
COMMENT

THE RECOMMENDATIONS CLAUSE AND THE
PRESIDENT’S ROLE IN LEGISLATION

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INTRODUCTION

In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Black wrote that the Constitution limits the President’s “functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”¹ Article II, Section 3 of the Constitution is the source of the President’s recommending function, stating 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”² Presidents dating back to George Washington have relied on the Recommendations Clause³ as a positive source of authority to make legislative recommendations to Congress. In an interesting twist, however, recent administrations have also frequently wielded it as a source of *negative* power to escape statutory requirements to provide information to Congress. Despite a great deal of scholarship and media commentary on executive power and the presidency, the active role of the Recommendations Clause in legislative politics as a source of negative presidential power has gone largely unexplored. This Comment sheds light on this important intersection of constitutional law and interbranch politics.

A recent example illustrates the significance of the Recommendations Clause as a tool of negative executive power. In 2003, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act (Medicare Modernization Act),⁴ which codified a provision requiring that the President recommend responsive legislation to Congress in the event of a “medicare funding warning.”⁵ A Medicare funding warning occurs when the

¹ 343 U.S. 579, 587 (1952).

² U.S. CONST. art. II, § 3.

³ Some sources use the singular Recommendation Clause, while others use the plural Recommendations Clause. For consistency, I exclusively use the latter.

⁴ Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of the U.S. Code).

⁵ 31 U.S.C. § 1105(h)(1) (2018).

portion of Medicare expenditures paid for with general revenues, as opposed to dedicated Medicare funding, surpasses forty-five percent two years in a row.⁶ Despite the law's clear language that "the President *shall* submit to Congress, within the 15-day period beginning on the date of the budget submission to Congress . . . proposed legislation to respond to such warning,"⁷ every President since has indicated that they view this requirement as optional.⁸ While President George W. Bush ultimately did submit the required proposed legislation to Congress after a Medicare funding warning during his tenure, Presidents Obama and Trump did not comply with the requirement.⁹ They both declared in their budgets that they viewed the law as merely "advisory" and did not submit responsive legislation within the prescribed fifteen-day period.¹⁰ The upshot is that Congress passed a law, but multiple Presidents unilaterally decided not to comply with the obligation it placed on them. Members of Congress and their constituents might understandably demand to know: on what authority?

The answer offered by these presidents is explored in depth in Section III.A, but the short version is: the Recommendations Clause. This Comment explores the exercise of this type of negative power under the Recommendations Clause by recent administrations. It is the first to comprehensively address this issue. Just two scholarly articles squarely address the Recommendations Clause, but they explore the interaction of the *positive* duty to recommend with laws that frustrate performance of that duty—most commonly "muzzling laws" that prohibit the use of funds to study a policy area and thereby impede the President from crafting a recommendation in that area.¹¹ By contrast, I focus on laws that *require* the

⁶ See *id.* (citing MMA § 801(a)(2), 117 Stat. at 2357).

⁷ *Id.* (emphasis added).

⁸ See *infra* Section III.A.

⁹ See *infra* Section III.A.

¹⁰ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010, at 197 (2009) [hereinafter 2010 BUDGET]; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2020, at 23 (2019) [hereinafter 2020 BUDGET].

¹¹ See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2080, 2101 (1989) (defining muzzling laws as "any legislation that impairs the Executive's ability to deploy resources to study or advocate a change in the federal government's policies on a particular issue" and arguing that "the structure of the Constitution does not allow the appropriations power . . . to override the President's constitutional duty to recommend policy measures to Congress"). See generally Vasana Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1 (2002) (discussing the President's role for the President in the legislative process). Several other commentators have more briefly addressed the Recommendations Clause in the context of broader works. See, e.g., Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 286-92 (1995) (describing attitudes toward the Recommendations Clause during the Constitutional Convention, ratification debates, and the First Congress); Harold J.

President to make a recommendation on a given policy topic and explore whether they infringe on presidential discretion under the Recommendations Clause, as recent presidential administrations claim.

Accordingly, I have three goals in this Comment. In Part I, I seek to build on the limited scholarship about the history and purpose of the Recommendations Clause and the different ways Presidents and Congress have interpreted and applied it. I show that the Framers made it the President's constitutional duty to make legislative recommendations to Congress in order to increase information flow from an executive branch, with unique access to policy information, to a legislative branch in need of that information to effectively discharge its lawmaking function.

In Part II, I describe the types of arguments administrations make about the scope of negative presidential power, incident to the positive duty to recommend under the Recommendations Clause, and how those arguments are developed in and expressed by the executive branch. Specifically, I identify a common presidential practice that has not previously been the subject of thorough academic attention: asserting negative power under the Recommendations Clause to escape statutory requirements to provide legislative recommendations to Congress, like the one in the Medicare Modernization Act. I call these statutory requirements "triggering laws." A triggering law is any bill or statute that requires the executive branch to make a legislative recommendation to Congress on a particular topic but does not dictate the content of that recommendation.¹²

My research reveals that, despite the lack of scholarly attention to the issue, it has become common practice for presidents to assert negative power under the Recommendations Clause to escape triggering laws, both by seeking to influence the content of pending legislation containing triggering provisions and through signing statements and legal memoranda stating how the administration will interpret triggering laws after they are passed. For example, going back to Ronald Reagan, presidents have issued ninety-nine signing statements expressing objections to triggering laws on Recommendations Clause grounds—often expressing multiple objections in the same statement.¹³ President George W. Bush was the most prolific, issuing sixty such signing statements. President Trump is on pace to rival that

Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 539-46 (2008) (analyzing the role of the Recommendations Clause in the George W. Bush Administration's conception of the unitary executive theory); Rajiv Mohan, *Chevron and the President's Role in the Legislative Process*, 64 ADMIN L. REV. 793, 798-801 (2012) (providing a brief history of the Recommendations Clause).

¹² See, e.g., 31 U.S.C. § 1105(h)(1) (2018) (requiring the president to submit "proposed legislation to respond to" a Medicare funding warning).

¹³ See *infra* subsection II.C.3.

number, having already issued sixteen such statements.¹⁴ Add to that figure other executive communications about legislation still pending in Congress, like Department of Justice (DOJ) views letters¹⁵ and informal exchanges, and the Recommendations Clause comes into focus as an actively used tool of negative executive power.

In Parts III and IV, I argue against using the Recommendations Clause in this way. I contend that the scope of presidential discretion under the Recommendations Clause is more limited than recent administrations claim and that triggering laws like the Medicare Modernization Act generally do not infringe on that discretion. I contend that, while administrations have rightly objected to muzzling laws as impediments to the President fulfilling his or her duty to make recommendations to Congress, triggering laws do not frustrate the President's performance of any constitutionally assigned function. I conclude that reading the Recommendations Clause to confer exclusive discretion on the President broad enough to preclude enforcement of triggering laws subverts its purpose, offends separation of powers principles, and risks permitting an administration to bottleneck executive branch information important to congressional lawmaking and oversight in the office of the President.

I. THE POSITIVE DUTY TO RECOMMEND

A. *The Recommendations Clause at the Framing*

The Framers considered, and rejected, making it optional for the President to recommend legislation to Congress. An early draft of the Constitution from the Philadelphia Constitutional Convention of 1787 included a Recommendations Clause reading, "He shall, from time to time, give information to the Legislature, of the State of the Union: he *may* recommend to their consideration such measures as he shall judge necessary, and expedient . . ." ¹⁶ According to James Madison's notes from the convention, on August 24, 1787, a motion passed amending the clause to its current construction, replacing "may" with "shall," "in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it."¹⁷ The Framers were apparently concerned that the President would refrain from engaging with Congress on important issues out of fear

¹⁴ See *infra* subsection II.C.3.

¹⁵ See *infra* subsection II.C.2.

¹⁶ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 392 (W.W. Norton & Co. 1987) (1840) (emphasis added) (recording the final report of the committee of detail).

¹⁷ *Id.* at 526.

that Congress would resent the intrusion on its legislative power and exact political revenge.¹⁸ They changed the language of the clause in order to guarantee presidential input on legislation.¹⁹

Another change to the language of the clause lends additional support to this reading. A preliminary draft of the Constitution, produced by the Convention's Committee of Detail and found among the papers of one of its members, James Wilson, shows that the Recommendations Clause originally stated that the President "may recommend *Matters*" to Congress.²⁰ The chairman of the Committee, Edward Rutledge, crossed out "matters" and replaced it with "such *measures* as he shall judge nesy. & expedt."²¹ The change suggests a preference for more in-depth presidential involvement in lawmaking, inasmuch as "measures" implies that recommendations should be formed means to identified ends, in contrast to the spare referrals or general observations that might qualify as recommended "matters."²²

Taken together, the changes to the draft text demonstrate the Framers' intent to guarantee that the President would play a substantive role in congressional lawmaking.²³ Early scholars agreed that this desire for collaboration was based on the unique institutional competency of the executive. In his appendix to *Blackstone's Commentaries*, St. George Tucker noted that "[a]s from the nature of the executive officer it possesses more

¹⁸ See Sidak, *supra* note 11, at 2082 (explaining that making it a duty to recommend legislation to Congress made it so "partisans of congressional power could not argue that the President's participation in lawmaking was part of a scheme to usurp Congress'[s] legislative power").

¹⁹ The Recommendations Clause was understood at the time as creating a duty on the President. In his first inaugural address, George Washington stated, "[b]y 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.'" George Washington, First Inaugural Address (Apr. 30, 1789), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. 101-10, at 3 (1989) [hereinafter INAUGURAL ADDRESSES] (emphasis added).

²⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 171 (Max Farrand ed., 1966) [hereinafter 2 CONVENTION RECORDS] (emphasis added). The Convention's deliberations began in earnest on May 29, 1787, with Edmund Randolph's presentation on behalf of the Virginia delegation of a set of resolutions to "correct[] & enlarge[]" the Articles of Confederation, referred to as the Virginia Plan. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1966) [hereinafter 1 CONVENTION RECORDS]. After several weeks spent discussing and amending the resolutions, the Convention referred a draft to the Committee of Detail to use in creating an initial draft Constitution. 1 CONVENTION RECORDS, *supra*, at 128.

²¹ 2 CONVENTION RECORDS, *supra* note 20, at 171 (emphasis added).

²² See Kesavan & Sidak, *supra* note 11, at 48-49 ("One well-accepted meaning of the word 'measure' at the Founding, and one largely overlooked today, is a 'legislative bill or enactment.' The Recommendation Clause thus makes clear that the President shall recommend legislation and not merely put forth indefinite ideas."); Sidak, *supra* note 11, at 2084 ("To the extent that a 'measure' connotes the formulation of a proposed solution to an identified condition, the submission of 'measures' implies greater presidential participation in the lawmaking process than would the mere submission of 'matters' to Congress for its ruminat[i]on.").

²³ See Kesavan & Sidak, *supra* note 11, at 64 ("Far from making the President a cipher in the legislative process, the Constitution created the Legislator-in-Chief.").

immediately the sources, and means of information than the other departments of government,” and therefore “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.”²⁴ Justice Story agreed that, due to the “nature and duties of the executive department, [the President] must possess more extensive sources of information . . . than can belong to congress.”²⁵ He argued that the Recommendations Clause recognized the President’s unique visibility into “the defects in the nature or arrangements” of different policy areas and made him “responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them.”²⁶ The fact that the Constitution calls for the President to provide information on the state of the union to Congress further shows that the Framers believed the President had unique access to information relevant to congressional lawmaking.²⁷

To be sure, the exclusivity of the President’s access to policy information has diminished as Congress has developed far greater factfinding capacity.²⁸ Congress’s enhanced ability to inform itself has been offset, however, by significant growth in the scope of executive power, and thereby in the scope of policy information available to the President.²⁹ Thus the executive branch continues to be “the repository of the country’s most important information for public policy formulation.”³⁰ Whether or not the President retains special access to information, the early agreement that he did—agreement that included influential lawmakers³¹—strongly supports reading the

²⁴ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app., at 344 (Phila., Birch & Small 1803).

²⁵ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555, at 412-13 (Boston, Hilliard, Gray & Co. 1833).

²⁶ *Id.* at 413.

²⁷ U.S. CONST. art. II, § 3.

²⁸ See Sidak, *supra* note 11, at 2087 (“In addition to its power to conduct hearings, the current Congress has information-gathering arms . . . [During] 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.”).

²⁹ See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727-28 (1996) (explaining that, through the president’s power as both commander in chief of the armed forces—with massive clandestine and destructive faculties—and as head of a vast administrative state capable of influencing most areas of social and economic life, “[n]ever has the executive branch been more powerful, nor more dominant over its two counterparts”).

³⁰ Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO L.J. 737, 739 (2002).

³¹ See, e.g., Killenbeck, *supra* note 11, at 286-92 (noting that, while some worried about undue influence of the president over Congress, then-Congressman James Madison argued that the alternative of an aloof president would be worse because the “[i]nconsistent, unproductive, and

Recommendations Clause as reflecting an intention to increase information flow from executive to legislature by making it the duty of the President to recommend measures to Congress.³²

B. *Defining the Scope of the Duty to Recommend*

Today, it is so common for the President to be deeply involved in congressional lawmaking that the Framers' concerns about a reclusive executive seem anachronistic. But it was not always so. The Recommendations Clause gives the President the discretion to "judge" what measures are necessary and expedient for purposes of making affirmative recommendations, and thereby define for himself the scope of his duty. Different presidents have defined that scope differently.

In his first inaugural address to Congress, George Washington stated his understanding that Article II made it his duty to provide recommendations, but he found it more expedient to flatter the nation's first Congress, which had convened just weeks before, than to make specific policy recommendations.³³ He thought it "more consistent with th[e] circumstances, and far more congenial with the feelings which actuate [him], to substitute, in place of a recommendation of particular measures, the tribute that is due to the talents, the rectitude, and the patriotism which adorn the characters selected to devise and adopt them."³⁴ He elaborated that he lacked the experience in office required to judge measures for recommendation: "Instead of undertaking particular recommendations on this subject, in which I could be guided by no lights derived from official opportunities, I shall again give

expensive schemes" of a Congress operating without the benefit of executive input "will be more injurious to our constituents than the undue influence which the well-digested plans of a well-informed officer can have").

³² See *id.* at 306 ("[The Recommendations Clause] is more than a simple attempt to defuse controversy if and when the President actually speaks. It reflects . . . that the executive is in a superior . . . position to convey the [electorate's] views . . . to [Congress]."). But see *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 908 & n.7 (D.C. Cir. 1993) (explaining that "the Recommendation Clause is less an obligation than a right," and that the Framers' use of the word "shall" was simply "intended to squelch any congressional objections to the President's *right* to recommend legislation"). However, the D.C. Circuit seems to have made this observation to distinguish the broad discretion granted to the President to decide the scope of his duty under the Recommendations Clause, as explained in Section I.B., from the "greater . . . importance" of his "affirmative duty" under the Take Care Clause. *Id.* at 908. This is all the more likely because the authority cited by the D.C. Circuit for this proposition actually argues that "[t]he recommendation of measures is a *duty* imposed on the President, for the clause states that 'he *shall* recommend.'" Sidak, *supra* note 11, at 2081 (first emphasis added).

