

2009

The More Things Change, the More They Stay the Same

Neal Devins

William & Mary Law School, nedeви@wm.edu

Repository Citation

Devins, Neal, "The More Things Change, the More They Stay the Same" (2009). *Faculty Publications*. 1117.
<https://scholarship.law.wm.edu/facpubs/1117>

Copyright c 2009 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>



THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Neal Devins

I GET IT. The 2008 elections were about change. Real change. Change we can believe in. And, most definitely, change from the failed presidency of George W. Bush.

The sad truth is that the most basic questions of how the Bush White House understood and exercised presidential power played next to no role in the 2008 elections. “What almost no one disputes,” wrote Adam Liptak in *The New York Times*, “is that a central legacy of the Bush presidency will be its distinctively muscular vision of executive power.”¹ This legacy, however, did not meaningfully figure into the 2008 presidential campaign. While Barack Obama and John McCain differed sharply on how they would exercise presidential power, the question of how much power presidents should have simply played no role in this election.

An even sadder truth is that fundamental questions about the American system of checks and balances are hardly ever at play in presidential elections. Voters, presidential candidates, and political parties focus on first order policy preferences, not abstract ques-

Neal Devins is the Goodrich Professor of Law and a Professor of Government at the College of William and Mary.

¹ Adam Liptak, *More Power for Executive: Will It Last?*, N.Y. TIMES, Dec. 30, 2007, at A16.

tions about the division of power. The only time that candidates or parties will talk about structural questions is to provide rhetorical cover to underlying policy preferences.

And while none of this is surprising, I think it useful to spend a few pages talking about why truly fundamental questions about our governmental system are unlikely to figure into presidential elections. In particular, the Bush presidency is a casebook example of why it is that voters and lawmakers are unlikely to check presidential unilateralism. My argument will be divided into four parts. First, I will discuss the Bush presidency – both the preeminence of presidential power claims to Bush’s legacy and the debate among scholars and political columnists about whether Bush’s assertive view of presidential power would boomerang and limit presidential power in the future. Second, I will look at the 2008 elections, focusing on the limited saliency of the presidential power issue. Third, I will explain why voters and candidates have little interest in abstract questions about the balance of powers. Among other things, I will talk about the 1976 presidential election between Gerald Ford and Jimmy Carter – where, notwithstanding Watergate, the issue of presidential power received next to no play. Fourth, I will wrap things up by talking about the implications of all this – tying together voter lack of interest in structural questions with the rise of presidential unilateralism.

GEORGE W. BUSH & THE SCOPE OF PRESIDENTIAL POWER

Expansive claims of inherent presidential power played a figurative role in the Bush White House. To cite a few well-known examples: the assertion of the power to indefinitely detain so-called enemy combatants, the establishment of a military tribunal system without formal congressional approval, the warrantless wiretapping of U.S. citizens, the robust use of executive privilege, and the expansive use of presidential signing statements to direct agency policymaking – including agency non-enforcement of laws that the president deems unconstitutional.

Without question, this push for expansive presidential power has

The More Things Change

been the source of most academic and popular commentary on the administration. Just think of the titles of some recent books about the Bush campaign for presidential power: *Takeover: The Return of the Imperial Presidency & the Subversion of American Democracy*, *Unchecked and Unbalanced: Presidential Power in a Time of Terror*, and *The Terror Presidency: Law & Judgment Inside the Bush Administration*. Some, most notably legal scholars Jack Goldsmith (who served as the head of the Office of Legal Counsel under Bush) and John McGinnis (a Reagan-era veteran of the Office of Legal Counsel), argue that the Bush administration weakened the presidency. This argument focuses on the tie-in between Bush administration defeats before the Supreme Court in war on terror cases and the administration's failure to seek Congressional approval for some of its initiatives. Goldsmith, for example, said that the administration's unnecessarily broad "go it alone" view of executive power was intended "to leave the presidency stronger . . . but the approach they took achieved exactly the opposite effect."² In sharp contrast, journalists like Charlie Savage and Emily Bazelon have argued that "presidential power once accrued generally sticks" and that "the expansive presidential powers claimed and exercised by the Bush-Cheney White House are now an immutable part of American history."³

Whatever one thinks of the Bush presidency, one cannot escape the fact that the White House's view of presidential power was hugely visible, hugely consequential, and absolutely central both to the administration's policy agenda and to the manner in which it interfaced with other parts of government and the American people. And with sharp disagreement over the long-term consequences of Bush's embrace of presidential unilateralism, there was good reason to think that the issue of presidential power would figure into the 2008 presidential elections. Think again.

