article explores these two least discussed clauses of Article II. A careful parsing of the thirty-one words of these clauses yields insights into the presidency that are both timely and timeless. Through these clauses we analyze the President's constitutional role in the origination of legislation. We use, in addition to familiar methods of constitutional analysis, tools from economic theory concerning asymmetric information and organizational design. Our analysis reveals the State of the Union and Recommendation

8. *THE FEDERALIST NO. 77*, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. See, e.g., JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 270 (Little, Brown & Co. 1826) ("The propriety and simplicity of these [Article II, § 3] duties speak for themselves."); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1555 (Boston, Hilliard, Gray & Co. (1833)) [hereinafter *STORY'S COMMENTARIES*]. Justice Story argued:

The first part [of Article II, Section 3], relative to the president's giving information and recommending measures to congress, is so consonant with the structure of the executive departments of the colonial, and state governments, with the usages and practice of other free governments, with the general convenience of congress, and with a due share of responsibility on the part of the executive, that it may well be presumed to be above all real objection.

*Id.*

10. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

11. See *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 551 n.6 (1977).

12. See 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 624 (Max Farrand ed., 1937) [hereinafter *FARRAND*].

Clauses as surprisingly rich and relevant to the modern conception of the Presidency.

## I. THE STATE OF THE UNION CLAUSE

The State of the Union Clause can be dissected into four core principles.<sup>13</sup> We call these (i) the executive duty principle,<sup>14</sup> (ii) the periodicity principle,<sup>15</sup> (iii) the publicity principle,<sup>16</sup> and (iv) the public deliberation principle.<sup>17</sup> We consider each in turn and show how these principles and the principles of the Recommendation Clause<sup>18</sup> cohere to give substance to these two clauses and to illuminate the President's constitutional role as the Legislator-in-Chief.

### A. "He Shall": The Executive Duty Principle

The phrase "[h]e shall" is the font of the executive duty principle. The State of the Union and Recommendation Clauses are obviously about the President. A quick glance at the rest of the Constitution confirms that no analogous clauses appear in Articles I or III. This fact is a textual hint that there is something special about these clauses relating to the features and functions of the presidency.

The clauses do not signify any kind of congressional prerogative. They do not provide that "Congress may from time to time require the President to give to the Congress Information of the State of the Union." Some, however, have called for just such a reading of the State of the Union Clause. For example, Raoul Berger, in his work

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13. For articles utilizing a similar organizational strategy of carefully parsing the text of a clause in bite-size chunks, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (analyzing U.S. CONST. amend. XIV, § 1); Amar, *Some Opinions*, *supra* note 7 (presenting seven principles of the Opinion Clause, U.S. CONST. art. II, § 2, cl. 1); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (examining the Self-Incrimination Clause, U.S. CONST. amend. V); and John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89 (1995) (analyzing the Emoluments Clause, U.S. CONST. art. I, § 6, cl. 2).

14. See *infra* Part I.A.

15. See *infra* Part I.B.

16. See *infra* Part I.C.

17. See *infra* Part I.D.

18. See *infra* Part II.



on executive privilege, has written that Congress may request performance of the President's duty under the State of the Union Clause at its convenience.<sup>19</sup> This reading is textually awkward and wrong: The President is not, constitutionally speaking, the inferior of Congress, but is the head of an independent and coequal branch of government.<sup>20</sup>

Another clause of Article II governs a different information exchange and provides an important textual clue that underscores the idea of an executive duty. The Opinion Clause 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 ...."<sup>21</sup> There is a vast difference between the phrase "may require" in the Opinion Clause and the phrase "shall give" in the State of the Union Clause. The Opinion Clause governs an information exchange between a superior and his inferiors, whereas the State of the Union Clause governs an information exchange between two equals.<sup>22</sup> The former clause implies the specification of orders to, and the evaluation of the performance by, someone to whom the President has delegated executive power. The analogy is to a principal and agent relationship.<sup>23</sup> The latter clause, in contrast, implies joint

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19. See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 37-38 (1974) (concluding that the State of the Union Clause supports Congress's "absolute power of inquiry" and is "the reciprocal of the familiar legislative power to inquire"). More generally, the Supreme Court has suggested that the power to require reports of executive officers of the United States is incident to the legislative power. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (stating that receiving reports from executive officers of the United States is "incidental to the legislative function").

20. See Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 555 (2000) (arguing that the State of the Union Clause "means the opposite of what Berger suggests").

21. U.S. CONST. art. II, § 2, cl. 1.

22. See Amar, *Some Opinions*, *supra* note 7, at 658 (noting that the State of the Union Clause is "[p]erhaps the best textual illustration of coordinacy in the reporting and opining contexts" and "exemplifies a meeting of equals"); Calabresi & Rhodes, *supra* note 7, at 1207 n.262 (stating that the State of the Union Clause "gives Congress no power to require presidential opinions *in writing* upon any subject relating to the President's duties, because the Clause governs information exchanges between two independent and co-equal departments of the national government").

23. See generally Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Capital Structure*, 3 J. FIN. ECON. 305 (1976) (providing an overview of agency concepts in a business context).

production resulting from two separate, but mutually dependent actors.<sup>24</sup>

The State of the Union and Recommendation Clauses do not signify executive prerogative, but rather executive duty. The Framers used "shall" as a word of obligation,<sup>25</sup> and the use of the word "shall" in the State of the Union Clause strongly suggests that the President is constitutionally obligated to "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 ...."<sup>26</sup>

The precursors to the State of the Union and Recommendation Clauses are illuminating. An early draft of the clauses by the Committee of Detail<sup>27</sup> made explicit that the clauses are an executive duty: "It shall be his *Duty* to inform the Legislature of the Condition of U.S. so far as may respect his Department—to recommend Matters to their Consideration ...."<sup>28</sup> This draft clause mirrored the language in Article XIX of the New York Constitution of 1777, which provided that "it shall be the *duty* of the governor to inform the legislature, at every session, of the condition of the State, so far as may respect his department; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity."<sup>29</sup>

24. See generally Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Organization*, 62 AM. ECON. REV. 777 (1972) (examining the idea of joint or team production in the business context).

25. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 782 & n.147 (1984) (stating that the Framers used "shall" as a word of obligation and "may" as a word of discretion and providing numerous examples in the Constitution); see also 1 FARRAND, *supra* note 12, at 185-86 (noting that the Framers carefully distinguished between the words "ought," "shall," and "may" in the drafting of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, cl. 1); 2 FARRAND, *supra* note 12, at 412 (remarks of George Mason) (noting the strength of the word "shall").

26. U.S. CONST. art. II, § 3.

27. The Committee of Detail consisted of five persons (alphabetically): Oliver Ellsworth (Connecticut), Nathaniel Gorham (Massachusetts), Governor Edmund Randolph (Virginia), John Rutledge (South Carolina), and James Wilson (Pennsylvania). See 2 FARRAND, *supra* note 12, at 97, 106. The Committee of Detail's mandate was to report a Constitution "for the establishment of a national government, except what respects the Supreme Executive." *Id.* at 85.

28. 2 FARRAND, *supra* note 12, at 158 (emphasis added).

29. N.Y. CONST. of 1777, art. XIX, in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL

Early commentators on the Constitution agreed that the State of the Union and Recommendation Clauses are mandatory. Justice Story wrote in his famous *Commentaries on the Constitution*:

There is great wisdom, therefore, in not merely allowing, but in *requiring*, the president to lay before congress all facts and information, which may assist their deliberations; and in enabling him at once to point out the evil, and to suggest the remedy. He is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them.<sup>30</sup>

Similarly, William Rawle, in his treatise on the Constitution, wrote that "[t]he president is also *required* to recommend to *their consideration such measures as he may deem expedient*."<sup>31</sup>

What about the Recommendation Clause? In 1993, the United States Court of Appeals for the D.C. Circuit stated that, while "[t]he Framers intended the Take Care Clause to be an affirmative duty on the President and the President alone," the Recommendation Clause "is less an obligation than a right."<sup>32</sup> This reading of the Recommendation Clause is wrong. The President is obligated to make recommendations to Congress—more precisely, those recommendations that she deems to be "necessary and expedient."<sup>33</sup> The secret drafting history of the Recommendation

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CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1335 (Benjamin Perley Poore ed., Lawbook Exchange Ltd. 2001) (1878) [hereinafter *FEDERAL AND STATE CONSTITUTIONS*] (emphasis added). Professor Farrand has suggested the importance of Article XIX of the New York Constitution of 1777 as an extratextual source of original public meaning relating to Article II, stating that in the drafting of the Constitution at the Philadelphia Convention, "the state constitutions were continually drawn upon," and that the New York Constitution of 1777 "seems to have been used more extensively than any other ... and especially in connection with the executive." MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 128-29 (1913).

30. 3 STORY'S COMMENTARIES, *supra* note 9, § 1555 (emphasis added).

31. See WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 172 (1825) [hereinafter *RAWLE'S COMMENTARY*] (first emphasis added).

32. *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993).

33. U.S. CONST. art. II, § 3. For additional discussion, see *infra* Part III.C. (discussing the executive discretion principle of the Recommendation Clause). Modern academic commentators have embraced the notion that the Recommendation Clause is mandatory, at least in part. See, e.g., Gary Lawson, *Everything I Need To Know About Presidents I Learned From Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381, 383 (2001) (reading the Recommendation Clause as indicating that "[the President] must recommend to Congress 'such Measures as

Clause confirms that the Framers made the Recommendation Clause an executive duty as well. The report of the Committee of Detail provided that "he may recommend to their consideration such measures as he shall judge necessary, and expedient."<sup>34</sup> On the motion of Gouverneur Morris, however, the phrase "he may" was struck and the word "and" was inserted before the word "recommend," thereby yoking together the State of the Union and Recommendation Clauses.<sup>35</sup> The purpose of this change was "to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it ...."<sup>36</sup> It is therefore not surprising that George Washington, President of the Philadelphia Convention of 1787, thought that the Recommendation Clause was mandatory. In his first Inaugural Address in 1789, he observed: "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.'<sup>37</sup>

A President must take the executive duty principle of the State of the Union and Recommendation Clauses seriously. A President who flouted the executive duty of these clauses would properly be subject to impeachment,<sup>38</sup> no less than a President who flouted the executive duty, contained in the same paragraph of Article II, to "take Care that the Laws be faithfully executed ...."<sup>39</sup>

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he shall judge necessary and expedient") (footnote omitted).

34. 2 FARRAND, *supra* note 12, at 185.

35. *Id.* at 405.

36. *Id.*

37. First Inaugural Address of George Washington (Apr. 30, 1789), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 52 (J. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS] (emphasis added).

38. See Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999) ("A President who completely neglects his duties by showing up at work intoxicated every day, or by lounging on the beach rather than signing bills or delivering a State of the Union address, would be guilty of no crime but would certainly have committed an impeachable offense."). During a discussion on the House floor in 1842, Representative Cushing explained:

The clause requiring the President to see to the execution of the laws, and to give information to Congress of the state of the Union, was imperative on the President, and constituted an obligation, by the omission of which he violated the Constitution and his oath of office, and was liable for impeachment; and if the Constitution or laws did not set forth the manner in which a duty was to be performed, it was for the President to decide upon it.

CONG. GLOBE, 27th Cong., 2d Sess. 482 (1842) (statement of Rep. Cushing).

39. U.S. CONST. art. II, § 3.

Finally, one should be careful about reading the State of the Union and Recommendation Clauses by negative implication. Arguments from *expressio unius est exclusio alterius*<sup>40</sup> must be contextually and sensitively applied to avoid wooden readings of the Constitution.<sup>41</sup> Because the clauses define the contours of executive duty, they do not limit what the President may do voluntarily when exercising the powers of her office. Surely the President may give more information to Congress than information concerning the State of the Union, but not less;<sup>42</sup> surely the President may do so more frequently than from time to time, but not less.<sup>43</sup> In addition, one should not assume that others—say, the President's subordinates within the executive department—may not also give information to Congress or recommend measures to them, at least with the President's consent. Nor should one assume that the State of the Union and Recommendation Clauses are the only clauses in the Constitution that require the President to share information with or make recommendations to the whole or a portion of the legislative department.<sup>44</sup>

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40. "The expression of one is the exclusion of another." BLACK'S LAW DICTIONARY 602 (7th ed. 1999). For classic discussions of the canon, see THE FEDERALIST NOS. 32, 83 (Alexander Hamilton).

41. See Amar, *Some Opinions*, *supra* note 7, at 653 n.30; Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 702-08 & n.6 (1995); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1815-36 (1998).

42. Two scholars have noted this obvious point. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995) ("The Constitution requires the President to report on the 'State of the Union,' but no one would argue that he is constitutionally disabled from sending messages to Congress on other subjects.") (footnote omitted).

43. It is a closer question whether the President *may* recommend unnecessary or inexpedient measures. One of the authors previously noted in passing that the Recommendation Clause by negative implication "counsels (if not requires) the President to avoid trivial or frivolous recommendations to Congress." Sidak, *Recommendation Clause*, *supra* note 7, at 2082. That said, it is difficult to believe that the Recommendation Clause actually *requires* the President to avoid unnecessary or inexpedient recommendations to Congress. Silly recommendations are unlikely, however, as the President is interested in preserving her own dignity vis-à-vis Congress. The President is a repeat player with Congress, and Congress can always register its dissatisfaction with the President's waste of its time in many political ways, such as delaying confirmations of presidential appointments or reducing appropriations for executive departments.

44. The Appointments Clause and the Treaty Clause require the President to share information with and make recommendations to the Senate.

[The President] shall nominate, and by and with the Advice and Consent of the

### B. "From Time to Time": The Periodicity Principle

The phrase "from time to time" is the font of the periodicity principle. The State of the Union Clause provides that the President shall exercise the executive duty "from time to time," and one might plausibly read the Recommendation Clause to provide the same, although such a reading is not grammatically required.<sup>45</sup>

The phrase "from time to time" is used three other times in the Constitution—in the Journal of Proceedings Clause of Article I, Section 5<sup>46</sup> and the Receipts and Expenditures Clause of Article I,

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Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2; *see also id.* art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."); *cf.* RAWLE'S COMMENTARY, *supra* note 31, at 63-64 ("[W]hen the treaty is agreed on, the president submits it to the senate, in whose deliberations he takes no part, but he renders to them, from time to time, such information relative to it as they may require.").

