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David C. Weiss

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## In Defense of the Post-Partisan President: Toward the Boundary Between “Partisan” Advantage and “Political” Choice

David C. Weiss\*

### ABSTRACT

This Article examines what it means, if anything, to be “post-partisan.” To that end it develops metrics of Executive Branch partisanship, which it uses to move toward a distinction between typical “political” action and decision making as compared to those actions taken or decision-making processes entered into for “partisan,” party-based advantage. It argues that while a clean distinction is problematically formalistic, an analysis of Executive Branch behavior allows points of comparison for the claim that certain administrations are more or less partisan than others.

Relying on this framework, the Article discusses the administrations of George W. Bush and Barack Obama, arguing that the former was the most party-focused in at least a half-century. It then examines what the Obama Administration’s claims of being “post-partisan” actually mean and discusses the relevance for public policy, concluding that post-partisanship is a more limited and pragmatic goal than true bipartisanship but that given the current American political landscape—characterized by parties that are more internally coherent and polarized from each other than at any time in generations—Obama’s vision of post-partisanship, regardless of whether he has realized it, is a valuable addition to the dynamics of American politics and serves a legitimizing function for a number of administrative and constitutional law doctrines.

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\* Law Clerk to The Honorable Michael Daly Hawkins, United States Court of Appeals for the Ninth Circuit. A.B., Dartmouth College; J.D., The University of Michigan Law School. From 1999–2006 the author worked on U.S. House, Senate, and presidential campaigns as well as on Capitol Hill. Thanks to Professor Bruce Green for insightful critiques of an earlier draft, and to the staff of the *BYU Journal of Public Law* for excellent and thoughtful editing. Additional thanks to Cheryl Bratt, Dave Cooper, Margaux Hall, Patrick Luff, Brad Moore, Brittany Parling, Sandhya Ramadas, and Tiffany Wang. The first draft of this Article was entirely written, submitted, and edited prior to my employment with the Ninth Circuit, and the Article solely reflects my personal views.

## INTRODUCTION

Barack Obama ran for and entered the presidency promising to embark on what he positioned as a new, “post-partisan” project.<sup>1</sup> The media, his supporters, and the opposition have seized on the phrase—post-partisan—devoting extensive coverage to the idea of a post-partisan presidency. To some commentators, on both the Right and the Left, the call for post-partisanship was the bold planting of a flag bearing the standard for a new way of doing business in Washington. For others, perhaps a larger number, the message of post-partisanship was the same old promise run up the well-worn rhetorical flagpole of campaign pandering.<sup>2</sup>

The debate over whether President Obama is realizing Executive Branch post-partisanship is ongoing among politicians, campaign operatives, and members of both traditional and new media. Most recently, those arguing that Obama’s vision of post-partisanship has failed have seemed to tally more points in the debate.<sup>3</sup> Claims of partisanship were particularly acute in the events surrounding the 2009 stimulus bill,<sup>4</sup> Justice Sonia Sotomayor’s nomination and confirmation to the Supreme Court,<sup>5</sup> and perhaps most dramatically, the bitterness of the later stages of the health care reform debate.<sup>6</sup> Not surprisingly, there is vast dis-

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1. See, e.g., Barack Obama, Address at the Democratic Convention: The American Promise (Aug. 28, 2008); Barack Obama, Address at the Council for Faith-Based and Neighborhood Partnerships (July 1, 2008); Barack Obama, Address at Labor Day Rally (Sept. 3, 2007). The full text of many of President Obama’s speeches is available at <http://www.obamaspeeches.com>. Though I am unaware of a speech in which Obama used the phrase “post-partisan” to describe himself, his high-level advisors (and the media) clearly did. See Bob Secter & John McCormick, *Obama in Chicago: Portrait of a Pragmatist*, CHI. TRIB., Apr. 3, 2007; Alec MacGillis, *Does Obama’s Message Match the Moment?*, WASH. POST., Oct. 17, 2007, at A1; Al From, *Keeping the Promise of Post-Partisanship*, POLITICO, Nov. 12, 2008; Jonathan Rauch, *Post-Partisanship*, THE ATLANTIC ONLINE, July/August 2008, available at <http://www.theatlantic.com/doc/200807/partisanship-rauch> (last visited Jan. 27, 2010).

2. Before Obama, Richard Nixon had promised to “bring us together.” Gerald Ford pledged an era of “compromise, conciliation and cooperation.” George H.W. Bush was supposedly “kinder and gentler,” Bill Clinton led with a vision of a “third way,” and George W. Bush stated his desire to “change the tone.” See JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* 114, 236, 302 (2005); Mara Liasson, *Obama Seeks to Bridge Partisan Divide*, NPR, <http://www.npr.org/templates/story/story.php?storyId=99536775> (last visited June 23, 2009) (interviewing Norman Ornstein).

3. See, e.g., Linda Feldmann, *Was Obama’s Promise of a Post-Partisan Era Ever Possible?*, CHRISTIAN SCI. MONITOR, Dec. 8, 2009; Jonathan Weisman, *Post-Partisan Promise Fizzles*, WALL ST. J., Aug. 19, 2009, at A4.

4. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat 115 (2009).

5. See Amy Goldstein & Robert Barnes, *Senate Committee Endorses Sotomayor*, WASH. POST, July 29, 2009 (describing the party-line vote over Sotomayor’s nomination in the Judiciary Committee).

6. See Meredith Shiner, *House GOP: Obama “Most Partisan”*, POLITICO, Jan 20., 2010 (discussing healthcare reform and quoting Congresswoman Candice Miller, Republican of Michigan, as saying “you could argue [Obama is] the most partisan president that America has ever seen”). See also David E. Sanger, *Big Win for Obama, but at What Cost?*, N.Y. TIMES, Mar. 21, 2010, at A1

agreement about whether the Obama Administration has worked to usher in an era of post-partisanship, or if instead the post-partisan promise was the paradigmatic naïveté to be expected from a politician with less than a full Senate term under his belt.

But before we decide the extent to which President Obama has realized his post-partisanship, we must ask what does it even mean to be post-partisan? So far, the debate has existed mostly in the realm of op-ed rhetoric, anecdotal example, and television sound bite. There is no legal framework or policy approach for examining what a post-partisan administration might look like. Attempting to parse a difference between actions and decision-making processes that are either political or partisan can break down quickly. For example, to many progressive detractors the Bush Administration was intensely “partisan,” but the same critics often explained how it differed from typical presidential politics through emotional appeals rather than arguments situated in a legal and policy framework.<sup>7</sup> As currently constructed, the debate over post-partisanship could easily—and unfortunately—continue unchanged with both sides merely talking past each other.

Distinguishing the partisan from the merely political is challenging, and doing so without falling into rightly rejected formalistic categories is even more so. As I use and explain the terms throughout this Article, the concepts fall on a continuum with “partisan” denoting Executive Branch action or decision making engaged in purely for cynical party advantage—for example, relating to election outcomes, voting rules, or fundraising. On the other hand, “political” describes a much larger part of the continuum that encompasses Executive Branch actions or decisions made based on policy or ideological difference. Because of the closed-door nature of Executive Branch decision making it is undoubtedly difficult to determine if the President has made a decision based on his particular ideology or specifically for Democratic or Republican electoral advantage. In other words, while it is rhetorically easy to call an administration more or less partisan, creating the policy arguments and legal framework for such a claim is substantially more complex. No less an authority than the Supreme Court has cautioned that “inquiry into the mental processes of administrative decision makers is usually to be avoided.”<sup>8</sup> The same

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(“[T]here is no doubt that in the course of [the health care] debate, Mr. Obama has lost something — and lost it for good. Gone is the promise on which he rode to victory less than a year and a half ago — the promise of a “postpartisan” Washington in which rationality and calm discourse replaced partisan bickering.”).

7. For such an attack see DAVID CORN, *THE LIES OF GEORGE W. BUSH: MASTERING THE POLITICS OF DECEPTION* 150–53 (2003). *See also The Frat Boy Ships Out*, *ECONOMIST*, Jan. 15, 2009. *But see* Richard M. Skinner, *George W. Bush and the Partisan Presidency*, 123 *POL. SCI. Q.* 605 (2008) (providing the most detailed study of the Bush Administration as partisan).

8. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

could easily be said about ex post analysis of White House decision making. Yet ignoring the practical difference between reasons for Executive Branch action is to allow theory to lag behind reality, a result we should seek to avoid.<sup>9</sup> Some decisions are made for party advantage, some for policy goals, and, critically, many for mixed motives; discerning lines—even rough lines—between these motivations is the challenge and goal of this Article.

To some, such a distinction may be impossible. During the 2006 and 2007 U.S. attorneys removal controversy, for example, Attorney General (AG) Alberto Gonzales' Chief of Staff, Kyle Sampson, suggested to Congress that it was unrealistic to unpack a distinction between partisan politics and less nefarious political forms of decision making.<sup>10</sup> Parsing the partisan from the political may remind some readers of the Progressive's now-quaint notions of administration as "science."<sup>11</sup> The failure to distinguish the meaning of the two terms and the two concepts, however, has not occurred because such analysis is impossible or is a formalistic dead end. Instead, it is because policy makers, political thinkers, and commentators have neglected to sufficiently problematize the distinction and analyze the difference inherent in the terms and embodied in the concepts of "political" and "partisan." This neglect has led to a further failure to explore what implications the distinction has for many issues facing modern American law and government: arguments regarding the proper role and unitariness of the executive; claims in both directions regarding "new" and "excessive" partisanship in Congress; assertions about the recently "politicized" judicial nomination process; discussion of the role of politics and partisanship in Executive Branch agencies that have historic norms of independence; and challenges to the proper deference—*Chevron*<sup>12</sup> or otherwise—that courts allow the Executive Branch.