² Quoted in Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, at Sunday Magazine 40. Goldsmith's thinking is fully detailed in his book *The Terror Presidency* (2007). See also John O. McGinnis, *Executive Power in the War on Terror*, 146 POLICY REVIEW 63 (Dec. 2007/Jan. 2008).

³ Emily Bazelon, *All the President's Powers*, N.Y. TIMES, Nov. 18, 2007, at Book Review 18; Charlie Savage, TAKEOVER 332 (2007).

PRESIDENTIAL POWER & THE 2008 ELECTIONS

The appropriate scope of presidential power played no meaningful role in the 2008 presidential race. The campaign, instead, focused on first order policy priorities, most notably the economy, Iraq, and energy. And while both John McCain and Barack Obama spent considerable time talking about the failings of the Bush White House, that time was not spent answering the question of whether Bush either had or sought too much power. Rather, McCain and Obama spoke about how they would exercise presidential power and how it was that they would bring change to Washington.

I do not mean to suggest here that Barack Obama or John McCain said nothing at all about the scope of presidential power. They did. But their comments were limited and, more significant, seem little more than an effort to wrap policy preferences in high-sounding rhetoric. Indeed, dramatic differences in the positions and rhetoric of McCain and Obama highlight the fact that neither campaign felt voter pressure to formally embrace a particular view of presidential power. Unlike the Bush presidency (where voter sentiment clearly demanded that the candidates distance themselves from the president and speak about their commitment to change), the abstract question of presidential power lacked salience. As such, the candidates were free to ignore it – and invoke it simply as part of their efforts to distance their policy preferences from the Bush White House and from each other.

Before discussing what candidates McCain and Obama did say about presidential power, a few words about press coverage of and editorial opinion about this issue. Press coverage, to put it mildly, was scant. During the primary season, I could only locate four news articles that focused on the presidential power issue. During the period after McCain and Obama secured their parties' nominations and up through the party conventions, I could find no news story that discussed the issue. And while my research skills may be wanting, I think it safe to say that there was next to no press coverage of this question.

Editorial opinion was equally sparse. Aside from a call by the *Boston Globe* to make the “limits of executive power . . . a vital sub-

The More Things Change

ject for the [presidential] debates,” no major newspaper took an editorial position on the scope of presidential power issue.⁴ Indeed, I could only locate three op-ed pieces on this topic – two of which complained about voter disinterest in the presidential power issue. One was written by Bruce Fein, head of the American Freedom Agenda – a conservative group which tried to get Republican and Democratic candidates to sign a pledge committing “to restore the Constitution’s checks and balances” (Ron Paul signed; no other major party candidate signed).⁵ Writing in *The Washington Times*, Fein lamented that the “current political campaigns are blind to what the Founding Fathers thought elections should be about,” that is, “securing freedom . . . with a robust system and transparent system of checks and balances.”⁶ Likewise, Dana Nelson wrote in the *Los Angeles Times* that the American people should “begin questioning presidential candidates” about “Bush’s exercise of executive power” and, with it, the unitary executive.⁷

Journalistic disinterest in this topic is also reflected in the presidential debates. No question was asked about Congress’s role in checking presidential power; no question was asked about the scope of inherent presidential power. And while the scope of vice-presidential power came up in the Biden-Palin debate, the McCain-Obama debates focused exclusively on the exercise of presidential power.

Now on to the campaigns themselves. Let me start with Barack Obama. His web page made no mention of the presidential power issue, his acceptance speech made no mention of this issue, transcripts of convention remarks made by other key Democrats (including Al Gore, Joseph Biden, Bill Clinton, and Hillary Clinton) made no mention of the scope of presidential power issue. Com-

⁴ *Veeps for unfettered power*, BOSTON GLOBE, Oct. 7, 2008, at A12. On the question of vice-presidential power, *The New York Times* ran an editorial on October 4, 2008, *Dick Cheney, Role Model*.

⁵ See Charlie Savage, *Disaffected conservatives set a litmus test for '08: Want vow to curb presidential power*, BOSTON GLOBE, June 12, 2007, at A1.

⁶ Bruce Fein, *Unaddressed issue*, WASH. TIMES, Sept. 3, 2008, at A18.