45. *See Sidak, Recommendation Clause, supra* note 7, at 2122 (positing that the phrase "from time to time" may modify the Recommendation Clause). An interesting question is whether the duties of the State of the Union and Recommendation Clauses must be exercised contemporaneously—that is, whether the President must give information when she recommends, and vice versa. This is a wooden reading of the clauses. One should not, in the absence of a very clear statement, tie the President's hands in this way. *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 230 n.131 (1987) (stating that "juxtaposition was not intended by the Framers to limit the presidential power to recommend measures to the context of giving information on the state of the union"). President Washington, for his part, had no qualms with respect to a "disjunctive" reading of the State of the Union and Recommendation Clauses. He invoked the Recommendation Clause in his first Inaugural Address of April 30, 1789, but did not invoke the State of the Union Clause. *See* First Inaugural Address of George Washington (Apr. 30, 1789), *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 37, at 51-54. He also made recommendations to Congress at times other than the annual State of the Union Message. *See id.* at 57-63 (presenting President Washington's "Special Messages" to Congress for the period May 25, 1789 to Sept. 29, 1789).

46. According to the Journal of Proceedings Clause:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

U.S. CONST. art. I, § 5, cl. 3.

Section 9<sup>47</sup> to delineate the frequency of a legislative duty, and in the Vesting Clause of Article III, Section 1<sup>48</sup> to delineate the frequency of a legislative power.<sup>49</sup>

The phrase "from time to time" might plausibly mean at least once a year, or, more precisely, at least once during every session of Congress. These two meanings were nearly synonymous at the Founding, as evidenced by Article I, Section 4, Clause 2, which provides that "The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December; unless they shall by Law appoint a different Day."<sup>50</sup> The State of the Union and Recommendation Clauses therefore establish a constitutional minimum of an annual duty. Not surprisingly, President George Washington's first State of the Union Message was simply titled "First Annual Address."<sup>51</sup> A short typology of eighteenth-century official presidential rhetoric is useful. The "Annual Message," as the State of the Union Message was known, was a particular type of "Message to Congress," which in turn was one of three kinds of "official rhetoric" by early presidents.<sup>52</sup>

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47. *Id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

48. *Id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

49. In one elegant variation on the phrase "from time to time," the Constitution provides: Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn *from day to day*, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

*Id.* art. I, § 5, cl. 1 (emphasis added).

50. *Id.* art. I, § 4, cl. 2.

51. First Annual Address of George Washington (Jan. 8, 1790), in *MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 37, at 65-67. The term "State of the Union Message" did not emerge until the middle of the twentieth century. For most of the nation's history, the President's exercise of duty under the State of the Union Clause was simply referred to as the "Annual Message." See Arthur M. Schlesinger, Jr., *Annual Messages of the Presidents: Major Themes of American History*, Introduction to 1 *THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966*, at xiii (Fred L. Israel ed., 1966) [hereinafter Schlesinger, *Major Themes*]; see also *The State of the Union Address*, at <http://www.senate.gov/~boxer/archive/stateofunion/history.htm> (noting that the term "State of the Union Address" originated in 1945) (last visited Sept. 28, 2002).

52. See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 45-59 (1987) (discussing "Inaugural Addresses," "Proclamations," and "Messages to Congress").

Interestingly, these clauses were drafted against the backdrop of the British practice whereby the Monarch would open each session of Parliament with a "Speech from the Throne."<sup>53</sup> Article XIX of the New York Constitution of 1777 reflected this British practice by providing that "it shall be the duty of the governor to inform the legislature, *at every session*, of the condition of the State, so far as may respect his department."<sup>54</sup> So too, Alexander Hamilton's private, unadopted draft of the Constitution provided:

The President *at the beginning of every meeting of the Legislature* as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be necessary for their information, or as may require their consideration.<sup>55</sup>

The evolutionary link to the King's Speech thus explains the timing of the annual State of the Union Message. President Washington gave the first State of the Union Message on January 8, 1790, a few days after the First Congress assembled for its second session on the first Monday in January.<sup>56</sup> Today the State of the Union Message is usually given by the middle of January, shortly after the opening of the first session of the new Congress.<sup>57</sup> In addition to ceremonial custom, there is a natural functional reason why the State of the Union Message is given at this time: Information of the State of the Union is a necessary precondition for wise public deliberation and legislation by members of Congress.<sup>58</sup>

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53. See generally 3 WILLIAM STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 477-80 (Clarendon Press 1880) (outlining the role of the Monarch).

54. N.Y. CONST. of 1777, art. XIX, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1335 (emphasis added).

55. 3 FARRAND, *supra* note 12, at 624 (emphasis added).

56. President Washington did not give a State of the Union Message after the First Congress assembled for its first session on March 4, 1789. Tulis observes that "Washington's first Inaugural Address served also as his first Annual Message." TULIS, *supra* note 52, at 55. Notwithstanding this statement, President Washington and history have considered his "First Annual Message" to have been delivered on January 8, 1790. See *infra* note 111 and accompanying text.

57. See U.S. CONST. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

58. See 1 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION



The phrase "from time to time," however, should mean something more than "at least once during every session of Congress." The phrase is to be interpreted flexibly because it was impossible for the Framers to specify all of the times that would give rise to the duty of the clauses.<sup>59</sup> The phrase may simply mean "when necessary."<sup>60</sup> One can also take an important textual clue from the juxtaposition of the State of the Union and Recommendation Clauses with the Special Session Clause, which provides that "[the President] may, on extraordinary Occasions, convene both Houses, or either of them ...."<sup>61</sup> A special session of Congress calls for heightened sensitivity to the State of the Union and Recommendation Clauses. As William Rawle put it in his treatise on the Constitution, the President, on such an extraordinary occasion, "would not be guiltless to his constituents if he failed to exhibit on the first opportunity, his own impressions of what it would be useful to do, with his information of what had been done."<sup>62</sup> One may even interpret the phrase to require the President

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AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app. at 344 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803) [hereinafter TUCKER'S COMMENTARIES]. According to Tucker:

[A]s it is indispensably necessary to wise deliberations and mature decisions, that they should be founded upon 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.

*Id.*

James Madison put the point more generally in *The Federalist No. 53* when he wrote that "No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate." THE FEDERALIST NO. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961).

59. Cf. U.S. CONST. art. II, § 1, cl. 6 ("The President shall, *at stated Times*, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.") (emphasis added); *id.* art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, *at stated Times*, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.") (emphasis added).

60. See, e.g., 2 FARRAND, *supra* note 12, at 186 ("The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.").

61. U.S. CONST. art. II, § 3.

62. RAWLE'S COMMENTARY, *supra* note 31, at 172. President Jefferson delivered his third State of the Union Message in 1803 and his seventh in 1807 upon calling a special session of

to communicate to Congress as new information of the State of the Union becomes known to her. For example, President Jefferson closed his sixth State of the Union Message by promising to communicate certain pieces of information "from time to time *as they become known to me*, with whatever other information I possess or may receive, which may aid your deliberations on the great national interests committed to your charge."<sup>63</sup>

### C. "Give to the Congress": The Publicity Principle

The phrase "give to the Congress" is the font of the publicity principle.<sup>64</sup> The word "give" in the State of the Union Clause arguably implies a duty of personal appearance by the President when giving the State of the Union Message. The personal appearance of the President before Congress is an important symbol that the President is not a King ruling from 1600 Pennsylvania Avenue. Ironically, the paradigm case of the King's Speech is instructive. The King's Speech was usually given by the King in the House of Lords, where members of the House of Lords and the House of Commons gathered.<sup>65</sup> So too, the first State of the Union Message

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Congress. See Third Annual Message of Thomas Jefferson (Oct. 17, 1803), *reprinted in* 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 68 (Fred L. Israel ed., 1966) [hereinafter THE STATE OF THE UNION MESSAGES]; Seventh Annual Message of Thomas Jefferson (Oct. 27, 1807), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* at 89. President Madison did the same in his third and sixth State of the Union Messages, delivered in 1811 and 1814, respectively. See Third Annual Message of James Madison (Nov. 5, 1811), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* at 111; Sixth Annual Message of James Madison (Sept. 20, 1814), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* at 129.

63. Sixth Annual Message of Thomas Jefferson (Dec. 2, 1806), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 89 (emphasis added). Indeed, President Jefferson regularly promised to give additional information during the course of the session. See Fourth Annual Message of Thomas Jefferson (Nov. 8, 1804), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 77; Fifth Annual Message of Thomas Jefferson (Dec. 3, 1805), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 83; Seventh Annual Message of Thomas Jefferson (Oct. 27, 1807), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 94.

64. Cf. Amar, *Some Opinions*, *supra* note 7, at 670-72 (discussing probity and publicity principles of Opinion Clause).

65. See George Kamberelis, *Genre as Institutionally Informed Social Practice*, 6 J. CONTEMP. LEGAL ISSUES 115, 132 (1995) (citation omitted); Pomp and Ceremony: The Monarch in Parliament, at [http://www.bbc.co.uk/history/lj/churchlj/pomp\\_01.shtml](http://www.bbc.co.uk/history/lj/churchlj/pomp_01.shtml) (last visited Sept. 15, 2002).

was given by President Washington in the chamber of the Senate, where members of the Senate and the House of Representatives gathered.<sup>66</sup>

Consider also in this regard Article III, Section 10 of Alexander Hamilton's private, unadopted draft of the Constitution:

The President at the beginning of every meeting of the Legislature as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be necessary for their information, or as may require their consideration. He may by message during the Session communicate all other matters which may appear to him proper.<sup>67</sup>

If this clause represents the view of the Framers as a whole—as opposed to Hamilton's idiosyncratic view—the President's personal appearance would seem to be constitutionally required, at least in the annual, ceremonial State of the Union Message. It would not make sense for the Members of Congress to “convene ... together” in the Senate Chamber if the President were not to appear personally before them—they could just as easily read the State of the Union Message in their separate Houses. Moreover, the phrase “by message” in the discretionary part of the clause but not in the mandatory part of the clause suggests that personal appearance is required for the annual, ceremonial State of the Union Message, but not for other communications made during the session of Congress.<sup>68</sup>

Other evidence from the Philadelphia Convention of 1787 confirms that other Framers considered a State of the Union Speech. An early note from the Committee of Detail provided that the President “[s]hall propose to the Legisle. from Time to Time by Speech or Messg such Meas as concern this Union.”<sup>69</sup>

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66. See The First State of the Union Address, at <http://www.earlyamerica.com/earlyamerica/firsts/sou/text.html> (last visited Sept. 10, 2002).

67. 3 FARRAND, *supra* note 12, at 624.

68. See RAWLE'S COMMENTARY, *supra* note 31, at 172-73 (“These communications were formerly made in person at the opening of the session, and written messages were subsequently sent when necessary, but the whole is now done in writing.”).

69. 2 FARRAND, *supra* note 12, at 145.

True to British practice, Presidents George Washington and John Adams both personally appeared before Congress in delivering the first twelve State of the Union Messages.<sup>70</sup> President Thomas Jefferson, however, broke with the tradition of personal, oral appearance in 1801, because he felt that it was “too kingly for the new republic.”<sup>71</sup> He began a practice of delivering by messenger his annual Messages in writing, although he had clerks read his Message aloud in each House of Congress.<sup>72</sup> This practice lasted through the next twenty-four presidencies until President Woodrow Wilson resumed the original tradition of oral delivery in 1913.<sup>73</sup> This break with convention caused some commotion, with one leading Senator stating, “I am sorry to see revived the old Federalistic custom of speeches from the throne .... I regret this cheap and tawdry imitation of English royalty.”<sup>74</sup> Three Republican presidents following President Wilson did not embrace the original tradition: President Warren Harding only followed President Wilson’s example twice, President Calvin Coolidge once, and President Herbert Hoover not at all.<sup>75</sup> Beginning with President Franklin D. Roosevelt, however, all presidents have embraced the original British and early American tradition of personal, oral delivery of the State of the Union Message.<sup>76</sup>

One might dare say that President Jefferson and the next twenty-four presidents acted in an unconstitutional fashion, at least slightly.<sup>77</sup> Constitutional requirements aside, however, the publicity principle of the State of the Union Clause makes for good public

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70. 3 STORY’S COMMENTARIES, *supra* note 9, § 1555; From Time to Time: History of the State of the Union, at <http://www.whitehouse.gov/stateoftheunion/history.html> (last visited Sept. 11, 2002) [hereinafter From Time to Time].

71. From Time to Time, *supra* note 70.

72. Then-Professor Woodrow Wilson surmised that President Jefferson did so because he was a poor orator. See WOODROW WILSON, THE STATE § 1335, at 546 (rev. ed. 1902).

73. See From Time to Time, *supra* note 70. Tulis notes that President Wilson “did not revive the practice of reply.” TULIS, *supra* note 52, at 56 n.55.

74. Schlesinger, *Major Themes*, *supra* note 51, at xvi (quoting Sen. John Sharp Williams of Mississippi).

75. *Id.* at xvii.

76. See The State of the Union Message, at <http://www.clinton4.nara.gov/WH/SOTU00/history/address.html> (last visited Sept. 18, 2002).

77. At least one other scholar agrees that the State of the Union Clause mandates some personal appearance. See MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 50 (1990).

policy. President Wilson explained why he thought personal appearance was important:

I am very glad indeed to have this opportunity to address the two Houses directly and to verify for myself the impression that the President of the United States is a person, not a mere department of the Government hailing Congress from some isolated island of jealous power, sending messages, not speaking naturally and with his own voice—that he is a human being trying to cooperate with other human beings in a common service. After this pleasant experience, I shall feel quite normal in all our dealings with one another.<sup>78</sup>

President William Howard Taft thought that the personal appearance of the President and the principal officers of the executive department before Congress would foster public accountability. He proposed in his fourth State of the Union Message in 1912 that Cabinet members be required by statute “to introduce measures, to advocate their passage, to answer questions, and to enter into the debate” in each House of Congress 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.”<sup>79</sup>

Most importantly, the publicity principle transcends the personal appearance of the President before Congress. The annual State of the Union Message is an important channel of communication between the President and We the People.<sup>80</sup> As early as 1823, President James Monroe in his seventh State of the Union Message talked about the fact that the President was communicating with We the People as well as the Congress:

The people being with us exclusively the sovereign, it is indispensable that full information be laid before them on all important subjects, to enable them to exercise that high power with complete effect. If kept in the dark, they must be

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78. Schlesinger, *Major Themes*, *supra* note 51, at xvi (quoting President Woodrow Wilson).

79. WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 31 (1916).

80. A similar publicity principle, or public education principle, exists in the Senate's role in confirming presidential appointees, including Justices to the Supreme Court. See J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENT. 9, 46 (2001).

incompetent to it.... To the people every department of the Government and every individual in each are responsible, and the more full their information the better they can judge of the wisdom of the policy pursued and of the conduct of each in regard to it. From their dispassionate judgment much aid may always be obtained, while their approbation will form the greatest incentive and most gratifying reward for virtuous actions, and the dread of their censure the best security against the abuse of their confidence.<sup>81</sup>

The State of the Union Message has long been directly disseminated to the People by the press. Historian Charles Beard observed that the annual State of the Union Message is

the one great public document of the United States which is widely read and discussed. Congressional debates receive scant notice, but the President's message is ordinarily printed in full in nearly every metropolitan daily, and is the subject of general editorial comment throughout the length and breadth of the land. It stirs the country: it often affects Congressional elections; and it may establish grand policy.<sup>82</sup>

Twentieth-century presidents made the annual State of the Union Message an even more public event. President Calvin Coolidge was the first President to use radio for a State of the Union Message in 1923.<sup>83</sup> President Harry Truman was the first President to use television for a State of the Union Message in 1947.<sup>84</sup> President Lyndon Johnson in 1965 began the modern practice of delivering the State of the Union Message in the evening so as to attract a larger television audience.<sup>85</sup> President George W. Bush was the first President to use the Internet for a live presentation of the State of the Union Message in 2002.<sup>86</sup> Most recently, the Bush

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81. Seventh Annual Message of James Monroe (Dec. 2, 1823), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 202.

82. Fred L. Israel, *Preface to* 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790-1966, at V (Fred L. Israel ed., 1966) (quoting historian Charles Beard).

83. *See* From Time to Time, *supra* note 70.

84. *Id.*

85. John F. Yarbrough, *Stand and Deliver*, at [http://abcnews.go.com/sections/us/PoliticalNation/pn\\_jfy\\_stateofunion.html](http://abcnews.go.com/sections/us/PoliticalNation/pn_jfy_stateofunion.html) (last visited Sept. 11, 2002).

86. *See* 2002 State of the Union, at <http://www.whitehouse.gov/stateoftheunion> (last

Administration reported: "[T]he State of the Union gives the President an opportunity to reflect on the past while presenting us hopes for the future to Congress, the American people and the world."<sup>87</sup>

#### *D. "Information of the State of the Union": The Public Deliberation Principle*

The phrase "Information of the State of the Union" is the font of the public deliberation principle. The purpose of the phrase is for the President to inform Congress so that it may wisely deliberate on public affairs. Two features of the phrase merit attention: (1) the meaning of the phrase and (2) the imposition of this duty upon the President. We address these two features in turn.

##### *1. The Meaning of "Information of the State of the Union"*

Consider the first word of the phrase—"Information." This word connotes facts, not opinions.<sup>88</sup> The President is required to faithfully and fully report facts to Congress. Early commentators underscored the factual nature of the President's duty under the State of the

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visited Sept. 15, 2002).

87. See From Time to Time, *supra* note 70.

88. See, e.g., WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 628 (1988) (defining "information" as "knowledge of a particular event or situation: NEWS").

A blinkered intratextual contrast with the word "Opinion" in the Opinion Clause is not helpful because "Opinion" in this clause means "an evaluation or conclusion based on special knowledge or expertise"—as in a "medical opinion." *Id.* at 824. Indeed, the Framers' understanding was that the President would require his subordinates in the executive department to give both information and opinions in their opinions. See 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448 (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES] (remarks of James Wilson at Pennsylvania ratifying convention); 2 FARRAND, *supra* note 12, at 80 (remarks of John Rutledge) (discussing Council of Revision and stating, "The Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information and opinions"); 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 319 (stating that the President "may require all necessary information, as also their opinions in writing, upon any subject relating to the duties of their respective offices ...."); Calabresi & Prakash, *supra* note 7, at 584 ("[T]he Opinions Clause empowers the President to obtain information in writing on government matters precisely so he will be able to issue binding orders to his subordinates.") (footnote omitted); Calabresi & Rhodes, *supra* note 7, at 1207 n.262 ("[T]he Opinion in Writing Clause enables the President to get information whenever he wants it, in writing, on any subject relating to official duties ....").

Union Clause. St. George Tucker in his "American Blackstone" stated:

[A]s 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.<sup>89</sup>

Likewise, Justice Joseph Story in his *Commentaries on the Constitution of the United States* linked "facts and information" in his discussion of the State of the Union Clause: "There is great wisdom, therefore, in not merely allowing, but in requiring, the president to lay before congress all *facts and information*, which may assist their deliberations."<sup>90</sup> President Franklin Pierce in his fourth State of the Union Message in 1856 stated:

While performing his constitutional duty in this respect, the President does not speak merely to express personal convictions, but as the executive minister of the Government, enabled by his position and called upon by his official obligations to scan with an *impartial eye* the interests of the whole and every part of the United States.<sup>91</sup>

Importantly, the State of the Union Clause commands that the President provide Congress not just any information but that "of the State of the Union."<sup>92</sup> What did the Framers mean by this qualifying phrase? One obvious, plausible interpretation is that the phrase "Information of the State of the Union" is an elegant variation of the phrase "Information on the Condition of the Country." The word "State" in the State of the Union Clause obviously does not refer to

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89. 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344 (emphasis added).

90. 3 STORY'S COMMENTARIES, *supra* note 9, § 1555 (emphasis added).

91. Fourth Annual Message of Franklin Pierce (Dec. 2, 1856), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 918 (emphasis added).

92. U.S. CONST. art. II, § 3, cl. 1.



a political unit, but to status.<sup>93</sup> Once again, the precursors to the State of the Union Clause are illuminating. An early draft of the State of the Union Clause by the Committee of Detail provided: "It shall be his *Duty* to inform the Legislature of the Condition of U.S. so far as may respect his Department ...."<sup>94</sup>

The question remains as to the scope of the phrase "of the State of the Union." True to purpose, the phrase properly embraces the public affairs of the United States, including both domestic and foreign matters. President John Tyler, in concluding his fourth State of the Union Message in 1844, wrote, "I have thus, gentlemen of the two Houses of Congress, presented you a true and faithful picture of the condition of public affairs, both foreign and domestic."<sup>95</sup> President James K. Polk likewise wrote in his third State of the Union Message in 1847 that "it is again my duty to communicate with Congress upon the state of the Union and the present condition of public affairs."<sup>96</sup> William Rawle, in his treatise on the Constitution, elaborated on the President's duty to provide information to the Congress on foreign affairs:

It is the duty of the president from time to time to give congress *information of the state of the union*; but although this alone is expressly mentioned in the Constitution, his communications naturally embrace a wider scope than internal affairs. Under the expression *he is to receive ambassadors*, the president is charged with all transactions between the United States and foreign nations, and he is, therefore, the regular channel through which the legislature becomes informed of the political situation of the United States in its foreign, as well as its domestic relations; yet it has been always understood that he is not required to communicate more than, in his apprehension, may be consistent with the public interests.<sup>97</sup>

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93. See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1133 (1988) (defining "state" as "[a] condition or mode of existence"). *State* and *status* descend from the same Latin root.

94. 2 FARRAND, *supra* note 12, at 158 (emphasis added).

95. Fourth Annual Message of John Tyler (Dec. 3, 1844), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 630.

96. Third Annual Message of James K. Polk (Dec. 7, 1847), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 700.

97. RAWLE'S COMMENTARY, *supra* note 31, at 171.

Professor Calabresi and Rhodes have suggested in passing that the obligation of the State of the Union Clause is "only on general matters such as the circumstances of the whole country."<sup>98</sup> We respectfully disagree. The State of the Union Clause calls for detailed reporting on the public affairs of the United States so that Congress may properly exercise its legislative power. It is important to remember that Congress had no vast legislative-investigative apparatus at the Founding and would rely on the President and her subordinates for all such information.<sup>99</sup> Alexander Hamilton's *The Federalist No. 72* is consistent with an expectation of the Framers that the Congress would have a comparative disadvantage relative to the President in the gathering and evaluation of information. Hamilton explained:

The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.<sup>100</sup>

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98. Calabresi & Rhodes, *supra* note 7, at 1207 n.262.

99. One of us has previously observed:

To be sure, Congress also has the means to compile information. 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.

Sidak, *Recommendation Clause*, *supra* note 7, at 2087.

100. THE FEDERALIST NO. 72, at 435-36 (Alexander Hamilton) (Clinton Rossiter ed., 1961). William Rawle subsequently gave a similar assessment:

Exercising his office during the recess of the legislature, the members of which, when they return to the mass of citizens, are disengaged from the obligatory inspection of public affairs; supplied by his high functions, with the best means of discovering the public exigencies, and promoting the public good, he would not be guiltless to his constituents if he failed to exhibit on the first opportunity, his

Treasury functions, in particular, weigh strongly in favor of detailed reporting by the President. The Receipts and Expenditures Clauses of Article I, Section 9 provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."<sup>101</sup> Although the First Congress passed a law (with the approval of the President) requiring the Secretary of the Treasury to report directly to Congress,<sup>102</sup> it is far from clear that such a law is constitutional, strictly speaking.<sup>103</sup> The President is the Treasurer-in-Chief, and the State of the Union Clause, when read in conjunction with the Receipts and Expenditures Clause, requires that the President give to Congress detailed information about the public moneys, or authorize her subordinates to do so.<sup>104</sup>

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own impressions of what it would be useful to do, with his information of what had been done. He will then have discharged his duty, and it will rest with the legislature to act according to their wisdom and discretion.

RAWLE'S COMMENTARY, *supra* note 31, at 172; *see also id.* at 52 (stating that "[t]he president comes into daily contact with the people, by his daily executive functions").

101. U.S. CONST. art. I, § 9, cl. 7. The Framers thought the office of Treasurer to be very important because the Treasurer would be the keeper of the public monies. The office was important enough to provide Congress with the Article I, Section 8 power of appointing the Treasurer by joint ballot in both the draft of the Constitution referred to the Committee of Style and its report. *See* 2 FARRAND, *supra* note 12, at 570 (draft referred to Committee of Style) (stating Congress shall have power "[t]o appoint a Treasurer by joint ballot"); *id.* at 594 (report of Committee of Style, first provision of Article I, § 8) ("The Congress may by joint ballot appoint a treasurer."). This provision was intended to be the lone exception to the power of appointing officers of the United States with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. However, it was subsequently deleted on September 14, 1787, just three days before the Philadelphia Convention of 1787 completed its business. *See* 2 FARRAND, *supra* note 12, at 614.

102. *See* Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (establishing the Department of the Treasury and requiring the Secretary of Treasury "to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred by him by the Senate or House of Representatives, or which shall appertain to his office"). For diverse analyses of the Appropriations Clause and the Receipts and Expenditures Clause, *see* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988) and J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162.

103. For examples of recent statutes requiring executive officers of the United States to report to Congress or either House, *see* Golove, *supra* note 41, at 1856-57 n.202.

104. *See also* Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1340 (1999) (stating that "[t]he President is subject to several constitutional requirements of reporting and disclosure," including the State of the Union Clause and Receipts and Expenditures Clause).

Early practice is illuminating. Since the First Congress, congresses have vested the President with substantial discretion with respect to appropriations. In *Clinton v. City of New York*,<sup>105</sup> the Line Item Veto Act case, Justice Scalia recently explained:

From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. In 1803, it appropriated \$50,000 for the President to build "not exceeding fifteen gun boats, to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require," Act of Feb. 28, 1803, ch. 11, §3, 2 Stat. 206. President Jefferson reported that "[t]he sum of fifty thousand dollars appropriated by Congress for providing gun boats remains unexpended. The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary," 13 Annals of Cong. 14 (1803).<sup>106</sup>

There would be a practical need—and constitutional duty—for the President to report to Congress whether and to what extent that discretion was in fact exercised. The hard question is whether the President also has a constitutional duty to report a plan of revenue—a national budget—in addition to a statement and account of receipts and expenditures. The Framers may have well expected the President to do so. Gouverneur Morris's proposal for a Privy Council provided:

The Secretary of Commerce and Finance who shall also be appointed by the President during pleasure. It shall be his duty to superintend all matters relating to the public finances, to prepare & report plans of revenue and for the regulation of expenditures, and also to recommend such things as may in his Judgment promote the commercial interests of the U.S.<sup>107</sup>

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105. 524 U.S. 417 (1998).

106. *Id.* at 466-67. For another interesting and earlier example, see Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128, 129 (1790) (appropriating funds for foreign affairs) ("[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify.").

107. 2 FARRAND, *supra* note 12, at 343.

A cursory examination of early State of the Union Messages reveals that presidents routinely reported (or committed to report) national budgets—as well as statements and accounts of receipts and expenditures.<sup>108</sup> Subsequent history, however, clouds the issue. The Constitution of the Confederate States of America, drafted in Birmingham, Alabama in February of 1861, closely tracked the United States Constitution in nearly all respects, yet specifically created an implied executive duty to prepare a national budget.<sup>109</sup> If the Framers of the Confederate Constitution believed that a specific provision was necessary, it is possible that the prevailing interpretation seventy-one years after the ratification was that the United States Constitution did not impose such a duty on the President.<sup>110</sup>

If we take the public deliberation principle seriously, the President must provide detailed information to Congress under the State of the Union Clause—at least enough detail for Congress to go about the nation's legislative business. A State of the Union speech may be necessary under the publicity principle, but not sufficient under the public deliberation principle, because a speech could not possibly convey all necessary information in any but the smallest Athenian republic. The President would thus need to supplement a speech with detailed information in writing. Not surprisingly, this was the first practice. President Washington concluded his first State of the Union Message by stating, "I have directed the proper officers to lay before you, respectively, such papers and estimates as

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108. See, e.g., Fourth Annual Message of Thomas Jefferson (Nov. 8, 1804), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 77 ("Accounts of the receipts and expenditures of the last year, with estimates for the ensuing one, will as usual be laid before you.").

