

WHY THE ASSERTION OF A “NATIONALIST” PRESIDENCY DOES NOT SUPPORT CLAIMS FOR EXPANSIVE PRESIDENTIAL POWER

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The central premise of the theory of the nationalist presidency is that the President is the “true representative of the American people.”¹ The Congress, in contrast, is parochial because its members have narrow, geographically bound constituencies that may not reflect the broader concerns of the nation as a whole.² Thus, the nationalist presidency theorists contend, it is more consistent with democratic ideals to invest power in the nationalist presidency rather than in the parochial Congress. The presidency, they argue, is the more democratic branch.

Proponents of the vision of the nationalist presidency point to two key factors in support of their thesis. The first is structural. The President is the only political official elected nationally under the Constitution.³ He is therefore the only elected officeholder who must respond to a national, as opposed to a local, constituency. Accordingly, he should be expected to represent and be accountable to national rather than parochial interests.

The second factor pertains to the public’s expectations surrounding the presidency. The common, if not universal, perception in the current political climate is that the presidency, far more than the Congress, is the key institution in advancing the nation’s agenda and

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1 Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1219 (2006).

2 The nationalist presidency assertion is similar to the notion of the so-called unitary executive in that it is, at its essence, an argument for concentrating power in the presidency. But its premises are substantially different. The theory of the unitary executive posits that the Constitution vests all executive power in the executive branch; therefore any incursions by the other branches into the realm of executive power are unconstitutional. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008) (explaining the unitary executive theory). The nationalist presidency claim, on the other hand, is based upon more general claims of democratic legitimacy: power is appropriately vested in the presidency because of the President’s unique relationship to the national electorate.

3 The Vice President is also elected nationally, but he is not elected independently of the President.

that the presidential election is far more important in setting the nation's direction than are Congressional races.⁴

Voter and media behavior bear this out. Voters have far greater interest in presidential elections than down-ballot races, voter turnout is far greater in presidential elections than in off-year elections, and voters invest far greater expectations in the results of presidential races than other political choices.⁵ The media, in turn, reflects (and/or catalyzes) the public's interest. Intense media focus on presidential elections usually begins at least two years before the actual event;⁶ and the dominance of the coverage of the presidential race over all other political contests becomes even more overwhelming once the formal presidential selection process gets underway in the state caucuses and primaries—events that now start close to a year before the presidential election itself.⁷ Thus, the presidential election has been characterized by some as, in effect, a national plebiscite on the direction of the country.⁸

The thrust of the nationalist presidency assertion, however, is not limited to observations regarding constitutional structure and public expectations. Rather, the import of this vision is also in its normative implications for the debate over the breadth and the limitations of presidential power. This is because, if true, a vision of a nationalist

⁴ See Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2613 (2006) (“Electing the President is the democratic decision that really counts.”).

⁵ See Larry J. Sabato, *Who Votes? The Key Question for the 2006 Midterms*, SABATO'S CRYSTAL BALL, Apr. 28, 2006, <http://www.centerforpolitics.org/crystalball/article.php?id=LJS2006042801> (analyzing consistently lower voter turnout in midterm elections than in presidential races).

⁶ This point may well be understated. In fact, the media begins to apply significant coverage to the next presidential race often before the last ballots in the previous election are fully counted. See, e.g., Jonathan Martin, *GOP Gears up for 2012*, POLITICO, Nov. 9, 2008, <http://www.politico.com/news/stories/1108/15451.html> (describing discussions of the Republican field of candidates for the 2012 presidential election even as votes are “being counted in some races in last Tuesday's election”).

⁷ The 2008 election season, for example, formally began on January 3, 2008 with the Iowa caucuses. See, e.g., FRANK NEWPORT ET AL., WINNING THE WHITE HOUSE 2008: THE GALLUP POLL, PUBLIC OPINION, AND THE PRESIDENCY 271 (2009) (“In the early part of January [2008], Iowa and New Hampshire voters cast the first official votes of the 2008 presidential election.”).

⁸ As Matthew Adler explains, the notion of a plebiscite presidency is one that is directly responsive to the electorate and is therefore justified in broadly exercising control over the administrative state. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997) (describing the “Plebiscitary President” who is responsive to the “judgments, preferences, beliefs or other attitudes” of the citizenry such that an argument could be made for “augmenting his control over administrative agencies”).

presidency is supported by two democratic ideals, representativeness and accountability. The representativeness claim is that the President better reflects the national will than the Congress because he is elected by the entire nation. The accountability claim is that because he is nationally elected, the President is more accountable to the people for his actions than is the Congress. Based upon these values, then, the normative case purportedly follows. If the President rather than the Congress is more accountable to the nation and better represents the national will, as the proponents of the nationalist presidency suggest, then it ostensibly is more democratic to defer to the power of the presidency vis-à-vis the Congress in inter-branch disputes.⁹ Thus, presidential power advocates have raised the vision of the nationalist presidency as an argument as to why more power should be centered in the executive rather than the legislative branch in a host of contested realms, including foreign policy,¹⁰ war powers,¹¹ and presidential control over the administrative state.¹²

This Article addresses the central issues regarding the question of the nationalist presidency. Part I discusses the structural argument. Does the fact that the President is elected nationwide mean that he