In this Article, I argue that it is both possible and important to distinguish types of Executive Branch behavior and decision making that are made based on partisan advantage, as opposed to those based on political choice. Beginning to sketch the difference between political and partisan behavior is one step toward a better understanding of the basic features of the American political and legal systems from a party-conscious perspective. Toward this end, the Article surveys commentators' concerns with settings and procedures that are particularly vulnerable to excessive

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9. For an important article making the general claim that legal commentators should seek to reconcile academic discourse and theory with practical political reality, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 1 (2006).

10. See *Prosecutorial Independence: Is The Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III: Hearing Before the Subcomm. on the Judiciary*, 110th Cong. (Mar. 29, 2007) (testimony of D. Kyle Sampson, former Chief of Staff to the Att'y Gen.).

11. E.g., SAMUEL HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 265–66 (1959).

12. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

partisanship as well as the injection of such party-based behaviors into those spaces by presidential administrations over the previous half-century. It uses this survey to claim that though a distinction is difficult, and although there may be many cases that present analytically impenetrable mixed motives, the typical areas of concern and questionable action can be grouped into five metrics of partisanship,<sup>13</sup> revealing behavior or decision making grounded in party-based advantage. The five metrics I develop are as follows: first, the amount of emphasis placed on expertise in Executive Branch process; second, the level of specificity and accountability of political involvement in policy choices; third, personnel management; fourth, actions and decision making related to election policies; and fifth, relationship building. While it would almost certainly devolve into formalism to simply check off whether an administration has acted politically or in a partisan manner for each metric, they allow points of comparison, enabling the description of one administration as seeming more or less partisan in relation to others. This Article also asserts that these metrics can provide leverage on thinking about what it means for a President to be “post-partisan,” arguing for a conception of post-partisanship that is more optimistic than those skeptically viewing such claims as naive, but also developing post-partisanship as a more limited goal than do Pollyannas who claim that President Obama has found an entirely new brand of presidential politics.

Part I notes the often-debated boundary between law and politics, before turning to the core of the discussion, the distinction between “political” and “partisan” action and decision making. It sketches metrics of partisan action and decision making relying on criticism of excessive presidential partisanship from Richard Nixon through Bill Clinton. Part II applies this framework to the Bush Administration and the Obama White House and argues that the former exhibited a degree of partisan action and decision making not seen in recent presidencies, a trend from which President Obama has so far retreated. Part III then defines what it means to be “post-partisan” and explores normative implications of a post-partisan presidency. It argues that post-partisanship is a more limited philosophy than traditional bipartisanship but that such a development is well-suited for the current political climate, which is characterized by atypically divided parties that are each more ideologically coherent than at almost any time in American history. Finally, Part III concludes by discussing the implications of post-partisanship for separation of powers and executive power doctrines in constitutional law as well as judicial deference to the Executive Branch in administrative law.

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13. The same analysis undertaken in a more political setting would likely be termed a “Partisan Checklist,” “The Whip List,” or perhaps the “Partisan Pentathlon,” but for my purposes here, metrics of partisanship seems appropriate.

## I. LAW AND POLICY, POLITICAL CHOICE, AND PARTISAN ADVANTAGE

Legal and political science commentators have spent decades debating the distinction—or lack thereof—between law and politics, but the difference between political choices and decisions made for partisan advantage is conceptually distinct.<sup>14</sup> In *Marbury v. Madison*, Chief Justice Marshall explored the difference between “discretionary” and “non-discretionary” acts—politics and law—explaining that discretion involved cases that “can never be examinable by the courts” because there is no law to apply.<sup>15</sup> Later, an increasing awareness of the influence of politics on the law began with the growth of legal realism, with its slogan “law is politics,”<sup>16</sup> and continued as insights were gleaned from public choice theory. Yet the problem for Justice Marshall, and later the Wilsonians, and then the Realists—distinguishing between legal authority and political discretion—is not the same as differentiating between “political” and “partisan” decisions. Much closer to the issue of the political/partisan divide was the Supreme Court’s decision in *Bush v. Gore*.<sup>17</sup> There, many progressives felt that the Court was acting with a different type of political motivation than justices typically bring to a case. Politics, a framework for understanding ideological values, had become partisan politics, a medium through which to ensure crass electoral advantage without further ends.

A. *The Boundary Between Law and Politics*

This Section describes the history of the debate between “law” and “politics.” Commentators’ efforts to explain the difference, if one exists, between “law” and “politics” illustrates one end of a spectrum that potentially runs from purely legal action on one end, through all shades of political action, to purely partisan action on the other. The law/politics debate also provides lessons on how one should approach an effort to

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14. This Article uses the terms “law” and “policy” interchangeably since the core of the discussion here is related to acting politically versus acting in a partisan manner. I recognize, however, that “law” and “policy,” in other contexts, can have quite different meanings. As Elena Kagan has noted there is a sub-distinction among the law/politics distinction depending on whether one is using “law” to describe the bringing of a particular enforcement action, which is truly legal authority, or using the term “law” to describe a more broad type of neutral decision making that one might typically equate with the term “policy.” See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2357–58 (2001). For the purposes of this Article the distinction is not critical because the focus is on parsing those decisions and actions that are political from those that are partisan.

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

16. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selections*, 61 S. CAL. L. REV. 1735, 1735 (1988).

17. 531 U.S. 98 (2000).

distinguish the “political” from the “partisan,” providing a warning of the analytical risks of slipping into formalism.

The history of the discussion surrounding the law/politics distinction is lengthier than can be recounted in this Article, but insights from those debates are useful to the political/partisan distinction that I develop below. After the passage of the Sedition Act of 1798, which made it a crime to make false and malicious statements against President Adams or Congress—but not Vice President Jefferson, Adams’ likely opponent in 1800—there were, not surprisingly, politically motivated prosecutions of newspapers supporting Jefferson.<sup>18</sup> This was one of the first of many crises for the somewhat blurry distinction between law and politics. Coming on the heels of this controversy, Chief Justice Marshall used *Marbury* to explain that politics was about discretion and that discretion was “the liberty to decide between alternatives.”<sup>19</sup> Around the turn of the twentieth century, the Progressives advanced a related distinction to describe the “science” of administration. Woodrow Wilson famously wrote that “administration lies outside the proper sphere of politics.”<sup>20</sup> Later, the Administrative Procedure Act required procedures for agency action “in virtual isolation from electoral politics.”<sup>21</sup> In his renowned *Youngstown* concurrence, Justice Jackson recognized a distinction between the President’s role as leader of a distinct “legal system” and a “political system.”<sup>22</sup> More recently, Jerry Mashaw has articulated what is now the classic formulation of the difference between law and politics: a distinction that treats law as “a system of objective and accessible commands” formed through “collective agreement” of policymakers as compared to politics, which is embodied by “the exercise of discretion or preference by those persons who happen to be in positions of authority.”<sup>23</sup> Though commentators still disagree about the precise parameters of the distinction, Mashaw captures its core.

Commentators also differ on the tenability of the law/politics distinction. Legal realists, public choice theorists, and others have thus challenged the viability of the classic formulation of the law/politics distinc-

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18. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” 66–79 (2000). For the classic account of the Sedition Act, see JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

19. Marshall E. Dimock, *The Role of Discretion in Modern Administration*, in THE FRONTIERS OF PUBLIC ADMINISTRATION 46 (John M. Gaus et al. eds., 1936).

20. Woodrow Wilson, *The Study of Administration* (1887), reprinted in CLASSICS OF PUBLIC ADMINISTRATION 10, 10 (Jay M. Shafritz & Albert C. Hyde eds., 1978).

21. B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS 6 (1994).

22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

23. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 86 (1985) (though Mashaw does not himself support this “familiar” position).



tion, often by criticizing a literal reading of the Progressive view of administration, which believed in the possibility of administration free from political considerations.<sup>24</sup> Other commentators, however, view the distinction as one that still does analytical work, even if not as much as earlier generations had claimed. In general, realism rejected formalism's rigid categories and belief in genuinely neutral decision making as "transcendental nonsense," claiming that administrative decision making could not occur in an environment devoid of political choices.<sup>25</sup> Yet, the rejection of the Progressive assertions does not mean there is no distinction between law and politics. According to Peter Strauss, for example, "Scholars and courts writing about the exercise of executive authority often seem careless about the relationship between political and legal authority, but one can see that its dimensions are hardly trivial."<sup>26</sup> Strauss has argued that George W. Bush's use of signing statements "has again crossed the line that divides the realm of law from that of politics, that divides oversight from decision (and policymaking)."<sup>27</sup> Professor H.W. Perry has explained that "[w]ords such as 'political,' 'bargaining,' and 'strategy' need not connote smoke-filled back rooms and shady deals. Politics, after all, only means that values are being authoritatively allocated."<sup>28</sup> Finally, even for the many commentators skeptical that any form of decision making can be free from politics, neutral decision making is often at least important to discuss as a normative aspiration for administration.<sup>29</sup> This demonstrates that even the skeptical commentators recognize that administration can be infused with varying degrees of politics and that for some decisions less politics is better.<sup>30</sup> As such, a conception of "law" as a neutral form of decision making is still relevant to a

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24. See, e.g., WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 7 (2000); Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 547 (1989); Book Note, *Democracy and Dishonesty*, 106 HARV. L. REV. 792, 796-97 (1993) (reviewing JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 19 (1992)).

25. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

26. Peter L. Strauss, *Overseer, Or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702 (2006) (citing Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1537 (1997), as an example of such carelessness).

27. Strauss, *supra* note 25, at 737 (also making the same law/politics distinction regarding Executive Order 13,422, which centralized White House control over agency decision making).

28. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 141 (1991). Economist David Brooks recently tried to set up a type of policy-politics distinction using the terms "legislative pragmatism — writing bills that can pass" and "policy pragmatism — creating programs that work." Op-Ed, David Brooks, *Vince Lombardi Politics*, N.Y. TIMES, June 30, 2009, at A21.

29. E.g., Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1413, 1413 n.347 (1995).

30. See *id.*

debate comparing those terms to “politics.”

Regardless of whether one believes in “law” as potentially neutral, the term I use in this Article, “political choice,” is similar to Mashaw’s description in conceptualizing an Executive Branch officer’s discretion to approach a policy choice informed by personal or ideological policy preferences, or even the favoring of traditionally aligned interest groups. There may certainly be occasions when interest group consideration crosses a boundary into partisan politics, but, as discussed below, these are the difficult issues that must be teased out. Skeptical commentators would say that all administrative and Executive Branch decisions are political. Mark Tushnet, for example, has described the law/politics distinction by describing courts and legal institutions as retrospective and political institutions as prospective.<sup>31</sup> Conceding the strongest realist claims, however, is not problematic for this Article because it examines only the subset of prospective decisions, seeking to break out *partisan* political decision making from the larger set of *political* decisions.

### B. *The Boundary Between Politics and Partisanship*

If—as Professor Strauss argued—decision is policymaking, and—as Chief Justice Marshall explained—discretion is politics, differentiating *partisan* politics from the larger set of political decisions and actions is another way of claiming that all uses of discretion are not equal. The goal in creating metrics to measure and distinguish a subset of partisan behavior is not simply to create formalist boxes that realism properly rejected. It is precisely the opposite. The insight in discussing partisan behavior is that party and electoral advantage are pervasive, and—rather than being able to be excluded from decision making—factional gain can sometimes be the sole driver of modern, Executive Branch decision-making processes. The differentiation is also part of an effort to systemize a feeling that many political observers—professional and casual—have experienced. In other words, many political commentators can tell when something is being done for simple ideological disagreement as opposed to cynical, party-based motives. However, such an experiential observation, while helpful, is not as robust as the type of policy and legal framework that I begin to develop in this Article. To this end, the following section describes the difference between partisan and political behavior and decision making and explores environments and situations in which the Supreme Court and commentators have discussed—even in passing—the distinction.

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31. See MARK TUSHNET, WEAK COURTS STRONG RIGHTS 84 (2009).

1. *Differentiating between partisan and political behavior*

The reason to distinguish between partisan and political actions and decisions is that there are a number of normative concerns with purely party-based action. I explore these problems with pure partisanship in detail below.<sup>32</sup> For now, however, it is sufficient to point out that acts taken for purely electoral purposes, serving no larger ideological end, undermine a number of doctrines in both constitutional and administrative law as well as traditional good governance values. First, partisan behavior subverts the accountability justification of executive power. Public accountability, characterized in part by openness in decision making and procedural regularity, is a primary justification for broad executive power.<sup>33</sup> To the extent that partisan behaviors undermine public accountability,<sup>34</sup> the rationale for executive power is weakened as well. Second, purely partisan behavior implicates practical separation of powers concerns, particularly a modern separation of powers view that includes an account of whether government is party-unified or party-divided between Congress and the White House.<sup>35</sup> Modern government structure relies as much on parties as branches to check government actors, and if the Executive Branch takes purposeful action to weaken this check it affects the structural restraints that the Framers intended.<sup>36</sup> Third, judicial deference to Executive Branch decision making is also called into question if the Executive is making administrative decisions for purely party-based reasons. Both commentators who view deference from the perspective of democratic values,<sup>37</sup> as well as those who question deference when expertise is subverted for political purposes,<sup>38</sup> would have reason to question the proper scope of judicial deference when the White House injects party considerations into administrative decision making.<sup>39</sup> Indeed, as I

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32. See discussion *infra* Section III.B.2.

33. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35–37, 45, 65–66 (1995) (justifying normative claims for a unitary executive on the benefits of increased accountability).

34. It is also not difficult to see how increasing opacity of government operations limits the ability of the electoral component of accountability to function properly as it becomes more difficult for the public to acquire the information to make decisions. In addition, to the extent that the White House can shift blame from itself to purportedly expert agencies while, in fact, overriding expert advice with White House appointees, the possibility of subverting accountability is even greater.

35. Levinson & Pildes, *supra* note 9, at 17.

36. *Id.*

37. *Id.*; see, e.g., Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 763, 780 (2006).

38. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007).

39. Though not focusing on specifically party-based White House involvement, one interesting article has advocated courts' increased use of arbitrary and capricious review in agency decision making when the White House injects itself into administrative decision making. See Daniel P.

explore below, in the later years of the Bush Administration the Supreme Court became less deferential to administrative decision making when the White House's explanations for its involvement seemed like pretext for more party-based motivations.<sup>40</sup> Finally, even those commentators who have questioned the tenability of a form of administration absent political considerations have recognized that administrative decision making can involve more or less weight given to politics.<sup>41</sup> They further concede that it is a widely-accepted normative value that in regard to many decisions and regulations a degree of technocratic expertise is desirable, particularly if the White House characterizes a decision as being made on the basis of science or expertise.<sup>42</sup> Thus, party-based considerations, which are likely even more damaging than ideological considerations, move administrative decision making farther from this good governance ideal. It is for these reasons that it is important to think about the problem of partisanship and to try to differentiate purely partisan from more broadly political actions and decision-making processes.

The Section that follows addresses the predicate issues to the normative discussion that I touched on just now and to which I will return in more detail in Part III. The Section first explains that partisan behaviors can be seen in both decision-making processes (means) and policy goals (ends) and that this distinction can be important for the discussion of partisanship. Then, it explores the historical records, Supreme Court statements, and academic commentators' views on the tenability of a distinction between political choice and partisan advantage, demonstrating that such a distinction has existed since the Founding and is still relevant in a number of modern legal doctrines.

*a. Means and ends in the political/partisan distinction.* If politics and political choice is the type of discretion embodied in the majority of Executive Branch operations—as opposed to rarer pure partisan actions and decision making effected only for party advantage—an important, predicate explanation is that purely partisan behaviors can occur both in terms of ends or in terms of means,<sup>43</sup> a distinction that could also be loosely understood in terms of substance and process. Without access to a decision-maker's state of mind, however, means often serve as the best indication of motivation. Means are often the only practical method of detecting partisan pretext in ex post justifications for a decision.

The ends-means distinction can be explained as follows: There are

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Rathbun, Note, *Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 663-73 (2009).

40. See *infra* notes 270–272 and accompanying text.

41. See, e.g., Idleman, *supra* note 30.

42. See *id.*

43. Thanks to Brad Moore for raising this point.

particular Executive Branch decision-making processes in which we may find strident partisanship. Decision-making mechanisms that seek to limit expertise, improperly inject political appointees, or purposefully advantage a particular party instead of an ideology, can often be characterized as more partisan than political from the perspective of means. DOJ hiring practices during the Bush Administration that considered party affiliation in violation of the Hatch Act is an example of such means-based partisanship, detectable after-the-fact regardless of the purpose for which it was done (its ends).<sup>44</sup>

There are also decisions and actions, however, that, even if undertaken in a procedurally neutral way, may have partisan ends. In other words, these policies are those that the Executive Branch designs purely to benefit one party over another, not only in the sense of advancing a party's political ideology—which could be seen as a case of mixed political and partisan motives—but in the sense of direct electoral advantage.<sup>45</sup> Actions taken for the purpose of influencing a prosecution for partisan gain can be characterized as having a uniquely partisan character in their ends. Former AG Gonzales, for example, conceded that it would have been “improper” had he fired a U.S. attorney to “interfere with or influence a particular prosecution for partisan political gain.”<sup>46</sup>

Author Ronald Brownstein has highlighted this means and ends issue in discussing partisanship and the “paradox” of the Nixon Administration.<sup>47</sup> Nixon, Brownstein writes, “pursued (mostly) conciliatory ends with (almost invariably) divisive means.”<sup>48</sup> Nixon recognized that “he had been elected in part because he had promised to heal the divisions” in the country, and he supported Democratic-sponsored legislation on the Voting Rights Act, the end of the draft, and many environmental statutes.<sup>49</sup> But, on the other hand, “[a]s a matter of both personal instinct and political strategy, Nixon welcomed polarization,” planning and strategiz-

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44. See U.S. Dep't of Justice, Office of Prof'l Responsibility & Office of Inspector Gen., An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division (July 2, 2008), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>.

45. See *infra* notes 86–89 and accompanying text (conceding that cases of mixed motive decision making must be considered political if a concept of pure partisanship is to do any analytical work).

46. Dan Eggen & Paul Kane, *Senators Chastise Gonzales at Hearing*, WASH. POST, Apr. 20, 2007, at A1. Another example, though one that is closer to a line of politics, are the Bush White House's “faith based initiative,” which David Frum has admitted “was pursued primarily to woo religious voters, rather than to remedy social problems.” Skinner, *supra* note 7, at 617.

47. See RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* 101 (2007).

48. *Id.*

49. *Id.* at 100.

ing his actions from the constant perspective of Democrat versus Republican.<sup>50</sup>

Both ends and means in political acts—those that cannot be characterized as taken solely for party advantage or as purely neutral administration—are by far the majority of Executive Branch decisions, and, as I explain below,<sup>51</sup> for reasons of mixed motives, all decisions including legitimate consideration of actual policy preference, ideological disagreement, legitimate resource-allocation issues, and political coalition-building, among many more, must be conceptualized as proper political decisions if a delimiting of partisan actions is to provide any useful insights. Partisan advantage, on the other hand, relates to those decisions made with either the means, or for the ends, of pure party advantage. Discouraging legitimate participation in democratic elections to benefit a particular party or bringing an individual prosecution based on a President's legislative agenda may both be examples of naked partisanship. Mobilizing government resources either through personnel hiring, firing, or reassignment, or for the purpose of driving party-based campaign fundraising, are also likely examples of actions taken for purely partisan reasons; though, of course, issues of how these decisions are characterized remain.<sup>52</sup> Finally, examples of patronage, directing government contracts, or making policy in expectancy of a quid pro quo donation may also be examples of purely partisan behavior that has no end beyond party and electoral advantage.