109. This positive executive duty was by implication because, in the absence of a supermajority vote of both houses, the Confederate Framers limited congressional appropriations to amounts budgeted by the Confederate President: "Congress shall appropriate no money from the Treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments and submitted to Congress by the President ...." CONST. OF THE CONFEDERATE STATES art. I, § 9, cl. 9, reprinted in 1 THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, INCLUDING DIPLOMATIC CORRESPONDENCE, 1861-1865, at 37, 43-44 (James D. Richardson ed., 1905).

110. It is possible that the Confederate Constitution merely clarified the prevailing understanding of this clause in the U.S. Constitution. Cf. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 15-21 (1998) (discussing declaratory and clarifying amendments in the Bill of Rights).

regard the affairs particularly recommended to your consideration, and necessary to convey to you that information of the state of the Union which it is my duty to afford.”<sup>111</sup>

## 2. *The Imposition of the Duty upon the President*

Why is the duty to give information of the State of the Union given to the President? Professor Jay Bybee has observed that “[t]he [State of the Union] Clause presupposes that the President would have information regarding the state of the Union and that the information would be known only to him, or at least that Congress would not possess it.”<sup>112</sup> This observation is appealing, and there is more to be said.

As is true of many a constitutional provision, there is a powerful geographic and logistical theme<sup>113</sup> lurking behind the presupposition that the President has a special institutional competence with respect to “Information of the State of the Union,” and indeed all of Article II.<sup>114</sup> Like Citibank, the President never

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111. First Annual Message of George Washington (Jan. 8, 1790), reprinted in 1 *THE STATE OF THE UNION MESSAGES*, *supra* note 62, at 4. Jeffrey Tulis, discussing early official presidential rhetoric, has written that “[o]ften appended to a Special Message [such as an Annual Message] was a detailed technical report from an executive department.” TULIS, *supra* note 52, at 55. Recent practice is amusing: President Nixon purportedly broke with precedent in his State of the Union Message in 1972 by delivering to Congress two Messages—a short 4,000-word speech for his television audience and a 15,000-word document for his congressional audience. CONGRESSIONAL QUARTERLY, NIXON: THE THIRD YEAR OF HIS PRESIDENCY 1 (1972).

112. Bybee, *supra* note 7, at 104.

113. See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469-71 (1989) (“Geography preoccupied the founding generation .... [It] ramified in every direction, influencing virtually every major issue considered by the Philadelphia Convention ....”); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 125 (1995) (“Where to locate various government personnel and institutions obsessed those who wrote and ratified the Constitution, largely because location does affect (and did so much more in 1787) the smooth running of government.”).

114. For an economics-oriented account of the President’s institutional competence in information collection, see Sidak, *Recommendation Clause*, *supra* note 7, at 2086-87 (offering principal-agent problem rationale). The “economic” explanation need not be considered as a different account than the structural account discussed in the text. Rather, it explains with a different set of analytical tools the behavior and choices of the Framers and, ultimately, the rules they laid down in the Constitution. So viewed, the economic approach is being originalist/interpretivist in its own way. *The Federalist* is rife with economic depictions of human motivation, as in *The Federalist* No. 10 on factions and in Hamilton’s several essays

sleeps: The President is the only constitutional actor who must be on duty twenty-four hours a day, seven days a week, fifty-two weeks a year.<sup>115</sup> By contrast, we are sometimes, and at the Founding were oftentimes, without a Congress. Recall that Article I, Section 4, Clause 2 provides that "[t]he Congress shall assemble *at least once in every Year*, and such Meeting shall be on the first Monday in December; unless they shall by Law appoint a different Day."<sup>116</sup> Similarly, it has been noted that "in the early Republic, Americans expected that [federal] legislators would typically meet in short sessions and quickly return back home to live (like everyone else) under the laws just made."<sup>117</sup> This point is reinforced by considering the President's Commander-in-Chief responsibilities.<sup>118</sup> Even in the absence of a standing army, the nation could never be without a Chief Commander, as defense of the nation could be required at any

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on executive action. See THE FEDERALIST NO. 10 (James Madison), NOS. 69-76 (Alexander Hamilton).

115. We are never without a President, or to the extent there is any difference, an "Acting President." See U.S. CONST. art. II, § 1, cl. 6; *id.* amends. XX, XXV; see also Amar & Amar, *supra* note 113, at 126 ("The President and the executive officers who serve beneath him are on duty—in office—without break or interruption, 365 days a year."); Amar & Katyal, *supra* note 41, at 713 (1995) ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps."). A similar principle animates the Guarantee Clause of Article IV. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). This clause presumes that the State's executive authority never sleeps, unlike its legislative authority.

116. U.S. CONST. art. I, § 4, cl. 2 (emphasis added); see also *id.* amend. XX, § 2. The Arrest Clause of Article I reflects the fact that Members of Congress would not always be seated at the Seat of Government: "The Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same ...." *Id.* art. I, § 6, cl. 1. And the Army Clause of Article I also reflects a similar principle. See U.S. CONST. art. I, § 8, cl. 12 (establishing that Congress shall have Power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); 2 FARRAND, *supra* note 12, at 509 (remarks of Roger Sherman) ("As the Legislature is to be biennially [sic] elected, it would be inconvenient to require appropriations to be for one year, as there might be no Session within the time necessary to renew them."). Even the modern Constitution recognizes that Members of Congress would not always be seated at the Seat of Government. See U.S. CONST. amend. XX.

117. Amar & Amar, *supra* note 113, at 126.

118. See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States ....") (emphasis added).

moment. One recognition by the Framers of this fact is that they empowered the States to wage a defensive war in the event of an attack by a foreign power, on the rationale that word might not travel fast enough for the federal government to launch a defense.<sup>119</sup> This awareness of urgency is evidence in the Framers' minds of the need for presidential vigilance.

One leading Framer noted the President's institutional competence in information collection. At the Pennsylvania ratifying convention, James Wilson justified the President's veto power in part by observing that the President "will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government."<sup>120</sup> The President would also have the advice of the executive authorities of the several States as well, a point which underscores the executive's institutional competence in information collection vis-à-vis the legislature. The report of the Committee of Detail included a clause, juxtaposed with the President's duty to receive ambassadors,<sup>121</sup> providing that the President "may correspond with the supreme Executives of the several States."<sup>122</sup> This clause was rejected by the Framers "as unnecessary and implying that he could not correspond with others."<sup>123</sup> Early commentators on the Constitution also appreciated the geographical and logistical underpinnings of Article II. St. George Tucker wrote, "As from the nature of the executive office it possesses more immediately the sources, and means of information than the other departments of government ...."<sup>124</sup> Justice Story similarly observed that "[f]rom the nature and duties of the executive department, he must possess more extensive sources of

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119. *See id.* art. I, § 10, cl. 3. The Constitution provides:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

*Id.*

120. 2 ELLIOT'S DEBATES, *supra* note 88, at 448.

121. *See* U.S. CONST. art. II, § 3.

122. 2 FARRAND, *supra* note 12, at 185.

123. *Id.* at 419 (motion of Gouverneur Morris).

124. 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344.



information, as well in regard to domestic as foreign affairs, than can belong to congress."<sup>125</sup>

The Constitution's assignment of legislative powers to the President resembles vertical integration within a firm. Vertical integration enables a firm to coordinate investment and production decisions. A comparison of the costs of contractual exchange with those of internal exchange often reveals vertical integration to be the least-cost alternative to achieving the desired level of coordination.<sup>126</sup> The minimization of coordination costs is extremely important in a market subject to rapid technical change. It should likewise be important in political "markets," where change may be not only technological, but also economic, military, and diplomatic.

The point here is different from Hamilton's famous discourse on the accountability of a strong, unitary executive.<sup>127</sup> Hamilton was concerned about the asymmetry of information between the electorate and their officials at the Seat of Government. A separate concern is who within the federal government has the best information to make certain decisions. A related question is the extent to which that person must be "vertically integrated" into other governmental functions to see that the information at his disposal is productively used to formulate policy. The Hamiltonian unitary executive needs not only unity, but also some degree of vertical integration across the activities that generate valuable information and the activities that exploit it for the benefit of the electorate.

Yet another consideration is opportunism. The transaction costs of negotiating and enforcing contracts make it prohibitively costly to write contracts that specify all obligations under all contingencies. In such circumstances, contracting parties may engage in opportunistic behavior, which undermines the likelihood of maximizing joint profits.<sup>128</sup> A high degree of asset specificity gives rise to "appropriable quasi-rents," which implies that contracting at

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125. 3 STORY'S COMMENTARIES, *supra* note 9, § 1555.

126. For a review of transaction-cost economics, see OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (Oxford University Press 1996). This literature, of course, descends from Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937).

127. See *THE FEDERALIST* NOS. 69-76 (Alexander Hamilton).

128. The classic explanation of this "hold-up" problem is Victor P. Goldberg, *Regulation and Administered Contracts*, 7 *BELL J. ECON.* 426 (1976).

arms' length could induce opportunistic behavior.<sup>129</sup> Paul Milgrom and John Roberts note:

In the integrated organization, planning entails consultation between those who sell the product, those who make it, and those who supply parts or systems for it. Together they forecast capacity needs and identify product improvements and investments in specialized equipment that promise higher quality or lower production costs. If the investment is highly specific, vertical integration alleviates the hold-up problem by eliminating the opportunity to negotiate over the price paid to the owner of the newly created asset.<sup>130</sup>

Relative to contracting at arms' length, vertical integration reduces these costs. The analogy within Article II may be the following: The President, by virtue of the Hamiltonian "energy" that attends the executive,<sup>131</sup> acquires the information and experience with which to formulate improvements in laws. Nevertheless, politicians benefit from receiving credit for spearheading policy initiatives. In this way, they earn a return on "investment" in the political equivalent of innovation or research and development. The President could contract at arms' length with members of Congress to share all of her good legislative insights with them privately, so that those members could then introduce legislation. However, the analogy to "production" here is not simply the enactment of a new law; rather, it is the combination of the enactment and effective execution of policy embodied in a new law. In this respect, the State of the Union and Recommendation Clauses are political expressions of the importance of coordinating investment and production decisions.

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129. See Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

130. PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 558 (1992).

131. Alexander Hamilton famously asserted:

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

There are two other structural features of the presidency that are important to consider. First, recall that one particular worry at the Founding was that Members of the House of Representatives, elected biennially, would be ignorant of national affairs and therefore could not legislate for the benefit of the nation as a whole.<sup>132</sup> How could a farmer-legislator<sup>133</sup> from Massachusetts be aware of the state of affairs of Georgia, let alone the state of foreign affairs?<sup>134</sup> The President, by virtue of a four-year term, would be significantly better acquainted with national affairs.<sup>135</sup> Second, information collection is a natural by-product of the President's duty to execute the laws. The State of the Union and Recommendation Clauses are located in the same paragraph of Article II as the Take Care Clause.<sup>136</sup> One inference to draw from this textual proximity is a belief among the Framers that executing a particular law, reporting its efficacy, and recommending ways to improve it are all closely related.<sup>137</sup> Justice Story strongly hinted at this connection:

The true workings of the laws; the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the Union, are more readily seen, and more constantly under the view of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring, the president to lay before congress all facts and information, which may assist their deliberations; and in enabling him at once to point out the evil, and to suggest the remedy. He is thus justly made responsible, not merely for

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132. See *supra* notes 99-100, 115-25 and accompanying text.

133. The reference to "farmer-legislator" is no joke. See 2 FARRAND, *supra* note 12, at 200 (remarks of Oliver Ellsworth) ("The summer will interfere too much with private business, that of almost all the probable members of the Legislature being more or less connected with agriculture.").

134. See THE FEDERALIST NOS. 53, 56 (James Madison); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 31 (1998) [hereinafter AMAR, BILL OF RIGHTS].

135. The Founders recognized the relationship between length of term and expertise. See, e.g., THE FEDERALIST NO. 64, at 377 (John Jay) (Clinton Rossiter ed., 1961) (linking six-year term of Senators with treaty-making power).

136. See U.S. CONST. art II, § 3.

137. See Sidak, *Recommendation Clause*, *supra* note 7, at 2085 (noting this point); *id.* at 2089 & n.48 (noting that Justice Story made a similar point).

a due administration of the existing systems, but for due diligence and examination into the means of improving them.<sup>138</sup>

As we shall see next, the President's duty to recommend legislation is also tightly paired with the President's duty to execute the laws.

## II. THE RECOMMENDATION CLAUSE

The Recommendation Clause shares with the State of the Union Clause the executive duty principle.<sup>139</sup> Perhaps the two also share the periodicity principle, although that case is less persuasive.<sup>140</sup> Beyond these principles, four more principles animate the Recommendation Clause: (i) the anti-royalty principle, (ii) the closely related popular sovereignty principle, (iii) the legislation principle, and (iv) the executive discretion principle.

### A. *"And Recommend to Their Consideration": The Anti-Royalty and Popular Sovereignty Principles*

The phrase "and recommend to their Consideration"<sup>141</sup> is the font of the anti-royalty principle and the closely related popular sovereignty principle.<sup>142</sup> We address each of these in turn.

#### 1. *The Anti-Royalty Principle*

The President's recommendations under the Recommendation Clause are recommendations, not regal edicts. As Justice William O. Douglas memorably observed in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>143</sup> "the power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to

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138. 3 STORY'S COMMENTARIES, *supra* note 9, § 1555.

139. *See supra* Part II.A.

140. *See supra* note 45 and accompanying text.

141. U.S. CONST. art. I, § 3.

142. *Cf. Amar, Some Opinions, supra* note 7, at 654-55 (discussing the anti-royalty principle embodied in the Opinion Clause).