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- ⁹ See Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2098 (2009) (describing the argument that "the selection of the President had become, in effect, the only credible expression of the public's will").
- ¹⁰ See *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (deference to the President in foreign policy is required because the nation "speaks with one voice" through the presidency to the rest of the world); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 89 (1995) (describing balance of power between the President and Congress with respect to foreign policy); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007) (arguing for increased deference to the executive in matters of foreign affairs based on the national accountability of the President and also for practical concerns); see also BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 145 (1990) (noting that the President must "go outside the constitution" and act as foreign policymaker in order to meet public expectations regarding his role in foreign policy matters); CRAIG A. RIMMERMAN, *PRESIDENCY BY PLEBISCITE: THE REAGAN-BUSH ERA IN INSTITUTIONAL PERSPECTIVE* 115–17 (1993) (describing how recent administrations have overstepped their constitutional authority and expanded their powers in foreign affairs in order to meet plebiscitary expectations).
- ¹¹ See Calabresi, *supra* note 10, at 38 ("Energy in the executive is defended here as being essential for both foreign policy reasons and to protect the polity as a whole from factional strife.").
- ¹² See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (noting "the regulatory activity of the executive branch agencies [is] more and more an extension of the President's own policy and political agenda"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994) (describing the strong version of the unitary executive theory in which "the President has plenary or unlimited power over the execution of administrative functions").

will more likely reflect, and be more accountable to, the views of the nation as a whole as opposed to a Congress whose members are elected in states or districts that are geographically limited? The Part concludes that the structural case in favor of the vision of the nationalist President is not persuasive because other structural aspects of the constitutional, winner take all elections, the role of the Electoral College, and term limits serve to limit both the presidency's representativeness and its accountability. Part II examines the case in favor of the nationalist presidency stemming from the public expectations surrounding the presidency. The Part suggests that the argument is descriptively accurate; citizens do consider the presidency and presidential elections to be uniquely significant in carrying out and setting the nation's agenda. The Part then goes on to question, however, whether this political reality should be deemed to have any constitutional or normative consequence. The Part concludes that it does not. Part III addresses a further assertion offered by the proponents of the nationalist presidency vision—that the public expectations placed on the office serve to weaken the presidency because the president does not have the capacity to meet those expectations. Accordingly, these proponents contend, the presidency should be empowered to meet those expectations. The Part suggests, however, that this argument is not persuasive because the assertion that power should be expanded to meet expectations is virtually boundless and that, in any event, the breadth of presidential power should be measured in its relation to congressional power and not to public expectations. The Part concludes that because of the current imbalance of power between the Congress and the presidency, any further accretion of presidential authority is not warranted.

I. THE STRUCTURAL CASE FOR THE NATIONALIST PRESIDENCY

The case from constitutional structure supporting the vision of the nationalist presidency is straightforward. Because the President is the only nationally elected officer under the Constitution, he is uniquely beholden to a national constituency. Members of Congress, on the other hand, are presumed to be more motivated by regional concerns because they are elected from states and congressional districts.¹³ The President, therefore, is ostensibly both more representative of, and accountable to, the interests of the nation as a whole.

¹³ *See* *INS v. Chadha*, 462 U.S. 919, 948 (1983) (“[I]t may be . . . that the President elected by all the people is rather more representative of them all than are the members of either

The structural argument, however, is not as clear-cut as it might originally appear. Consider first the claim that the President is more representative of the popular will than the Congress. As Jide Nzelibe points out in his superb article, *The Fable of the Nationalist President and the Parochial Congress*,¹⁴ there is a critical conceptual flaw in this structural claim that the President better represents the national will than members of Congress because he is elected nationally and they are elected only regionally. It compares the President to individual members of Congress and not to the institution of Congress as a whole. But while members of Congress may have specific incentives to "cater to the narrow needs of their constituencies," this does not necessarily mean that "the *collective* preferences of Congress will also be parochial."¹⁵ The question, in short, is not whether the President is more nationalist (or less parochial) than any individual member of Congress,¹⁶ the question is whether the presidency is more nationalist than the institution of Congress as a whole. The answer to this question, in turn, is far less clear.

To begin with, the vision of the nationalist presidency as the most representative institution is inconsistent with the Framers' concept of which branch was designed to most directly reflect the will of the people. To the Framers, that body was intended to be the House of Representatives.¹⁷ That is why its elections were set for every two years.¹⁸ Thus, even if deference to which elected branch was most re-

body of the Legislature whose constituencies are local and not countrywide . . ." (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)).

¹⁴ Nzelibe, *supra* note 1.

¹⁵ *Id.* at 1221.

¹⁶ In fact, members of Congress may not be as purely motivated by regional concerns as nationalist presidency advocates seem to suggest. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) ("In [the] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation."). Moreover, even members who are not motivated by the lofty goals ascribed to them in *Thornton* are still likely, because of campaign finance concerns, to be as influenced by national issues as much as local. Much of the money flowing into federal races come from ideological sources that transcend state or district boundaries and members of Congress may find themselves equally, if not more obligated, to respond to these contributors' concerns than to the parochial concerns of the actual voters in their district.

¹⁷ See CHARLES B. CUSHMAN JR., AN INTRODUCTION TO THE U.S. CONGRESS 36 (2006) ("In the case of the House, the Framers built a chamber that focused on the representative role—they wanted to ensure that the people's voice was heard in the national government.").

¹⁸ See *id.* ("[B]y requiring frequent elections of the whole membership of the House, the Founders thought they could guarantee that the members of the House would stay very close to the people who chose them."); THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (explaining the purpose of frequent elections as a mechanism for the House of Representatives to reflect the will of the people); JOHN R. VILE, 1

sponsive to immediate popular will were considered relevant to the allocation of power between the branches, a matter to be discussed below,¹⁹ an originalist interpretation stemming from constitutional structure would center that power in the House and not the presidency.