³³ See Washington, *supra* note 19, at 3-4.

³⁴ *Id.*

way to my entire confidence in your discernment and pursuit of the public good”³⁵

Other presidents judged it much more to be necessary and expedient to provide recommendations to Congress. Millard Fillmore offered recommendations to Congress on “the leading subjects of legislation” in his first annual message to Congress.³⁶ Ulysses S. Grant went further in his first inaugural address, avowing that “[o]n *all* leading questions agitating the public mind” he would “*always* express [his] views to Congress and urge them according to [his] judgment”³⁷ Franklin Delano Roosevelt tailored his recommendations to policies addressing the Great Depression, stating that he was “prepared under [his] constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require.”³⁸ But he emphasized just how necessary and expedient he felt his recommendations were: should Congress fail to act on his recommendations, he warned, “it may be that an unprecedented *demand* and *need* for undelayed action may call for temporary departure from that normal balance” of executive and legislative power and process.³⁹ Even the taciturn Calvin Coolidge⁴⁰ took the opportunity in his first inaugural address to recommend tax reform.⁴¹

Today, we seem to have reached stasis: presidents outline a detailed list of legislative recommendations during the state of the union address, in other less formal communications on an almost daily basis, and in their active role in all stages of the drafting and passing of legislation.⁴² Modern

³⁵ *Id.* at 4.

³⁶ Millard Fillmore, First Annual Message (Dec. 2, 1850), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2615 (New York, Bureau of National Literature, 1897) [hereinafter MESSAGES & PAPERS]. Recommendations on these “leading subjects” included everything from changes in trade policy, to establishing an “agricultural bureau,” to raising “one or more regiments of mounted men” for “protection” against Native American tribes, and more. *Id.* at 2616-30.

³⁷ Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), in INAUGURAL ADDRESSES, *supra* note 19, at 146 (emphasis added).

³⁸ Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), in INAUGURAL ADDRESSES, *supra* note 19, at 273.

³⁹ *Id.* (emphasis added).

⁴⁰ On learning that President Coolidge had passed away, the writer Dorothy Parker reportedly asked, “How can they tell?” MAX EASTMAN, ENJOYMENT OF LAUGHTER 155 (1936).

⁴¹ Calvin Coolidge, First Inaugural Address (Mar. 4, 1925), in INAUGURAL ADDRESSES, *supra* note 19, at 253-54.

⁴² Some argue that the White House drafts more legislation than Congress now. See, e.g., Kathryn Marie Dessayer, Note, *The First Word: The President's Place in “Legislative History,”* 89 MICH. L. REV. 399, 407 (1990) (“Waiting for the President to propose legislation has become so common in modern times that members of Congress have actually begun to expect the administration to present a bill as a starting point for consideration of new policies and governmental actions.” (citations omitted)).

presidents thus appear to have adopted a broad definition of what is “necessary and expedient.”

II. NEGATIVE POWER UNDER THE RECOMMENDATIONS CLAUSE

The Supreme Court has held repeatedly that Congress may not “prevent[] the Executive Branch from accomplishing its constitutionally assigned functions,”⁴³ although not without controversy.⁴⁴ Since the 1920s, presidents have declared that certain legislative provisions do prevent the executive from accomplishing its functions under the Recommendations clause.⁴⁵ These Presidents have made Recommendations Clause objections both to seek changes to pending legislation and to state their administration’s plan to execute laws already passed according to its own interpretation. Presidents exercise this negative power—that is, power to negate or change Congress’s exercise of the legislative power—in response to two main types of legislation: (1) muzzling laws that forbid the President from using funds to explore a specified policy area and (2) triggering laws that require the President’s input on a certain policy topic.

Muzzling laws have been the subject of thorough analysis in just two scholarly articles, both of which argue that they violate the Recommendations Clause by impeding the President’s ability to craft recommendations.⁴⁶ But

⁴³ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

⁴⁴ See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2120 (2019) for a forceful argument that “history supports readings of Article II of the Constitution that limit Presidents to exercise their power when it is motivated in the public interest” and that “tend to subordinate presidential power to congressional direction, requiring the President to follow the laws, instructions, and authorizations set in motion by the legislature.” The authors’ findings “tend to undermine imperial and prerogative claims for the presidency. . . .” *Id.* It is enough for purposes of this Comment to point out descriptively that the executive branch does advance its own constitutional interpretation, even as there is active debate as to whether it should. Compare Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 868 (1994) (“[T]he Framers did not envision that Presidents would possess the power to suspend laws, even where a President thought that the law was unconstitutional.”), with Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221-22 (1994) (arguing that “the President possesses the power of full ‘legal review’ of the actions of the other branches—the full power to review the lawfulness or correctness of their legal interpretations of the Constitution,” and that “[h]e may decline to execute acts of Congress on constitutional grounds In executing a statute he determines is constitutionally valid, he may use his own interpretation of the statute . . .”).

⁴⁵ The earliest objections, however, focused on muzzling laws, not triggering laws. See Sidak, *supra* note 11, at 2097 (identifying a “precursor” to the muzzling laws of the 1980s as early as 1921). See *infra* Section III.C. for a discussion about how the executive branch accepted triggering laws as consistent with the Recommendations Clause until the DOJ’s Office of Legal Counsel (OLC) first articulated an objection in 1981.

⁴⁶ See Sidak, *supra* note 11, at 2118-28; Kesavan & Sidak, *supra* note 11, at 58-59.

triggering laws have been almost completely ignored,⁴⁷ even though they represent the real battleground over the scope of negative executive power under the Recommendations Clause today.⁴⁸

In this Section, I describe how Recommendations Clause objections are developed and expressed by the executive branch and show that recent administrations express these objections primarily in response to triggering laws. I first explain the role of the OLC in developing the legal argument that certain laws violate the Recommendations Clause and describe the two primary vehicles administrations use to make these arguments: DOJ views letters and signing statements. I show that modern administrations are active in using both of these tools to state Recommendations Clause objections. I then briefly describe the differences between muzzling laws and triggering laws and explain the substance of Recommendations Clause objections to each. I show that, despite the lack of scholarly attention to the practice, the overwhelming majority of the Recommendations Clause objections lodged by modern administrations respond to triggering laws.

A. *Recommendations Clause Objections: Form and Frequency*

1. OLC Opinions

Executive branch legal arguments about the constitutionality of legislation are often born in the OLC.⁴⁹ The OLC was officially established in 1950,⁵⁰ but before that its functions were performed by a specialized assistant solicitor general.⁵¹ Today, the OLC is led by a Senate-confirmed

⁴⁷ The only article that appears to address triggering laws does so indirectly in service of a broader exploration of unitary executive theory. See Krent, *supra* note 11, at 541-42 (conceding that the view that “Congress cannot compel the President to recommend measures may rest on firm ground,” but focusing instead on “whether Congress can mandate recommendations by subordinate executive branch officials”).

⁴⁸ See *infra* Section II.B. for evidence that the vast majority of signing statements expressing Recommendations Clause objections respond to triggering laws.

⁴⁹ The OLC and the DOJ Office of the Solicitor General (SG) are the two principal sources of constitutional interpretation in the executive branch. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682 (2005). Justiciability rules often keep separation of powers disputes out of the courtroom, and therefore out of the reach of the SG in its role as the administration’s chief litigator, while the OLC’s Bill Comment Practice and its general presidential advisory role put it in a position to routinely and directly make Recommendations Clause arguments. Cf. *Clark v. Valeo*, 559 F.2d 642, 649-50 (D.C. Cir.), *aff’d sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977) (holding non-justiciable a senatorial candidate’s separation of powers challenge to a provision of the Federal Election Commission Act providing for legislative review of the Commission’s rules and opinions by only the House of Representatives). Accordingly this Comment focuses on the OLC.

⁵⁰ Reorganization Plan No. 2 of 1950, § 4, 15 Fed. Reg. 3173-74, *reprinted in* 64 Stat. 1261 (1950).

⁵¹ Independent Offices Appropriations Act, 1934, Pub. L. No. 73-78, § 16, 48 Stat. 283, 307-08 (1933).

Assistant Attorney General with a staff of four deputies and around twenty career attorney advisors.⁵² The OLC's authority arises out of the Attorney General's duty to give "advice and opinion on questions of law when required by the President" and respond to requests regarding "questions of law arising in the administration of [a] department."⁵³

Thus, the "core work" of the OLC consists of "provid[ing] written and oral legal opinions" in response to requests from executive branch department heads.⁵⁴ Through these OLC opinions, administrations state legal conclusions about the scope of the Recommendations Clause and disseminate them throughout the DOJ and to the White House. For example, a 2016 OLC opinion addressed to the General Counsel of the Office of Management and Budget comprehensively lays out the administration's argument that neither muzzling nor triggering laws are permissible under the Recommendations Clause.⁵⁵ These legal arguments are often first developed by the OLC in DOJ views letters and presidential signing statements.⁵⁶ For example, that 2016 OLC opinion's Recommendations Clause analysis relied in part on arguments expressed in a signing statement issued in 2003.⁵⁷ OLC opinions also serve as authority for objections stated in future DOJ views letters and signing statements. For example, a 2018 DOJ views letter expressing

⁵² See Pillard, *supra* note 49, at 713.

⁵³ 28 U.S.C. §§ 511, 512 (2018). The Attorney General formally delegated that responsibility to the OLC. 28 C.F.R. § 0.25(b) (2019).

⁵⁴ Pillard, *supra* note 49, at 710. The President and Attorney General are the most common requesters. *Id.* at 711.

⁵⁵ See Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 40 Op. O.L.C., 2016 WL 10590110, at *3 (Aug. 25, 2016) [hereinafter 2016 OLC Opinion]; see also Common Legislative Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 256 (1989) ("Despite this Clause, Congress frequently attempts by statute to control the executive's legislative priorities by requiring that the President or his subordinates recommend legislative measures on certain subjects."); Constitutionality of Statute Requiring Exec. Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 640 (1982) ("[A]lthough the Constitution gives to the President the right to present legislative recommendations on behalf of the Executive Branch, Congress . . . purports to require a subordinate executive official to present legislative recommendations of his own. Such a provision clearly transgresses upon the President's constitutionally designated role.")

⁵⁶ See *infra* subsections II.A.2 and II.A.3 for in-depth discussion of presidential signing statements and DOJ views letters. I await reply to a FOIA request for additional OLC documents relating to the Recommendations Clause.

⁵⁷ See 2016 OLC Opinion, *supra* note 55, at *2 (quoting Presidential Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act, 2003, 2003 PUB. PAPERS 1698 (Dec. 8, 2003), as declaring that the administration would treat the triggering law in question "consistent with the President's constitutional authority" under the Recommendations Clause).

concerns about pending legislation on Recommendations Clause grounds cited the 2016 OLC opinion.⁵⁸

2. DOJ Views Letters

The OLC also runs a Bill Comments Practice⁵⁹ through which it reviews all bills introduced in Congress that the DOJ Office of Legislative Affairs identifies as having a realistic chance at passage to identify any constitutional concerns.⁶⁰ When an attorney advisor identifies a constitutional concern, she writes a bill comment about it. After review and approval by an OLC deputy, the bill comment is then sent to the Office of Management and Budget for approval and addition of any policy commentary.⁶¹ It is then sent to Congress—usually to the chairs of the committee of jurisdiction, but also to bill sponsors or leadership—in a letter, usually over the signature of the Assistant Attorney General for Legislative Affairs.⁶²

Letters from the Obama and Trump Administrations show how administrations use this tool to express Recommendations Clause objections to Congress about pending legislation.⁶³ They also show that the Trump Administration uses DOJ views letters for this purpose more than the Obama Administration did. Of the views letters available on the DOJ website, the

⁵⁸ U.S. Dep't of Justice, Office of Legislative Affairs, Views Letter on S. 1591, the Otto Warmbier Banking Restrictions Involving North Korea Act of 2017 (Jan. 9, 2018), <https://www.justice.gov/page/file/1026246/download> [<https://perma.cc/XHY7-XYGX>].

⁵⁹ Less relevant for purposes of this Comment, the OLC also maintains an Orders Practice to review executive orders and proclamations, as well as orders and regulations to be issued by the Attorney General. See Pillard, *supra* note 49, at 712.

⁶⁰ See *Id.* at 711-12, 712 n.110. While this formalized process of scrutinizing legislation for constitutional issues only took shape more recently, the practice itself dates back to George Washington, who requested of his department heads "opinions on the constitutionality of acts of Congress." STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 41 (2008) (emphasis omitted) (quoting LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 32-33, 106-07 (1948)).

⁶¹ See Pillard, *supra* note 49, at 711-12.

⁶² See *id.* at 712; see also, e.g., U.S. Dep't of Justice, Office of Legislative Affairs, Views Letter on S. 1631, the Department of State Authorities Act of 2018 (Feb. 13, 2018), <https://www.justice.gov/ola/page/file/1035286/download> [<https://perma.cc/R8Q2-3Z8V>] (opining that two sections of a proposed bill would violate the Recommendations Clause).

⁶³ For a digital collection of these letters, see *Views Letters*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ola/views-letters> [<https://perma.cc/J4A2-9ATQ>] (last visited Sept. 3, 2019) [hereinafter DOJ Views Letters]. DOJ views letters gathered from other sources show that views letters have been in use since at least as early as 1977. Professor Jean Galbraith and I recently wrote a short piece about DOJ views letters. Jean Galbraith & Benjamin Schwartz, *The Trump Administration and Executive Power: Evidence from Justice Department Views Letters*, *LAWFARE* (Feb. 5, 2019, 3:35 PM), <https://www.lawfareblog.com/trump-administration-and-executive-power-evidence-justice-department-views-letters> [<https://perma.cc/DPR4-9RFG>]. The data referenced in this section was gathered in connection with that project. We await reply to a FOIA request for additional DOJ views letters.

Obama Administration sent three stating a Recommendations Clause objection through its two terms, while the Trump Administration had already sent ten as of August 2019.⁶⁴ Further, objections stated in DOJ views letters often apply to multiple provisions. For example, a recent DOJ views letter responding to legislation assigning duties and powers to the Department of State objected to two separate provisions on Recommendations Clause grounds.⁶⁵ That letter also illustrates a distinctive feature of DOJ views letters in general: they comment on bills that have yet to become law.⁶⁶ DOJ views letters are not reactions to bills passed by Congress; rather, they are intended to influence the content of legislation as it winds its way through Congress.

There is some evidence that DOJ views letters have been successful in this effort in certain cases. For example, a version of the Intelligence Authorization Act for Fiscal Year 2010 was reported out of the House Intelligence Committee on June 26, 2009 with a provision under the section “Protection of Certain National Security Information” requiring the President to submit an “assessment of the need for any modification of this title for the purpose of improving legal protections for covert agents.”⁶⁷ That version passed the House and was pending in the Senate when a DOJ views letter, sent to the chair and vice-chair of the Senate Intelligence Committee on March 15, 2010, expressed concern that the language could be “construed to require the President to submit legislative recommendations for congressional action even where he did not think any legislation is advisable”⁶⁸ Because that would “violate the Recommendations Clause,” the letter advocated a change in the language to only “require recommendations of statutory measures deemed appropriate, *if any*.”⁶⁹ The Senate amended the language, and the version eventually signed by the President on October 7, 2010 only required an “assessment of the need, *if any*, for modification of this title for the purpose of improving legal protections for covert agents.”⁷⁰ Using a DOJ views letter, the executive branch

⁶⁴ DOJ Views Letters, *supra* note 63; Galbraith & Schwartz, *supra* note 63. The blog post only discusses data from President Obama’s first two years in office, but I used the DOJ website to collect data on DOJ views letters sent during the entirety of his two terms for that project.