143. 343 U.S. 579 (1952).

legislate."<sup>144</sup> This was not the practice in Great Britain. St. George Tucker explained:

In England, the laws do, in fact, originate with the executive: a revenue bill is always proposed by the chancellor of the exchequer, or some member of that department; and it is understood to be the practice, that every other measure of considerable magnitude and importance is first discussed in the privy council, before it is brought into parliament; where it is generally introduced, and the bill prepared by some of the officers of the crown.<sup>145</sup>

The Recommendation Clause, therefore, stands as yet another clause in the Constitution repudiating British monarchy.<sup>146</sup> The President stands as an adviser to Congress, not unlike the position of the Senate vis-à-vis the President in treaty making or the appointment of officers of the United States. An early resolution by the Committee of Detail made the President's advisory role especially clear: "In the President the executive Authority of the U.S. shall be vested .... He shall have a Right to *advise* with the Heads of the different Departments as his Council...."<sup>147</sup>

Several presidents have made this point as well. President Zachary Taylor in his first and only State of the Union Message in 1850 quoted the Vesting Clause of Article I and observed: "The Executive has the authority to recommend (not to dictate) measures to Congress."<sup>148</sup> Professor and future President Woodrow Wilson

144. *Id.* at 632 (Douglas, J., concurring).

145. 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 324; *see also id.* app. at 344 ("In France, under the present constitution, all laws originate with the executive department: than which, there can not exist a stronger characteristic of a despotic government."). As noted earlier, the Confederate Constitution moved back in the direction of granting budgetary power to the executive. *See supra* note 109 and accompanying text.

146. For a useful discussion of the Constitution's repudiation of British monarchy, see Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994).

147. 2 FARRAND, *supra* note 12, at 135 (emphasis added).

148. First Annual Message of Zachary Taylor (Dec. 4, 1849), *reprinted in* 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 788. Additionally, St. George Tucker noted:

[T]his 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.

wrote that "[a] President's messages to Congress have no more weight or authority than their intrinsic reasonableness and importance give them."<sup>149</sup>

Although the President's recommendations under the Recommendation Clause are not binding, this most certainly does not mean that Congress may blithely ignore them. The Recommendation Clause provides that the President "shall ... recommend to their Consideration such Measures as he shall judge necessary and expedient."<sup>150</sup> The word "consider" means to give serious, careful thought and deliberation.<sup>151</sup> Just as the President has a duty under the Recommendation Clause to recommend measures, Congress has a corresponding duty under the Recommendation Clause to consider them.<sup>152</sup> Of course, Congress's duty of consideration of the recommendations tendered by the President guarantees nothing. As one of us has previously explained, "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,

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1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344.

149. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 72 (1908).

150. U.S. CONST. art. II, § 3.

151. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 301 (1988) (defining "consideration" as "[c]areful thought: DELIBERATION" and defining "consider" as "[t]o think about seriously"); Sidak, *Recommendation Clause*, *supra* note 7, at 2121 (stating that "the plain meaning of 'consideration' entails contemplation, attentive thought, and reflection") (citing 3 OXFORD ENGLISH DICTIONARY 858 def. 1, 2 (1970)).

152. One of us has previously argued that the Recommendation Clause, either by its terms or by negative implication, imposes a duty of consideration on Congress. See Sidak, *Recommendation Clause*, *supra* note 7, at 2118 ("[F]or 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."); *id.* at 2121 ("[I]t would defeat the purpose of the recommendation clause for Congress not to have a corresponding duty to listen."). In subsequent testimony before the Senate, Professor Laurence Tribe has taken the same position. *National Environmental Policy Act and the North American Free Trade Agreement: Hearing Before the Committee on Environment and Public Works*, 103d Cong. 11-14 (1993) (testimony of Professor Laurence Tribe) (suggesting that there is a congressional duty to consider the President's recommendations even though Congress may decide not to implement any of them). For a contrary view made in passing, see Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 392 n.206 (1994) (stating that "the Constitution imposes no duty on Congress to pay any attention [to the President's recommendations]").

Congress need not take additional steps to transform the President's recommendations into law."<sup>153</sup>

A devout textualist would ponder the use of the related words "reconsider," "reconsidered," and "Reconsideration" in the Veto Clause to wring the most drops of meaning from the Recommendation Clause. In the span of 156 words, the Veto Clause uses "reconsider" or its close variants three times:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to *reconsider* it. If after such *Reconsideration* two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be *reconsidered*, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.<sup>154</sup>

It should be obvious that the President's "Objections" to vetoed legislation are especially important in the process of law making. These objections are mentioned not once, not twice, but thrice in the Veto Clause. The President's objections are to be entered on the journal of the originating House so that they may be made public.<sup>155</sup> The President's objections are to serve as the focal point in the process of reconsideration. Reconsideration is mandatory—the originating House "shall ... proceed to reconsider it,"<sup>156</sup> and if the bill is sent to the other House, it is sent with the President's objections, where "it shall likewise be reconsidered."<sup>157</sup> James Wilson explained the significance of the President's objections at the Pennsylvania ratifying convention:

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153. Sidak, *Recommendation Clause*, *supra* note 7, at 2121.

154. U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

155. *Id.*

156. *Id.*

157. *Id.*

[E]ven if his objections do not prevent its passing into a law, they will not be useless; they will be kept, together with the law, and, in the archives of Congress, will be valuable and practical materials, to form the minds of posterity for legislation. If it is found that the law operates inconveniently, or oppressively, the people may discover in the President's objections the source of that inconvenience or oppression. Further, sir, when objections shall have been made, it is provided, in order to secure the greatest degree of caution and responsibility, that the *votes* of both houses shall be determined by *yeas* and *nays*, and the names of the persons voting for and against the bill shall be entered in the journal of each house respectively.<sup>158</sup>

If the President's "last word" on legislation is entitled to such careful consideration by each House of Congress and, as importantly, future congresses, why not her "first word" on legislation, too? The President should not have to smuggle her recommendations into her objections to vetoed legislation to garner the consideration of the Congress. One need not extrapolate and interpolate much from the Veto Clause to recognize that each House of Congress owes the President's "first word" a degree of consideration similar to her "last word."

Moreover, the President's "last word" and "first word" are related in important ways. The President's veto may be considered a kind of recommendation—and vice versa. Professors Jeremy Rabkin and Neal Devins hinted at this connection in their statement that the Veto Clause "presents the veto power not as a mere mechanical obstacle, but quite specifically as a device for highlighting presidential policy views on emerging legislation."<sup>159</sup> Similarly, the President's recommendation is a sort of veto—an embryonic veto warning Congress not to present the President with legislation that does not comport with the President's legislative agenda unless Congress can muster a requisite two-thirds supermajority in each House of Congress.<sup>160</sup>

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158. 2 ELLIOT'S DEBATES, *supra* note 88, at 448.

159. Rabkin & Devins, *supra* note 45, at 230 n.131.

160. *See id.* at 231 n.131 (referring to a President's recommendation under Recommendation Clause as "advance warning of an intention to veto").



If one takes the principle of the Veto Clause seriously, one might surmise that each House of Congress, if it does not approve the President's recommendations, must give the President its objections in writing. The British practice was more general: Parliament would respond to the King's Speech with a written answer.<sup>161</sup> It is hence not surprising that after Washington's First Annual Message "[f]ollowing British practice, the president received formal replies to his address from both houses of Congress."<sup>162</sup> In fact, President Washington received replies from each House of Congress to whom the State of the Union Message was addressed, and "[t]he two replies addressed each point of Washington's speech and thus constituted a kind of oath on the part of congressmen to do the virtuous deeds that Washington urged."<sup>163</sup> And Washington, receiving a committee from each House of Congress, then orally replied to each of these written replies.<sup>164</sup>

This early American practice was the cause of some concern. After President Washington's second State of the Union Message in 1791, Senator Maclay wrote in his diary that:

It was a Stale ministerial Trick in Britain, to get the Houses of parliament to chime in with the speech, and then consider them as pledged to support any Measure which could be grafted on the Speech. It was the Socratic mode of Argument introduced into politicks, to entrap men into Measures they were not aware of.<sup>165</sup>

Indeed, President Jefferson's desire to break this parliamentary practice influenced his decision to reject the original tradition of oral, personal delivery of the State of the Union Message. "By sending a message, instead of making a speech at the opening of the session," he wrote, "I have prevented the bloody conflict which the

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161. TULIS, *supra* note 52, at 55.

162. *Id.*

163. *Id.*

164. *Id.* at 55-56.

165. William Maclay, Diary Entry (Mar. 17, 1790), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 4 MARCH, 1789 - 3 MARCH, 1791, at 181 (Charlene Bangs Bickford et al. eds., 1988). We thank Professor Currie for this evidence. See David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 189 (1995).

making an answer would have committed them. They consequently were able to be set into real business at once."<sup>166</sup>

However, Congress's practice of a written answer to the President's recommendations has deliberative virtues and accountability benefits, just as do the President's written objections to vetoed legislation. The practice of replies might be thought to be empowering and not degrading of Congress, as it "formally constituted a deliberative relation between the branches and offered the potential for the exercise of considerable legislative power."<sup>167</sup> This was true especially of the opposition party in Congress. In 1809, Representative John Randolph stated:

The answer to an Address, although that answer might finally contain the most exceptionable passages, was in fact the greatest opportunity which the opposition to the measures of the Administration had of canvassing and sifting its measures.... This opportunity of discussion of the answer to an Address, however exceptionable the answer might be when it had received the last seasoning for the presidential palate, did afford the best opportunity to take a review of the measures of the Administration, to canvass them fully and fairly, without there being any question raised whether the gentlemen was in order or not; and I believe the time spent in canvassing the answer to a speech was at least as well spent as a great deal that we have expended since we discontinued the practice.<sup>168</sup>

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166. Schlesinger, *Major Themes*, *supra* note 51, at xiv (quoting President Thomas Jefferson); see also TULIS, *supra* note 52, at 56 (quoting President Thomas Jefferson as stating that "the custom [of formal replies] was regarded as an English habit, tending to familiarize the public with monarchical ideas" and that "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 in public affairs").

167. TULIS, *supra* note 52, at 56.

168. *Id.* at 57 (quoting Rep. Randolph). At least one other legislator expressed a similar sentiment:

To this speech there was an answer from each house, and those answers expressed, freely, the sentiments of the house upon all the merits and faults of the administration.... [President Washington] did not complain of it; he did not doubt that both houses had a perfect right to comment, with the utmost latitude, consistent with decorum, upon all his measures. Answers, or amendments to answer, were not unfrequently proposed, very hostile to his own course of public policy, if not sometimes bordering on disrespect.

*Id.* at 57-58 (quoting Sen. Daniel Webster).

Justice Story observed, "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 single debate on the answer."<sup>169</sup> The rejection of the President's recommendations by Congress or either House of Congress may be considered a congressional veto of sorts. President James K. Polk, defending the President's veto power, made this precise point in his fourth State of the Union Message in 1848:

When the President recommends measures to Congress, he avows in the most solemn form his opinions, gives his voice in their favor, and pledges himself in advance to approve them if passed by Congress. If he acts without due consideration, or has been influenced by improper or corrupt motives, or if from any other cause Congress, or either House of Congress, shall differ with him in opinion, they exercise their *veto* upon his recommendations and reject them; and there is no appeal from their decision but to the people at the ballot box.<sup>170</sup>

## 2. *The Popular Sovereignty Principle*

The phrase "and recommend to their Consideration"<sup>171</sup> is also the font of the popular sovereignty principle. There are powerful relationships between the President's recommendations under the Recommendation Clause, the People's petitions under the Petition Clause of the First Amendment,<sup>172</sup> and the grand jury's presentments under the Grand Jury Clause of the Fifth Amendment.<sup>173</sup> Legal scholars have almost completely ignored these

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169. 3 STORY'S COMMENTARIES, *supra* note 9, § 1556 n.1.

170. Fourth Annual Message of James K. Polk (Dec. 5, 1848), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 767.

171. U.S. CONST. art. II, § 3.

172. U.S. CONST. amend. I ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

173. *Id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.").

relationships.<sup>174</sup> Four insights emerge from considering these clauses as a whole.

First, the People's petitions and the grand jury's presentments are both recommendations of sorts. A petition is a request or suggestion made to a government body; it is not binding on its recipient, strictly speaking, although it is entitled to consideration.<sup>175</sup> A presentment—a type of report by the grand jury typically exposing wrongdoing by public officials<sup>176</sup>—is also nonbinding on its prosecutor-recipient, strictly speaking, although it too presumably is entitled to consideration.<sup>177</sup> There is also a close relationship between a petition and a presentment: A presentment is the paradigmatic type of petition. Grand juries in Great Britain “were

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174. Only a few scholars have noted the connection between the Recommendation Clause and the Petition Clause of the First Amendment—and then only in passing. See Sidak, *Recommendation Clause*, *supra* note 7, at 2119 (“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.”); see also Bybee, *supra* note 7, at 105 n.269. According to Professor Bybee:

The Recommendation Clause empowers the President to represent the people before Congress, by recommending measures for the reform of government, for the general welfare, or for the redress of grievances. The Right of Petition Clause prevents Congress from abridging the right of the people to petition for a redress of grievances.

*Id.*

175. Indeed, the phrase “petition or suggestion” enjoys a certain pedigree in Anglo-American jurisprudence. See 25 Edw. 3, st. 5, ch. 4 (1350); N.Y. BILL OF RIGHTS OF 1787, in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINIS 353 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS] (“That no Citizen of this State shall be taken or imprisoned for any Offence upon *Petition or Suggestion*, unless it be by Indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.”) (emphasis added); see also MASS. CONST. of 1780, pt. 1, art. XIX, in 1 FRANKLIN B. HOUGH, AMERICAN CONSTITUTIONS 625 (1872) (“The people have a right ... to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”) (emphasis added). For the government's duty to consider the People's petitions, see Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 155-58 (1986).

176. See AMAR, BILL OF RIGHTS, *supra* note 134, at 85 (observing that the grand jury through the legal device of a presentment, “had sweeping proactive and inquisitorial powers to investigate suspected wrongdoing or cover-ups by government officials and to make its findings known ... [in] a public document stating its accusations”).