Even beyond originalist understandings, however, the representativeness claim in favor of the nationalist presidency is not as direct as its proponents might suggest.²⁰ For example, the winner take all system of presidential elections set up by the Constitution undercuts the claim because it lessens the extent that the President needs to be representative of the nation as a whole rather than of his own political majority or plurality. Regardless of how close the presidential election, the elected President assumes full control over the executive branch and can exclude all other political voices from his administration if he so chooses. Not so for the Congress. Congress has members that represent national political minorities as well as political majorities and therefore its deliberations necessarily reflect wider perspectives than an executive branch of government comprised of one party alone. For that reason, its decisions may reflect a broader national consensus than that of the presidency.²¹

The structural claim in favor of representativeness is also weakened by the role of the Electoral College. The President is not

THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 146 (2005) ("Presidents serve for four-year terms, senators for six-year terms, and members of the federal judiciary 'during good behavior,' or for life. The term of the House is thus the shortest of any official specified in the Constitution. This short term indicates the delegates' desire to keep the members of the body 'close to the people.'"); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 360-62 (Max Farrand ed., 1911) (publishing the transcription of the delegates' discussion at the convention before they voted on a two-year term length for the House).

¹⁹ *See infra* note 32, notes 50-58 and accompanying text.

²⁰ This is not to say that the House has lived up to its role as being the institution that is most representative of popular will. As has been well documented, the House has been particularly subject to capture by special interests. *See, e.g.,* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-49 (1985) (describing the continuum of representative roles in Congress including the pressures of constituents and the influence of special interest groups). The fact that so many House seats have been made 'safe' by redistricting has also arguably undercut that institution's responsiveness to popular will.

²¹ As Professor Nzelibe has explained:

Far from presuming that the president would be a plebiscitary figure that embodied majoritarian preferences, the framers implemented the opposite presumption—the national interest would be achieved by the institutional clashing of interests. Indeed, to the extent that the framers compared the features of the political branches at all, they appeared to assume that Congress would be more accountable to the people than the president.

Nzelibe, *supra* note 1, at 1219-20 (footnotes omitted).

elected by a national vote. He is elected by an Electoral College defined by state boundaries,²² a process which necessarily injects regionalism and parochialism into presidential politics. This means not only that presidential campaigns and their messages are skewed to voters in battleground states²³ but, as Nzelibe documents, that presidential policies are often geared to currying favor with voters in those states regardless of whether such policies reflect the interests of the nation as a whole.²⁴ Because states like Ohio and Florida, for example, often serve as Electoral College tipping points,²⁵ Presidents often cater their policies to respond to the specific concerns of citizens of those states.²⁶ Non-contested states, on the other hand, may see their particular concerns diminished. The reality of the Electoral College, in short, makes the claim that the President is uniquely representative of the country as a whole significantly overstated.

Additionally, the length of the four-year presidential term also weakens the structural claim of representativeness because it sets forth too great a lag time to fairly suggest that a President still reflects the popular will that many years into his term. Popular opinion is far too mercurial and, in any case, is often overtaken by intervening events for an election taken years earlier to accurately reflect popular opinion on any given issue.²⁷ In fact, a dramatic loss of public support for a President's policies quite often takes only months rather than years to be realized. Already, as of this writing, for example, there has been a sharp decline in support for President Barack Obama's policies even though the current administration is still less than

22 U.S. CONST. art. II, § 1; *id.* amend. XII.

23 See Dan Balz & Jim VandeHei, *Candidates Narrow Focus to 18 States: Battle Has Begun in Most-Contested Areas of Nation*, WASH. POST, Mar. 15, 2004, at A1 (discussing the number of electoral votes and past election results as decisive motivation for candidates to focus their campaigns on battleground states like Ohio, Florida, and others in the 2004 presidential race).

24 Nzelibe, *supra* note 1, at 1240–42 (documenting several instances in which candidates cater to swing voters).

25 See Balz & VandeHei, *supra* note 23; see also PAUL R. ABRAMSON ET AL., CHANGE AND CONTINUITY IN THE 2004 ELECTIONS 36, 45 (2006) (listing swing states with a high number of electoral votes at stake as the focus of the 2004 presidential campaign, including fifty-three visits by the candidates to Ohio).

26 See Nzelibe, *supra* note 1, at 1240 ("President [George W.] Bush also increased steel tariffs before the 2004 presidential election, a move that would ostensibly benefit steel interests in swing states like Ohio, Pennsylvania, and West Virginia at the expense of steel consumers in the rest of the country.").

27 For a study explaining how events account for changes in popular opinion during a President's term of office, see Samuel Kernell, *Explaining Presidential Popularity: How Ad Hoc Theorizing, Misplaced Emphasis, and Insufficient Care in Measuring One's Variables Refuted Common Sense and Led Conventional Wisdom Down the Path of Anomalies*, 72 AM. POL. SCI. REV. 506 (1978).

a year old.²⁸ That assertion that a President can lay claim that he accurately represents the current will of the people cannot be sustained simply on the basis that he was the President most recently elected.