⁶⁵ See Views Letter on S. 1631, *supra* note 62 (“Sections 102(b)(4) and 103(b)(10) of the bill would violate the Recommendations Clause by requiring the Secretary to submit legislative recommendations to the Congress.”).

⁶⁶ Department of State Authorities Act, Fiscal Year 2018, S. 1631, 115th Cong. (2017) (unenacted).

⁶⁷ H.R. 2701, 111th Cong. § 362(b) (as passed by House, Feb. 26, 2010).

⁶⁸ U.S. Dep’t of Justice, Office of Legislative Affairs, Views Letter on H.R. 2701 and S. 1491, the Intelligence Authorization Bills for Fiscal Year 2010 (Mar. 15, 2010), <https://www.justice.gov/sites/default/files/ola/legacy/2010/04/05/031510-ltr-reyes%20re-hr2701-s1494-intel-auth-bills.pdf> [<https://perma.cc/4L5B-72TZ>].

⁶⁹ *Id.* (emphasis added).

⁷⁰ Pub. L. No. 111-259, § 363(b), 124 Stat. 2655, 2702 (2010) (emphasis added).

successfully asserted negative power under the Recommendations Clause to change legislation pending in Congress.

Even where a DOJ views letter does not cause a change in legislative language, it can foreshadow, often in substantial detail, objections later stated in signing statements. For example, the Trump Administration sent a DOJ views letter on the National Defense Authorization Act for Fiscal Year 2018 expressing, among other things, objections to four provisions that “would require the Secretary of Defense to recommend legislative measures, in contravention of the President’s constitutional authority” under the Recommendations Clause.⁷¹ President Trump’s signing statement on that bill echoed those objections and stated that his “Administration will treat those provisions consistent with” the Recommendations Clause.⁷² This suggests a connection between the arguments of the OLC and the positions of the President. The fact that the OLC is more or less active in asserting Recommendations Clause objections to legislation depending on who the President is raises the possibility that OLC legal arguments about the Recommendations Clause do not simply reflect neutral opinions about the law, but also, or perhaps instead, the constitutional interpretation and institutional interests of the President.⁷³ It shows that the President will follow through in his execution of the law on Recommendations Clause objections first identified in DOJ views letters.

3. Signing Statements

Signing statements are “short documents that presidents often issue when they sign a bill.”⁷⁴ They do not, however, have intrinsic legal force; they have no formal definition.⁷⁵ Still, these short documents can have important implications. In 1899, the Supreme Court recognized signing statements as a

⁷¹ U.S. Dep’t of Justice, Office of Legislative Affairs, Views Letter on H.R. 2810, the National Defense Authorization Act for Fiscal Year 2018 (Nov. 8, 2017).

⁷² Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2018, 2017 DAILY COMP. PRES. DOC. 906 (Dec. 12, 2017).

⁷³ There is active debate about whether the OLC operates, or should operate, based on a client model whereby it explicitly serves the legal needs of the President, or as a detached “proponent[] of the best view of the law.” Pillard, *supra* note 49, at 685. This Comment does not weigh in on that debate beyond observing that the rate at which administrations express Recommendations Clause objections to legislation varies from President to President.

⁷⁴ Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006).

⁷⁵ See TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1 (2012) (“There is no explicit constitutional provision authorizing the issuance of presidential signing statements.”); TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS’N, REPORT 7 (2006) [hereinafter ABA TASK FORCE REPORT] (“The Constitution says nothing about the President issuing any statement when he signs a bill presented to him.”).

proper means for the President “to inform Congress by message of his approval of bills, so that the fact may be recorded.”⁷⁶ But most scholars trace the origins of the presidential signing statement either to 1822, when James Monroe responded to congressional criticism that he was not following a recent law with a letter explaining his interpretation,⁷⁷ or 1830, when Andrew Jackson issued a statement declaring that a road Congress meant to run from Detroit to Chicago would not extend past the Michigan Territory.⁷⁸ As these early examples suggest, a primary function of signing statements, and the one relevant for purposes of this Comment,⁷⁹ is to advance the President’s interpretation of a bill passed by Congress.⁸⁰

The OLC elaborated on this function in a 1993 memorandum, asserting that on “appropriate occasions” signing statements can perform the “useful and legally significant” function of

informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the executive branch to the extent that such enforcement would create an unconstitutional condition.⁸¹

Through this function, signing statements are another tool the executive branch uses to express Recommendations Clause objections to legislation.⁸²

⁷⁶ *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). Later decisions “accorded signing statements some degree of interpretive weight.” Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1808 (2016); *see id.* at 1808 n.35 (providing case law precedent in support of Yoo’s above statement).

⁷⁷ James Monroe, Special Message to the Senate (Jan. 17, 1822), in 2 MESSAGES & PAPERS, *supra* note 36, at 680-82; *accord* CALABRESI & YOO, *supra* note 60, at 86.

⁷⁸ Andrew Jackson, Special Message to the Senate and House of Representatives of the United States (May 30, 1830), in 3 MESSAGES & PAPERS, *supra* note 36, at 1046; *accord* CALABRESI & YOO, *supra* note 60, at 104.

⁷⁹ The OLC defined two other legally important functions of signing statements: “(1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption; (2) directing subordinate officers within the executive branch how to interpret or administer the enactment . . .” *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993). It also identified and discussed the merits of a fourth, “much more controversial” use of signing statements: “to create legislative history to which the courts are expected to give some weight when construing the enactment.” *Id.*

⁸⁰ *See* Bradley & Posner, *supra* note 74, at 308 (listing one function of signing statements as “advanc[ing] particular interpretations of specific provisions of [a] bill”).

⁸¹ *Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. at 131.

⁸² There is active debate about the constitutionality of signing statements of this type, and whether they in effect function as an unconstitutional line-item veto. *See, e.g.*, ABA TASK FORCE REPORT, *supra* note 75, at 5 (opposing the use of this type of signing statement as an unconstitutional violation of separation of powers); Bradley & Posner, *supra* note 74, at 308-10 (arguing that such signing statements are constitutional); Yoo, *supra* note 76, at 1808 (arguing that criticism of presidential signing statements as unconstitutional advancements of “their own constructions of the

They are also a commonly used tool. Jimmy Carter was the first President to make significant use of constitutional signing statements. With twenty-four in his single term, Carter made more than twice as many such statements as any President before him.⁸³ Since Carter, the number of signing statements expressing constitutional objections to legislation has exploded.⁸⁴ President Ronald Reagan sent 71 signing statements expressing constitutional objections;⁸⁵ President George H. W. Bush sent 146;⁸⁶ President Bill Clinton sent 105;⁸⁷ and President George W. Bush sent 127.⁸⁸ President Obama substantially reined in the use of signing statements to make constitutional objections, issuing only twenty-three such statements,⁸⁹ but President Trump appears to be re-expanding the practice, having already issued forty-two such statements as of August 2019.⁹⁰

Many of these constitutional objections were Recommendations Clause objections.⁹¹ I searched the document archive of University of California Santa Barbara's American Presidency Project for written signing statements by all presidents since Jimmy Carter using search terms "recommend" and "expedient"—two terms that seem to appear in every signing statement

Constitution appear to be overstated"). Without arguing the merits, I presume for purposes of this Comment that Presidents will continue to use signing statements in this way.

⁸³ Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 192 (2003) (unpublished Ph.D. dissertation, Miami University), https://etd.ohiolink.edu/!etd.send_file?accession=miami1057716977&disposition=inline [<https://perma.cc/E6JY-ZVH6>].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Note, however, that a different analysis came up with different numbers: 16 constitutional signing statements for Carter, 61 for Reagan, 98 for George H. W. Bush, 65 for Clinton, and 104 for George W. Bush. Bradley & Posner, *supra* note 74, at 323.

⁸⁸ GARVEY, *supra* note 75, at 7.

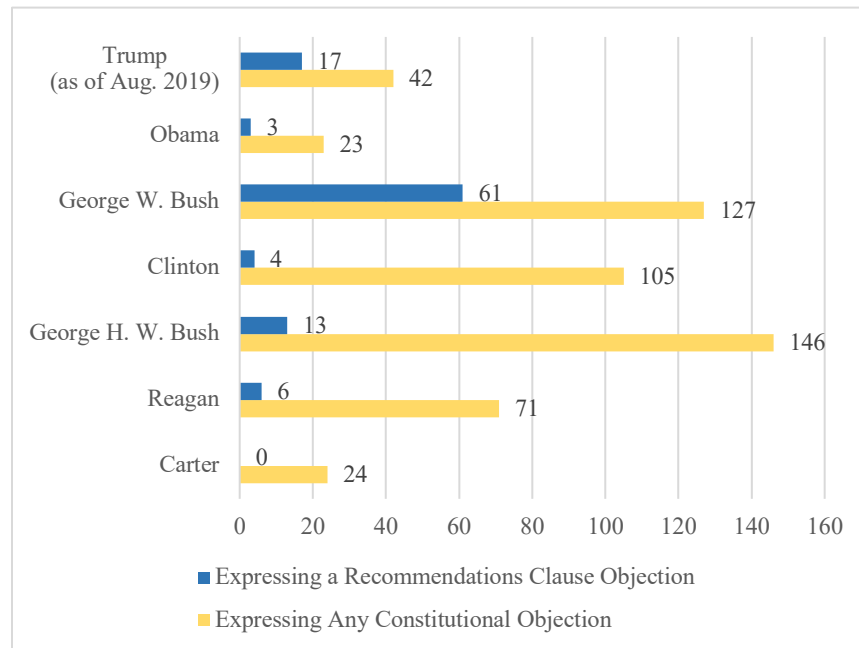
⁸⁹ *Provisions of Law Named in Barack Obama's Signing Statements*, PRESIDENTIAL SIGNING STATEMENTS, <http://www.coherentbabble.com/BHOCCounts.pdf> [<https://perma.cc/RJ4T-W3CE>] (last visited March 4, 2019).

⁹⁰ *Provisions of Law Named in Donald Trump's Signing Statements*, PRESIDENTIAL SIGNING STATEMENTS, <http://www.coherentbabble.com/DJTCCounts.pdf> [<https://perma.cc/TU2K-U8R9>] (last visited August 29, 2019). However, fluctuations across administrations in the quantity of signing statements issued stating constitutional objections do not necessarily indicate differences in their substantive positions about proper constitutional interpretation. *See* Presidential Signing Statements, 31 Op. O.L.C. 23, 23 (2007) (arguing that "President Bush's signing statements are indistinguishable from those issued by past Presidents" because his concerns about "infringe[ment of] explicit constitutional provisions (such as the Recommendations Clause . . .)" appear in signing statements dating back to James Monroe); GARVEY, *supra* note 75, at 8 ("While the number of provisions challenged or objected to by President [George W.] Bush gave rise to controversy, it is important to note that the substance of his signing statements did not appear to differ substantively from those issued by either Presidents Reagan or Clinton.").

⁹¹ Other objections included perceived encroachments on the President's power under the Appointments Clause, power to conduct diplomacy, power as Commander-in-Chief, and other presidential powers and privileges.

containing a Recommendations Clause objection.⁹² My results show that every President since Reagan has used signing statements to make Recommendations Clause objections. President Reagan issued six; President George H. W. Bush issued thirteen; President Clinton issued four; President George W. Bush issued sixty-one; President Obama issued three; and President Trump has issued seventeen.⁹³ Many of these signing statements contained Recommendations Clause objections to multiple provisions of the law at issue. President George W. Bush, for example, stated 219 unique Recommendations Clause objections across all of his signing statements.⁹⁴

Figure 1: Signing Statements Expressing Recommendations Clause Objections Compared to Signing Statements Expressing Any Constitutional Objections



⁹² *Document Archive*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/advanced-search> [<https://perma.cc/JF7W-KDMS>] (last visited Dec. 22, 2019) (enter “expedient” in the box labeled “All of these Terms” and enter “recommend* Recommend*” in the box labeled “Any of these Terms”; select “Signing Statements” from the “Document Category” box; select the desired president from the “Presidents” box). All results were confirmed as Recommendations Clause objections.

⁹³ *See id.*

⁹⁴ Neil Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001–2009*, at 185 (Ohio St. Pub. Law & Legal Theory Working Paper Series, Paper No. 118, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485715.

B. *Recommendations Clause Objections: Substance*

To different extents, it has become common presidential practice to use both DOJ views letters and signing statements to lodge objections to legislation under the Recommendations Clause. However, objections to muzzling laws and objections to triggering laws differ in important ways that can bear on whether they are properly made.

1. Muzzling Laws

A muzzling law is “any legislation that impairs the Executive’s ability to deploy resources to study or advocate a change in the federal government’s policies on a particular issue.”⁹⁵ Presidents have objected to these laws since at least 1912, when President Taft declared of a provision in an appropriations bill dictating the form and timing of this budget proposal:

To give [the provision] the effect of forbidding the President . . . to communicate to Congress recommendations as to expenditures and revenue, to acquire information from his subordinates needed to illustrate the utility of his recommendations, and to emphasize and point out the application of proposed reforms to existing conditions, would be to permit the legislative branch of the Government to usurp the functions of the Executive and to abridge the executive power in a manner forbidden by the Constitution.⁹⁶

The OLC has objected to muzzling laws since at least 1955, when it detailed Recommendations Clause objections to legislation that would require that the President’s budget submission to Congress contain estimated expenditures not exceeding estimated receipts:

First, in order to fulfill his obligation to transmit information to the Congress, together with such measures “as he shall judge necessary and expedient,” the President is given absolute discretion as to the character of information and recommendations he may choose to transmit. The proposed resolution plainly would frustrate the President’s responsibility of advising the Congress of the needs of the nation, the measures for fulfilling those needs, as his judgment dictates, and the required appropriations therefor. It appears too clear for serious question that a legislative fiat which seeks to

⁹⁵ Sidak, *supra* note 11, at 2080.

⁹⁶ Letter from William Howard Taft, President of the United States to Franklin MacVeagh, Secretary of the Treasury (Sept. 19, 1912), in COPY OF LETTER SENT BY THE PRESIDENT TO THE SECRETARY OF THE TREASURY RELATIVE TO THE SUBMISSION OF A BUDGET TO CONGRESS 1, 5 (1912).

remove the President's unlimited judgment in communicating with the Congress is in violation of the cited provisions of the Constitution.⁹⁷

The Reagan Administration appears to have adapted these arguments to the more straightforward type of muzzling law that proliferated during the 1980s: appropriations riders prohibiting the executive branch from using funds to study or advocate a particular policy change.⁹⁸ President George H. W. Bush's Administration echoed these arguments,⁹⁹ as have all administrations since.¹⁰⁰ The thrust of these objections is that prohibiting the

⁹⁷ Constitutionality of a Joint Resolution Requiring the President to Propose a Balanced Budget Every Year, 1 Op. O.L.C. Supp. 161, 161 (1955).