177. See *United States v. Hill*, 26 F. Cas. 315, 316 (C.C.D. Va. 1809) (No. 15,364) (Marshall, C.J.) (noting that a grand jury's presentment does not carry with it a duty on the part of the prosecutor to respond). But see 1 Op. Att'y Gen. 41, 42-43 (1794) (suggesting that a district attorney should follow the grand jury's lead).

seen as the proper body to initiate [petitions] that brought grievances to the attention of [Parliament],<sup>178</sup> and not surprisingly, early grand juries in America styled their presentments as petitions for the redress of grievances.<sup>179</sup>

Second, the People's petitions and the grand jury's presentments are both recommendations of sorts to the President. The Petition Clause provides for the right of the People "to petition the Government for a redress of grievances."<sup>180</sup> The use of the word "Government" stands in stark contrast to the use of the word "Congress" as the first word of the same First Amendment; "Government" is most definitely not a synonym for "Congress."<sup>181</sup> The word "Government" reflects an understanding that the People would petition the President or the Congress, just as the People would petition the King or either House of Parliament.<sup>182</sup> In the Declaration of Independence, Thomas Jefferson detailed several dozen malefactions of King George and then emphasized that the King had refused the many petitions of the American colonies:

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. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.<sup>183</sup>

Plainly, the Framers intended their President not to exhibit the same tyrannical indifference to the petitions of We the People. It would, moreover, make more sense for the People to petition their President: The President is the representative of the People, not their monarch or regent. As President James K. Polk put it in his

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178. Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 AM. J. LEGAL HIST. 118, 130 n.46 (1994) (quoting John Brewer).

179. See AMAR, BILL OF RIGHTS, *supra* note 134, at 86-87 & n.18.

180. U.S. CONST. amend. I.

181. James Madison's initial draft of the Petition Clause in the House of Representatives used the word "legislature," but the House Committee of Eleven Report changed the Petition Clause to use the word "Government." See THE COMPLETE BILL OF RIGHTS, *supra* note 175, at 129-30.

182. See, e.g., Proceedings of the Congress at New York (Oct. 19, 1765), at 16 (photo. reprint 1938) (1766) ("That it is the right of the British subjects in these colonies, to petition the king or either house of parliament.").

183. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

fourth (and last) State of the Union Message in 1848, "The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them."<sup>184</sup> Moreover, as we have seen, it would not make sense, for reasons of geography and logistics, for the People to send petitions to the "Seat of Government of the United States, c/o The Speaker of the House of Representatives."<sup>185</sup> So too the grand jury's presentments are directed to the President as Prosecutor-in-Chief for the United States.<sup>186</sup>

Third, the People's petitions and the grand jury's presentments are both recommendations of sorts to the President that enable the President to fulfill her executive duties under the State of the Union

184. Schlesinger, *Major Themes*, *supra* note 51, at xxxiv (quoting President Polk); *see also* *Myers v. United States*, 272 U.S. 52, 123 (1926).

The President is a representative of the people just as the members of the Senate and the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide ....

*Id.* In addition, numerous other authorities noted the President's representative nature. *See* Fourth Annual Message of Franklin Pierce (Dec. 2, 1856), *reprinted in* 1 *THE STATE OF THE UNION MESSAGES*, *supra* note 62, at 919 (stating that the President "represents the aggregate population of the United States" and that the People's election of the President "is the explicit and solemn act of the sole sovereign authority of the Union"); 2 *ELLIOT'S DEBATES*, *supra* note 88, at 448 (remarks of James Wilson at Pennsylvania ratifying convention).

[The President] will, under this Constitution, be placed in office as the President of the whole Union, and will be chosen in such a manner that he may be justly styled *the man of the people*. Being elected; by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection.

*Id.*; *see also* RAWLE'S COMMENTARY, *supra* note 31, at 164 ("The president himself is elected on the supposition that he is the most capable citizen to understand and promote [the true interests of the people], and in every appointment he ought to consider himself as executing a public trust of the same nature.").

185. *See supra* notes 113-19 and accompanying text. There is at least one instance in which a President proactively recommended to the Congress the redress of a would-be petition by a private citizen. *See* First Annual Message of Andrew Jackson (Mar. 4, 1829), *reprinted in* 1 *THE STATE OF THE UNION MESSAGES*, *supra* note 62, at 313-14.

186. On the President as Prosecutor-in-Chief, *see*, for example, *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."); Calabresi & Prakash, *supra* note 7, at 658-61 (presenting evidence from presidential practice and British tradition to support the argument that prosecutorial authority is inherently an executive function); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1189 n.178 (2000) (collecting evidence from opinions by the Office of Legal Counsel).

and Recommendation Clauses. Both petitions and presentments are important information-gathering devices for the Government and particularly the President. They are the stuff that fills the nation's suggestion box. Several scholars have shown that petitions would inform government officials about local conditions and popular sentiments.<sup>187</sup> The information gathering characteristic of the petition stands at the core of the Petition Clause.<sup>188</sup> The petition is perhaps best understood as a mini-State of the Union Message from the People to the President. As historian Arthur Schlesinger eloquently put it, "The people through their representatives, their newspapers and their right of petition had to be free to send back their own state-of-the-union messages to the President."<sup>189</sup> So too presentments would serve an important information gathering function and an important recommendation function as well. James Wilson observed:

The grand jury are [sic] a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.<sup>190</sup>

James Wilson's words highlight the "great channel of communication" between the grand jury, as spokespersons for the People, and the President who "administer[s] the laws." The grand jury's recommendations—whether in the form of "publick improvements" or pointing out "publick bad measures"—would undoubtedly assist

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187. See Higginson, *supra* note 175, at 153-55; Norman B. Smith, "Shall Make No Law Abridging...": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1178-79 (1986). Petitions and presentments served as prominent information-gathering devices in the election of 1816. See AMAR, BILL OF RIGHTS, *supra* note 134, at 31, 85.

188. AMAR, BILL OF RIGHTS, *supra* note 134, at 31 (observing that the Petition Clause "is not primarily concerned with the problem of overweening majoritarianism; it is at least equally concerned with the problem of attenuated representation").

189. Schlesinger, *Major Themes*, *supra* note 51, at xxxvi.

190. 2 THE WORKS OF JAMES WILSON 537 (Robert Green McCloskey ed., 1967).

the President in executing her duty under the Recommendation Clause.<sup>191</sup>

Fourth, and most importantly, the President's recommendations under the Recommendation Clause are especially important vehicles for the redress of the People's grievances, presented to the President in the form of petitions and presentments.<sup>192</sup> President Ulysses S. Grant emphasized the connection between the People's grievances and the President's recommendations in his first State of the Union Message in 1869: "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."<sup>193</sup>

There is a neat functional linkage between the Veto Clause and the Recommendation Clause as well. As Alexander Hamilton explained in *The Federalist No. 73*, the veto power "serves as a shield to the executive" and "establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."<sup>194</sup> If the Veto Clause is the People's shield, the Recommendation Clause is the People's sword.

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191. See RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 2 (1963) (stating that grand juries at the Founding "acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities").

192. See Bybee, *supra* note 7, at 105 n.269 ("The Recommendation Clause empowers the President to represent the people before Congress, by recommending measures for the reform of government, for the general welfare, or for the redress of grievances."); Sidak, *Recommendation Clause*, *supra* note 7, at 2119 ("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.").

193. First Inaugural Address of President Ulysses S. Grant (Mar. 4, 1869), *reprinted in 8 MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 37, at 6.

194. *THE FEDERALIST NO. 73*, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), *reprinted in 3 THE FOUNDERS' CONSTITUTION* 247 (Philip B. Kurland & Ralph Lerner eds., 1987) (similarly characterizing the veto power as a shield for the rights of the Executive). For two earlier statements describing the veto power as a shield for the rights of the people, see 2 FARRAND, *supra* note 12, at 74 (remarks of James Madison), and *id.* at 74-75 (remarks of Elbridge Gerry).



### B. "Such Measures": The Legislation Principle

The phrase "such Measures"<sup>195</sup> is the font of the legislation principle. Today much if not most legislation "originates" in the Office of the President.<sup>196</sup> In *Clinton v. City of New York*,<sup>197</sup> the Supreme Court, after citing the text of the State of the Union and Recommendation Clauses, simply concluded: "Thus, [the President] may initiate and influence legislative proposals."<sup>198</sup> Despite this conclusion it is not self-evident that the Recommendation Clause is concerned with legislation per se. The use of the word "Congress" in the State of the Union Clause and the phrase "their Consideration" in the Recommendation Clause are hints that these clauses concern legislation. Even so, it is the phrase "such Measures" that crystallizes the legislative contour of the Recommendation Clause.

One well-accepted meaning of the word "measure" at the Founding, and one largely overlooked today, is a "legislative bill or enactment."<sup>199</sup> The Recommendation Clause thus makes clear that

195. U.S. CONST. art. II, § 3.

196. See *How Our Laws Are Made*, at <http://thomas.loc.gov/home/lawsmade.bysec/sourcesofleg.html> (last visited Sept. 15, 2002) (discussing sources of legislation in the House of Representatives).

In modern times, the "executive communication" has become a prolific source of legislative proposals. The communication is usually in the form of a message or letter from a member of the President's Cabinet, the head of an independent agency, or the President transmitting a draft of a proposed bill to the Speaker of the House of Representatives and the President of the Senate.

*Id.* This practice is especially important when it comes to the national budget. See *id.*; see also *Origins of Legislation*, at <http://thomas.loc.gov/home/enactment/origins.html> (last visited Sept. 15, 2002) (discussing origins of legislation in the Senate and quoting the text of the State of the Union and Recommendations Clauses). All bills, of course, must formally originate in one of the two Houses of Congress. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 7, cl. 2 ("If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.") (emphasis added).

197. 524 U.S. 417 (1998).

198. *Id.* at 438.

199. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 736 (1988). One of us previously examined the definition of the word "measure" but missed the critical legislative definition of the word, which was in all probability in the minds of the Framers. See Sidak, *Recommendation Clause*, *supra* note 7, at 2084 n.24 (defining "measure" only as "plan or course of action intended to attain some object") (citing 6 OXFORD ENGLISH DICTIONARY 280

the President shall recommend legislation and not merely put forth indefinite ideas. Indeed, the word "measures" may have been chosen by the Framers with some care. The draft of the Committee of Detail provided: "It shall be his Duty ... to recommend *Matters* to their Consideration ...."<sup>200</sup> The Legislature considers matters but resolves on measures, a point made especially clear by the same Committee of Detail draft that only a few lines later provided: "It shall be his Duty ... to expedite all such *Measures* as may be resolved on by the Legislature ...."<sup>201</sup> One common, accepted meaning of the word "matter" is a "subject of concern, feeling, or action."<sup>202</sup> The word "subject" invites one to ponder the Opinion Clause of Article II, which 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 ...."<sup>203</sup> The Recommendation Clause does

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(1970)). This point is similar to the question posed in Sidak & Smith, *Four Faces of the Item Veto*, *supra* note 6, to which the Constitution's text gives no answer: "What is a bill?"

200. 2 FARRAND, *supra* note 12, at 158 (emphasis added). This language mirrored Article XIX of the New York Constitution of 1777, which provided that "it shall be the duty of the Governor ... to recommend *such matters* to [the Legislature's] consideration as shall appear to him to concern its good government, welfare, and prosperity." N.Y. CONST. of 1777, art. XIX, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1335 (emphasis added).

201. 2 FARRAND, *supra* note 12, at 158 (emphasis added); *see also id.* at 252 (remarks of George Mason) (stating that Congress "could carry such measures as they pleased"); *id.* at 299 (remarks of Gouverneur Morris) (stating that legislators will "concur in measures"); THE FEDERALIST NO. 50, at 317-20 (James Madison) (Clinton Rossiter ed., 1961) (referring to "measures" of "legislative assembly"). This language also mirrored Article XIX of the New York Constitution of 1777, which provided that "it shall be the duty of the Governor ... to take care that the laws are faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature." N.Y. CONST. of 1777, art. XIX, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1335; *see also* PA. CONST. of 1776, § 20, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1545 ("[President and Council] are also to take care that the laws be faithfully executed; they are to expedite the execution of such measures as may be resolved upon by the general assembly...."). The juxtaposition of the phrase "expedite all such measures" with the State counterpart to the Take Care Clause, U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."), may be no accident. The next draft of the Committee of Detail omitted the phrase "expedite all such measures" in favor of a precursor to the Take Care Clause. *See* 2 FARRAND, *supra* note 12, at 171 ("He shall take Care to the best of his Ability, that the Laws) <It shall be his duty to provide for the due & faithful exec—of the Laws> of the United States (be faithfully executed) <to the best of his ability>").

202. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 733 (1988).

203. U.S. CONST. art. II, § 2, cl. 1 (emphasis added). The secret drafting history of the Opinion Clause provides additional evidence of the distinction in meaning between the words

not provide that the President "shall ... recommend to their Consideration such *Subjects* as he shall judge necessary and expedient."<sup>204</sup>

One of us has previously argued that the substitution of the word "Measures" for "Matters" in the Recommendation Clause "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[,] and that "[t]o 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."<sup>205</sup>

If one takes the distinction between "Matters" and "Measures" seriously, it may not be enough, constitutionally speaking, for the President to say to Congress that it must address pressing national issues such as the financial viability of Social Security or Medicare. Although the President may surely make subject-matter recommendations to Congress pursuant to her executive power, the Recommendation Clause calls for more, and perhaps far more. Perhaps the President must recommend to Congress how to address the financial restructuring of Social Security or Medicare—and with draft legislation to boot.<sup>206</sup> Perhaps the President would be bound

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"measures" and "matters," as well as the similarity in meaning between the words "matters" and "subjects." A precursor to the Opinion Clause provided:

The President of the United States shall have a Privy-Council ... whose duty it shall be to advise him in *matters* respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the *measures* which he shall adopt....

2 FARRAND, *supra* note 12, at 367 (emphasis added).

204. Consider, however, the description penned by St. George Tucker:

But 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 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344 (emphasis added).

205. Sidak, *Recommendation Clause*, *supra* note 7, at 2084.

206. The Recommendation Clause admittedly does not specify the form of the President's measures. See C. ELLIS STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* 158-59 n.2 (MacMillan and Co., 2d ed. 1927) (1894).