In fact, even on the day of the election, the representativeness claim may be overstated with respect to the President's position on any specific issue. This is because voters cannot differentiate between issues in a presidential election but must instead vote for a single candidate who may, or may not, reflect their views on a particular matter.²⁹ President George W. Bush, for example, ran in 2004 on a platform that included Social Security privatization.³⁰ But any claim that his winning the election meant that the majority of Americans supported this reform would be completely false.³¹ The suggestion that a presidential election reflects national support for all of the issues in a President's agenda is simply unwarranted.

Finally, and perhaps most fundamentally, a true structural argument would find the question of which political body best represented the will of the majority of the people at any given moment largely irrelevant. The Constitution was deliberately designed to insulate government action from the immediate pressures of popular will and not to allow popular will to be facily implemented.³²

The claim that constitutional structure means that the President is uniquely accountable to the nation as a whole, in turn, like the representativeness assertion, also has considerable weaknesses. Certainly, the Framers' design in having the House of Representatives be the

28 See, e.g., Lydia Saad, *Obama Approval Slips Three Points in Past Week*, GALLUP, July 28, 2009, <http://www.gallup.com/poll/121934/Obama-Approval-Slips-Three-Points-Past-Week.aspx> (noting the drop in President Obama's job approval rating since the election).

29 See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–99 (1995) (noting that the President does not hold the majority view of Americans on every policy issue); see also Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2078–80 (2005) (questioning electoral accountability of the President given the tendency of voters to select a familiar personality based on certain characteristics or a few issues only).

30 Christine Dugas, *Bush Renews Call for Privatization of Social Security*, USA TODAY, Sept. 3, 2004, at A5.

31 See Jeffrey M. Jones, *Majority Disapproval for Bush on Social Security*, GALLUP, Mar. 2, 2005, <http://www.gallup.com/poll/15097/Majority-Disapproval-Bush-Social-Security.aspx> (noting “a majority of Americans disapprove of the way [President Bush] is handling [Social Security]”); see also Adam Nagourney & Janet Elder, *Bush Doesn't Share Public's Priorities, New Poll Indicates*, N.Y. TIMES, Mar. 3, 2005, at A1 (finding that a majority of Americans think Bush's proposal to privatize Social Security is a bad idea).

32 E.g., PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 7–8 (2009) (noting that the Constitution was structured to provide careful deliberation among various factions); Skowronek, *supra* note 9, at 2071 (“The American Constitution was designed to render political change slow and difficult . . .”).

institution closest to the people suggests they also believed that the House would be the more accountable (as well as the more representative) institution.³³ And Electoral College politics speaks to lack of national accountability as well as to lack of national representativeness. Because swing states play the key roles in whether a President is re-elected, the President's need for accountability to those states is considerably higher than his need to appease the voters of non-battleground states.

The structural accountability claim also suffers from an additional infirmity. Because of the term limits imposed by the Twenty-Second Amendment,³⁴ the accountability of the President is time-limited. During the second term, the President is under considerably less pressure to respond to the preferences of his constituency because he does not stand for re-election.³⁵ And during the final few months of the administration, he has virtually no accountability at all.³⁶ The members of Congress, in contrast, are continually accountable to the voters.³⁷

³³ See *supra* notes 17–18 and accompanying text.

³⁴ U.S. CONST. amend. XXII.

³⁵ See JAMES R. HEDTKE, LAME DUCK PRESIDENTS—MYTH OR REALITY 155 (2002) (“[Two-term limits] break[] the link between accountability and responsiveness by removing re-eligibility. Thus, a president in his or her second term of office is not directly accountable to the electorate. . . . [and] is not responsive to the demands of the people.”). But see Thomas E. Cronin, *Presidential Term, Tenure and Reeligibility*, in *INVENTING THE AMERICAN PRESIDENCY* 61, 84 (Thomas E. Cronin ed., 1989) (arguing that a President does not necessarily become unaccountable once he enters a second term).

³⁶ See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 98–101, 156 (2006) (discussing the problem of the lack of political accountability of the President during periods of presidential transitions); Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 330 (2001) (“[V]oters and scholars . . . view the actions of a lame duck as being not entirely legitimate democratically. By electing his opponent, the voters can be understood to have repudiated the outgoing President and his agenda. Thus, the outgoing administration can no longer be said to represent the will of the people.” (footnote omitted)). For a contrast of the accountability of incoming and outgoing presidents during the transition between administrations, see Nina A. Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. 464 (2009); cf. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1254, 1265 (2006) (noting the diminished political power of an outgoing president during the transition period).

³⁷ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking down state-imposed term limitations on members of Congress). To be sure, any accountability for House members may be seriously undermined by the creation of safe seats through legislative redistricting. See Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 646 (2009) (“This sort of political homogeneity in congressional districts works against the idea that robust accountability will be demanded Even in the 2008 election, only fifty of 435 House seats were decided by fewer than ten percentage points, and that number is itself higher than the average in

Finally, although fostering political accountability may be a constitutional value,³⁸ it does not inevitably trump other constitutional concerns such as the fostering of checks and balances and the promotion of inter-branch deliberations.³⁹ Thus, as will be further discussed in the next section, even if one accepts the nationalist presidency proponents' assumptions that the presidency is uniquely accountable to the voters, it does not follow that the office is thereby entitled to particular deference in its disputes with Congress.