⁷ Dana D. Nelson, *How powerful a president?*, L.A. TIMES, Oct. 11, 2008, at A19.

ments by Obama (or a surrogate) about presidential power are few and far between. His comments, however, are telling – revealing a desire to attack the Bush White House without formally committing to a particular view of presidential power.

Obama, for example, said that he would “turn the page on the imperial presidency that treats national security as a partisan issue – not an American issue” and that he would consult “every month” with a “group of congressional leaders on national security.”⁸ He also signed a pledge disavowing Bush administration policies on warrantless wiretapping, torture, and “unchecked [presidential] power.”⁹ He also criticized Bush’s use of signing statements, saying that presidents must protect their “constitutional prerogatives” but that the “Bush administration had gone much further than that.”¹⁰ And finally, Obama ran on a platform that rejects the “sweeping claims of inherent presidential power” made by President Bush and calls for the appointment of judges who “respect our system of checks and balances.”

Notwithstanding their high-sounding rhetoric, Obama’s attacks on presidential power had nothing to do with the appropriate scope of presidential power. These are attacks, pure and simple, on how Bush exercised presidential power. Obama did not call for Congress to enact reform legislation that would tie the president’s hands. His criticisms of signing statements and inherent war powers are criticisms of how Bush made use of these powers. While saying that Bush treats the Constitution “like a nuisance” and that “[w]e’ve paid a heavy price for having a president whose priority is expanding his own power,”¹¹ there is no suggestion that Obama would not use signing statements to justify non-enforcement of federal statutes. Indeed, Obama claims that he would use signing statements when-

⁸ Lynn Sweet, *Power-sharing promises*, thehill.com, Oct. 4, 2007.

⁹ Bob Egelko, *Groups on left, right ask candidates to reject Bush’s wider powers*, S.F. CHRONICLE, Oct. 14, 2007, at A1.

¹⁰ Charlie Savage, *Candidates on Executive Power: A Full Spectrum*, BOST. GLOBE, Dec. 22, 2007 at A1 (quoting Obama).

¹¹ David Nather, *Barack Obama: Calling for ‘a New Era of Openness’*, CONG. Q. WEEKLY, Dec. 17, 2007, at 3712.

The More Things Change

ever he thinks it necessary to protect his “constitutional prerogatives.” Likewise, there is no suggestion that Obama thinks that presidents must first obtain congressional approval before committing the nation’s troops to battle. And his call to regularly meet with congressional leaders is no different than what Presidents Clinton and Bush did (it is just that Obama promises to do a better job listening than did his predecessor).

At bottom, all Obama is saying is that his policy priorities are different than Bush’s and he would exercise power differently than Bush. His calls for a more constrained view of inherent power are simply a way for him to justify his policy preferences and attack Bush on constitutional as well as policy grounds. Along these lines, while claiming that Bush abused his powers, the Obama campaign – when asked whether “Mr. Bush had personally violated any laws as he moved to expand his executive authority” – said it “doesn’t have enough information” to assess whether the president did anything illegal (and presumably that includes unconstitutionally extending the reach of executive power).¹²

The Republican campaign followed a similar script, although the constitutional rhetoric embraced by John McCain embraced a far different set of policy preferences. To start, there were very few comments about this issue from either McCain or his backers. Likewise, his web page made no mention of the presidential power issue. His acceptance speech made no mention of this issue. Transcripts of the remarks made by other key Republicans (including President George W. Bush, Sarah Palin, and Rudy Guilliani) made no mention of the presidential power issue. The party platform made limited reference to presidential power, calling for an expansion in the scope of executive power. In particular, the platform embraced the creation of a line item veto, the recognition that the president has plenary power over the management of war and deployment of troops, and for Congress (not the president) to operate

¹² James Risén, *The Executive Power Awaiting the Next President*, N.Y. TIMES, June 22, 2008, at Week in Review 4.

within its proper, limited scope of power established in the Constitution.

McCain and his surrogates hardly spoke about presidential power but their comments largely tracked the party platform. When asked if President Bush had abused his power, the McCain campaign responded by speaking generally about the need for “war-time presidents . . . [to] exert[] their constitutional powers to the utmost.”¹³ Likewise, McCain refused to sign the pledge (that Obama signed) disavowing “unchecked [presidential] power.” On the other hand, McCain criticized several Bush administration initiatives, most notably warrantless wiretapping and the contemplated use of torture. He also disavowed the Bush administration’s use of signing statements – claiming that “I don’t think the president has the right to disobey any law.”¹⁴

As was true with the Democratic platform, those appeals to constitutional principle were little more than a way to package policy preferences in high-sounding rhetoric. On national security, McCain simultaneously distanced himself from Bush (on wiretapping and torture) while placing no limits on the scope of his war making powers. And while he claimed that presidents must obey the law, there was little question that a President McCain would make use of pre-enforcement directives and other techniques to see to it that agencies adhered to McCain’s policy preferences.