A discussion of partisanship will thus often begin in terms of ends and conclude discussing means. An example: Suppose a Republican President enacts a voter fraud prevention policy. He could do so because he believes voter fraud is a legitimate policy concern. He could enact the same policy on the grounds that increasing visibility of prosecutions, even unfounded ones, would discourage voters who typically support Democrats from voting whether they are eligible or not. Enacted for the former reason, the policy is political; for the latter, partisan. Such discussions often devolve into means because it is easier to detect pretext in means than in ends; in ends it is almost always possible for those in the room to concoct *ex post* justifications. More detailed metrics of partisanship are needed to flesh out the distinction and the continuum on which it operates, and I develop these metrics below. However, for now, such generalities capture the essence of the distinction.

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50. *See id.* at 102.

51. *See infra* notes 88–90 and accompanying text.

52. For an excellent discussion of characterization in determining political or partisan motives in decision making, see Bruce A. Green & Fred C. Zacharias, 'The U.S. Attorneys Scandal' and the Allocation of Prosecutorial Power, 69 OHIO ST. L. J. 187, 235–37 (2008).

*b. Recognition of the political/partisan distinction and the limits of impure partisanship.* A distinction between the concepts of party-based partisanship and more typical politics has existed since before the Founding. Semantically, historical usage supports a strong differentiation between these two concepts.<sup>53</sup> The word “partisan” not surprisingly derives from the word “party.”<sup>54</sup> Even the use of “partisan” in its military meaning contained a somewhat negative connotation, describing a corps of military engaged in “surprising” and “desultory warfare.”<sup>55</sup> The distinction has long existed conceptually as well. In an appendix to Blackstone’s Commentaries, published in 1770, “political” is used to describe those of “political wisdom,” whereas “partisan” is used in conjunction an extreme adjective: “zealous partizan[s].”<sup>56</sup> Such a conception crossed the Atlantic. “Equating parties with nefarious ‘factions,’ the Framers attempted to design a ‘Constitution Against Parties.’”<sup>57</sup> Publius also distinguished between the concepts of “partisan” and “political.” Whereas Hamilton referred to “politics” as a “science,”<sup>58</sup> grouped “politicians” with “statesmen,”<sup>59</sup> and used “political” as a sometimes-solemnizing description that related to policymaking or beliefs about individual rights,<sup>60</sup> the *Federalist* used the term “partisan” to refer to narrow, factional interest.<sup>61</sup> Later, Jacksonian-era civil service reformers considered “the yoke of party discipline” the “curse of our politics.”<sup>62</sup> The term post-partisan is of more recent vintage. William Safire traced the first usage of the word “post-partisan” to a 1976 *New York Times* article describing the post-Watergate “disenchanted electorate,” which had the potential to “shape new parties, realign the old ones or extend the history of erosion into a new ‘post-partisan’ era.”<sup>63</sup> While there has thus historically been a

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53. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 522, 551 (1872) (defining “partisan” as “1. An adherent to a party or faction” or “2. (a.) Engaged in irregular warfare or outposts. (b.) Any member of such a corps.”; “partisanship” as the “State of being partisan; adherence to a party”; and “political” as “1. Pertaining to public policy or politics; relating to state affairs . . . 2. Derived from office or connection with government; public”).

54. *Id.*

55. *Id.*

56. AN INTERESTING APPENDIX TO SIR WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND, Part III, 66–67 (Phil., Bell, 1772).

57. Levinson & Pildes, *supra* note 9, at 8 (quoting RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840, at 40 (1969)).

58. THE FEDERALIST No. 9 (Alexander Hamilton).

59. THE FEDERALIST No. 70 (Alexander Hamilton).

60. See THE FEDERALIST No. 1 (Alexander Hamilton).

61. See THE FEDERALIST No. 4 (John Jay), No. 46 (James Madison).

62. WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 63 (1982).

63. See William Safire, *On Language: Postpartisan*, N.Y. TIMES, (Feb. 10, 2008) available at <http://www.nytimes.com/2008/02/10/magazine/10wwln-safire-t.html>, (discussing the origin of the term post-partisan and concluding that from the standpoint of usage, sources are inconsistent on its

difference in the usage of the terms “partisan” and “political,” as well as the concepts that the terms embody, even today the distinction can do analytical work.

The most high-profile Supreme Court case that provides insight on the political-partisan distinction is *Bush v. Gore*.<sup>64</sup> In subsequent criticism of that case, many legal commentators set up critiques of the decision by differentiating between typical *political* decision making, which realists often accept as an inherent aspect of adjudication, with a different type of *partisan* concern from *Bush* that related not to ideological differences but to outcomes of elections and party advantage.<sup>65</sup> For example, Jesse Choper’s response to *Bush* claimed that “it is critical to distinguish between judicial (or jurisprudential) ideology and political ideology (or crude partisanship).”<sup>66</sup> The attacks on *Bush* generally did not focus on a Justice acting consistently with her ideological views—essentially acting as either a conservative or liberal.<sup>67</sup> They instead questioned the Court’s legitimacy when weighing in on which political party would win an election. In drawing these distinctions, Jack Balkin and Sanford Levinson distinguished the “‘high’ politics [of] larger political principles and ideological goals” from the “‘low’ politics of partisan political advantage.”<sup>68</sup>

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from, through preferring the un-hyphenated form: “postpartisan”).

64. 531 U.S. 98 (2000). See also Posting of Michael C. Dorf to Dorf on Law, available at <http://michaeldorf.org/2007/03/dont-say-political-say-partisan.html> (Mar. 19, 2007).

65. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001); Sanford Levinson, *Return of Legal Realism*, THE NATION, Jan. 8, 2001, at 8; see Bruce Ackerman, *Off Balance*, in *Bush v. Gore* 192, 197–98 (Bruce Ackerman ed., 2002); see generally ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 4–10, 116–17, 194 (2001); Guido Calabresi, *In Partial (but not Partisan) Praise of Principle*, in *BUSH V. GORE*, *supra*, at 67, 71–77; cf. CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 129–56 (2006) (discussing judges’ party affiliation and judicial track records, especially on hot “political” issues, though not engaging in the same critiques of illegitimacy as the commentators critiquing *Bush*); See also David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 359–60 (2008) (differentiating between removals effected for partisan or political reasons).

66. Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 347 (2001).

67. Such a discussion regarding the views that a judge or justice brings to her work is beyond the scope of this Article.

68. See Balkin, *supra* note 65, at 1408–09 (citing Levinson, *supra* note 65, at 8). See also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062–63 (2001). Balkin and Levinson also note a speech from Justice Breyer that they say exemplifies their distinction between “high politics” and “low politics.” Justice Breyer stated: Politics in our decision-making process does not exist. By politics, I mean . . . will it help certain individuals be elected? . . . Personal ideology or philosophy is a different matter . . . Judges have had different life experiences and different kinds of training, and they come from different backgrounds. Judges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world.

Stephen G. Breyer, *The Work of the Supreme Court*, Am. Acad. of Arts and Sci., Sept.–Oct. 1998, at 47, quoted in Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 490 n.26 (2001).



According to Balkin and Levinson, “The unseemliness of *Bush v. Gore* stems from the overwhelming suspicion that the members of the five person majority were willing to make things up out of whole cloth—and, equally importantly, contrary to the ways that they usually innovated—in order to ensure a Republican victory.”<sup>69</sup> *Bush v. Gore* thus allows for significant insight into the difference between acting for party-based motivations as opposed to mere ideological, i.e. political, disagreement.

One recent set of events that sheds light on the political-partisan distinction was the U.S. attorney removals during the George W. Bush Administration.<sup>70</sup> In perhaps the most similar discussion to this Article, Professors Bruce Green and Fred Zacharias have compellingly described motivations for prosecution in the context of the firings, noting the “semantic and substantive problem of distinguishing neutral prosecutions, politics, and partisan politics.”<sup>71</sup> They recognized the difficulty of such an inquiry, arguing that a “‘political’ decision in the policy sense can simultaneously be a ‘partisan’ decision, and the two features will sometimes be inseparable.”<sup>72</sup> Their discussion is of imperfect applicability as it focuses solely on prosecution, but their recognition of the distinction for which I argue is important. Though they see many intractable problems with separating decision-makers’ motives, they also recognize that detecting pretext in certain decisions—regardless of how decision-makers characterize their decisions after the fact—is possible when asserting otherwise defies belief or reason.<sup>73</sup>

Commentators in other contexts have also noted a distinction between two types of politics—what I refer to as *partisan* advantage and *political* choice—though such discussions have almost always been in passing. In the historical context, commentators describing the hyper-partisanship of America’s “party period” during the 1820s and 1830s have noted that “partisan officeholders” had only limited public policy duties expected of them; however, such partisans “genuinely excelled” at “allocating economic resources and privileges” to party men, carrying out their “partisan policy-making activities.”<sup>74</sup> Covering more recent events, Robert Leflar has described two types of politics, one as “the realistic reconciliation of claims to justice in our society” and the other as

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69. Balkin & Levinson, *supra* note 68, at 1064.

70. See generally U.S. Dep’t of Justice, Office of Prof’l Responsibility & Office of Inspector Gen., An Investigation into the Removal of Nine U.S. Attorneys in 2006 (Sept. 2008), available at <http://www.usdoj.gov/opr/us-att-firings-rpt092308.pdf> (detailing U.S. attorney removals).