II. THE PUBLIC EXPECTATIONS CASE IN FAVOR OF THE NATIONALIST PRESIDENCY

Perhaps the better argument in favor of the nationalist presidency is that, as a practical matter, the voters and the nation view the presidential election as the key to setting national policy. As Steven Calabresi and James Lindgren note:

Every four years Americans focus intently for ten months on the nation's presidential race. That race formally begins in late January with the Iowa caucuses and the New Hampshire primary, and it continues nonstop until November with a torrent of primaries, nominating conventions, presidential and vice presidential debates, and opinion polls. The unmistakable message sent to the voters is that this is it: The selection of a new President will determine which direction we go in as a society for the next four years. Electing the President is the democratic decision that really counts.⁴⁰

Calabresi and Lindgren's observations are descriptively accurate.⁴¹ The race for the presidency captures the national imagination in a way that no other political election even comes close.

most recent elections. The profusion of safe seats is also driven by a set of familiar incumbent advantages that further sabotage accountability, such as fundraising advantages, seniority, and the ability of incumbents to dole out pork and do casework." (footnotes omitted)).

38 See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 4–5 (2005) (discussing the President's accountability under the constitution). As Krent notes, however, the President's accountability extends to Congress as well as to the citizenry. *Id.*

39 See SHANE, *supra* note 32, at 181 ("The Framers, recognizing the bewildering diversity of interests among the people, eschewed any reliance on the fiction that public sentiment embodied in a single plebiscite could capture the public interest. They instead configured the government's principal institutions to reflect different constituencies, whose representatives would be engaged in a complex ongoing dialogue to determine where the public interest lay.").

40 Calabresi & Lindgren, *supra* note 4, at 2613.

41 Calabresi and Lindgren are certainly correct that voter turnout is considerably and consistently higher in presidential than in off-year elections. For example, voter turnout in 2008 and 2004 was considerably higher than in the off-year elections (2002 and 2006) preceding those elections. See The United States Elections Project, *Voter Turnout*,

That said, however, it is not so clear that popular interest automatically equates to representativeness and accountability. Indeed, many of the factors noted in the previous Parts that demonstrate the flaws in the structural theory of the nationalist presidency also undercut the factual claim that the President is uniquely representative and accountable. The Electoral College skews the extent the President is representative of, and accountable to, the nation as a whole as an actual as well as a theoretical matter.⁴² The four-year lag time between elections raises considerable question as to how representative a President truly is nearing the end of his term⁴³ and presidential term limits undercut the claim of accountability.⁴⁴ The winner take all election minimizes the extent the President needs to reach beyond his political base,⁴⁵ and the nature of presidential elections makes it unclear which specific issues in a President's agenda actually enjoy popular support.⁴⁶ Moreover, the reality of current presidential politics is that accountability is limited in one other important aspect as well: the lack of transparency in the executive branch. The notion of a highly accountable presidency makes sense only if there is sufficient transparency in the executive branch for the voters to be able to call the President to account.⁴⁷ But as recent history suggests, it has been far too easy for the President to avoid that accountability.⁴⁸

http://elections.gmu.edu/voter_turnout.htm (relying on statistics compiled for research by Professor Michael McDonald at George Mason University). More detailed reports from the U.S. Census Bureau also indicate far greater turnout in presidential elections than off-year elections since 1966. See U.S. Census Bureau, Voting and Registration Data, available at <http://www.census.gov/population/www/socdemo/voting.html> (containing voting and registration data from the elections between 1964 and 2008).

⁴² See *supra* notes 22–26 and accompanying text.

⁴³ See *supra* notes 27–28 and accompanying text.

⁴⁴ See *supra* notes 34–36 and accompanying text.

⁴⁵ See *supra* note 21 and accompanying text.

⁴⁶ See *supra* notes 29–31 and accompanying text.

⁴⁷ For a discussion of the relationship between the unitary executive theory and presidential accountability, see Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009).

⁴⁸ See Kagan, *supra* note 12, at 2345–46 (noting that the check of political accountability on the president is not effective where the President “eschews transparency” through secretive methods, citing the Reagan administration as one example); Kitrosser, *supra* note 47, at 1744 (“The Bush administration offers a powerful case study in the impact of unitary executive theory on information control and in the negative relationship between a unitary executive and accountability.”); Elena Kagan, Dean, Harvard Law Sch., Remarks at the Yale Law Journal Symposium: The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law (Mar. 25, 2006); see also LEVINSON, *supra* note 36, at 79–81 (describing unchecked and non-transparent “creeping presidential autocracy” under the most recent Bush administration); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2475 (2006) (noting how lack of transparency undercuts accountability).

Even if we assume, however, that popular interest in the presidential election translates into a unique representativeness and accountability in the office of the presidency, i.e., that the presidential election has in fact become something akin to a plebiscite in which voters believe that they are setting the national agenda, there is significant question as to what normative or constitutional significance should be attached to that ostensible reality.⁴⁹ The Constitution, after all, was not designed to have a plebiscite presidency,⁵⁰ and even if the presidency has, as a matter of public perception, evolved in that direction, there are sound reasons against integrating that concept into constitutional law.⁵¹

Nationalist presidency advocates, after all, advance their assertion for a reason. As they see it, the existence of a nationalist presidency should be deemed to have normative consequences. They contend,

49 The Court, apparently, has imbued the fact that the President is elected nationally with some normative significance in its requirement, set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that courts must defer to administrative agencies in statutory interpretation. See Adler, *supra* note 8, at 877 (noting *Chevron* “clearly invokes the President’s majoritarian cast in justifying its doctrine of judicial deference to agencies on matters of statutory interpretation”). The Court reinforced this requirement this past term in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), in which it held that such deference was required even when an agency changed positions to reflect the political agenda of a new administration.