⁹⁸ See Sidak, *supra* note 11, at 2079-80, 2135 (listing several such muzzling laws and noting "President Reagan's acquiescence to muzzling laws"). President Reagan did, however, make objections to muzzling laws that at least gestured toward the Recommendations Clause. For example, in response to a 1986 appropriations rider prohibiting the administration from studying the sale of government energy facilities without congressional authorization, President Reagan issued a signing statement, saying, "[t]his ban on studying a valid proposal is an unreasonable restriction on the executive branch . . . I continue to believe that the proposal . . . should be pursued." Presidential Statement on Signing the Urgent Supplemental Appropriations Act, 1986, 1986 PUB. PAPERS 906, 907 (July 2, 1986). He used slightly stronger language in response to a 1984 law prohibiting the use of funds for enforcement of certain areas of antitrust law, albeit language not directly referencing the Recommendations Clause: "[T]his provision raises questions pertaining to the separation of powers among the branches of government, because it seeks to permit unwarranted intrusion by Congress into pending law enforcement proceedings brought by an administrative agency." Presidential Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1985, 1984 PUB. PAPERS 1210, 1210 (Aug. 30, 1984).

⁹⁹ President George H. W. Bush objected to a provision purporting to prohibit the use of funds to study energy prices on grounds that it "infringe[d] on the Executive's authority to conduct studies that might assist in the evaluation and preparation of such measures" as he deemed necessary and expedient under the Recommendations Clause. Presidential Statement on Signing the Energy and Water Development Appropriations Act, 1991, 1990 PUB. PAPERS 1561, 1562 (Nov. 5, 1990). He echoed this objection in both of the following two years' appropriations bills. Presidential Statement on Signing the Energy and Water Development Appropriations Act, 1992, 1991 PUB. PAPERS 1045, 1046 (Aug. 17, 1991); Presidential Statement on Signing the Energy and Water Development Appropriations Act, 1993, 1992 PUB. PAPERS 1736, 1737 (Oct. 2, 1992).

¹⁰⁰ See, e.g., Presidential Statement on Signing the Department of Defense Appropriations Act, 2004, 2003 PUB. PAPERS 1217, 1218 (Sept. 30, 2003) ("The executive branch shall construe these provisions relating to planning and making of budget recommendations in a manner consistent with the President's constitutional authority to require the opinions of the heads of the departments and to recommend for congressional consideration such measures as the President shall judge necessary and expedient."); Presidential Statement on Signing the Consolidated Appropriations Act, 2012, 2011 PUB. PAPERS 1568, 1569 (Dec. 23, 2011) ("Additional provisions in this bill . . . purport to restrict the use of funds to advance certain legislative positions. I have advised the Congress that I will not construe these provisions as preventing me from fulfilling my constitutional responsibility to recommend to the Congress's consideration such measures as I shall judge necessary and expedient."); Presidential Statement on Signing the Consolidated Appropriations Act, 2017, 2017 DAILY COMP. PRES. DOC. 312 (May 5, 2017) ("Because the Constitution gives the President the authority to recommend "such Measures as he shall judge necessary and expedient" (Article II, section 3), my Administration will continue to treat these, and similar provisions, as advisory and non-binding").

use of funds to develop recommendations frustrates the President's ability to fulfill his positive duty to develop and transmit to Congress recommended measures he judges necessary and expedient.¹⁰¹

2. Triggering Laws

Triggering laws, on the other hand, compel executive recommendations. Objections to triggering laws therefore do not argue that they frustrate the President's ability to recommend measures, but rather that, by dictating the timing and topic of the recommendation, they frustrate his ability to judge which measures are necessary and expedient.¹⁰² While the OLC traced the origin of triggering laws to a 1948 law that required the President to "recommend to the Congress legislation with respect to the disposal of the Government-owned rubber-producing facilities,"¹⁰³ I identified triggering laws dating back as far as 1941.¹⁰⁴ All of these bills were signed into law without objection from the sitting President, and the same was true for a number of other triggering laws signed by Presidents in the 1950s, 1960s, and 1970s.¹⁰⁵

The OLC first articulated its objection to triggering laws in 1981, declaring that "a statutory direction to the President to include any particular request in the budget he submits to Congress would be of doubtful constitutionality' under the Recommendations Clause."¹⁰⁶ This position has been echoed in different legislative contexts by each president since.¹⁰⁷ The

¹⁰¹ See 2016 OLC Opinion, *supra* note 55, at *3 ("[W]e have maintained for over half a century that Congress may not enact statutes, commonly known as 'muzzling laws,' that purport to prevent the President from recommending legislation he thinks necessary and expedient." (citations omitted)).

¹⁰² See *id.* at 9 ("Laws purporting to compel the President to recommend legislation to Congress, regardless of whether the President judges the enactment of such legislation necessary or expedient, would prevent the President from fulfilling that obligation, by requiring the President to recommend legislation that he has not judged necessary and expedient.").

¹⁰³ *Id.* at 15-16 (quoting The Rubber Act of 1948, Pub. L. No. 80-469, § 9(a), 62 Stat. 101, 105). The OLC identified an earlier possible triggering law in a 1921 budget law that required the president to "transmit to Congress on the first day of each regular session, the Budget" including "[e]stimates of the expenditures and appropriations necessary in [the president's] judgment for the support of the Government for the ensuing fiscal year," but concluded it provided enough discretion that it did not infringe on the president's ability to judge what measures were necessary and expedient. *Id.* at 15 (quoting The Budget and Accounting Act of 1921, Pub. L. No. 67-13, § 201(a), 42 Stat. 20).

¹⁰⁴ See *infra* Section III.C. for a detailed discussion of early historical practice regarding triggering laws.

¹⁰⁵ See *infra* Section III.C.

¹⁰⁶ 2016 OLC Opinion, *supra* note 55, at *13 (citing Memorandum from Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel to Robert A. McConnell, Assistant Attorney Gen., Office of Leg. Affairs 1 (Oct. 9, 1981)).

¹⁰⁷ See *e.g.*, Presidential Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988, 1988 PUB. PAPERS 1284, 1284-85 (Oct. 5, 1988) ("[T]he Act

thrust of the argument is that, by assigning the President the duty to recommend “such Measures as he shall judge necessary and expedient,”¹⁰⁸ the Recommendations Clause “assigns the President the ‘exclusive[]’ . . . responsibility to decide which measures the President shall recommend to Congress.”¹⁰⁹ Therefore, “Congress may not command the President to exercise that discretion in a particular circumstance” without trespassing on the separation of powers.¹¹⁰ Administrations are more or less aggressive in how they state this argument in DOJ views letters depending on the substance of the triggering law in question and whether the bill is pending or has already been passed by Congress. For example, the Trump Administration’s DOJ views letters often state bluntly that a triggering law “contravenes” or “violates” the President’s power under the Recommendations Clause, whereas the administration’s signing statements more often vaguely state the administration’s intention to treat the triggering law “in a manner consistent with” the Recommendations Clause.¹¹¹

also purports to require the Secretary of the Interior to transmit to the Congress a report with legislative recommendations Because the Constitution grants the President authority to recommend such measures as he shall judge necessary and expedient, this provision must be construed as advisory rather than mandatory.”); Presidential Statement on Signing the Support for East European Democracy (SEED) Act of 1989, 1989 PUB. PAPERS 1596, 1597 (Nov. 28, 1989) (“Other sections of the Act also require the President to submit . . . his recommendations. The Constitution grants exclusively to the President the power to recommend for the consideration of the Congress such measures as he judges necessary and expedient [S]uch provisions have always been treated as advisory rather than mandatory.”); Presidential Statement on Signing the Oceans Act of 2000, 2000 PUB. PAPERS 1574, 1574 (Aug. 7, 2000) (“[The act] states that the President ‘shall submit to Congress a statement of proposals to implement or respond to the Commission’s recommendations’ [T]o avoid any infringement on the President’s” Recommendations Clause prerogatives, “I construe section 4(a) not to extend to the submission of proposals or responses that the President finds it unnecessary or inexpedient to present.”); Presidential Statement on Signing the Pension Protection Act of 2006, 2006 PUB. PAPERS 1523, 1523-24 (Aug. 17, 2006) (“The executive branch shall construe [the Act] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President shall judge necessary and expedient.”); Presidential Statement on Signing the Omnibus Appropriations Act, 2009, 2009 PUB. PAPERS 216, 217 (March 11, 2009) (“[T]he Act . . . effectively purport[s] to require me and other executive officers to submit budget requests to the Congress in particular forms. Because the Constitution gives the President the discretion to recommend only ‘such Measures as he shall judge necessary and expedient’ . . . I shall treat these directions as precatory.”); Presidential Statement on Signing the DHS Stop Asset and Vehicle Excess Act, 2017 DAILY COMP. PRES. DOC. 380 (June 6, 2017) (“[The Act] purports to require the Under Secretary to recommend budget rescissions to the Congress My Administration . . . will respectfully treat the provision in a manner consistent with [the Recommendations Clause], which provides the President the exclusive authority to ‘recommend’ to the Congress spending ‘Measures’ in such amounts . . . ‘as he shall judge necessary and expedient.’”).

¹⁰⁸ U.S. CONST. art. II, § 3.

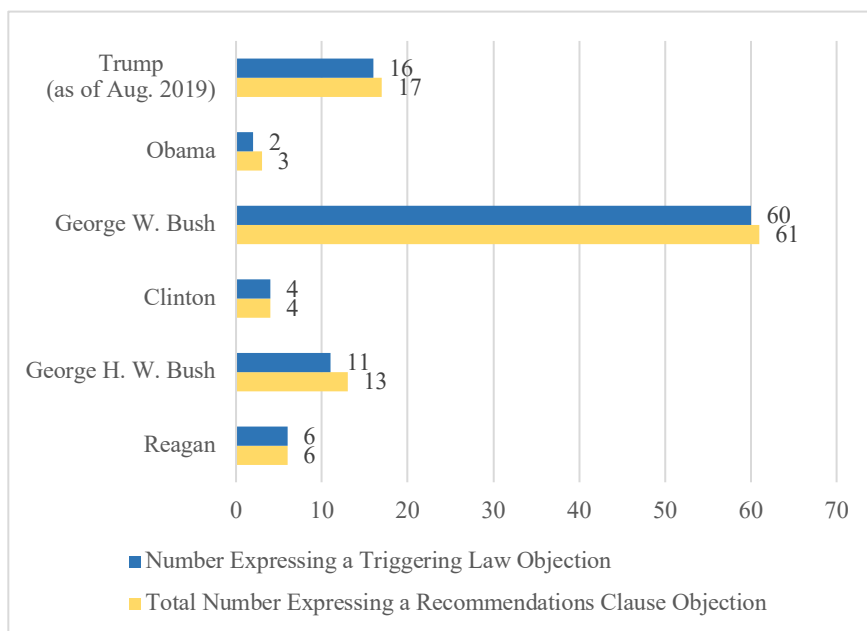
¹⁰⁹ 2016 OLC Opinion, *supra* note 55, at *8.

¹¹⁰ *Id.*

¹¹¹ Compare, e.g., Views Letter on S. 1591, *supra* note 58 (stating that a provision requiring a recommendation to Congress would “contravene the President’s constitutional authority” under the

Today, administrations seek to exercise negative power under the Recommendations Clause to escape triggering laws far more than muzzling laws. Indeed, according to the results of my search of the American Presidency Project archives, Reagan made six signing statements with Recommendations Clause objections, and each statement responded to a triggering law.¹¹² The same was true of eleven of the thirteen such George H. W. Bush signing statements (two objected to muzzling laws), all four of the four such Clinton signing statements, sixty of the sixty-one such George W. Bush signing statements (four objected to muzzling laws—some statements contained objections to both types of legislation), two of the three such Obama signing statements (one objected to a muzzling law), and sixteen of the seventeen such Trump signing statements (three objected to muzzling laws).¹¹³

Figure 2: Triggering Law Objections Compared to All Recommendations Clause Objections in Signing Statements



Recommendations Clause); *with* Presidential Statement on Signing the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, 2018 DAILY COMP. PRES. DOC. 726 (Oct. 24, 2018) (acknowledging that, consistent with the objectives of the Act, the administration will, “respectfully treat these provisions in a manner consistent with Article II, section 3 of the Constitution, which provides the President the exclusive authority to recommend to the Congress only ‘such Measures as he shall judge necessary and expedient.’”).

¹¹² See *supra* note 92.

¹¹³ *Id.*

III. THE LIMITS OF NEGATIVE POWER UNDER THE RECOMMENDATIONS CLAUSE

The frequency with which modern presidents use the Recommendations Clause as a license to reinterpret triggering laws duly passed by Congress demands scrutiny. In this Part, I argue that the scope of negative power under the Recommendations Clause is narrower than the interpretation advanced by recent administrations and does not reach triggering laws. First, I expand on the Medicare law example from the introduction to show how a successful exercise of negative executive power under the Recommendations Clause to escape a triggering law works. I then argue that such an exercise of negative power manifests incorrect constitutional interpretation. Specifically, I start with an analytical argument that the “necessary and expedient” modifier in the Recommendations Clause is best read to limit the scope of the President’s duty to recommend, not to entail exclusive discretion over the timing and topic of recommendations. I then contend that neither historical practice of administrations before the 1980s nor judicial precedent supports reading the Recommendations Clause to confer exclusive discretion either. I argue that Congress acts consistent with separation of powers principles and within its Article I power when it passes triggering laws. I warn that the prevailing view of negative power in the executive branch risks permitting a President to bottleneck information necessary to sound lawmaking under the auspices of the Recommendations Clause—a clause drafted to prevent just such an outcome. I conclude with suggestions on how Congress and future administrations should work to correct this false reading of the Recommendations Clause.¹¹⁴

A. *Example of Exercising Negative Power Under the Recommendations Clause*

In its 2016 opinion, the OLC argued that a statutory trigger for a presidential recommendation should be treated as optional because the President’s duty to recommend measures he judges “necessary and expedient” entails exclusive discretion over when to make recommendations.¹¹⁵ The law in question in that opinion addressed a situation where the portion of Medicare expenditures paid for with general revenues, as opposed to dedicated Medicare funding, surpasses forty-five percent two years in a row—

¹¹⁴ One caveat to all of this is that, even as administrations are wrong to interpret the Recommendations Clause as a source of discretion to treat triggering laws as optional, administrations should remain free to assert policy objections to them. For example, there is no constitutional impediment to an administration sending a DOJ views letter advocating against a legislative provision requiring an executive recommendation because it is unnecessary, or duplicative, or simply unwise.