71. Green & Zacharias, *supra* note 52, at 224.

72. *Id.* at 229.

73. See *id.* at 240–42. Again, this is similar to Balkin’s and Levinson’s claims “that it is almost impossible to believe that the best explanation of the result [in *Bush v. Gore*] is the internal logic of the law.” Balkin & Levinson, *supra* note 68, at 1064.

74. See RICHARD L. MCCORMICK, THE PARTY PERIOD AND PUBLIC POLICY 3 (1988).

merely “backroom venality or the buying of votes.”<sup>75</sup>

Leflar is not alone.<sup>76</sup> In describing prosecution, Professors Donald Moynihan and Alasdair Roberts have noted that “[w]hile U.S. state attorneys were traditionally regarded as positions above *partisan* intrigue, they were still *political* positions.”<sup>77</sup> Finally, in their important article describing the role of party politics on the theoretical foundations of separation of powers, Daryl Levinson and Richard Pildes allude to the difference between “partisan political competition” that dominates modern political organization and relates to elections and a more policy-based “political competition” under the Madisonian vision by which government branches would check each other, promoting the power and independence of government departments.<sup>78</sup>

Cases involving gerrymandering also raise the issue of when an inherently political process crosses some line of partisanship that renders the character of decision making somehow different. In *Vieth v. Jubelirer*, for example, Democratic Pennsylvania voters brought a claim alleging that Pennsylvania’s redistricting following the 2000 census was an unconstitutional partisan gerrymander.<sup>79</sup> The case resulted in a plurality opinion in which four justices found the claim not justiciable; four found the claim justiciable, but they produced three potential methods for discerning unconstitutional partisan gerrymandering.<sup>80</sup> In dissent, Justices Souter and Ginsburg recognized the difficulty of culling the *partisan political* decisions from the more general *political* decisions, writing that the “Court’s job must be to identify clues . . . indicating that partisan competition has reached an extremity of unfairness.”<sup>81</sup> The dissenting justices explained that if the plaintiffs could make out a prima facie case of unconstitutional partisan gerrymandering, the burden should then be on the government to demonstrate legitimate reasons for its actions “by

75. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 740 (1979)

76. See, e.g., Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 581, 584 n.28 (2009). Author Chris Mooney has used such a distinction in his discussion of “political science abuse,” which he defined as “any attempt to inappropriately undermine, alter, or otherwise interfere with the scientific process, or scientific conclusions, for political or ideological reasons.” CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 17 (2006). Mooney uses the terms “partisan” and “political” interchangeably, but he is unquestionably referring to the difference between acceptable differences of political opinion and more cynical party advantage. *Id.* at 45, 51, 224–47.

77. Donald P. Moynihan & Alasdair Roberts, *The End of an Idea? The Bush Administration and the Exhaustion of the Politicized Presidency* 12 (Legal Studies Research Paper Series, Research Paper 09-17) (emphasis added), available at <http://ssrn.com/abstract=1316554>.

78. See Levinson & Pildes, *supra* note 9, at 2–3, 6–7, 10, 26, 39, 62.

79. 541 U.S. 267, 271–73 (2004).

80. See *id.* at 281; *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

81. *Id.* at 344 (Souter, J., dissenting).

reference to objectives other than naked partisan advantage.”<sup>82</sup> They recommended a burden-shifting framework designed to produce as many facts as possible during litigation, but it did not settle the question of how to determine improper partisan advantage from more typical political choice. The justices did clearly recognize the problem, and sometimes-necessity, of differentiating between the two types of behavior and decision making.<sup>83</sup> Such calls to uncover pretext are similar to Green and Zacharias’ statement that, despite characterization problems undermining the separation of partisan from merely political decisions, some circumstances produce facts that subsequent rationalizations cannot explain away.<sup>84</sup>

Thus, whether something is “political” or “partisan” is likely best understood in relative terms or as a question of degree. Professors Levinson and Pildes have cautioned in the context of the law/politics distinction that “[l]egal culture has become rightly skeptical of the bright-line distinction between value judgments about ends and technocratic decisionmaking about means, and of the legitimacy or desirability of rule by politically unaccountable ‘experts’ . . . .”<sup>85</sup> But the distinction between politics and partisanship assumes no naive government decision-making processes divorced from public choice-based motivations. On the contrary, to many observers, the problem with the Bush Administration’s partisanship—though I will not yet engage the point—was that the Administration allowed the strategy of political control “to be corrupted for purposes that had little to do with the accomplishment of administration priorities.”<sup>86</sup> This is the crux of the difference described above. Acting politically has ends that relate to policy goals of an administration and its ideological allies. Acting in a partisan way is decision making and action materially divorced from policy goals, and rather focused on ends such as party advantage, fundraising, or elections. Determining whether an administration is behaving politically or in a partisan manner is best explained by comparison to the only logical benchmarks: other administrations. The metrics that I develop below set up a framework for engaging in this comparison.<sup>87</sup>

An important concession in setting up this partisan/political distinction is the fact that many decisions and policies are entered into for both political and partisan reasons. Such an admission, no doubt, limits the force of my thesis, but to claim otherwise would be to unrealistically in-

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82. *Id.* at 351.

83. *See id.* at 347–51.

84. *See* Green & Zacharias, *supra* note 52, at 240–42 (2008).

85. Levinson & Pildes, *supra* note 9, at 65–66.

86. Moynihan & Roberts, *supra* note 77, at 5.

87. *See* discussion *infra* Section I.B.2.

sist on formalistic boxes in which decisions must be either labeled partisan or political. Rejecting such an approach, I argue that there are some decisions for which enough information is available, based on the metrics below, to find a presumption of partisanship—decision-making processes or policies that were conceived or enacted for mere electoral gain. This is similar to Professor Choper’s claim that in analyzing *Bush* to determine whether a particular Justice was acting in a jurisprudential or partisan fashion, an inquiry is necessary to determine whether the purported doctrinal reasons for the decision were pretext.<sup>88</sup> Professors Green and Zacharias have claimed in analyzing the U.S. attorney firings that “co-dependency of the rationales for prosecuting suggests that it is often foolhardy to even attempt to characterize decisions” as either “political” or “partisan,” and that “actual motivation is difficult to ascertain by anyone other than the actor himself. Even after the fact it can be rarely proven.”<sup>89</sup> Maybe so, and, undoubtedly, there are many decisions for which it is not possible to conduct an ex post screening of decisional elements. However, decision makers know why they actually made a particular decision. Green and Zacharias assert that “when viewed from the outside . . . many discretionary decisions can be characterized in multiple ways, depending on where the person doing the characterizing places the emphasis.”<sup>90</sup>

This also seems correct, but I argue that it is possible to move toward creating a framework for analyzing decisions to see if a claim of genuine policy decision or political choice is actually pretext for a decision motivated by partisan advantage. Claiming that such an effort “often is foolhardy” is to give up without trying to detect the types of partisan pretext that concerned Justices Souter and Ginsburg in *Vieth* and concerned Congress and the public in the U.S. attorney firings. Those instances of partisan pretext are the ones that undercut the rationale of accountability for judicial deference to the Executive Branch and for broad executive power, as well as limit the separation of powers checks across branches;<sup>91</sup> they also allow us to think about what it means to be post-partisan.

A final problem with the political/partisan distinction is that in speaking in passing of such a distinction, commentators tend to lapse into criticism of political, value-based judgments with which they simply disagree.<sup>92</sup> This slippery slope into a policy debate dressed up as a discus-

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88. See Choper, *supra* note 66, at 348.

89. Green & Zacharias, *supra* note 52, at 230, 244.

90. *Id.* at 230.

91. See discussion *infra* Section III.B.2.

92. See, e.g., Jonathan H. Adler, *Don't Politicize Science (Unless You're on My Side)* (Case Research Paper Series in Legal Studies), available at <http://ssrn.com/abstract=958826> (reviewing

sion about partisanship is exactly what occurred with the back-and-forth over partisanship in the health care reform debate, for example.<sup>93</sup> However, rather than providing a reason that one should not delimit partisan decisions from broader political ones, this slippage provides a reason for engaging in the project. Having a set of *a priori* factors, which are created to be as objective as possible, against which one can think about the degree to which decision making is partisan, helps prevent this conceptual and rhetorical slide toward a debate about partisanship as a proxy for simply policy disagreement.

## 2. *Metrics of partisanship*

In his farewell address, after two terms as America's first President, George Washington used the opportunity to warn a still-fragile nation to work for unity and beware of the "misrepresentations" of faction and "the jealousies and heartburnings which spring from these misrepresentations"<sup>94</sup> More than two centuries later, his concern with partisanship still rings true. But determining what constitutes partisanship, and specifically partisan action and decision making in the Executive Branch, is a more difficult task. In beginning to sketch metrics of partisanship, this Article pinpoints a number of likely metrics based on recurring themes in criticism of Executive Branch partisanship. None of these metrics, alone, would dispositively prove partisan behavior because lone acts and decisions can almost always be re-characterized. However, I argue that viewed as a whole, if most of the metrics of partisanship are present, then a non-party based explanation from an administration is likely pretext. In the words of Justices Souter and Ginsburg, the metrics of partisanship developed here serve, together, as "clues . . . indicating that partisan competition has reached an extremity of unfairness."<sup>95</sup>

In developing the metrics of partisanship, this Article deploys a two-pronged methodology. First, the idea is that there are many presidential watchdogs—Congress, the media, governance groups, legal commentators, and eventually historians—and that these actors raise enough claims of partisanship, founded or unfounded, that common critiques of Executive Branch hyper-partisanship emerge. The metrics discussed below rep-

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and critiquing MOONEY, *supra* note 76); Moynihan & Roberts, *supra* note 77, at 18–19 (criticizing the Bush Administration's decision to ignore scientists' advice in promoting abstinence as opposed to more effective measures to prevent sexually transmitted diseases and promoting family planning that the Administration viewed as condoning sexual activity among young people).