50 See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 44 (2005) (noting that the notion of the plebiscite presidency arose with the modern presidency); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 30 (1993) (“No matter how closely the President approaches a ‘plebiscitary presidency’ as a matter of political reality, no such legal relationship is contemplated by the Constitution.”); Nzelibe, *supra* note 1, at 1219–20 (“Far from presuming that the president would be a plebiscitary figure that embodied majoritarian preferences, the framers implemented the opposite presumption—the national interest would be achieved by the institutional clashing of interests. Indeed, to the extent that the framers compared the features of the political branches at all, they appeared to assume that Congress would be more accountable to the people than the president.” (footnotes omitted)).

51 Justice Souter, for example, makes a particularly powerful argument as to why it is dangerous to invest too much power in the presidency with respect to matters of national security:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring), *quoted in* Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 237 (2008).

for example, that a nationalist presidency supports greater control by the President over the administrative state on grounds that the President will use the administrative machinery to advance national as opposed to parochial concerns.⁵² Similarly, they suggest that the nationalist vision means that the President should have more unilateral control over foreign policy and war matters because he enjoys a national mandate that the Congress does not.⁵³

Deferring to the presidency for these reasons, however, threatens other fundamental constitutional values. First, the Framers were interested in insulating the government from the immediate pressures of popular will.⁵⁴ Thus, to the extent that the concept of the nationalist presidency is designed to more readily allow for the implementation of popular will, it runs contrary to the Constitution's overall structure. As such, it creates the risk that the federal government will succumb to popular passions in a manner that the Constitution was deliberately designed to avoid.⁵⁵

Second, the Framers were concerned with creating a balance of power between the branches.⁵⁶ Suggesting that any one branch should be especially empowered because it is purportedly uniquely democratic threatens this balance and creates the dangers of abuse,

52 See *supra* note 12; see also SHANE, *supra* note 32, at 158–66 (responding to the accountability rationale for expanded presidential power over administrative agencies).

53 See *supra* notes 10–11. But see CALABRESI & YOO, *supra* note 2, at 428–29 (conceding that there are limits on executive power in the area of foreign policy). Notably, Calabresi and Yoo argue that although the President, as a unitary executive, should control foreign policy, the unilateral exercise of additional, implied powers in foreign affairs is unconstitutional. Using the most recent Bush administration as an example, they contrast Bush's sweeping claims of power during the War on Terror with the more "modest" exercise by the Reagan administration. *Id.*

54 See ERIC LANE & MICHAEL ORESKES, *THE GENIUS OF AMERICA: HOW THE CONSTITUTION SAVED OUR COUNTRY—AND WHY IT CAN AGAIN* 15 (2007) ("America's government is designed to slow [a] response [to the demands of the its people], to resist, as Hamilton put it, 'an unqualified complaisance to every sudden breeze of passion, or to every transient impulse.'").

55 See THOMAS E. CRONIN & MICHAEL A. GENOVESE, *THE PARADOXES OF THE AMERICAN PRESIDENCY* 4–5 (2004) ("[I]f there was one thing the framers of the Constitution did not want, it was an overly powerful presidency. . . . [The] early presidency, as envisaged by the founders, did not encourage a popularly elected leader who would seek to directly shape and respond to the public's views. On the contrary, popular leadership too grounded in the will of the people was viewed as a vice to be avoided. The founders' goal was to provide some distance between the public and national leaders, especially the president, that distance to be used to refine the popular view, to allow for leadership and statesmanship rather than to do what the people wanted done.").

56 See KRENT, *supra* note 38, at 2 (describing the background behind the "constitutional system of separation of powers").

misfeasance, and incompetence that come with unchecked power.⁵⁷ Third, as Peter Shane points out, the Framers were interested in adopting a constitutional structure that promoted inter-branch deliberation.⁵⁸ Empowering a single branch to act without consultation eliminates this benefit.

III. PUBLIC EXPECTATIONS AND A WEAKENED PRESIDENCY?

There is one other intriguing argument based upon the public perception of a nationalist presidency that merits special attention. The public perception of the breadth of presidential power, it is argued, leads to the expectations that the President has such power. Public expectations are then frustrated when the President does not have the power to meet those expectations. As Steven Calabresi writes, “[o]ne of the biggest problems American democracy faces today is that the presidency is too weak an office, constitutionally, to fulfill the expectations that voters have for it.”⁵⁹ Thus, the suggestion is that the President needs to have more power in order to meet these expectations.⁶⁰ Otherwise, presumably, the office is destined to fail.⁶¹

There are, however, serious weaknesses in this position. To begin with, the voters may be more sophisticated with respect to the expectations regarding presidential elections than this account would al-

57 The Framers expressly contemplated the threat of tyranny by an overly powerful branch of government. In order “to control the abuses of government” and to prevent “a gradual concentration of the several powers in the same department,” THE FEDERALIST NO. 51 (James Madison), *supra* note 18, at 289–90, the Framers intended to distribute powers among three independent branches as “practical security . . . against the invasion of the others.” THE FEDERALIST NO. 48 (James Madison), *supra* note 18, at 276. In this model, each branch is meant to perform its duties without an “overruling influence over the others.” *Id.*

58 SHANE, *supra* note 32, at 7.

59 Steven G. Calabresi, Book Review, “*The Era of Big Government is Over*”, 50 STAN. L. REV. 1015, 1040 (1998) (reviewing ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION (1997)); *see id.* at 1040 n.141 (citing the proposition that “the expectations of the masses have grown faster than the capacity of presidential government to meet them.” (quoting THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED xii (1985))); *see also* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN ix (The Free Press 1990) (1960) (arguing that the presidency is weak because of the contrast between what is expected of the office and its “assured capacity to carry through”).