¹¹⁵ 2016 OLC Opinion, *supra* note 55, at *9.

a situation it called a “medicare funding warning.”¹¹⁶ In the event of a Medicare funding warning, the law required the President to “submit to Congress, within the 15-day period beginning on the date of the budget submission to Congress . . . for the succeeding year, proposed legislation to respond to such warning.”¹¹⁷ President George W. Bush issued a signing statement declaring his Administration’s intent to construe this requirement “in a manner consistent with the President’s constitutional authority” under the Recommendations Clause,¹¹⁸ but he went on to comply with the requirement by submitting legislation to Congress in response to a Medicare funding warning.¹¹⁹

President Obama, however, did not submit legislation to Congress, despite annual Medicare funding warnings from 2007 to 2013.¹²⁰ It is arguable that President Obama nevertheless fulfilled his obligations under the statute

¹¹⁶ 31 U.S.C. § 1105(h)(1) (2018).

¹¹⁷ *Id.* (citing MMA, Pub. L. No. 108-173, §§ 801(a)(2), (c)(1), 117 Stat. 2066, 2357 (2003)). Interestingly, this provision was only added through the conference report—neither the House-passed nor the Senate-passed versions of the bill contained it. *Compare* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, H.R. 1 (2003) (as passed by the House, June 27, 2003) (lacking the requirement); *and id.* (as passed by the Senate, July 7, 2003) (same); *with* Pub. L. No. 108-173, § 801(a)(2), 117 Stat. 2066, 2357 (containing the requirement). This is technically a violation of conference committee rules; new matter may not be added to a bill. *See* RULES OF THE HOUSE OF REPRESENTATIVES, Rule XXII(9), H.R. DOC. 115-177, at 945 (2d Sess. 2019) (“[A] conference report may not include matter not committed to the conference committee by either House . . .”); STANDING RULES OF THE SENATE, Rule XXVIII(3)(a), S. DOC. NO. 113-18, at 40 (1st Sess. 2013) (“Conferees shall not insert in their report matter not committed to them by either House . . .”). However, this rule is only enforced by a member raising a point of order, and therefore it is commonly waived. *See* RULES OF THE HOUSE OF REPRESENTATIVES, Rule XXII(10)(a)(1), H.R. DOC. 115-177, at 948 (2d Sess. 2019) (“A Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter . . .”); STANDING RULES OF THE SENATE, Rule XXVIII(3)(c), S. DOC. NO. 113-18, at 40 (1st Sess. 2013) (“If new matter is inserted in the report, a point of order may be made against the conference report and it shall be disposed of . . .”); *see also* WALTER J. OLESZEK, CONG. RESEARCH SERV., 97-708, CONFERENCE COMMITTEE DELIBERATIONS 2 (2008) (“The point to remember is that these few rules [pertaining to conferencing] can be waived or not be invoked in either chamber.”).

¹¹⁸ Presidential Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 2003 PUB. PAPERS 1698, 1698 (Dec. 8, 2003).

¹¹⁹ *See* HINDA CHAIKIND, JIM HAHN, JENNIFER O’SULLIVAN & HENRY COHEN, CONG. RESEARCH SERV., RL34407, THE PRESIDENT’S PROPOSED LEGISLATIVE RESPONSE TO THE MEDICARE FUNDING WARNING 1 (2008); *see also* 2016 OLC Opinion, *supra* note 55, at *2 (stating that President Bush did submit legislation in compliance with the Medicare law).

¹²⁰ *See* PATRICIA A. DAVIS, TODD GARVEY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RS22796, MEDICARE TRIGGER 5 (2018) (“Although the Medicare trustees issued warnings each year from 2007 through 2013, no additional legislative proposals have been submitted to Congress pursuant to Section 802.”); *see also* THE BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, 2017 ANNUAL REPORT 185 (2017) (“The Trustees made determinations of excess general revenue Medicare funding in each of the reports for 2006 through 2013. Two consecutive such determinations trigger a Medicare funding warning. The 2007 through 2013 reports thus prompted Medicare funding warnings.”).

in 2010 through various proposals included in his budget submission to address the funding shortfall.¹²¹ Regardless, the Obama Administration took a different approach than the Bush Administration by not forming and recommending targeted legislation to Congress, and it felt free to take that approach based on discretion it read into the Recommendations Clause. President Obama's 2010 budget submission stated that, "[i]n accordance with the Recommendations Clause . . . the President considers this requirement [to recommend legislation in response to a Medicare funding warning] to be advisory and not binding."¹²² It repeated a version of this position in subsequent budget submissions.¹²³

This exercise of discretion was important to members of Congress. In a 2011 letter to the President demanding that he "submit a legislative proposal to Congress in response to the Medicare funding warning," forty-four senators stated flatly: "[y]our administration is currently in violation of [the Medicare law]."¹²⁴ Another 2011 letter from Representative Paul Ryan and Senator Jeff Sessions decried how the administration was "ignoring the law" by "not even acknowledg[ing] the existence of the Medicare funding warning" in its budget.¹²⁵ In 2013, eight senators sent another letter expressing concern

121 President Obama's first budget submission argued that the Administration had abided by the letter of the law because "the President has put forth Budget proposals that would save Medicare \$92.3 billion over five years and \$287.5 billion over ten years. They would also save about \$49.9 billion in 2014 and bring the share of Medicare funded by general revenues below 45 percent." 2010 BUDGET, *supra* note 10, at 197. The budget proposal also implicitly suggested that, even if these budget proposals did not amount to "legislation" under the statute, they did amount to recommended "measures" sufficient to discharge the President's duty under the Recommendations Clause. "The President believes that enactment of these submitted *measures* would address the warning conditions." *Id.* at 198 (emphasis added).

122 *Id.* at 197.

123 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2013, at 66 (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2014, at 57 (2013); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015, at 30 (2014); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2016, at 30 (2015). However, none of these budget submissions contained the language from the 2010 budget submission stating that the budget proposals taken as a whole "address the warning conditions" by "bring[ing] the share of Medicare funded by general revenues below 45 percent." 2010 BUDGET, *supra* note 10, at 197, 196.

124 Letter from U.S. Sens. to Barack Obama, U.S. Pres. (June 15, 2011), <https://www.budget.senate.gov/imo/media/doc/Zients%20Medicare%20trigger%20letter.pdf> [<https://perma.cc/X45M-ULUC>].

125 Letter from Paul Ryan, U.S. Rep., & Jeff Sessions, U.S. Sen., to Barack Obama, U.S. Pres. (June 14, 2011), <https://www.budget.senate.gov/imo/media/doc/Zients%20Medicare%20trigger%20letter.pdf> [<https://perma.cc/X45M-ULUC>]. Ironically, Senator Sessions would go on to become Attorney General of a DOJ that repeatedly advanced the interpretation of the Recommendations Clause he repudiated in this letter. *See e.g.*, U.S. Dep't of Justice, Office of Legislative Affairs, Views

that “[t]he administration has failed each of the last four years to respond to these funding warnings despite receiving several communications from Congress urging them to comply with this unambiguous legal requirement.”¹²⁶ The Obama Administration did not change positions in response to these letters.

Setting aside the political gamesmanship of this episode,¹²⁷ the upshot is that Congress passed legislation requiring the President to respond to a defined threat to Medicare’s solvency with a legislative recommendation, and the President relied on the Recommendations Clause to reinterpret that requirement. President Trump has followed suit following the first Medicare funding warning of his administration. Issued in 2018, the warning triggered the requirement to submit a responsive legislative recommendation to Congress within fifteen days after he submitted his Fiscal Year 2020 Budget.¹²⁸ President Trump submitted that budget on March 11, 2019, but did not submit any recommended legislation within fifteen days.¹²⁹ Instead, the budget stated that, “[i]n accordance with the Recommendations Clause of the

Letter on H.R. 654, the Pacific Northwest Earthquake Preparedness Act of 2017 (Mar. 24, 2017), <https://www.justice.gov/ola/page/file/969271/download> [<https://perma.cc/76TS-ER27>] (expressing the view of the Justice Department under Attorney General Sessions that “it would advise the Administration to treat as advisory and non-binding one provision in the bill that would require the Administrator of the Federal Emergency Management Agency (“FEMA”) and a presidentially appointed task force to recommend legislative measures to Congress in violation of the Recommendations Clause”).

¹²⁶ Letter from U.S. Senators to Jeffrey Zients, Acting Dir., Office of Mgmt. & Budget (Feb. 4, 2013), <https://www.budget.senate.gov/imo/media/doc/Zients%20Medicare%20trigger%20letter.pdf> [<https://perma.cc/XX97-3SG9>].

¹²⁷ The Medicare funding warning provision was likely included in the bill to mollify concerned Republicans during an intense battle to pass it—a battle in which President Bush was deeply involved. Thomas R. Oliver, Philip R. Lee & Helene L. Lipton, *A Political History of Medicare and Prescription Drug Coverage*, 82 MILBANK Q. 283, 329 (2004) (explaining the political dynamics of the fight to pass the bill and the ways “President Bush invested his political capital” to pass the Medicare bill). Once a Democrat won the presidency, Republican members of Congress used the provision to argue that President Obama was not serious about reigning in the deficit and securing the future of Medicare. *See, e.g.*, Letter from U.S. Sens. to Barack Obama, U.S. Pres., *supra* note 124; Letter from Paul Ryan, U.S. Rep., & Jeff Sessions, U.S. Sen., to Barack Obama, U.S. Pres., *supra* note 125.

¹²⁸ THE BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, 2018 ANNUAL REPORT 8 (2018) (“[A] Medicare funding warning is triggered and . . . the President must submit to Congress proposed legislation to respond to the warning within 15 days after the submission of the Fiscal Year 2020 Budget.”) (emphasis omitted).

¹²⁹ During the same period of time, however, the Trump Administration sent a report to Congress pursuant to another section of the Medicare law. *See* 165 CONG. REC. S1658 (daily ed. March 5, 2019) (Executive Communication 484) (providing notice to the Senate Committee on Finance of a “communication from the Assistant Secretary for Legislation, Department of Health and Human Services, transmitting, pursuant to law, a report entitled ‘Finalizing Medicare Regulations under Section 902 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 For Calendar Year 2018’”).

Constitution, and as the Executive Branch has noted in prior years, the Executive Branch considers [the requirement to recommend legislation in response to a Medicare funding warning] to be advisory.”¹³⁰

B. “*Necessary and Expedient*”

The 2016 OLC opinion justifying the Obama Administration’s reinterpretation of the Medicare law argued that, because the law “requires the President to recommend that Congress enact legislation . . . regardless of whether the President judges any such legislation necessary and expedient,” it “contravenes the Recommendations Clause and may be treated as advisory and non-binding.”¹³¹ President Obama, and later President Trump, did not deem it necessary and expedient to recommend discrete legislation responding to Medicare funding warnings, so they did not recommend any.¹³² Yet, the Framers made recommending legislation to Congress a presidential duty of constitutional dimension. It is implausible that, in the same breath, they meant to provide the President a tool to escape that duty. The better reading of the Recommendations Clause identifies “necessary and expedient” not as conferring discretion to ignore statutory demands for executive input, but rather simply as establishing a limit on the scope of the President’s positive duty to make recommendations.

Reading “necessary and expedient” as a limitation on the scope of the President’s duty makes analytical sense. According to J. Gregory Sidak, the only commentator to comprehensively study the Recommendations Clause, the Framers likely presumed that only “serious proposals advanced by the President” would provoke the type of congressional “umbrage or cavil” they sought to prevent.¹³³ Therefore, there was no need to make it the duty of the President to make recommendations beyond those he judged necessary and expedient because the President would not face the same political consequences for making minor recommendations. As the Congressional Research Service summarized in a brief on the Medicare law:

[T]he text of the [Recommendations Clause], read in conjunction with analogous case law, does not appear to support an interpretation that would prevent Congress from directing the President to submit legislative recommendations. The clause is perhaps most accurately characterized as establishing a *right* as opposed to a substantive source of authority—ensuring that the President may submit directly to Congress legislative proposals that

¹³⁰ 2020 BUDGET, *supra* note 10, at 23.

¹³¹ 2016 OLC Opinion, *supra* note 55, at *1, *15.

¹³² See *supra* Section III.A.

¹³³ Sidak, *supra* note 11, at 2082 (quotation omitted).

he views as “necessary and expedient.” Thus, this *right* would appear only to be infringed where Congress *prevents* the President from submitting his own legislative proposal or attempts to dictate the contents of a required legislative proposal. Under this reading, it is unlikely that Congress imposes an excessive burden on the President where it merely directs the President to submit a proposal, the contents of which remain within the President’s discretion, in response to a specific trigger.¹³⁴

As outlined in Section I.A, it is incorrect to say the Recommendations Clause merely establishes a right. It establishes a duty by its text: the President *shall* recommend measures. Functionally, however, given the discretion of the President to set the scope of that duty according to his belief about what is necessary and expedient, as discussed in Section I.B, the characterization of the duty to recommend as a right works to show that it is not a “substantive source of authority.”

The somewhat amorphous duty to recommend measures to Congress also requires the “necessary and expedient” limitation to make it administrable. Without further definition, a bare duty to “recommend measures” to Congress would be vague to the point of meaninglessness. It could be construed so narrowly as to require little more than stray utterances in the direction of Capitol Hill. On the other extreme, to the extent that failure to perform a constitutionally prescribed duty is an impeachable offense,¹³⁵ an ambitious Congress could find continuing grounds for removal in a limitless duty to recommend.

History also counsels against the interpretation of “necessary and expedient” advanced by recent administrations: that the Framers and early scholars regarded the Recommendations Clause as generally uncontroversial suggests it was not meant to confer exclusive powers on the President. Alexander Hamilton said of Article II, Section 3 in *Federalist* 77, “no objection has been made to this class of authorities; nor could they possibly admit of any.”¹³⁶ Indeed, there is no record of debate over the wisdom of the clause at the Constitutional Convention beyond the adoption, without objection, of Gouverneur Morris’s amendment to change “may” to “shall.”¹³⁷ As Justice Story put it:

[T]he 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

¹³⁴ DAVIS, GARVEY & DAVIS, *supra* note 120, at 6 (citations omitted).

¹³⁵ See Kesavan & Sidak, *supra* note 11, at 11 (“A President who flouted the executive duty of [the Recommendations Clause] would properly be subject to impeachment . . .”).

¹³⁶ THE FEDERALIST NO. 77, at 501 (Alexander Hamilton) (Modern Library ed., 1941).

¹³⁷ Kesavan & Sidak, *supra* note 11, at 5-6; 2 CONVENTION RECORDS, *supra* note 20, at 404-05.

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.¹³⁸

The Recommendations Clause's easy path was likely due at least in part to its familiarity: the New York Constitution of 1777 provided a model for the Recommendations Clause.¹³⁹ The New York Constitution declared "[t]hat 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."¹⁴⁰ The New York Constitution was ratified in the midst of a violent revolution to throw off the yoke of a tyrannical king, a fact certainly not lost on its drafters whose work was repeatedly delayed by movements to escape the fighting.¹⁴¹ Despite "the convention's desire to avoid . . . a governor with too much legislative power," it ratified the state Constitution, including its version of the Recommendations Clause, 31–1.¹⁴² And by the time of the next full state constitutional convention in 1821, the text was amended to expand the scope of the governor's duty: rather than limiting recommendations to matters that concern the state's "good government, welfare, and prosperity," the 1821 Constitution required the governor to recommend any matters he deemed "expedient."¹⁴³ Somewhere along the way, the clause would have faced at least

¹³⁸ 3 STORY, *supra* note 25, at 412. The state constitutions, and especially the New York Constitution, heavily influenced the Framers in Philadelphia. See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 128–29 (1913) (explaining that "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 . . . especially in connection with the executive.") It is likely no accident that Gouverneur Morris was the one to propose changing "may" to "shall" at the Philadelphia Convention, as he played a major role in framing the New York Constitution. PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 3 (2d ed. 2012).