That presidential candidates would place few limits on the scope of their powers is to be expected. Presidents gain little by placing formal constraints on how they exercise power. In other words, presidents will not run against presidential power unless there is an identity of interests between a president’s policy preferences and some constitutional limit on the exercise of presidential power. This phenomenon is longstanding. The balance of power issue is a non-starter for presidential candidates. In other words, unless and until voters make presidential power a defining campaign issue, the focus of presidential elections will be first order policy preferences

¹³ Id.

¹⁴ Savage, *supra* note 10 (quoting McCain).

The More Things Change

– not the seemingly abstract question of how power is divided within the federal government and between the states and federal government. For reasons I will now detail, voters have little interest in structural issues and, consequently, elections never turn on a candidate's position on the balance of powers.

WHY VOTERS & CANDIDATES DO NOT WANT PRESIDENTIAL POWER TO BE AN ELECTION ISSUE

The 2008 elections typify a longstanding pattern – voters have no interest in structural questions; presidential candidates have no interest in running against presidential power. The fact that presidential power was the centerpiece of the Bush presidency did not matter. The fact that the rhetoric of the 2008 elections was tied to the widespread belief that the Bush White House failed America did not matter. Plain and simple: If checks and balances did not matter in 2008, it seems unlikely that the scope of presidential power will ever loom large in presidential races.

Here are two more data points that back up this claim: the 1976 presidential race between Jimmy Carter and Gerald Ford; and the 1951 ratification of the 22nd amendment (limiting a president to two terms in office). In critical respects, presidential overreaching cast a shadow over both the 1976 race (Richard Nixon's abuse of power) and the 22nd amendment (Franklin Delano Roosevelt's stranglehold on the presidency through four election cycles). At the same time, just as George W. Bush's strong claims of presidential power proved a non-issue in 2008, the abstract question of presidential power did not captivate voter interest in either the 1976 presidential race or the 22nd amendment ratification fight.

The 1976 election. Traditional issues – employment, taxation, and inflation – dominated the campaign. And while Watergate lurked in the background, the focal point here was “an elusive something called ‘trust.’”¹⁵ Jimmy Carter spoke of the Nixon-Ford

¹⁵ Joseph Lelyveld, *The Soft-Sell Presidential Commercials: So Far, Carter and Ford Have Pushed the 'Trust' Issue*, N.Y. TIMES, Oct. 3, 1976, at Week in Review 4. See also Gerald M. Pomper, *The Presidential Election*, in THE ELECTION OF 1976: REPORTS

administration and promised the American people that he “would not lie to [them];” Gerald Ford, while speaking of his life as “an American ethic, an obligation to serve,” could not escape the shackles of his Nixon pardon.¹⁶ Voters and candidates paid no attention to the scope of presidential power. The fact that Nixon acted “imperial[ly]” by claiming “broad, virtually unchecked authority to conduct military operations” and had “moved aggressively to assert presidential powers to impound appropriated funds [and] to pocket veto legislation” did not matter.¹⁷ And it did not matter that the Watergate-era Congress set about to limit presidential prerogatives through the enactment of landmark legislation constraining presidential prerogatives over war-making, the budget, and much more. All that mattered was how the president would use his power. For this very reason, Carter ran against the Nixon legacy by simultaneously pushing for an increase in presidential power and a commitment to using that power to be a “citizen president” who would fight special interests and “restore efficiency, competence, and virtue to the federal government.”¹⁸

The 22nd amendment is an even clearer example of voter interest in first order policy priorities, not structural questions about the scope of presidential power.¹⁹ In both 1940 and 1944, the Republican Party platform sought to derail Roosevelt’s re-election bids by calling for a constitutional amendment to limit the president to two terms. Campaign literature in 1940, for example, compared Roosevelt to the Axis-power leaders and “railed against the dangers of allowing a President to serve as a would-be-dictator.”²⁰ When the

& INTERPRETATIONS 37 (Marlene M. Pomper, ed., 1977).