93. See, e.g., Shiner, *supra* note **Error! Bookmark not defined.**

94. George Washington, Farewell Address (Sept. 19, 1796), *reprinted in* 1 AMERICAN STATES PAPERS: SPEECHES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES TO BOTH HOUSES OF CONGRESS 34, 36 (1833).

95. Vieth v. Jubelirer, 541 U.S. 267, 351 (Souter, J., dissenting).

resent a compilation of commentators' claims of Executive action or decision making that are likely—for structural reasons in any administration—to be directed at party advantage or partisanship. Second, I use illustrative examples of such actions from the Nixon Administration through the Clinton Administration to highlight a sliding scale from neutral policy and legal authority (or as close to neutral as may exist), through political choice, to partisan advantage.<sup>96</sup> While it is not possible to catalog all allegations of partisanship since the Nixon Administration in such a short Article, the examples provide useful illustrations of party-based behavior. Thus, based on legal and political commentary and events from 1968 through 2000,<sup>97</sup> I argue that criticisms and examples of excessive partisanship can be captured in the following five metrics: first, the amount of emphasis placed on expertise in Executive Branch process; second, the level of specificity of political involvement in policy choices as well as the related elements of the transparency and accountability about that specificity; third, personnel management, including judicial appointments; fourth, actions and decision making related to election policies and fundraising; and fifth, relationship building.

*a. Expertise.* The emphasis on expertise has a longer pedigree than most arguments for independent, neutral decision making; however, it is important not to overstate the degree to which such independence exists. In any case, an Administration's willingness to rely on or override expertise is often cited as a harbinger of partisanship in a White House. Some commentators have argued that placing partisanship above expertise threatens the very heart of modern, agency-based Executive Branch operation.<sup>98</sup> Historically, political scientists also claimed that policy decisions directed by party-based concerns undermined rationality in policy-making, eliminating even the possibility of neutral competence

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96. I have chosen this time period because the Nixon White House is often viewed as the first "modern" administration in terms of its frequent party focus and control of the bureaucracy, as well as the fact that it represented the first presidency in which the southern states primarily supported a Republican—a party and ideological alignment that was building for decades and appears unlikely to abate any time in the near future. See Skinner, *supra* note 7, at 615 ("Richard Nixon set the pattern for presidents taking greater control of the executive branch."). It is also important that with one exception, the period from Nixon until Bush was characterized almost exclusively by divided government. One could analyze claims of excessive partisanship from any number of periods, but given the history of such things as the Sedition Act and the political dimension of the Supreme Court's removal power cases. See *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988), such a long historical reach is unlikely to provide claims that counsel for significantly different metrics of partisanship.

97. Though relying on the George W. Bush and Obama Administrations would be helpful, using criticisms of their practices and then deploying those same practices to show their partisanship would be detrimentally circular.

98. MOONEY, *supra* note 76 (stating that partisan decision making in the executive branch "threatens not just our public health and the environment, but the very integrity of American democracy, which relies heavily on scientific and technical expertise to function").

inherently based on the kind of “objective standards” that are “embodied in expert knowledge.”<sup>99</sup> This intuition in its more recent incarnation has led to the claim that proponents of highly partisan decision making have “essentially challenged the proposition that objective standards exist.”<sup>100</sup> Political scientists have noted the partisan nature of increasing rejection of administrative expertise.<sup>101</sup> The Supreme Court also recently reiterated the value of expertise, explaining that it based its assumptions of congressional intent in delegating on a determination that a particular agency possesses “historical familiarity and policymaking expertise.”<sup>102</sup> Justice Breyer has argued that the professional bureaucracy benefits greatly from the “inherent” benefits of expertise, rationality, and insulation.<sup>103</sup>

As in the law/politics debate, I need not argue here for a form of expertise devoid of political considerations. The statements above, focusing on the emphasis that an administration places on expertise,<sup>104</sup> are likely driven by an intuition that an administration’s willingness to override expertise provides one of the few visible windows into the degree to which partisan concerns drive Executive Branch decision making. Thus instead of debating whether neutral decision making is possible, I borrow a definition from Professor Hugh Hecló who described expertise in administration—“neutral competence” in his words—as “loyalty that argues back.”<sup>105</sup> To examine post-partisanship we need not be overly concerned with the injection of *some* politics into administrative decision making. Partisan policies and partisan decision making are problematic, instead, when party advantage wholly corrupts the process or predetermines an outcome—when experts are used as degree veneer on a preconceived process and predetermined outcomes, as pretext for objective decision making.

Considering these issues against a historical backdrop shows that, in terms of reliance on expertise, partisanship has generally increased over time. Nixon, notoriously skeptical of the bureaucracy, created a “counter-bureaucracy” with a staff of political appointees in the White House more than double that employed in the Johnson Administration, as well as an Office of Management and Budget (OMB) remade from the Bureau

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99. See, e.g., Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060–61 (1956).

100. Moynihan & Roberts, *supra* note 77, at 15 (citing Anthony Bertelli & Laurence E. Lynn, Jr., *Managerial Responsibility*, PUB. ADMIN. REV. 259, 262 (2003)).

101. See, e.g., Skinner, *supra* note 7, at 606.

102. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

103. See STEPHEN BREYER, *BREAKING THE VICIOUS RISK CYCLE: TOWARD EFFECTIVE RISK REGULATION* 61 (1993).

104. See *supra* notes and accompanying text 98–103.

105. See Hugh Hecló, *OMB and the Presidency—The Problem of Neutral Competence*, 38 PUB. INT. 80 (1975).

of the Budget to bring non-budgetary matters under presidential control.<sup>106</sup> Ford and Carter expanded this precedent incrementally, particularly with Carter's requirement that agencies submit proposed rules to the Regulatory Analysis Review Group, a new policy group consisting of White House appointees, though it was still understood that the agencies had the final call.<sup>107</sup> President Reagan represented a "sea change" in centralization and possibility for political override of expert decision making with the now famous Executive Order 12,291, which required agencies to prepare a "Regulatory Impact Analysis" for every proposed "major rule."<sup>108</sup> Reagan used this authority to return a number of important rules from OMB back to the agencies. President Clinton may have injected more politics into agencies than did Reagan due to the Clinton White House's involvement in even minor policy matters. Elena Kagan, for example, has described the "presidential administration of the Clinton bureaucracy as typified by his use of directives."<sup>109</sup> In very briefly describing this history I do not argue that at a certain point this behavior became partisan; I simply claim that the behavior and decision-making processes of the Clinton Administration with respect to agency expertise are unquestionably more political than under Nixon.<sup>110</sup>

At each step of this history, as expert bureaucrats were given less authority to "argue back," the role of expertise was reduced in favor of politics. The problem with this politicization is that as White House control becomes more all-encompassing, it creates more opportunities for interest group involvement in rulemaking with an implicit promise of campaign contributions if the White House involves itself by forcing an agency to come to a favorable position.<sup>111</sup> While ideological agreement could simply be understood as basic politics, as political control becomes tighter a threshold into partisanship may be crossed when the Executive Branch takes opportunities for quid pro quo, electorally-focused governance for the sole purpose of immediate campaign contributions or sup-

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106. RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 34 (1986); see Perri E. Arnold, *The Managerial Presidency's Changing Focus, Theodore Roosevelt to Bill Clinton*, in *THE MANAGERIAL PRESIDENCY* 217, 222–23 (James P. Pfiffner ed., 2d ed. 1999).

107. See Kagan, *supra* note 14, at 2476–77 (2001).

108. See Exec. Order No. 12,291, 3 C.F.R. 127, 128–30 (1981); Kagan, *supra* note 107, at 2477.

109. See Kagan, *supra* note 14, at 2306–08, 2281, 2333, 2355–56.

110. It is possible that this metric has moved towards increased politicization since Nixon shows that the metric is not particularly useful. However, as I discuss below, the Obama Administration has now rolled-back some of the institutional devices that George W. Bush used to politicize the bureaucracy, suggesting that the metric need not always move more toward politicization. See *infra* notes 177–178 and accompanying text.

111. At least one study has directly tracked these quid pro quo campaign contributions with a temporal axis, demonstrating the cynical nature of, in that case, congressional campaign donations. See *infra* notes 156–159 and accompanying text. The political space created by increasing White House control of agencies creates the same opportunity as to Executive Branch behavior as well.



port. Use of or willingness to undermine expertise is thus one metric of partisanship. In discussing increasing partisanization of expertise, I do not seek to create a formalistic, partisan expertise threshold. I simply point out that various employments of expertise can, in fact, appear different to a reasonable observer. For example, setting aside the normative dynamic, the way in which OMB has brought politics into agency agenda setting is unquestionably closer to partisanship than Justice Breyer's proposal "for a centralized corps of regulatory experts, more detached from the President than OMB's current staff."<sup>112</sup>

*b. Specificity and accountability of policymaking.* Commentators have recognized a second area in which Presidents often face criticism for taking party-based action: the level of specificity of political involvement in policy choices and the openness with which that politicization is conducted. In other words, to what degree do senior political appointees direct minor details of policymaking, and how honest is the Executive Branch with Congress and the public about the way in which it reaches decisions? Dealing with the level of policy formulation first, those who support as much injection of politics as possible essentially challenge the existence of objective standards. Indeed, as Professors Moynihan and Roberts argue, "This challenge is most persuasive at the highest levels of policy formulation and general management, and least persuasive in those areas where scientific knowledge is most highly developed."<sup>113</sup> At the high levels of policy formulation, for example, there are many arguments for the President's role in serving a coordination function, sometimes through OMB, to eliminate redundancies and inconsistencies, energize agencies in a temporally consistent manner, and hold agencies to general regulatory principles to apply throughout the administration.<sup>114</sup> From a separation of powers perspective, Bruce Ackerman has also noted that a President calling a judge about a case is "treated as a crime against the Constitution," while "a similar call to a middle-level bureaucrat" is not, though Ackerman believes that such a call poses a similar "threat to the separation of powers when considered as a doctrine of functional specialization."<sup>115</sup>

Such a focus on the type of decision being made can also be seen in the Supreme Court's removal power jurisprudence. The Court's statement in *Myers v. United States*, the famous case that—before being limited by *Humphreys Executor v. United States*<sup>116</sup> and *Wiener v. United*

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112. Kagan, *supra* note 14, at 2341.