¹³⁹ Kesavan & Sidak, *supra* note 11, at 9 (describing the Recommendations Clause in the New York Constitution of 1777 as a "precursor" to that in federal constitution based on their "mirrored" language).

¹⁴⁰ N.Y. CONST. of 1777, art. XIX. The Pennsylvania Constitution of 1776, too, at least gestured in the direction of a duty to recommend. It gave authority to a Council of Censors, created to preserve the constitution and ensure proper performance of the executive and legislature, "to recommend to the Legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the Constitution." PA. CONST. of 1776, § 47.

¹⁴¹ GALIE & BOPST, *supra* note 138, at 5.

¹⁴² *Id.* at 6, 9.

¹⁴³ N.Y. CONST. of 1821, art. III, § 4. It is possible that New York substituted in the "expedient" modifier simply to put it more in line with the language of the federal Constitution. However, it did not accept the additional "necessary" modifier included in the federal Constitution. To the extent that a matter can be expedient without being necessary, this change still expanded the governor's duty under the Recommendations Clause. See Kesavan & Sidak, *supra* note 11, at 61 ("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.").

some opposition if it was thought to concentrate executive power vis-à-vis the legislature.¹⁴⁴ Instead, it became the model for the Recommendations Clause included in the federal constitution, and the amendment to substitute “may” with “shall” was made by Gouverneur Morris, a New York delegate who was instrumental in drafting the state’s constitution.¹⁴⁵

Thoughts of executive tyranny and revolution likewise influenced debates around the framing and ratification of the federal constitution. To be sure, many of those who came to be known as federalists were primarily concerned about the accrual of too much power in the legislature, a sentiment which fueled their hard-fought victory to include the veto power in the Constitution.¹⁴⁶ But that fear was reactive, largely born of a perception that the Framers’ preoccupation with circumscribing executive power would have unintended consequences. For example, James Madison, writing just a few months after the Convention signed its proposed Constitution, warned in *Federalist 48* that “[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”¹⁴⁷ But his warning had roots in a perception that the Framers’ focus on containing executive power crowded out deliberation on the proper role of the legislature. The Framers, he wrote,

seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.”¹⁴⁸

It seems unlikely that delegates so concerned about executive power would have adopted the Recommendations Clause without recorded debate if it was understood to entail executive power broad enough to preclude Congress from using its legislative power to seek executive recommendations.¹⁴⁹

¹⁴⁴ Indeed, Alexander Hamilton played to New York’s revolutionary fear of monarchy to defend the veto and secure support for ratification in *Federalist 69*: “The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of [New York], of which the governor is a constituent part.” THE FEDERALIST NO. 69, at 447 (Alexander Hamilton) (Modern Library ed., 1941).

¹⁴⁵ GALIE & BOPST, *supra* note 138, at 3.

¹⁴⁶ See, e.g., THE FEDERALIST NO. 49, at 330 (Alexander Hamilton or James Madison) (Modern Library ed., 1941) (“We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); THE FEDERALIST NO. 73, at 476 (Alexander Hamilton) (Modern Library ed., 1941) (noting “[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments”).

¹⁴⁷ THE FEDERALIST NO. 48, at 322 (James Madison) (Modern Library ed., 1941).

¹⁴⁸ *Id.*

¹⁴⁹ Debate over the veto power, for example, was fierce. See Carl McGowan, *President’s Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 797-98

On its own terms, and in light of the history of the Recommendations Clause, the “necessary and expedient” modifier is properly read as a limitation on the scope of the President’s affirmative duty to recommend, not a grant of discretion precluding enforcement of triggering laws.

C. *Historical Practice*

The OLC relies heavily on historical practice to determine constitutional meaning with respect to presidential powers and duties.¹⁵⁰ Accordingly, it asserted in its 2016 opinion that “longstanding historical practice” supports its conclusion that triggering laws interfere with presidential discretion under the Recommendations Clause.¹⁵¹ But it relied only on historical practice since 1981, the year when the OLC first articulated this view of the Recommendations Clause.¹⁵² Importantly, between the 1940s, when Congress began passing triggering laws, and 1981, the OLC conceded it was “unaware of an instance . . . in which the Executive Branch lodged an objection to [a triggering law] on Recommendations Clause grounds.”¹⁵³

My research confirms that, for as long as the executive branch has objected to triggering laws on Recommendations Clause grounds, it has accepted them as valid for longer. In 1941, Congress passed a law providing that, if the President concludes an executive office should be eliminated, “he shall report his conclusions to Congress with such recommendations as he may deem proper.”¹⁵⁴ There is no evidence of executive branch objection to this law. While the “as he may deem proper” qualifier could be construed as allowing enough discretion to avoid conflict with the Recommendations Clause as interpreted by today’s OLC, recent administrations have objected to similarly relaxed formulations.¹⁵⁵ Regardless, a superficial search shows triggering laws were both common and signed without objection during this era. For example, the

(1986) (“[An] antifederalist author attacked the veto power as a violation of the separation of powers. ‘It is . . . a political error of the greatest magnitude,’ he wrote, ‘to allow the executive power a negative, or in fact any kind of control over the proceedings of the legislature.’” (citation omitted)).

¹⁵⁰ See, e.g., Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *7 (April 1, 2011) (explaining, in the national defense context, that “two centuries of practice . . . is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities”).

¹⁵¹ 2016 OLC Opinion, *supra* note 55, at *6, *8.

¹⁵² See *id.* at *13 (“Beginning in 1981 . . . the Executive began to object to [triggering laws].”).

¹⁵³ *Id.* at *13.

¹⁵⁴ The War Powers Act of 1941, Pub. L. No. 77-354, § 4, 55 Stat. 838, 839.

¹⁵⁵ See, e.g., U.S. Dep’t of Justice, Office of Legislative Affairs, Views Letter on S. 1494, the Intelligence Authorization Act for Fiscal Year 2010 (Mar. 15, 2010), <https://www.justice.gov/sites/default/files/ola/legacy/2010/04/05/031510-ltr-feinstein-bond-re-hr2701-s1494-intel-auth-bills.pdf> [<https://perma.cc/PGE2-G9JZ>] (objecting to a provision requiring the President to submit to Congress an “assessment of the need for *any* modification of this title” (emphasis added)).

President did not object to a 1946 triggering law requiring the Secretary of War and the Secretary of the Navy to “submit to the Congress a joint recommendation for revision of the Pay Readjustment Act of 1942.”¹⁵⁶ Interestingly, this law arguably went so far as to dictate the content of that recommendation, requiring that it contain specific “recommendations with respect to increases authorized for flying pay, parachute pay, glider pay, submarine pay, and similar special pay and allowances.”¹⁵⁷

A triggering law passed a few years later offers another useful, if somewhat byzantine, case study. The law, passed in 1952 without Recommendations Clause objection, was aimed at improving water research and development by, among other things, requiring the Secretary of the Interior to “make reports to the President and the Congress at the beginning of each regular session of the action taken or instituted by him under the provisions of this Act” and further requiring that “[t]he report shall include suitable recommendations for further legislation.”¹⁵⁸ That section was superseded in 1961 by another triggering law, also passed without presidential objection, which instead required that the Secretary “recommend to the Congress from time to time authorization for construction and operation, or for participation in the construction and operation, of a demonstration plant for any process which he determines” will advance the goal of producing water suitable for consumption, agriculture, and research.¹⁵⁹ That law was updated by a 1967 law replacing the language “demonstration” plant with “prototype” plant,¹⁶⁰ which in turn was superseded by a 1971 law, also passed without Recommendations Clause objection, instead directing the Secretary to “report to the President and to the Congress . . . his recommendation as to the best opportunity for the early construction of a large-scale prototype desalting plant.”¹⁶¹

The 1971 law was repealed and replaced by a 1978 law that excluded the triggering provision,¹⁶² but the Water Desalination Act of 1996 revived it, requiring the Secretary to “recommend to Congress desalination demonstration projects or full-scale desalination projects.”¹⁶³ President Clinton did not issue a signing statement on that legislation, nor does he appear to have objected to it in other writings or speeches. In 2016, Congress

¹⁵⁶ First Supplemental Surplus Appropriation Rescission Act of 1946, Pub. L. No. 79-301, 60 Stat. 6, 20-21.

¹⁵⁷ *Id.* at 21.

¹⁵⁸ Act of July 3, 1952, Pub. L. No. 82-448, § 6, 66 Stat. 328, 329.

¹⁵⁹ Act of Sept. 22, 1961, Pub. L. No. 87-295, § 2(c), 75 Stat. 628, 628.

¹⁶⁰ Act of June 24, 1967, Pub. L. No. 90-30, 81 Stat. 78, 77.

¹⁶¹ Act of July 29, 1971, Pub. L. No. 92-60, § 4(b), 85 Stat. 159, 160.

¹⁶² Water Research and Development Act of 1978, Pub. L. No. 95-467, §§ 201, 410(a), 92 Stat. 1305, 1310, 1316.

¹⁶³ Water Desalination Act of 1996, Pub. L. No. 104-298, § 3(b), 110 Stat. 3622, 3623.

passed a bill reauthorizing that 1996 law.¹⁶⁴ While it made a number of amendments to the law's text, it left the triggering provision intact.¹⁶⁵ President Obama issued a signing statement on the law, but it made no mention of the Recommendations Clause.¹⁶⁶

The bottom line is that Congress passed a triggering law in 1952 and passed new laws recreating that triggering law in different forms five times across six decades and as many presidents, but nowhere along the way did the executive branch raise Recommendations Clause concerns. In conjunction with the fact that the executive branch did not publicly raise such concerns about any of the other triggering laws I identified that were passed before the 1980s,¹⁶⁷ this is inconsistent with the OLC's assertion that objecting to triggering laws on Recommendations Clause grounds is the executive branch's longstanding historical practice. Historical practice, at least before 1981, instead supports reading triggering laws as consistent with any discretion committed to the President under the Recommendations Clause.

¹⁶⁴ The Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 3801, 130 Stat. 1628, 1846-47 (2016).

¹⁶⁵ *Id.* The current U.S. Code contains the full text of the triggering provision from the 1996 law verbatim. 42 U.S.C. § 10301 note (2018).

¹⁶⁶ *See* Presidential Statement on Signing the Water Infrastructure Improvements for the Nation Act, 2016 DAILY COMP. PRES. DOC. 852 (Dec. 16, 2016).

¹⁶⁷ *See, e.g.*, Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 513(b), 88 Stat. 829, 897 (requiring the Secretary of Labor to submit a report to Congress containing "recommendations" from an advisory council created by the law and "recommendations for further legislation . . . as he may find advisable"); Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 502(c), 88 Stat. 297, 321 (requiring the Director of the Office of Management and Budget to submit "conclusions and recommendations" to Congress based on a joint study conducted with the Congressional Budget Office); Egg Products Inspection Act, Pub. L. No. 91-597, § 26, 84 Stat. 1620, 1634 (1970) (requiring the Secretary of Agriculture to "submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture and Forestry of the Senate a comprehensive and detailed written report" that includes "recommendations for legislation" to improve certain programs); Vocational Education Amendments of 1968, Pub. L. No. 90-576, § 306, 82 Stat. 1064, 1097 (requiring the Commissioner of Education to "submit to the Congress a report on the results of [a study required under the law] and any recommendations for legislation which would facilitate consolidation of education programs"); Act of Sept. 20, 1966, Pub. L. No. 89-593, § 5(d), 80 Stat. 815, 820 (requiring that commissions consisting of members appointed by the President transmit a report to Congress including "specific recommendations" pertaining to certain provisions of the law); United States Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, § 603, 62 Stat. 6, 11 (requiring that commissions consisting of members appointed by the President transmit to Congress a report "including appraisals, where feasible, as to the effectiveness of [certain] programs, and such recommendations as shall have been made by the Commissions to the Secretary for effectuating the purposes and objectives of this Act and the action taken to carry out such recommendations").

D. *Judicial Precedent*

To reconcile the conflicting pre- and post-1981 executive branch positions on triggering laws, it is useful to look to the only branch without an institutional interest in the scope of the Recommendations Clause. The judiciary has not weighed in on this scope question directly. However, a few opinions do bear indirectly on the question, and they do not support reading the Clause as a grant of broad discretion to the President.

The most direct judicial consideration of the question came in *Judicial Watch, Inc. v. National Emergency Policy Development Group*, which involved a dispute over the publication of information related to a presidential task force on energy policy.¹⁶⁸ In that case, the D.C. District Court described the “stunning” implications of “the position taken by the government . . . that any infringement on any enumerated power in Article II is necessarily a *per se* violation of the Constitution.”¹⁶⁹ It noted that “the Supreme Court has never agreed” with that position, and declared it “untenable” that “[a]ny action by Congress or the Judiciary that intrudes on the president’s ability to recommend legislation to Congress or get advice from Cabinet members *in any way* would necessarily violate the Constitution.”¹⁷⁰ “Clearly,” the court concluded, “this is not the law.”¹⁷¹

The D.C. Circuit implied the same in *National Treasury Employees Union v. Nixon*.¹⁷² That case concerned a law that established a commission to make recommendations regarding the compensation of certain government officials and required the President to adjust pay accordingly or else submit alternative recommendations to Congress.¹⁷³ Although without reference to the Recommendations Clause, the court held that “the President has a constitutional duty forthwith to grant . . . the federal pay increase mandated by the Congress.”¹⁷⁴ Specifically, it found:

[T]he President failed to submit an alternative plan to Congress[,] . . . a plan *he was required to submit* if he desired to change or delay the otherwise required pay adjustments . . . After the President received the necessary

¹⁶⁸ 219 F. Supp. 2d 20, 24 (D.D.C. 2002).

¹⁶⁹ *Id.* at 49.

¹⁷⁰ *Id.* at 49-50.

¹⁷¹ *Id.* at 50.

¹⁷² 492 F.2d 587, 601 (D.C. Cir. 1974).

¹⁷³ *Id.* (“[O]nce the necessary comparability studies are completed and a certain report, findings and recommendations are sent to the President, the President has discretion not to adjust pay in accord with the dictates of Section 5305(a)(2) *only* if he has timely submitted an alternative plan to Congress.”) (emphasis added).

¹⁷⁴ *Id.* at 616.

comparability studies [from the commission], his obligation to adjust pay under the [law] was mandatory, *involving no discretion*.¹⁷⁵

Thus, the court did not see the Recommendations Clause as an impediment to enforcing a law requiring the President to submit a recommendation to Congress or else make pay adjustments.