¹⁶ Kathleen Hall Jameson, *PACKAGING THE PRESIDENCY: A HISTORY & CRITICISM OF PRESIDENTIAL CAMPAIGN ADVERTISING* 357 (3d ed. 1996).

¹⁷ Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 G.W. L. REV. 401, 408 (1989).

¹⁸ Lloyd F. Bitzer & Theodore Rueter, *CARTER VS. FORD: THE COUNTERFEIT DEBATES OF 1976* at 189 (1980).

¹⁹ This paragraph is drawn from Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971, 990-92 (2007).

²⁰ Bruce G. Peabody & Scott E. Gant, *The Twice & Future President: Constitutional*

The More Things Change

Republicans took over Congress in 1946, they saw passage of the amendment as a way to strengthen their power by discrediting the policies of Roosevelt and then-President Harry Truman. At that time, however, the presidential tenure issue held little interest for voters and the press. “There was only spotty coverage in the local press, virtually none in national periodicals, and little public participation. Even interest groups . . . paid little attention.”²¹ The reason: Without knowing who sits in the White House and in Congress, voters and interest groups could not predict whether the amendment would prove useful or harmful to favored policies. In contrast, there was widespread interest in the third term issue during the 1940 election campaign. That concern, of course, was tied to the outcome of the election. Stated differently, voters will pay scant attention to structural reform proposals unless those proposals are directly linked to policy questions that they care about.

Voter disinterest in structural questions is not at all surprising. “Executive power is such an abstract subject that it rarely, if ever, comes up during a presidential campaign. It’s hard to pose the questions in a way that matters to voters.”²² This is a by-product of two phenomena. First, structural issues simply do not engage the “passions of citizens;” voters care about “underlying public policy issues like drugs and education.”²³ Second, voters cannot predict whether their underlying policy preferences are better served by shifting power to or away from the president. Republicans pushed for the 22nd amendment to advance their policy agenda; Republicans called for the repeal of the 22nd amendment to cement policy gains made during the so-called Reagan Revolution.

Something else is also in play, namely, voters are generally ignorant about political matters and especially ignorant about issues that

Interstices & the Twenty-Second Amendment, 83 MINN. L. REV. 565, 586 (1999).

²¹ Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver*, 7 CONST. COMMENT. 67, 71 (1990).

²² David Nather, *New Handshake, Same Grip*, CONG. Q. WEEKLY, Dec. 16, 2007, at 3702.

²³ John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 96 (2004).

involve complex issues involving the balance of power between different governmental units. “[T]he low level of political knowledge among American citizens is one of the best-established findings in all social science.”²⁴ Voters, instead, care about things that matter to them – family, work, popular culture. For most Americans, the costs of becoming fluent in policy issues far outweigh the benefits of acquiring political knowledge. After all, a single vote is not likely to shape policy outcomes. On structural questions, political ignorance is at its most extreme. Not only are these issues complex and abstract, there is no obvious tie-in between preferred policy preferences and the division of power among governmental units. Take abortion. Pro-choice voters preferred presidential power when Bill Clinton faced a Republican Congress (Clinton’s repeal of Reagan era regulations and his veto of partial birth legislation) and preferred congressional power when Ronald Reagan faced a Democratic Congress (the Senate’s rejection of Robert Bork).

One final example: the 1994 Contract with America. Reflecting widespread public dissatisfaction with Congress, opinion polls revealed that Americans thought that the federal government was not trustworthy, that members of Congress cared more about making themselves look good than making the country better, and that people elected to Congress quickly lost touch with the people. Responding to these populist signals, Newt Gingrich and other Republican leaders in the House concocted the Contract as a symbol of change that would resonate with voters. The Contract advanced Republican policy priorities by calling for devolving power to the states both by eliminating unfunded mandates and by making use of block grants that would give the states more discretion over the expenditure of federal funds.²⁵ Embraced by Republican leaders as a symbol that would propel them to victory in 1994 congressional races, voters and candidates alike paid little mind to the Contract.

²⁴ Ilya Somin, *Political Ignorance & the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1371 (2004).

²⁵ See Somin & Devins, 55 DRAKE L. REV. at 988-89.