60 Calabresi, *supra* note 59, at 1040.

61 For a powerful argument that centralizing presidential power may paradoxically weaken the presidency because the visibility of the office of the presidency makes it ill-equipped for effective conflict resolution, see Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996).

low. A significant segment of the electorate,⁶² after all, routinely suggests that it favors divided government, indicating that voting behavior may parallel constitutional structure in evidencing a wariness about a President's agenda being enacted too quickly.

More broadly, the failure of an office to meet the expectations surrounding it is not unique to the presidency. As Derek Bok has written:

Americans have *expectations* for politics and the political process that are often unrealistic. Convinced that *presidents* can often accomplish more than is humanly possible, that legislators should be able to arrive at sensible decisions without prolonged disagreement or controversy, and that politicians should refrain from pandering to the voters yet still reflect the views of their constituents, the public seems fated to endure repeated disappointment over the government and those who run it.⁶³

Conforming the power of an office to the expectations surrounding it, accordingly, would require a significant re-writing of all of government. It could also lead to mutually inconsistent results. For example, the public may also have high expectations regarding the power of the Congress to achieve specific goals, but expanding congressional power to meet such expectations would likely conflict with expanding presidential power to meet the expectations imposed upon that office.

Second, the expectations argument is problematic in that it is potentially boundless. Public expectations about the scope of power arise in response to the uses and perceptions of that power.⁶⁴ Consequently, the more power that the President exercises or asserts, the more public expectations regarding the scope of his power will likely expand.⁶⁵ The public expectations argument is then simply a road map for a continuous expansion of power. Expectations lead to greater power which leads to greater expectations which lead to greater power which leads to greater expectations and so on.

That presidential power is already difficult to confine only makes this constant expansion more likely. The constitutional provisions governing the scope of presidential power are easily susceptible to expansive interpretation. The key language in Article II setting forth

62 MORRIS FIORINA, *DIVIDED GOVERNMENT* 12–13, 64–65 (2d ed. 1996) (suggesting that voters in federal elections consciously or unconsciously split their votes along party lines).

63 DEREK BOK, *THE TROUBLE WITH GOVERNMENT* 383 (2001) (emphasis added), *quoted in* LANE & ORESKES, *supra* note 54, at 204.

64 *See* HINCKLEY, *supra* note 10, at 9–11 (discussing what the President means to Americans).

65 *Id.*

the limits of presidential power such as the Executive Power Clause⁶⁶ and the Take Care Clause⁶⁷ are highly indeterminate, and the President also has been deemed to enjoy inherent, if undefined, powers.⁶⁸ This lack of precise contours on the scope of presidential power has inevitably led to its expansion, particularly in times of emergency when the presidency is often the only institution capable of immediately responding to the exigencies of the moment.⁶⁹ The expansion, moreover, has not been limited to emergencies alone. Presidential action creates precedents for similar actions by later administrations thus creating a historical dynamic in which the expansion of presidential power becomes, in effect, a one-way ratchet continually adding to a President's already considerable arsenal of available powers.⁷⁰ Such a process does not need further reinforcement by an argument that presidential power should also expand to meet public expectations.

Third and most fundamentally, the public expectations argument sets forth the wrong metric. The relevant constitutional inquiry should be the scope of presidential power relative to the Congress, the balance that the Framers set forth in the Constitution, not the scope of presidential power relative to public expectations. And with respect to that balance, the notion that we have a weakened presidency is strikingly inaccurate.⁷¹

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

67 *Id.* art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").

68 *See* *United States v. Nixon*, 418 U.S. 683, 713 (1974) (noting the President's right to keep advice from subordinates confidential based on an executive privilege); Monaghan, *supra* note 50, at 11 (noting the power of the President to act in times of emergency).

69 For a discussion of the judiciary's reluctance to limit the President's power to respond to emergencies, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

70 *Cf.* CALABRESI & YOO, *supra* note 2 (tracing the history of Presidents' assertions of a unitary executive as precedential authority for the proposition that the unitary executive is constitutionally based).

71 *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1727–28 (1996) (discussing the growth of presidential power in relation to that of Congress); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. CHI. L. REV.* 123, 125 (1994) (same); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2316 (2006) (same); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 *B.U. L. REV.* 505, 507–18 (2008) (same). To be sure, not all observers concede that the presidency is unduly powerful. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 550 (1994) (arguing that the President's power over the administrative state is relatively weak); Fitts, *supra* note 61, at 838 ("[T]he modern presidency does not seem to be a particularly strong institution.").

At the time of the Framing, it was thought that the legislative branch was the more powerful branch.⁷² That is why the Framers believed Congress needed to be divided into two branches.⁷³ Any notion, however, that Congress is twice as powerful as the executive is long since outdated.⁷⁴ As Abner Greene has succinctly stated, "[n]ow, it is the President [instead of Congress] whose power has expanded and who therefore needs to be checked."⁷⁵

In this respect consider Justice Jackson's famous opinion from over fifty years ago in *Youngstown Sheet & Tube Co. v. Sawyer*⁷⁶:

[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.⁷⁷

For numerous reasons, as I have written elsewhere,⁷⁸ presidential power continues to dramatically expand at a rate not matched by the Congress. Some of these reasons have already been noted above.⁷⁹ The fact that the constitutional definitions of presidential power are indeterminate, that each President's exercise of power, no matter how expansive, becomes precedent for similar uses of power by sub-

⁷² See THE FEDERALIST NO. 51 (James Madison), *supra* note 18, at ("In republican government, the legislative authority necessarily predominates.")