The D.C. District and Circuit courts also indirectly addressed the question in *Association of American Physicians and Surgeons v. Clinton*.¹⁷⁶ That case involved a dispute over whether a presidential task force and working group should be subject to a law requiring meetings of “advisory committees” to be public, and if so whether the law unconstitutionally encroaches on the President’s power under the Recommendations Clause.¹⁷⁷ The district court decided both questions in the affirmative, explaining that because the law “open[s] the advice and recommendation sessions of the advisory committee to the public, they would affect the candor with which the committee’s members deliberate their findings and proposals. This prevents the President from receiving the advice he needs to recommend legislation to the Congress.”¹⁷⁸

The D.C. Circuit reversed on grounds that the task force and working group were not in fact “advisory committees,” but it also provided detailed analysis on the Recommendations Clause question.¹⁷⁹ It paraphrased the government’s argument that “this clause gives the President the sole discretion to decide what measures to propose to Congress, and it leaves no room for congressional interference”¹⁸⁰ before finding that “[t]he government’s focus on the Recommendation Clause seems somewhat artificial.”¹⁸¹ The court objected to the government’s expansive reading of the clause because “[d]iscussions on policy . . . to some extent always implicate proposed legislation.”¹⁸² It held that, while the requirement to make task force

¹⁷⁵ *Id.* at 601 (emphasis added).

¹⁷⁶ 813 F. Supp. 82, 84 (D.D.C.), *rev’d*, 997 F.2d 898, 900 (D.C. Cir. 1993).

¹⁷⁷ *Ass’n of Am. Physicians and Surgeons*, 813 F. Supp. 82, at 84.

¹⁷⁸ *Id.* at 93.

¹⁷⁹ *Ass’n of Am. Physicians and Surgeons*, 997 F.2d at 900.

¹⁸⁰ *Id.* at 906.

¹⁸¹ *Id.* at 908.

¹⁸² *Id.* The court expanded:

Whenever an executive branch group considers policy initiatives, it discusses interchangeably new legislation, executive orders, or other administrative directives. Thus, virtually anytime an advisory group meets to discuss a problem, it will implicate the Recommendation Clause, from which all executive branch authority to recommend legislation derives. Accordingly, if the application of [the law requiring public meetings] to groups advising the President or anyone else in the executive branch were constitutionally problematic, insofar as those groups were advising on proposed legislation, [the law] would be problematic with regard to virtually all policy

and working group meetings public infringed on executive privilege over confidential communications, it did not impede his ability to recommend legislation.¹⁸³ Thus, while this case did not involve a triggering law, the Court's reasoning does suggest a preference for a narrow interpretation of executive discretion under the Recommendations Clause.

E. *Separation of Powers and the Exclusivity of Discretion to Recommend*

Separation of powers principles also counsel against reading the duty to recommend as conferring exclusive discretion to the President over the timing and topic of recommendations. In his canonical concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson laid out three situations in which a President exercises power. In the first, he “acts pursuant to an express or implied authorization of Congress” and his authority is thus “at its maximum.”¹⁸⁴ In the second, he “acts in absence of either a congressional grant or denial of authority” and “there is a zone of twilight in which he and Congress may have concurrent authority,” so “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”¹⁸⁵ In the third, he “takes measures incompatible with the expressed or implied will of Congress,” and thus his “power is at its lowest ebb.”¹⁸⁶

The President operates in the third situation when he ignores a duly passed triggering law. In this situation, according to Justice Jackson, “[c]ourts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁸⁷ Indeed, to support this proposition Justice Jackson cited *Humphrey's Executor v. United States*, in which the Court held that the President acted outside his power in firing a Federal Trade Commission commissioner in contravention of a statute regulating commissioner removal.¹⁸⁸ The Court in *Humphrey's Executor* found it “plain under the Constitution that illimitable power of removal is not possessed by the President”¹⁸⁹

advice. Under that reasoning [the law] would be constitutionally suspect on its face—an argument the government declined to make.

Id.

¹⁸³ *Id.* at 909.

¹⁸⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁸⁵ *Id.* at 637.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 637-38.

¹⁸⁸ *Id.* at 637-38 & n.4.

¹⁸⁹ 295 U.S. 602, 629 (1935).

While a vast and interesting body of scholarship has developed around analyzing the *Youngstown* framework,¹⁹⁰ it suffices for now to note that the OLC's expansive view of negative power under the Recommendations Clause is inconsistent with the separation-of-powers principles the framework expresses. The OLC argued bluntly in its 2016 opinion that all Article II powers are exclusive and therefore simply untouchable by Congress,¹⁹¹ but the *Youngstown* framework calls for cautious scrutiny to protect the "equilibrium established by our constitutional system" when the executive acts contrary to the expressed will of Congress¹⁹²—like when he ignores a duly passed triggering law.

1. Proper Congressional Action

Cautious scrutiny is thus required where a President seeks to escape a triggering law. Under the *Youngstown* framework, the constitutionality of this action hinges on whether "it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject."¹⁹³ The Supreme Court, while recognizing that the contours of executive, legislative, and judicial power are not "neatly defined,"¹⁹⁴ has created a two-prong test to determine whether an act of Congress impermissibly encroaches on executive power. First, it requires a threshold inquiry into "the extent to which [the act of Congress] prevents the Executive Branch from accomplishing its constitutionally assigned functions."¹⁹⁵ Where the "potential for disruption" of executive functions is present, the second prong of the test balances "whether that impact is

¹⁹⁰ See, e.g., Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 95 (2002) (arguing that the *Youngstown* framework "places too much reliance on courts to police executive action by locating ill-defined boundaries between categories that turn on Congress's implied will; and too little reliance on courts to identify and limit presidential powers based on inferences from the text and structure of the Constitution"); Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) (asserting that the *Youngstown* framework is an "empty vessel"); Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 339 (2010) (contending that the *Youngstown* framework affects how the three branches act in relation to each other, and "tends to disserve the institution it is thought to benefit: Congress").

¹⁹¹ 2016 OLC Opinion, *supra* note 55, at *9 (arguing that "where Article II assigns a duty to the President, the President alone has discretion to execute that duty, and Congress may not command the President to exercise that discretion in a particular circumstance").

¹⁹² 343 U.S. at 638.

¹⁹³ *Id.* at 640.

¹⁹⁴ *Clinton v. Jones*, 520 U.S. 681, 701 (1997).

¹⁹⁵ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977); see also *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citing *Nixon*, 433 U.S. at 443, to find that the independent counsel provision of the Ethics in Government Act of 1978 does not "disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions").

justified by an overriding need to promote objectives within the constitutional authority of Congress.”¹⁹⁶

While the fight over the scope of the Recommendations Clause occurs mostly on political landscape outside of the courtroom, the Supreme Court’s doctrinal test remains a useful guidepost because it instantiates founding principles relevant to interbranch political disputes.¹⁹⁷ After invoking Montesquieu’s warning that “[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” James Madison famously wrote in *Federalist 47* that Montesquieu “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.”¹⁹⁸ Instead, Madison argued that a problem arises only “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department,” such as if “the entire legislative body . . . possessed . . . the supreme executive authority.”¹⁹⁹ Justice Story agreed, contending that the separation of powers was “not meant to affirm[] that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree.”²⁰⁰ The Supreme Court’s separation-of-powers test adopted this “more pragmatic, flexible”²⁰¹ approach to account for the messy reality of governing with three coequal branches that Justice Jackson described in his *Youngstown* concurrence:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power to better secure liberty, it also contemplates that

¹⁹⁶ *Nixon*, 433 U.S. at 443.

¹⁹⁷ In 2015, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, the Supreme Court applied a variation of this test that only asked whether a President acting against the expressed will of Congress asserted power that was “both exclusive and conclusive on the issue.” 135 S. Ct. 2076, 2084 (2015) (internal quotations omitted). But, unlike the presidential power in question in that case—the power to recognize foreign sovereigns—even the 2016 OLC opinion conceded that the power to recommend measures to Congress is inherently not exclusive because anyone can make legislative recommendations to Congress. See 2016 OLC Opinion, *supra* note 55, at *9 (“[T]he ability to make recommendations to Congress—unlike the authority to nominate officers, receive ambassadors, or enforce the laws—is widely shared with other persons.”). Thus, the balancing framework better applies the separation-of-powers principles represented in the *Youngstown* framework to the situation in question here, where a triggering law may be thought to “have the potential for disruption” of the president’s recommending function, even as that function is inherently not exclusive. See *infra* subsection III.E.2 for more on the nonexclusivity of the Recommendations Clause.

¹⁹⁸ THE FEDERALIST NO. 47, at 314 (James Madison) (Modern Library ed., 1941).

¹⁹⁹ *Id.* at 314-15.

²⁰⁰ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 524, at 8 (Boston, Hilliard, Gray & Co. 1833).

²⁰¹ *Nixon*, 433 U.S. at 442.

practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness, but interdependence; autonomy, but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.²⁰²

Under my preferred interpretation of “necessary and expedient” as a limitation on the scope of the President’s duty to make recommendations, triggering laws that do no more than require executive recommendations, without dictating their contents, do not impair any executive function. Recall the Medicare law that required the President to recommend legislation to “respond” to a Medicare funding warning.²⁰³ That law intentionally did not dictate the content of that recommendation: the next paragraph of the bill merely expressed the “sense of Congress” that the recommended legislation “*should* be designed to eliminate excess general revenue Medicare funding.”²⁰⁴ A triggering law that merely requires the President to “respond” with a legislative recommendation, the contents of which remain within his discretion, does not impair his ability to make judgements about necessary and expedient legislation for recommendation to Congress.²⁰⁵ There is no “potential for disruption” of executive functions under the first prong of the Supreme Court’s test.

Even accepting the government’s argument that “necessary and expedient” confers discretion over when to make recommendations, the objective of triggering laws—to guarantee Congress access to the uniquely informed policy recommendations of the executive—should in most cases be seen as “overriding,” justifying the intrusion on that discretion. Article I of the Constitution vests “All legislative Powers herein granted” in Congress and empowers it to make “all Laws which shall be necessary and proper for carrying into Execution” the powers it enumerates.²⁰⁶ Meanwhile, the Recommendations Clause recognizes the President’s superior access to policy information and seeks to ensure that information flows to Congress to aid it in exercising the legislative power.²⁰⁷ Continuing the example of the Medicare

²⁰² 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

²⁰³ 31 U.S.C. § 1105(h)(1) (2018) (citing MMA, Pub. L. No. 108-173, § 801(a)(2), 117 Stat. 2066, 2537).

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ Scholars and the courts have applied separation of powers principles to interpret other presidential powers and responsibilities, like the President’s foundational duty to “take care that the laws be faithfully executed,” to imply limited negative power. U.S. CONST. art. II, § 3; *see also* *Kendall ex rel Stokes v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”); Kent, Leib & Shugerman, *supra* note 44, at 2182 (“[T]he language of faithful execution is for the most part a language of limitation, subordination, and proscription, not a language of empowerment and permission.”).

²⁰⁶ U.S. CONST. art. I, §§ 1, 8.

²⁰⁷ *See supra* Section I.A.

law, it would substantially undermine Congress's ability to make necessary and proper health and budget policy if it could not require the input of the President, who oversees the Department of Health and Human Services, and specifically the Centers for Medicare and Medicaid Services. Balanced against the relatively minor intrusion on the President's discretion to decide what is "necessary and expedient"—after all, every presidential budget since the funding warning law passed has recognized the importance of maintaining Medicare solvency²⁰⁸—Congress's need to inform itself is "overriding."

The open-ended type of recommendation required by the Medicare law is not unique. Recent administrations have claimed discretion under the Recommendations Clause to avoid this type of triggering law in numerous legislative contexts. The Trump Administration, for example, has asserted discretion over whether to make statutorily required, but open-ended, recommendations on patent policy,²⁰⁹ intelligence gathering,²¹⁰ and many other areas.²¹¹ It is possible to imagine a triggering law that requires too much—say, a presidential recommendation every week—and thus impermissibly frustrates the President's ability to craft recommendations the same way muzzling laws do, but I found no examples of such legislation. Some of the laws to which the Trump Administration and other administrations have objected also at least arguably dictate the position of the administration,²¹² which *would* impede the President's discretion to judge what is necessary and expedient and would also subvert the purpose of the Recommendations Clause to guarantee that Congress receives the benefit of the *President's* opinions.²¹³ But with respect to triggering laws in which

²⁰⁸ See *supra* note 123.

²⁰⁹ Presidential Statement on Signing the Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018, 2018 DAILY COMP. PRES. DOC. 748 (Oct. 31, 2018).

²¹⁰ U.S. Dep't of Justice, Office of Legislative Affairs, Views Letter on S. 3153, the Matthew Pollard Intelligence Authorization Act for Fiscal Years 2018 and 2019 (Sept. 17, 2018), <https://www.justice.gov/ola/page/file/1094616/download> [<https://perma.cc/A7ZZ-8DHQ>].

²¹¹ See, e.g., Presidential Statement on Signing The First Step Act of 2018, 2018 DAILY COMP. PRES. DOC. 860 (Dec. 21, 2018) (regarding criminal justice policy); Presidential Statement on Signing the Frank LoBiondo Coast Guard Authorization Act of 2018, 2018 DAILY COMP. PRES. DOC. 832 (Dec. 4, 2018) (regarding Coast Guard policies); Presidential Statement on Signing the Securely Expediting Clearances Through Reporting Transparency Act of 2018, 2018 DAILY COMP. PRES. DOC. 362 (May 22, 2018) (regarding security clearance policies).

²¹² See, e.g., Presidential Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 DAILY COMP. PRES. DOC. 533 (Sept. 28, 2018) ("[The bill] purport[s] to dictate the position of the United States My Administration will treat these provisions consistent with the President's exclusive constitutional authorities . . . to determine the terms upon which recognition is given to foreign sovereigns, to receive foreign representatives, and to conduct the Nation's diplomacy.").

²¹³ It would also potentially hamper the public's ability to hold the President politically accountable. See Sidak, *supra* note 11, at 2092 ("The President's constitutional duty to recommend measures to Congress imposes a degree of accountability . . . on the President Foolish laws

Congress does no more than require executive input on a specific policy, the balance of interests tips in favor of Congress's ability to inform itself in executing its Article I legislative powers—the interest the Framers had in mind when they wrote the Recommendations Clause.²¹⁴

Muzzling laws provide a useful point of comparison as a type of law that does appear to encroach on presidential powers implied by the duty to recommend. In his comprehensive exploration of the issue, Sidak argued that the Recommendation Clause must be “an authorization by law for the President . . . to make such expenditures or incur such obligations as are necessary to perform the constitutional duty of providing information and recommendations to Congress,” or else “Congress could nullify the recommendation clause through an ordinary statute.”²¹⁵ He concluded that “the structure of the Constitution does not allow the appropriations power . . . to override the President's constitutional duty to recommend policy measures to Congress. Otherwise, Congress could prevent the President from fulfilling *any* of his duties.”²¹⁶ By contrast, nothing about triggering laws enables Congress to “nullify” the Recommendations Clause or “override” the President's constitutional duty to recommend policy measures to Congress. They merely dictate a time and topic on which the President must exercise that duty.

2. Other Exclusive Powers

The 2016 OLC opinion also argues that, because other presidential duties and powers enumerated in Article II have been read as exclusive even though the text does not explicitly say as much, the duty to recommend should be read the same way.²¹⁷ The OLC points to the fact that certain constitutionally assigned responsibilities have been interpreted as exclusive, including that the President “shall nominate . . . Officers of the United

proposed by the President can be identified as such and dragged before the electorate by his adversaries.”). Even in this situation, however, the proper administration response would be to assert discretion over the content of the recommendation, but still treat the recommendation itself as mandatory.