The More Things Change

Reflecting the fact that structural issues do not resonate with voters and thus should not be a centerpiece of any campaign, few Republican candidates mentioned the Contract in their advertisements. More telling, a poll taken “one week before the election found that 71 percent of voters had never heard of the Contract – and those who had were just as likely to support Democrats.”²⁶

The McCain-Obama campaign follows this script. Balance of powers concerns played no role in the election but, on occasion, were invoked as rhetorical cover for preferred policy positions. The question remains: What are the consequences of electing presidents without paying attention to larger questions implicating the balance of powers among governmental units?

PRESIDENTIAL UNILATERALISM AFTER BUSH²⁷

The consequences of voter disinterest in presidential powers are profound. With no meaningful electoral check on presidential power, presidents have incentives to advance their favored policy preferences – and, if necessary, package those preferences as part and parcel of their inherent power. Indeed, presidents inevitably expand the scope of presidential power simply by pursuing favored policy initiatives. In particular, presidents have strong incentives to act unilaterally rather than pursue the burdensome and oft times unsuccessful strategy of seeking legislative authorization. In this way, presidents “push out the boundaries of their power” when making strategic use of their powers of unilateral action to “gain

²⁶ Peter Beinart, *Speak Not*, NEW REPUB., Sept. 4, 2006, at 6. Had Republican candidates made the Contract and, with it, the balance of power between federal and state government a centerpiece of their campaign, it is possible that the federalism issue would have resonated with voters. See Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUDIES 589 (2007).

²⁷ Portions of this section dealing with presidential and lawmaker incentives are drawn from comments I made at the Willamette Law School conference on presidential power in the 21st century. Those remarks will soon be published in the *Willamette Law Review*.

policy advantage.”²⁸ The rise of executive orders, OMB review of proposed agency regulations, and much more is tied to this phenomenon.

Voter disinterest in the presidential power issue also spills over to Congress’s willingness to assert its institutional prerogatives to check presidential power. To start, just as voters do not care about the scope of presidential power, they do not care about the scope of Congressional power. Voter disinterest in the 1994 Contract with America is just one example of this phenomenon. More to the point, voters and interest group constituents care about first order policy priorities, not the scope of power issue. For this very reason, the individual and institutional interests of members of Congress are often in conflict with one another. Members of Congress regularly trade off their interest in Congress as an institution for their personal interests – most notably, reelection and advancing their (and their constituents’) policy agendas. In describing this collective action problem, Terry Moe and William Howell speak of lawmakers being “trapped in a prisoner’s dilemma: all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency.”²⁹

What all this means is that presidents can pursue whatever visions of presidential power matches their policy agendas. This does not mean that presidents will necessarily assert a strong view of inherent presidential power. At the same time, with little meaningful voter or lawmaker interest in this question, it is not surprising that candidates McCain and Obama felt free to embrace competing visions of presidential power when describing policy preferences.

Consequently, even though the Supreme Court rejected George W. Bush’s claims of broad inherent power over enemy combatants, there is no reason to think that these Court rulings will meaningfully limit the scope of presidential power. In part, most presiden-

²⁸ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 138 (1999).

²⁹ *Id.* at. 144.

The More Things Change

tial powers claims are settled by the political process – so the most salient question is whether voters and lawmakers are willing to stand up to presidential power. For reasons detailed above, there is little reason to think that the electoral process will meaningfully check presidential power. More than that, Bush-era judicial defeats are time bound – repudiating a particular policy initiative but not limiting presidential power. Under this account, Supreme Court enemy combatant rulings will not necessarily spill over to foreclose presidential initiatives on other domestic or national security matters. While de-legitimizing certain claims of presidential power during the Bush years, these rulings did not diminish presidential power in some fundamental way. Presidents will continue both to articulate a broad vision of inherent presidential power and pursue unilateral policy initiatives. The question of whether a president will go it alone or seek framework legislation from Congress is, ultimately, a question about policy preferences. The Bush administration had a policy preference to advance favored policies through unilateral exercises of presidential power. President Obama may make more strategic use of unilateral decision making – going it alone when lawmakers will not back him up; going to Congress when lawmaker support improves his chances of successfully advancing his policy agenda in court.

Time will tell whether the above claims are correct. But if the past is prologue, I think my argument is a winner. Barack Obama and John McCain did not engage in the presidential power issue because voters did not care. And voters – at least since the New Deal – have never cared about this question. Ditto members of Congress – who have no reason to focus on constitutional abstractions when their constituents focus on first order policy priorities. Given presidential incentives to expand power, there is simply no reason for President Obama to see Bush’s legal defeats as a weight on his efforts to pursue his favored policy agenda.