113. Moynihan & Roberts, *supra* note 77, at 15.

114. See Kagan, *supra* note 14, at 2340.

115. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 690–91 (2000).

116. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

*States*,<sup>117</sup> and “wholly eviscerated” by *Morrison v. Olson*<sup>118</sup>—stood for some limits on the President’s removal power. Even the unitary vision expressed in *Myers* conceded that “[o]f course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.”<sup>119</sup> Elena Kagan has understood this passage as suggesting “that even when Congress cannot at all limit the President’s power to remove an official, Congress may be able to confine the President’s capacity to direct that official as to the exercise of his delegated discretion.”<sup>120</sup> Kagan has convincingly argued that similar considerations may be relevant if the President specifically directs, for example, the beginning, termination, or tactics of a particular legal action.<sup>121</sup> She focuses on issues of prosecution because “it is in this area, because so focused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.”<sup>122</sup>

Historically, administrations have placed relatively fewer political appointees in agencies that demand technical knowledge and professional expertise, though such generalizations are not as easily made about approaches to accountability. A particularly clear example of the slippage towards partisanship as high-level officials become involved in specific decisions was Richard Nixon’s “enemies list” of tax audit subjects.<sup>123</sup> A more recent example of specificity on the opposite end of the continuum was the fact that despite Clinton’s deep involvement in administrative issues, Clinton shrank from involvement in agency adjudication, never attempting to publicly usurp the powers of a department head or agency’s on-the-record determinations.<sup>124</sup> That said, Clinton immersed himself in the details of policymaking, seeking a way to effect change without having to go through Congress, and in this way, his in-

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117. *Wiener v. United States*, 357 U.S. 349 (1958).

118. *Morrison v. Olson*, 487 U.S. 654, (1988); see Saikrishna Prakash, *The Story of Myers and its Wayward Successors: Going Postal on the Removal Power*, in *PRESIDENTIAL POWER STORIES* 302 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

119. *Myers v. United States*, 272 U.S. 52, 135 (1926).

120. Kagan, *supra* note 14, at 2323.

121. *See id.* at 2357–58.

122. *Id.* at 2357–58.

123. JOHN A. ANDREWS, *POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON* 217–58 (2002).

124. *See* Kagan, *supra* note 14, at 2307.

volvement could also be characterized, as it was by the Republican Congress, as highly partisan.<sup>125</sup>

Another related variable in the equation is the degree to which an Administration acknowledges or covers up political involvement in the decision-making process, essentially, its accountability. On this view, regardless of the degree of politicization of administrative decision making, particular fire alarms are sounded when that politicization is either achieved secretly or, perhaps worse, covered-up after the fact. As Kagan has described, “To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests.”<sup>126</sup> A President’s insistence on hiding his involvement from public scrutiny almost certainly enhances the potential for the influence of party or faction over the decision-making process.<sup>127</sup> These types of secretive behaviors are often motivated by a quest for party advantage and, indeed, have been a typical criticism when Presidents have sought to limit their accountability.<sup>128</sup> One of the primary concerns with Ronald Reagan’s centralization of bureaucratic control in the 1980s, for example, was the secrecy with which OMB and the White House essentially rewrote rules and included regulated interest groups in the regulatory decisions.<sup>129</sup> Reagan usually worked “to veil his and his staff’s influence over administration.”<sup>130</sup> In contrast, Clinton’s unprecedented use of and willingness to take credit for his directive authority, though it injected more politics into decision making, provided accountability benefits that were a departure from the focus on confidentiality in political involvement in the Reagan—and to some extent George H.W. Bush—years.<sup>131</sup>

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125. This is one example where the warning from Professors Green and Zacharias regarding characterization seem particularly relevant. *See* Green & Zacharias, *supra* note 52, at 224–29. While the Republican Congress characterized the Clinton White House’s involvement in the minutia of policymaking as highly partisan, administration officials would undoubtedly characterize these efforts as achieving policy and ideological goals in the face of resistance from an obstinate Congress. As such, examples that are open to credible characterization on both sides, may have to be treated as mere political actions if there is to be a conceptual distinction between politics and pure partisanship.

126. Kagan, *supra* note 14, at 2337.

127. *See id.*

128. There are, of course, many other reasons for which the President may desire to keep certain Executive Branch decisions secret. Foreign affairs and national security decisions are such examples where secrecy may not immediately invoke accountability concerns. However, those that argue for a broad vision of the unitary executive draw a strong connection between popular electoral accountability and the desirability of a unitary executive. *See* Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (attributing executive action as responsive to popular opinion, which is based on public information); *see, e.g.*, Calabresi, *supra* note 33 (justifying normative claims for a unitary executive on the benefits of increased accountability). It is not thus unfair to link lack of public information with lack of an electorally-based political check.

129. *See* Kagan, *supra* note 14, at 2333.

130. *Id.*

131. *See id.* at 2250.

*c. Personnel management.* A third metric of partisanship that is a common thread in both legal and popular commentary is personnel management—the types of political appointees that an administration makes and the process in which it engages in hiring, firing, and transfer decisions. Building on the previous point, we should be less skeptical of intensely politicized personnel policies for higher-level officials than for those lower on the bureaucratic chain. Elliot Richardson, former cabinet secretary in the Carter and Nixon Administrations, noted in 1985 that the expansion of political appointments and centralized White House control into lower and lower levels of the bureaucracy had resulted in having to settle for less qualified people—“turkeys” in his words—to fill those jobs than would typically be required for political appointees.<sup>132</sup> While it is expected that less powerful jobs would attract less qualified candidates, the problem with younger, less experienced political appointees is that when their inexperience and immaturity is combined with the increasingly partisan tests for becoming a political appointee,<sup>133</sup> judgment is likely to be less rational, less expert, and less thoughtful.<sup>134</sup> Despite the importance of the process by which the White House chooses these lower-level appointees, many commentators continue to focus on the types of bureaucrats appointed at high-level positions, which can still yield insights about the partisan stance of an administration.<sup>135</sup>

The historical trend is mixed. At the higher levels, Nixon sought out a bipartisan cabinet, offering to appoint his campaign opponent, Hubert Humphrey, as the United Nations Ambassador and seeking out Democratic Senator Henry Jackson as Defense Secretary.<sup>136</sup> Though both declined, Nixon’s offers were genuine and aimed at moving beyond partisanship, and, in fact, Nixon did bring in Democrats John Connally as Treasury Secretary and Daniel Patrick Moynihan as a senior domestic policy advisor.<sup>137</sup> As the Nixon Administration progressed, however, the cabinet makeup gradually changed to reflect Nixon’s “preoccupation . . . with centralizing control in the White House.”<sup>138</sup> Carter appointed a cabinet that was not entirely partisan and one that many considered more expertise-oriented and less representative of typical Democratic interest

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132. See James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 67 *PUB. ADMIN. REV.* 57, 63 (1987).

133. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* 26 (2007) (describing his interview for a political appointment in the Office of Legal Counsel that began with a question about his past political contributions).

134. See *id.*

135. See Nelson W. Polsby, *Presidential Cabinet Making: Lessons for the Political System*, 93 *POL. SCI. Q.* 15, 15 (1978).

136. BROWNSTEIN, *supra* note 47, at 15.

137. See *id.* at 102, 404.

138. See Polsby, *supra* note 135, at 16.

groups.<sup>139</sup> Reagan's cabinet drew entirely from his party, while the cabinets of George H.W. Bush and Clinton each included one member of the opposite party.<sup>140</sup> Many commentators have also focused on the gradually expanding number of political appointees and the tendency for them to be further down in the bureaucracy.<sup>141</sup> At the lower levels of bureaucracy the trend toward increased political control and the potential for partisanization began in earnest with Reagan and his administration's belief that "Personnel is policy."<sup>142</sup> According to Terry Moe, Reagan's approach did "much more than continue a historical trend," as his Administration focused on increasingly partisan appointees, subject to increasing central control.<sup>143</sup> In many ways Clinton's presidential administration continued and even expanded on this trend.<sup>144</sup>

Judicial appointment as a subset of personnel management is a sub-metric from which it is difficult to discern meaning because of the importance of whether the President and the Senate are divided or unified at the time of appointment. While unified or divided government is an issue in any discussion of partisanship it is particularly prevalent in the context of often-politicized judicial nominations. However, commentators clearly look to a President's judicial appointments to see if they tend to be ideological appointments, respected umpires, or a mix of the two.<sup>145</sup> As such, judicial appointments provide more direction to the personnel management metric.

Historically, this trend is also mixed. Nixon, for example, demonstrated potential partisanship, only selecting Harry Blackmun for a seat on the Supreme Court after his two previous nominees F. Clement Haynsworth Jr. and G. Harrold Carswell were deemed too conservative,<sup>146</sup> though Nixon's nominations undoubtedly helped his Southern strategy. Ford's nomination of Justice Stevens was uncontroversial, as were the confirmation proceedings over Reagan's appointment of Justices O'Connor, Kennedy, and Scalia, all confirmed without a single dis-

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139. See *id.* at 20–25.