The Constitution does not prescribe the form in which the President shall present the measures which he may recommend; nor does it vest the Congress

politically (albeit not constitutionally) to support such legislation if it were passed by both Houses of Congress. As President Polk stated in his fourth State of the Union Message in 1848: "When the President recommends measures to Congress, he avows in the most solemn form his opinions, gives his voice in their favor, and pledges himself in advance to approve them if passed by Congress."<sup>207</sup> One can analogize here to offer and acceptance in contract law.<sup>208</sup> Politically, the recommendation is a binding offer that lasts until the end of the current Congress. Thereafter, the composition, leadership, and party control of Congress may change, such that the process of legislative horse trading might produce entirely different deals between Congress and the President that reflect changes in bargaining power, information, and other circumstances.

The Social Security or Medicare example is not so hypothetical or inconsequential as it may initially seem. Consider the paradigmatic national emergency at the Founding—invasion by a foreign enemy. It would be hardly constitutionally sufficient for the President to say to a special session of Congress: "I am the Commander-in-Chief and I am intimately familiar with our nation's military requirements. We need more troops, ships of war, and the like. Please pass whatever legislation you like to provide for the common defense."<sup>209</sup>

That said, early presidents did not take the distinction between "Measures" and "Matters" very seriously. President Washington was hesitant to recommend anything in his first Inaugural Address.<sup>210</sup>

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with the power to do it, either by an express provision or by any reasonable implication. It leaves the determination of the form, therefore, to the President himself.

*Id.* (citation omitted).

207. See Fourth Annual Message of James K. Polk (Dec. 5, 1848), reprinted in 1 *THE STATE OF THE UNION MESSAGES*, *supra* note 62, at 767.

208. See *RESTATEMENT (SECOND) OF CONTRACTS* §§ 24-70 (1981).

209. The Constitution implicitly calls for the President to prepare and recommend plans of offense and defense to the Congress in time of war. Gouverneur Morris' proposal for a "Council of State" to "assist the President in conducting the Public affairs" provides some interesting clues. See 2 *FARRAND*, *supra* note 12, at 342. The proposal, with respect to the Secretary of War, provided: "It shall be his duty ... in time of war to prepare & recommend plans of offence and defence." *Id.* at 343; see also *id.* (noting a similar provision with respect to the Secretary of the Marine: "It shall be his duty ... in the time of war to prepare & recommend plans of offence and defence.").

210. See Currie, *supra* note 165, at 188 (stating that President Washington's "reticence" to exercise the duty of the Recommendation Clause was "[o]ne of the most conspicuous

After giving his third State of the Union Message in 1792, Washington wrote that "[m]otives of delicacy" had "uniformly restrained" him "from introducing any topick which relates to Legislative matters to members of either house of Congress, lest it should be suspected that he wished to influence the question before it."<sup>211</sup> So too, President Thomas Jefferson avoided specificity in his recommendations, fearing that they might appear as regal edicts.<sup>212</sup>

It was not until President Andrew Jackson took office that the President championed specific issues in the annual State of the Union Message. President Jackson was not shy about exercising his duty under the Recommendation Clause; his first State of the Union Message contained more than ten specific recommendations.<sup>213</sup> Among early presidents, however, President Jackson represented the exception. As Professor Martin Flaherty explained, "nineteenth-century presidents used this [Recommendation Clause] authority sparingly, and then generally in abstract, almost ritualistic ways."<sup>214</sup>

That said, early twentieth-century presidents significantly changed the prevailing nineteenth-century norm. Presidents Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt seized the legislative initiative. One Member of Congress expressed the prevailing twentieth-century sentiment well when he told a member of the President's staff, "[D]on't expect us to start from

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features of this speech").

211. 31 THE WRITINGS OF GEORGE WASHINGTON 493 (John C. Fitzpatrick ed., 1939). Actually, as Professor Currie reminds us, President Washington's original draft of his Inaugural Address had contained a "detailed legislative program" for Congress's consideration, but then Representative James Madison apparently omitted it out of concern for the separation of powers. See Currie, *supra* note 165, at 189 n.190 (quoting RALPH KETCHAM, JAMES MADISON, A BIOGRAPHY 277-78 (MacMillan, 1971)); see also TULIS, *supra* note 52, at 48 (noting that President Washington "had originally prepared a seventy-three-page set of recommendations to Congress as his first draft of the Inaugural, thinking that he would speak as part of his constitutional duty" under the Recommendation Clause). If Representative Madison's involvement appears odd, it should not. Before President Washington had an inner circle of Heads of Departments (i.e., a Cabinet), Representative Madison was "in essence Washington's 'aide, grand vizier, and prime minister.'" Currie, *supra* note 165, at 183 n.155 (citing KETCHAM, *supra*, at 286-87, 315-17, 319-21).

212. See, e.g., First Annual Message of Thomas Jefferson (Mar. 4, 1801), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 321-24.

213. See First Annual Message of Andrew Jackson (Mar. 4, 1829), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 294-314.

214. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818 (1996).

scratch on what you people want. That's not the way we do things here—you draft the bills and *we* work them over.”<sup>215</sup>

One should not leap, however, to the conclusion that the legislation principle of the Recommendation Clause is almost entirely an informal twentieth-century “amendment by practice” to the Recommendation Clause. President Washington took an overly conservative approach to the Recommendation Clause. Professor Cass Sunstein has remarked that President Washington’s “own approach does seem extreme” and that the Recommendation Clause “authorizes a broader role.”<sup>216</sup> We agree.

The Recommendation Clause’s invitation to the President to be the Legislator-in-Chief is yet more apparent when we consider the President’s other duties. A tight, albeit overlooked, relationship exists between the Recommendation Clause and the Take Care Clause of Article II, which provides that the President “shall take Care that the Laws be faithfully executed ....”<sup>217</sup> The President, as Administrator-in-Chief of the executive bureaucracy, would possess a systematic working knowledge of the laws of the United States.<sup>218</sup> This knowledge would put the President in a unique position to revise legislation pursuant to the “last word” of the Recommendation Clause and to recommend new legislation pursuant to her “first word.” Sometimes existing laws will need to be amended or even repealed, and the need for amendment or repeal may only be apparent upon the execution of the law by the President. Sometimes new laws will be needed to ensure that the President shall fulfill her duty under the Take Care Clause. The net effect of these changes to the laws would be to lead the federal government down the experience curve of law making.<sup>219</sup>

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215. Richard E. Neustadt, *Presidency and Legislation: Planning the President's Program*, 49 AM. POL. SCI. REV. 980, 1015 (1955) (quoting a senior Member of Congress).

216. Cass R. Sunstein, *An Eighteenth Century President in a Twenty-First Century World*, 48 ARK. L. REV. 1, 9 (1995).

217. U.S. CONST. art. II, § 3.

218. For more on the President as Administrator-in-Chief, see, for example, Calabresi & Prakash, *supra* note 7, at 603-15; Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993).

219. Consider, however, James Madison's prediction:

The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draught will every year become both easier and fewer. Past transactions of the government

The secret drafting history of the Constitution is illuminating. Gouverneur Morris proposed forming a Privy Council to "assist the President in conducting the Public affairs," and provided that the Chief Justice of the Supreme Court "shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union ...."<sup>220</sup> Early commentators on the Constitution suggested a paired reading of the Recommendation and Take Care Clauses. St. George Tucker observed that "any inconveniencies resulting from new laws, or *for the want of adequate laws upon any subject*, more immediately occur to those who are entrusted with the administration of the government, than to others, less immediately concerned therein."<sup>221</sup> Justice Story similarly observed that "[the President] is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of *improving them*."<sup>222</sup> Indeed, the Recommendation Clause and the Take Care Clause appear in the same section of Article II. As one of us has previously observed: "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."<sup>223</sup>

Finally, the legislation principle need not be limited to ordinary legislation. The Recommendation Clause surely permits the President to recommend "higher" legislation—in other words, to recommend to Congress that it propose amendments to the Constitution pursuant to Article V of the Constitution. So thought President Washington in his first Inaugural Address, and so

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will be a ready and accurate source of information to new members [of Congress].

THE FEDERALIST NO. 53, at 334 (James Madison) (Clinton Rossiter ed., 1961).

220. See 2 FARRAND, *supra* note 12, at 342.

221. 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344 (emphasis added).

222. 3 STORY'S COMMENTARIES, *supra* note 9, § 1555 (emphasis added).

223. Sidak, *Recommendation Clause*, *supra* note 7, at 2085; see also Bybee, *supra* note 7, at 105 (stating that the Recommendation Clause "draws from the President's experience and his superior access to information relating to his other considerable powers, including his powers as Commander in Chief, *as the executor of the laws*, and as principal representative of the United States in foreign relations") (emphasis added).

thought the House of Representatives of the First Congress in its reply to President Washington.<sup>224</sup> Early presidents exercised the prerogative to recommend higher legislation. In his sixth State of the Union Message in 1806, President Jefferson expressed doubts that "public education, roads, rivers, canals, and such other objects of public improvement" fell within the enumerated powers of the Congress, and he recommended an amendment to give to the Congress the power to fund these objects.<sup>225</sup> President Monroe recommended a similar amendment in his first State of the Union Message in 1817,<sup>226</sup> and again in his sixth State of the Union Message in 1822, after he had vetoed a bill to fund the Cumberland Road because he thought it unconstitutional.<sup>227</sup> President Jackson too recommended a specific and now especially timely constitutional amendment in his first State of the Union Message in 1829: "I would therefore recommend such an amendment of the Constitution as may remove all intermediate agency in the election of the President and Vice-President."<sup>228</sup>

*C. "As He Shall Judge Necessary and Expedient": The Executive Discretion Principle*

The phrase "as he shall judge necessary and expedient"<sup>229</sup> is the font of the executive discretion principle.<sup>230</sup> The use of the word "judge" in the Recommendation Clause suggests a special degree of deliberation by the President, in seemingly stark contrast to a

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224. See First Inaugural Address of George Washington (Apr. 30, 1789), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 37, at 51, 56; 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 37, at 567.

225. Sixth Annual Message of Thomas Jefferson (Dec. 2, 1806), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 87-88.

226. First Annual Message of James Monroe (Mar. 4, 1817), reprinted in 1 STATE OF THE UNION MESSAGES, *supra* note 62, at 154.

227. Sixth Annual Message of James Monroe (Dec. 3, 1822), reprinted in 1 STATE OF THE UNION MESSAGES, *supra* note 62, at 197-98.

228. First Annual Message of Andrew Jackson (Mar. 4, 1829), reprinted in 1 STATE OF THE UNION MESSAGES, *supra* note 62, at 299.

229. U.S. CONST. art. II, § 3.

230. Cf. Amar, *Some Opinions*, *supra* note 7, at 672-75 (discussing executive discretion principle of Opinion Clause); *id.* at 672-73 (inviting applicability of executive discretion principle to State of the Union and Recommendation Clauses).



companion clause, which provides that "in Case of Disagreement between [the Houses of Congress], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall *think proper*."<sup>231</sup> The word "judge" also stands in contrast with the Recommendation Clause's counterpart in Article XIX of the New York Constitution of 1777, which provided that "it shall be the duty of the governor ... to recommend such matters to their consideration *as shall appear* to him to concern its good government, welfare, and prosperity."<sup>232</sup>

The verb "judge" in the Recommendation Clause connotes that the President's discretion to make recommendations must be exercised judiciously—with wisdom rather than caprice. Examining Article III for clues about the essence of judiciousness, one might infer that the Framers expected the President, in the exercise of his prerogative to make recommendations, to exhibit the same rectitude, sobriety, and wisdom as "[t]he Judges, both of the supreme and inferior Courts, [who] shall hold their Offices during good Behavior...."<sup>233</sup> To Alexander Hamilton, writing in *The Federalist No. 78*, the good-behavior standard was relevant to all three branches:

The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government *to secure a steady, upright and impartial administration of the laws*.<sup>234</sup>

Thus, Hamilton plainly understood good behavior to be a standard relevant to the President's execution of the laws, which we have shown is closely related to the President's duty to recommend

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

232. N.Y. CONST. of 1777, art. XIX, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1335 (emphasis added).

233. U.S. CONST. art. III, § 1.

234. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

measures to Congress. Likewise, William Rawle observed in his treatise: "It is a duty of the president to acquire, as far as possible, an intimate knowledge of the capacities and characters of his fellow citizens; to disregard the importunities of friends; the hints or menaces of enemies; the bias of party, and the hope of popularity."<sup>235</sup>

These understandings might have been aspirational, and not an expression of the characteristics whose absence would justify impeachment. Nevertheless, that distinction would not limit the insight here for Article II. If one sought a substitute expression for the phrase "take Care that the Laws be faithfully executed,"<sup>236</sup> Hamilton's phrase "secure a steady, upright and impartial administration of the laws"<sup>237</sup> would be a very strong candidate.

The verb "judge" in the Recommendation Clause also signifies that the President is the indeed last and only word on what recommendations he shall make.<sup>238</sup> The question of whether a particular recommendation is necessary and expedient is a quintessentially political question committed to the President—in our modern constitutional parlance, it is a "textually demonstrable commitment of the [adjudicatory] issue to a coordinate political department."<sup>239</sup> Congress may not, therefore, judge what recommendations are necessary and expedient. President Ulysses S. Grant made this point clear in his first State of the Union Message. He 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."<sup>240</sup> Congress could refuse to appropriate funds to enable the President to recommend legislation, but such action would not be constitutional.<sup>241</sup> Furthermore, any attempt by Congress to limit the

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235. RAWLE'S COMMENTARY, *supra* note 31, at 164.

236. U.S. CONST. art. II, § 3.

237. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

238. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 278 n.38 (1993).

239. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

240. First Inaugural Address of Ulysses S. Grant (Mar. 4, 1869), reprinted in 7 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 37, at 6.

241. See Sidak, *Recommendation Clause*, *supra* note 7, at 2118; Sidak, *The President's Power of the Purse*, *supra* note 102, at 1202-22. For an early view taken during the Jay Treaty debates, see 5 ANNALS OF CONG. 529 (statement of Speaker of the House Sedgwick) ("To support the Constitution each department must be enabled to perform the functions assigned

scope of the President's discretion under the Recommendation Clause would be flatly unconstitutional.<sup>242</sup>

This point appears in at least five other interesting ways if one considers constitutional structure. First, consider executive privilege. One could say that, "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."<sup>243</sup> Second, consider the Petition Clause. If "Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"<sup>244</sup> then Congress shall make no law muzzling the President, because the President is the man of the People and the representative of their petitions.<sup>245</sup>

Third, consider the principle of separation of powers and the postulate of "perfectly co-ordinate" departments.<sup>246</sup> A muzzling law

to it. To enable the Executive to do its duties, the compensation must be provided."). For a contrary view, see Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1154-55 (1999).