²¹⁴ See *supra* Section I.A; see also Killenbeck, *supra* note 11, at 286 (“There is little doubt that the framers considered it essential for the President to provide a critical mass of information that would serve as an important element of the legislative process.”); William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 818 (“[T]he Recommendations Clause, unlike the text of the Take Care Clause, sets forth a congressional role: Congress is designated to receive the President's recommendations. This would suggest, if anything, that Congress has a particularly strong justification for wanting to understand the bases of the President's recommendation to it . . .”).

²¹⁵ Sidak, *supra* note 11, at 2100-01.

²¹⁶ *Id.* at 2101-02.

²¹⁷ 2016 OLC Opinion, *supra* note 55, at *9.

States,”²¹⁸ that he “shall receive Ambassadors and other public Ministers,”²¹⁹ and that the executive branch holds prosecutorial power through the President’s charge to “take Care that the Laws be faithfully executed.”²²⁰ On this basis, the OLC asserts the broad proposition that “where Article II assigns a duty to the President, the President alone has discretion to execute that duty”²²¹

The OLC concedes that “the ability to make recommendations to Congress—unlike the authority to nominate officers, receive ambassadors, or enforce the laws—is widely shared with other persons,” but dismisses the distinction on grounds that the power to recommend is “unique” and “consequential.”²²² But the distinction carries an important difference. Anyone can make recommendations to Congress without having an impact on the President’s ability to recommend. By contrast, the discretion to appoint a government official must be held by the President alone to avoid overlapping appointments and unclear lines of authority. Likewise, diplomacy and law enforcement would be frustrated if other branches had discretion to conduct international negotiations or to prosecute breaches of the law. The nature of these duties demands exclusive authority to carry them out, but, as the OLC concedes, the duty to recommend is of a different nature. Nothing about Congress requiring the President to provide a recommendation impedes the President’s ability to recommend measures to Congress.

Further, a recommendation’s effect depends wholly on the reaction of the listener. When the President appoints someone, she assumes a position together with its duties and powers; when the President receives an ambassador, a diplomatic interchange occurs; when the Department of Justice initiates a prosecution, a particular set of procedures follows. By contrast, when the President makes a recommendation to Congress, nothing else necessarily happens—triggering laws simply do not implicate the President’s ability to carry out his constitutionally assigned functions.²²³ It is not triggering laws that threaten the “equilibrium established by our constitutional system,” but rather presidents operating at the “lowest ebb” of their power claiming discretion to ignore them.²²⁴

²¹⁸ U.S. CONST. art. II, § 2, cl. 2.

²¹⁹ U.S. CONST. art II, § 3.

²²⁰ *Id.*

²²¹ 2016 OLC Opinion, *supra* note 55, at *9.

²²² *Id.*

²²³ *See Sidak, supra* note 11, at 2082 (“Congress has no obligation under the recommendation clause to act upon the President’s recommendations.”).

²²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

F. Implications

If the expansive view of negative power under the Recommendations Clause advanced by recent administrations prevails, presidents may be able to bottleneck important policy information and shield their administrations from oversight. There is evidence that both of these things are already happening.

With respect to policy information, for example, the Trump Administration sent a DOJ views letter objecting to a legislative provision that required the Secretary of State to submit to Congress “[r]ecommendations for any legislative authorities required to implement” a government-wide reorganization plan.²²⁵ It objected on grounds that the provision “amount[ed] to [a] requirement[] that the Secretary, an executive branch official under plenary presidential supervision, submit recommendations for legislative measures to the Congress” in violation of the President’s “exclusive authority” under the Recommendations Clause.²²⁶ The Administration’s suggested remedy was to make the recommendations “precatory” instead of mandatory.²²⁷ It is not clear that the President has authority to insist that he get to pre-approve the statutorily required recommendations of subordinates,²²⁸ but even accepting that argument, the remedy should not be to declare the requirement to recommend precatory, but rather to interpret it consistent with the President’s power to clear the recommendation first. That is, even if the President can funnel all executive branch recommendations through his office, the Recommendations Clause does not permit him to refuse to transmit those recommendations to Congress.

There is also evidence that administrations are willing to use the Recommendations Clause to shield themselves from oversight. For example, Vice President Dick Cheney, in litigation with the General Accounting Office, argued on Recommendations Clause grounds that he should not have to produce documents related to an energy task force he led.²²⁹ Because forming legislative recommendations was among the task force’s duties and “[b]ecause Congress lacks any power whatsoever to legislate with respect to the exclusive Presidential prerogatives reflected in the Opinions and Recommendations Clause,” he claimed that “Congress cannot investigate—nor can it delegate to the Comptroller General the power to investigate [the

²²⁵ See Views Letter on S. 1631, *supra* note 62 (internal quotation omitted).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Krent, *supra* note 11, at 544 (arguing that “[t]he unitary executive principle does not . . . demand that the power to make legislative proposals be exclusive” and that “[s]cant precedent supports President Bush’s stance that Congress cannot require agency heads and others to make recommendations for legislation”).

²²⁹ *Walker v. Cheney*, 230 F. Supp. 2d. 51, 59 (D.D.C. 2002).

task force].”²³⁰ The notion that presidential powers inherently prevent congressional oversight is a stretch—as one commentator put it, the argument “makes sense only if one discounts the need for congressional investigations in the first place.”²³¹ Still, it is important to note that the Vice President saw the Recommendations Clause as a potential shield to oversight at the highest level. This case was decided on other grounds, so it remains an open question whether executive branch officials will seek to revive the argument.²³² The Trump Administration is the subject of a number of investigations where the issue could perhaps arise.²³³ Indeed, it may already have arisen, to the extent that haggling over documents sought in connection with oversight happens behind closed doors.

There are other ways one could imagine an administration stretching the Recommendations Clause to prevent the disclosure of information to Congress, too. For example, were an administration to interpret information gathered by executive agencies in the execution of the law that goes into forming legislative recommendations as encompassed by the term “measures” in the Recommendations Clause, that would potentially threaten the execution of the large number of laws that include agency reporting requirements.²³⁴

IV. REMEDIES

I have shown that Presidents commonly seek to change pending legislation and reinterpret laws based on what I argue is a false reading of the Recommendations Clause. If I am right that this exercise of negative executive power represents an unconstitutional infringement on the legitimate legislative activities of Congress, the natural question remains what options exist to cure the problem. This Section identifies three such options: executive reinterpretation, judicial review, and congressional action.

²³⁰ *Id.* at 59-60.

²³¹ See Marshall, *supra* note 214, at 819 (“The problem with any argument for any categorical exclusion of executive action from investigative purview is that it misses this essential point of Congress’s having investigative power in the first place.”).

²³² *But see* Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 445 (1977) (finding in the oversight context that “there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch” and that “[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy”).

²³³ See *Trump Team’s Conflicts and Scandals: An Interactive Guide*, BLOOMBERG (Mar. 14, 2019) <https://www.bloomberg.com/graphics/trump-administration-conflicts/> [<https://perma.cc/E343-C89U>] (listing ongoing investigations into the Trump Administration and close associates).

²³⁴ See Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 298 (“These requirements are extremely common—and often unnoticed—elements of modern federal legislation. Having created a complex network of federal executive agencies, Congress has struggled with how best to gather information about the activities of [federal agencies] . . . Congress has increasingly relied on reporting requirements as its favored monitoring device.”).

A. Executive Reinterpretation

The easiest and most obvious option is for a future administration to formally supersede the incorrect interpretations of the Recommendations Clause advanced by recent administrations with one that recognizes the constitutional legitimacy of triggering laws. Precedent exists for the OLC to change its position on separation of powers issues to better align itself with prevailing legal thought.²³⁵ The discrepancy between different administrations in the frequency with which they object to triggering laws also suggests that a President sensitive to executive overreach could successfully influence executive branch policy regarding the exercise of power under the Recommendations Clause. For example, President George W. Bush issued sixty signing statements objecting to triggering laws on Recommendations Clause grounds, while President Obama issued just two.²³⁶ If a future President looks negatively on the record of the Trump Administration and its prolific use of signing statements to object to triggering laws, he or she could likely succeed in changing the practice.

B. Judicial Review

Another somewhat more complicated, but not infeasible, avenue for relief is the courts. While justiciability issues would pose obstacles to challenging a President's refusal to comply with a triggering law in court,²³⁷ *Zivotofsky* ex rel. *Zivotofsky v. Clinton* demonstrates that interbranch political disputes can be susceptible to judicial review.²³⁸ In that case, the Supreme Court overruled the lower court's determination that it could not review the executive branch's refusal to follow a law passed by Congress, declaring that "[t]he courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution."²³⁹

Standing requirements also would not pose an insurmountable barrier to judicial relief for members of Congress or even private individuals,

²³⁵ See, e.g., The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 124 (1996) (superseding a previous OLC memo from 1989 written under a different president and outlining somewhat different arguments about the separation of powers on grounds that "subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues").

²³⁶ See *supra* Section II.C.2.

²³⁷ See *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

²³⁸ 566 U.S. 189 (2012).

²³⁹ *Id.* at 191.

depending on the wording of the triggering law in question.²⁴⁰ Members of Congress have been found to have Article III standing in numerous contexts.²⁴¹ Recently, the D.C. District Court found in *Blumenthal v. Trump* that 201 members of Congress had standing to sue President Trump for alleged violations of the Foreign Emoluments Clause of the Constitution.²⁴² The central question in the standing decision in that case was whether the President accepting foreign emoluments without seeking the consent of Congress, as required by the Constitution, constituted an “injury in fact” to the members of Congress by denying them the opportunity to provide their consent.²⁴³ The Court found that it did.²⁴⁴ While injury by this type of vote nullification is distinct from the type of vote nullification that occurs when a President ignores a triggering law, they are analogous in an important way. As the *Blumenthal* court put it, both leave members of Congress unable to “obtain their remedy in Congress.”²⁴⁵

In *Kennedy v. Sampson*, the D.C. Circuit found that a U.S. Senator had standing to sue the executive branch for an allegedly unconstitutional pocket veto of legislation passed by both houses of Congress.²⁴⁶ The *Blumenthal* court cited a subsequent case’s support for *Kennedy*’s finding of standing for the proposition that a “single Member of Congress could have standing to sue based on a vote nullification claim when it was the President’s action . . . that nullified the Member’s vote.”²⁴⁷ To be sure, it is far from clear that a court would find that members of Congress have standing to sue a President for refusing to follow a triggering law.²⁴⁸ The point is merely that it is equally as far from clear that it would not.

A cleverly drafted triggering law could also create standing for a private individual or entity to sue. For example, in *Zivotofsky ex rel. Ari Z. v. Secretary of State*, the D.C. Circuit found that a private individual had standing to sue

²⁴⁰ To establish standing, “a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (internal quotations omitted).

²⁴¹ See R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 2-13 (1986) (surveying the development of congressional standing doctrine).

²⁴² 335 F. Supp. 3d 45, 72 (D.D.C. 2018).

²⁴³ *Id.* at 50-51.

²⁴⁴ *Id.* at 61-66.

²⁴⁵ *Id.* at 61.

²⁴⁶ 511 F.2d 430, 433-36 (D.C. Cir. 1974).

²⁴⁷ *Blumenthal*, 335 F. Supp. 3d at 61 (citing *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999)).

²⁴⁸ See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (holding that members of Congress lacked standing to challenge the President’s withdrawal from a treaty without the approval of Congress).

the State Department for its refusal to follow a law providing that Americans born in Jerusalem could elect to have “Israel” listed as their place of birth on their passports.²⁴⁹ Just as presidents often do when signing a triggering law, President George W. Bush issued a statement on signing the law in question explaining that he would construe it as “advisory” because it “impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch.”²⁵⁰ The court found that the plaintiff had standing because “he did not get what the statute entitled him to receive,” regardless of the fact that his injury was not the traditional sort of “economic, physical, or psychological damage”²⁵¹ It is not difficult to imagine a triggering law drafted so as to entitle a private individual or entity to share in the benefits of presidential recommendations, and thereby provide standing to sue in the event a President refused to comply with it. The Federal Advisory Committee Act (“FACA”), for example, requires public notice of all advisory committee meetings, provides that “[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee,” and further provides that documents “which were made available to or prepared for or by each advisory committee shall be available for public inspection.”²⁵² The *Zivotofsky* court specifically emphasized how statutes that entitle individuals to government information like FACA provide standing to those who seek but do not receive that information.²⁵³ Some version of these requirements could be adapted to create standing to sue under a triggering law.

C. Congressional Action

Of course, Congress would have to care enough to intentionally draft a triggering law with a standing hook, and this suggests a third and final avenue for redress of a President’s unconstitutional evasion of triggering laws: Congress applying pressure through use of its legislative and oversight tools. A Congress serious about changing the way an administration applies the Recommendations Clause has a variety of methods at its disposal to achieve that end. It could make creative use of the appropriations power or employ

²⁴⁹ 444 F.3d 614, 617-19 (2006).

²⁵⁰ Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 PUB. PAPERS 1697, 1698 (Sept 30, 2002).

²⁵¹ *Zivotofsky ex rel. Ari Z.*, 444 F.3d at 618-19.

²⁵² Federal Advisory Committee Act, Pub. L. No. 92-463, § 10, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app.).

²⁵³ *Zivotofsky ex rel. Ari Z.*, 444 F.3d at 617-18 (listing the Freedom of Information Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act as common examples of statutes under which individuals have standing to sue).

softer methods of persuasion like holding hearings to question administration officials or strategically using the media to draw attention to the issue.²⁵⁴

The best outcome is one in which a future President recognizes that the interpretation of the Recommendations Clause employed by recent administrations to escape triggering laws is incorrect, reinterprets the clause in line with its history and purpose, and applies that interpretation consistent with separation of powers principles. Until that happens, Congress should seek redress in the courts and through use of its own institutional powers.

CONCLUSION

The Recommendations Clause plays an active role in modern politics and legislation, but that role has outgrown its design. Modern administrations commonly assert negative power under the Recommendations Clause that goes beyond the scope of authority necessary for the President to carry out his positive duty to recommend measures to Congress. In doing so, they misconstrue the history and purpose of the Recommendations Clause and misapply separation of powers principles. The Framers drafted the Recommendations Clause to increase the flow of policy information from an information-rich President in charge of executing the laws to an information-thirsty Congress in charge of making new ones. Triggering laws serve Congress's legitimate interest in informing itself without impeding the President from performing the duty to supply that information through legislative recommendations. Where administrations claim discretion to escape statutory requirements to provide those recommendations, Congress should assert this reading of the Recommendations Clause to protect its institutional interest in obtaining information necessary to sound lawmaking and oversight. Accepting the outsized view of executive discretion advanced by recent administrations risks giving presidents too much control over executive branch information.

²⁵⁴ For example, the Senators and Representatives who sought to force the Obama Administration to execute the triggering provision of the Medicare law employed some of these tactics. *See supra* Section III.A.

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