⁷³ See *id.* ("The remedy for this inconveniency is to divide the legislature into different branches . . .").

⁷⁴ Indeed, that vision may have been outdated as early as the Jefferson Administration. See ACKERMAN, *supra* note 50, at 44 (noting the rise of strong presidentialism during the Jefferson Administration); John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 422 (2008) (documenting President Jefferson's expansive use of presidential power).

⁷⁵ Greene, *supra* note 71, at 125.

⁷⁶ 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

⁷⁷ *Id.*

⁷⁸ See Marshall, *supra* note 71.

⁷⁹ See *supra* notes 66–70 and accompanying text.

sequent administrations, and that the exigencies of the modern world inevitably invest power in the branch that is able to respond the fastest, all serve to expand presidential power. Additionally, other factors such as the President's power to control information, his unique ability to use media to set the national agenda, the role of executive branch lawyers as the final arbiters of separation of powers issues also lead to an increasingly powerful executive branch.⁸⁰ And while I will not redevelop those arguments here, I should note one recent development that hopefully proves my point about the existing imbalance. In November 2008, Rahm Emanuel, one of the most powerful members of Congress, a potential future Speaker of the House, and a person who was assured of literally lifetime election to the House from his safe Chicago district, resigned his post to become a White House staffer, a position with no independent constituency, no autonomy, no job security, and no tenure.⁸¹ And while the White House assignment that he accepted was the immensely powerful position of Chief of Staff, his move to the White House demonstrates the locus of actual power in Washington in a way that no academic discussion can demonstrate.⁸²

The fact is that at this point in our history the political reality of contemporary Washington is that the setting of the national agenda begins and ends on the President's desk. Congress perhaps may have some ability from time to time to frustrate the President's agenda, but the notion that the power of the presidency is 'weak' compared to the power of Congress is simply not sustainable.

At this point, proponents of the vision of the nationalist presidency might still respond that I have not addressed their central point—that if the President does not have the power to meet the public's expectations, he is destined to fail and his presidency is weakened. The short answer to this, of course, is that failure is a part of politics. In 2006, for example, the voters elected a Congress in ma-

⁸⁰ See Marshall, *supra* note 71, at 509 (discussing factors that explain "why power has concentrated in the executive").

⁸¹ See Jackie Calmes, *Obama's First Decision Has Capital Asking: Politics as Usual, or Fresh Start?*, N.Y. TIMES, Nov. 6, 2008, at P5 (describing the significance of Emanuel's move from a powerful post in the House to serve in the new administration); Carl Hulse, *Candidates Emerge for Obama's Inner Circle*, N.Y. TIMES, Nov. 6, 2008, at P5 (profiling Emanuel as a potential member of the new administration).

⁸² To be sure, numerous members of Congress have left their posts to assume Cabinet positions, such as Senator Hillary Clinton, and Congressman Leon Panetta, who left his seat to become the head of the Office of Management and Budget. However, Emanuel's move to a White House staff position is particularly remarkable, precisely because of its lack of an independent portfolio and also because Emanuel was so well situated in a Congressional leadership position.

major part to extricate the United States from the war in Iraq.⁸³ Yet, President George W. Bush was able to block Congress's efforts in this regard even though the war was opposed by many in his own party.⁸⁴ The expectations argument, in short, could also lead to an argument in favor of expanding congressional power. But I suspect that the proponents of the nationalist presidency would agree with me that the failure of Congress to effectuate the popular will does not mean that congressional powers should be increased.

More fundamentally, the fact that the President does not have unilateral power to effectuate results does not mean that he will fail to achieve those results. Rather, it means that he will need to work with the Congress or other relevant institutions to reach the desired outcomes. And that is precisely what a system of separation of powers requires.

IV. CONCLUSION

The vision of the nationalist presidency is superficially appealing. The President is the only nationally elected officer and the public perceives the choice of the President to be the key event in the setting of the national agenda. It is therefore tempting to suggest on this basis that the President is uniquely representative of, and accountable to, the people.

In fact, however, the representativeness and accountability claims are overstated. The Electoral College, the President's four-year term, term limits, and a host of other factors serve to blur both the representativeness and accountability lines. More critically, the nationalist presidency claim ignores the constitutional design. To begin with, it misses the fact that the body deemed by the Framers to be the most representative and accountable was the House, not the presidency. More fundamentally, however, the vision of the nationalist presidency rejects the basic separation of powers principle that the Constitution was not created to allow facile implementation of popular will. Rather, it set forth a far more complicated matrix requiring deliberation and cooperation among the branches and not unilateral action by any one body. In the end the vision of the nationalist principle is

⁸³ See Adam Nagourney & Megan Thee, *With Iraq Driving Election, Voters Want New Approach: Poll Finds Worrisome Indicators for G.O.P. With Control of Congress in Play*, N.Y. TIMES, Nov. 2, 2006, at A1 (noting that the "war has framed the midterm elections").

⁸⁴ See Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 523 (2008) ("[M]ore than any President in recent memory, [George W. Bush] has refused to use Congress as a partner in fashioning national policy.").

nothing more than another argument for increasing presidential power. Given the current imbalance of power between the presidency and the Congress, however, it is an argument that the presidency and the nation do not need.