242. There has been significant hubbub in recent years over congressional attempts to limit the scope of the Recommendation Clause. One of us has written: "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." Sidak, *Recommendation Clause*, *supra* note 7, at 2079. Sidak has dubbed these appropriations riders "muzzling laws" and has argued that they are unconstitutional because they violate the Recommendation Clause. *Id.* at 2118-28; *see also* Bybee, *supra* note 7, at 104 ("By the terms of the Recommendation Clause, Congress lacks the power either to command the President to make certain recommendations or to forbid the President from doing so."). It should go without saying that "muzzling laws" are unconstitutional even if the President agrees to such legislation. *See* INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) ("The assent of the Executive to a bill which also contains a provision contrary to the Constitution does not shield it from judicial review.").

243. Sidak, *Recommendation Clause*, *supra* note 7, at 2124.

244. U.S. CONST. amend. I.

245. *See* Bybee, *supra* note 7, at 105 n.269 ("The argument that the First Amendment disables Congress ... implies that the First Amendment limits Congress' power to restrict the President's recommendation power."); Sidak, *Recommendation Clause*, *supra* note 7, at 2119 ("To muzzle the President, therefore, is to diminish the effectiveness of this right expressly reserved to the people under the first amendment.").

246. *See, e.g.*, THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers ....") (emphasis added). For a discussion of the constitutional "postulate" of coordinate departments, *see* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-40 (1994).

is a paradigmatic legislative encroachment on the other departments. Fourth, consider the principle of co-extensiveness. Congress may not limit the scope of the President's veto power, and the scope of the Recommendation Clause must be at least as expansive as that of the veto power; otherwise the President "may veto any bill that emerges from Congress, but may not always give Congress advance warning of an intention to veto, or may not always try to forestall a veto by proposing better alternatives."<sup>247</sup> Finally, there is perhaps the consideration of republican government. One of us has argued that muzzling laws violate the principle of "republican democracy," without, however, going so far as to say that muzzling laws violate the Guarantee Clause or the Constitution's implicit promise of a republican federal government.<sup>248</sup>

Although the President's discretion is significant and may not be limited by Congress, it has bounds. The executive discretion of the Recommendation Clause may not swallow up the executive duty of the same clause. There should be some constitutional standard to prevent the President from sitting on her laurels and judging that nothing is necessary and expedient.<sup>249</sup> After all, the Recommendation Clause is mandatory all around: The President "*shall* ... recommend ... such Measures as he *shall* judge necessary and expedient."<sup>250</sup> Consider again the paradigmatic situation of necessity and expediency—invasion by a foreign enemy. Would it be appropriate, constitutionally speaking, for the President to

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247. Rabkin & Devins, *supra* note 45, at 231 n.131.

248. See Sidak, *Recommendation Clause*, *supra* note 7, at 2118-20.

249. This statement begs the question of whether the inactivity of President Calvin Coolidge, whose nickname was "Silent Cal," was constitutional:

The political genius of President Coolidge, Walter Lippmann pointed out in 1926, was his talent for effectively doing nothing: "This active inactivity suits the mood and certain of the needs of the country admirably. It suits all the business interests which want to be let alone.... And it suits all those who have become convinced that government in this country has become dangerously complicated and top-heavy...."

Calvin Coolidge, at <http://www.whitehouse.gov/history/presidents/cc30.html> (last visited Sept. 11, 2002). Of course, President Coolidge didn't do absolutely nothing, just "effectively" nothing. He had a small number of achievements in both domestic and foreign affairs. See Calvin Coolidge, at <http://gi.grolier.com/presidents/ea/bios/30pcool.html> (last visited Sept. 11, 2002). Perhaps he thought that the necessary and expedient thing to do was in fact effectively nothing. We thank Professor Michael Gerhardt for bringing Coolidge's style of governance to our attention.

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

recommend nothing on such an extraordinary occasion? Surely not. The President's silence on such an occasion would violate the President's oath or affirmation to "preserve, protect and defend the Constitution of the United States,"<sup>251</sup> and thus be a proper cause for impeachment. It should go without saying that one who accepts the responsibilities of Commander-in-Chief vows to fight for the nation's survival. The Constitution could not tolerate an American version of Vichy France, for example.<sup>252</sup>

Finally, the phrase "necessary and expedient" demands scrutiny. Here again the Recommendation Clause represents a significant departure from its counterpart in Article XIX of the New York Constitution of 1777, which provided that "it shall be the duty of the governor ... to recommend such matters to their consideration as shall appear to him *to concern its good government, welfare, and prosperity*."<sup>253</sup> The phrase "necessary and expedient" is unique in the Constitution. A dedicated textualist would want to compare and contrast this phrase with "necessary and proper" in the Necessary and Proper Clause of Article I, Section 8,<sup>254</sup> "absolutely necessary" in the State Imposts and Duties Clause of Article I, Section 10,<sup>255</sup> and the use of simply the word "necessary" in a triad of other clauses in the Constitution.<sup>256</sup> Although the word "expedient" appears only once in the Constitution, the word was familiar to the Framers of the Constitution, given its use in state constitutions and other important Founding documents.<sup>257</sup> To the extent that the

251. *Id.* art. II, § 1, cl. 7. For a discussion of the special importance of the prolix Presidential Oath or Affirmation Clause, see Paulsen, *supra* note 246, at 261-62; Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 828-29 (1999).

252. See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 52-54 (1991) (arguing that on four separate grounds the President, as Commander-in-Chief, has a constitutional duty to fight to the death to defend the nation). *But cf.* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 128 (1984).

253. N.Y. CONST. of 1777, art. XIX, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1335 (emphasis added).

254. U.S. CONST. art. I, § 8, cl. 18.

255. *Id.* art. I, § 10, cl. 2.

256. See U.S. CONST. art. I, § 7, cl. 3; *id.* art. III; *id.* art. V.

257. See, e.g., N.Y. CONST. of 1777, pmbl., in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 1329; MASS. CONST. OF 1780, pt. II, ch. II art. VI, in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 965; ARTICLES OF CONFEDERATION, art. X, in FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 11; NORTHWEST ORDINANCE of 1787, pmbl., in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 429.

Necessary and Proper Clause contains distinct "necessity" and "proprietary" elements,<sup>258</sup> it would follow that the Recommendation Clause also contains distinct "necessity" and "expediency" elements.<sup>259</sup> Indeed, there is a sense in which judging what is necessary is different from judging what is expedient. For example, something may be necessary but inexpedient, or expedient but unnecessary.<sup>260</sup> And there is an even greater sense in which judging what is "necessary and expedient" is different from what is "necessary and proper"—a point presumptively made by difference in word choice. For example, something may be both necessary and expedient but improper, or both necessary and proper but inexpedient.<sup>261</sup> The critic would argue that the phrases "necessary and proper" and "necessary and expedient" do not contain two

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258. See James Madison, Speech to the House of Representatives (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 205-06 (Robert A. Rutland et al. eds., 1979); see also Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 787 (1997); Lawson & Granger, *supra* note 238, at 331.

259. Article III, Section 10 of the Hamilton Plan contains distinct necessity and propriety elements:

The President at the beginning of every meeting of the Legislature as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be *necessary* for their information, or as may require their consideration. He may by message during the Session communicate all other matters which may appear to him *proper*.

3 FARRAND, *supra* note 12, at 624 (emphasis added).

260. Cf. 2 FARRAND, *supra* note 12, at 418 (proposal of James McHenry and Charles Cotesworth Pinkney) (using phrases "judged expedient" and "judged necessary" as distinct terms in proposal concerning Duties or Imposts Clause, U.S. CONST. art. I, § 10, cl. 2).

261. Notwithstanding this linguistic point, "expedient" in the Recommendation Clause does not mean "improper," to the extent "improper" could be construed to mean "unconstitutional." Cf. Lawson & Granger, *supra* note 238, at 297-326 (discussing the "jurisdictional" meaning of the word "proper" in the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18). We think it is beyond question that the President must believe her recommendations under the Recommendation Clause to be constitutional. Such an understanding is implicit in the Recommendation Clause itself, and also flows from the President's oath to support the Constitution. See U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3; see also Lawson, *Everything I Need To Know About Presidents I Learned From Dr. Seuss*, *supra* note 33, at 383 (stating that "[t]he President's responsibilities under the Recommendation Clause are clear: recommend to Congress the enactment of measures that are constitutional, and recommend the repeal of existing laws that are unconstitutional"); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1288 n.97 (1996) (stating that "in exercising the recommendation power, the President must insure that his proposals are constitutional").

distinct terms, but rather one single and roughly synonymous term of art.<sup>262</sup>

What does "expedient" mean? One dictionary definition is "[a]ppropriate to a given purpose."<sup>263</sup> This definition appears to have been taken by President Andrew Jackson in his first State of the Union Message in 1829, when he stated: "The task devolves on me, under a provision of the Constitution ... to propose such measures as in the discharge of my official functions have suggested themselves as necessary *to promote the objects of our Union*."<sup>264</sup> One contextual definition is "practicable" or "convenient."<sup>265</sup> Another dictionary definition—now archaic, but likely to have been in the Framers' minds—is "speedy: expeditious."<sup>266</sup> This latter definition was probably used in an early draft of the Committee of Detail, which provided: "It shall be his Duty ... to *expedite* all such Measures as may be resolved on by the Legislature."<sup>267</sup> This latter definition of "expedient" becomes more crisp when one considers the juxtaposition of the Recommendation Clause with the Special Session Clause, which gives the President the right "on extraordinary Occasions, [to] convene both Houses, or either of them."<sup>268</sup> The paradigmatic situation of expediency is when the President exercises her right under the Special Session Clause. As St. George Tucker noted:

The power of the president to convene either or both houses of congress, was a provision indispensably necessary in a government organized as the federal government is by the constitution. Occasions may occur during the recess of congress,

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262. St. George Tucker, for example, apparently thought that "necessary and expedient" was no different from "necessary and proper." See 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 344 ("[I]t is likewise provided, that the first magistrate of the union should recommend to the consideration of congress such measures as he shall judge necessary, and proper.").

263. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 454 (1988).

264. First Annual Message of Andrew Jackson (Mar. 4, 1829), reprinted in 1 THE STATE OF THE UNION MESSAGES, *supra* note 62, at 294 (emphasis added).

265. See, e.g., 1 FARRAND, *supra* note 12, at 166 (remarks of James Wilson) (referring to proposal as "practicable or expedient"); 2 FARRAND, *supra* note 12, at 297 (remarks of Gouverneur Morris) (referring to amendment as "unnecessary and inconvenient").

266. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 454 (1988).

267. 2 FARRAND, *supra* note 12, at 158 (emphasis added).

268. U.S. CONST. art. II, § 3; see also NORTHWEST ORDINANCE of 1787, pmbl., in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 29, at 429 ("The governor shall have power to convene ... the general assembly, when in his opinion, it shall be expedient.").

for taking the most vigorous and decisive measures to repel injury, or provide for defence: congress, only, is competent to these objects: the president may therefore convene them for that purpose. Or it may happen that an important treaty hath been negotiated during the recess of the senate, and their advice thereupon be required, without delay, either, that the ratification may be exchanged in due time, or for some other important reason. On such extraordinary occasions as these, if there were not a power lodged in the president to convene the senate, or the congress, as the case might require, the affairs of the nation might be thrown into confusion and perplexity, or worse.<sup>269</sup>

The Recommendation Clause thus calls for heightened sensitivity in times of national exigency.

### CONCLUSION

The President's role in the legislative process begins long before she signs or vetoes a bill presented to her by Congress. The thirty-one words contained in the State of the Union and Recommendation Clauses envision the President as an active participant in the embryonic stages of law making. Close analysis of those words reveals eight separate principles that animate the President's responsibilities as the Legislator-in-Chief.

The State of the Union Clause imposes an executive duty on the President. That duty must be discharged periodically. The President's assessment of the State of the Union must be publicized to Congress, and thus to the nation. The publication of the President's assessment conveys information to Congress—information uniquely gleaned from the President's perspective in her various roles as Commander-in-Chief, chief law enforcer,

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269. 1 TUCKER'S COMMENTARIES, *supra* note 58, app. at 345. Justice Story similarly noted:

The power to convene congress on extraordinary occasions is indispensable to the proper operations, and even safety of the government. Occasions may occur in the recess of congress, requiring the government to take vigorous measures to repel foreign aggressions, depredations, and direct hostilities; to provide adequate means to mitigate, or overcome unexpected calamities; to suppress insurrections; and to provide for innumerable other important exigencies, arising out of the intercourse and revolutions among nations.

3 STORY'S COMMENTARIES, *supra* note 9, § 1556.



negotiator with foreign powers, and the like—that shall aid the legislature in public deliberation on matters that may justify the enactment of legislation because of their national importance.

The Recommendation Clause also imposes an executive duty on the President. Her recommendations respect the equal dignity of Congress and thus embody the anti-royalty sentiment that ignited the American Revolution and subsequently stripped the trappings of monarchy away from the new chief executive. Through her recommendations to Congress, the President speaks collectively for the People as they petition Government for a redress of grievances, and thus her recommendations embody popular sovereignty. The President tailors her recommendations so that their natural implication is the enactment of new legislation, rather than some other action that Congress might undertake. Finally, the President shall have executive discretion to recommend measures of her choosing.

When the State of the Union and Recommendation Clauses are seen to have these analytical subtleties, Justice Hugo Black's assessment that the President's "functions in the lawmaking process" are limited to "the recommending of laws he thinks wise and the vetoing of laws he thinks bad"<sup>270</sup> is revealed to be too abbreviated. The words of these two clauses reveal the sophistication of the Framers' design by highlighting that the President, through her institutionally unique ability to acquire and analyze information valuable to the leadership of the Republic, would have more to contribute to the making of laws than merely to sign off on their creation by another branch. Far from making the President a cipher in the legislative process, the Constitution created the Legislator-in-Chief.

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270. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).