140. See David Shribman, Op-Ed., *Case for a Bipartisan Cabinet*, POST-GAZETTE (Pittsburgh), Aug. 15, 2008.

141. See *supra* notes 113–124 and accompanying text.

142. John Hart, *Insiders on the Outside and Outsiders on the Inside: Competing Approaches to Presidential Management*, 50 PUB. ADMIN. REV. 103, 104 (1990).

143. Terry Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 271 (John Chubb & Paul Peterson eds., 1985).

144. See Kagan, *supra* note 14, at 2281 (“[P]residential control of administration, if with a different policy orientation and in a different form, expanded significantly during the Clinton Presidency, moving in this eight-year period to the center of the regulatory landscape.”).

145. See, e.g., Skinner, *supra* note 7, at 616; Kevin J. McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 LAW & SOC. INQUIRY 919, 927–28 (2007); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 941–44, 954 (1990).

146. See BROWNSTEIN, *supra* note 47, at 170.

senting vote. However, the process surrounding Reagan's nomination of Robert Bork is an obvious exception.<sup>147</sup> Toward the midpoint of his second term, though Clinton's ability to get his judicial nominees confirmed slowed to a trickle,<sup>148</sup> his Supreme Court nominees were confirmed by wide margins. While drawing lessons from individual nominations is difficult, it is not unfair to characterize Nixon's nominations of Haynsworth and Carswell as more partisan than Clinton's nominations of Ruth Bader Ginsburg and Stephen Breyer.

*d. Election related policies.* A fourth metric of partisanship that commentators have discussed is how an Administration handles both the necessary and discretionary decisions that directly relate to the mechanics of elections—both voting and fundraising. It is with regard to the outcomes of elections that Justices Souter and Ginsburg, as well as a number of commentators, have noted the real potential for political and legal powers to be used for partisan, party-based advantage.<sup>149</sup> As they have pointed out, this use can undermine norms of democracy, separation of powers, and independence.<sup>150</sup> In addition to the examples of the typical Executive Branch partisanship discussed below, commentators have pointed to the significant fox-henhouse problems related to voting, vote counting, and fundraising. The examples of *Bush v. Gore*, discussed above,<sup>151</sup> and the House Democratic majority's decision to seat Indiana Democrat Frank McCloskey in 1985 after a disputed election, for example, illustrate behavior for which a partisan,<sup>152</sup> election-based explanation is more plausible than any other.

Though nearly all Presidents have faced claims of impropriety related to elections or fundraising, both Richard Nixon and Bill Clinton reached new heights of partisanship on this front during their administrations. The minor scandals involving Bert Lance and alleged campaign improprieties in the Carter Administration, and George H.W. Bush's pardoning of Casper Weinberger and others involved in Iran-Contra, were insignificant compared to other administrations.<sup>153</sup> In addition, although the Reagan Administration's actions led to the massive Iran Contra-Affair, these actions were more ideologically motivated and less di-

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147. See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (2007).

148. BROWNSTEIN, *supra* note 47, at 101, 103–04.

149. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 343–44, 51 (2004); Choper, *supra* note 66, at 347.

150. See *id.*

151. See *supra* notes 64–68 and accompanying text.

152. See DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 130–31 (1991).

153. GERALD S. GREENBERG, HISTORICAL ENCYCLOPEDIA OF U.S. INDEPENDENT COUNSEL INVESTIGATIONS 79–83 (2000).

rected at elections. By contrast, Nixon's election tactics are legendary, and he generally sought to mobilize the vast resources of the White House as another arm of the Republican political operation. Nixon's wiretaps, his enemies list, the White House plumbers, and "dirty tricks" in the 1972 campaign were all actions taken directly to influence an election with no other plausible purpose.<sup>154</sup> Though not reaching the same level as Nixon, there were many problematic occurrences within the Clinton White House as well. A major point of criticism of Clinton was the 1996 campaign finance controversy and the claims of trading preferential policies to China for political contributions. The DOJ's investigation resulted in 22 eventual convictions for fraud and for funneling foreign contributions into U.S. elections.<sup>155</sup> Among other less high-profile issues, the use of the White House's Lincoln Bedroom and federal phones to support political fundraising and the issuance of 141 pardons on Clinton's last day of office, some directed at Democratic allies and donors such as Marc Rich, also raised serious claims of directing official powers and policies for party advantage.

A subset of the election-related metric of partisanship that I find critical but that is not often discussed by commentators, Congress, or the media, is decision making related to contemporaneous campaign contributions. This issue is important because it is more quantifiable than most of the metrics discussed above and it directly relates to elections and party advantage. In addition, it provides leverage on the difference between the concepts of political and partisan. Consider the following example: Some commentators have criticized the Bush Administration for "assaults on the most highly specialized components of the federal bureaucracy," that were "undertaken on behalf of constituencies whose support was critical to the conservative movement, such as industry lobbies or the religious right."<sup>156</sup> Yet, under the political/partisan distinction herein created,<sup>157</sup> such complaints are actually picking a bone with typical politics. Government and political parties have every right to align themselves and support like-minded interest groups and ideological allies, subject to plausibility limits related to expertise and personnel. That is politics. What begins to look more cynical and more partisan, are policy choices motivated by immediate campaign contributions. This is much closer to a direct quid pro quo. For example, a recent study of donations to House campaigns showed that prior to an important sugar sub-

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154. See BROWNSTEIN, *supra* note 47, at 104.

155. See Press Release, Department of Justice, No. 01-662, Ernest G. Green Pleads Guilty to Tax Violations (Dec. 21, 2001), *available at* [http://www.usdoj.gov/opa/pr/2001/December/01\\_crm\\_662.htm](http://www.usdoj.gov/opa/pr/2001/December/01_crm_662.htm).

156. Moynihan & Roberts, *supra* note 77, at 16.

157. See discussion *supra* Section I.B.1.

sidy vote in 2007, donations from sugar-beet and sugar-cane producing states increased greatly and suffered an instant drop immediately following the subsidy vote.<sup>158</sup> While this example is drawn from congressional behavior, it is a perfect example of the type of quid pro quo campaign contribution behavior that raises red flags as a metric of partisan behavior. Such a metric is, however, impossible to develop or apply for the purposes of this Article because of the limited availability, particularly historically, for this type of donor data and the temporal connection to political behavior.<sup>159</sup>

*e. Relationship building.* The final metric of partisanship that I discuss is relationship building, essentially a President's efforts to engage the opposition party leaders in more informal settings to build up good will for inevitable conflicts down the road. I include this issue primarily for consistency, as I do not find it particularly compelling, and it is troublingly anecdotal. However, commentators mention it almost universally when discussing the partisanship of a presidency,<sup>160</sup> so I discuss it briefly. The basic concept is that a President's efforts to build more social and informal relationships outside of specific policy battles creates good will that can be used later to forge cooperation. Such actions also represent an open-mindedness and willingness to cooperate across parties that limits excessive partisanship by relying on previously formed, personal relationships.

The Reagans, for example—unlike the Carters who had enjoyed a quiet social life—were known to spend significant time cultivating relationships both in Washington and Hollywood.<sup>161</sup> In perhaps the best expression of relationship building, the relationship between Tip O'Neil and Reagan was characterized by O'Neil's saying, which Reagan repeated in his memoirs, “[a]fter six o'clock we can be friends; but before six, it's politics.”<sup>162</sup> Compared to his predecessors, Clinton is properly viewed as more partisan given his relatively infrequent social interaction with Republican members of Congress and, like Carter, narrow circle of friends in Washington. Given the contentious relationship between Clinton and the Republican Congress that impeached him, Clinton was no model of bipartisan socializing. However, even Clinton brainstormed with Newt Gingrich on agreements they could reach. Gingrich has said, “He and I privately got along fine. . . . We were like two graduate stu-

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158. See *Mapping a Better World*, ECONOMIST, June 6, 2009.

159. Unfortunately, I also assume that were this issue to become one that is frequently discussed, politicians and donors would do more work to muddy the temporal connection. However, to the extent that they have not yet done so, this metric is ripe for further quantitative investigation.

160. See, e.g., Skinner, *supra* note 7, at 606.

161. Allison McGevna, *Obama Chic: Inside the White House Cocktail Parties*, FOX NEWS, <http://www.foxnews.com/story/0,2933,509831,00.html> (last visited January 29, 2010).

162. RONALD REAGAN, RONALD REAGAN: AN AMERICAN LIFE 234 (1991).



dents hanging out.”<sup>163</sup> Of course, any account of socialization is anecdotal and open to characterization, but the reputations discussed above are widely held and provide at least some insight into a President’s desire to build extra-political relationships.

## II. PARTISAN METRICS APPLIED TO PRESIDENTS GEORGE W. BUSH AND BARACK OBAMA

Having laid out and summarized the spaces in which commentators and the media have previously been concerned with excessive partisanship overriding otherwise normal political action and decision making, I turn to applying these metrics to the George W. Bush and Obama Administrations. The discussion below tracks the metrics of partisanship for the Bush Administration and includes anecdotal evidence where available for the Obama Administration, though it is still too early to make a final judgment on Obama.

### A. Expertise

Comparatively, the Bush Administration reached a new height in terms of its willingness to ignore, override, or suppress expertise. Ironically, Bush, the country’s first “MBA President” was supposed to usher in an era of management-focused administration in the executive office,<sup>164</sup> and in the spring of 2000, Bush accused Clinton and Gore of engaging in “the most relentlessly partisan administration in our nation’s history.”<sup>165</sup> Bush, the former executive, indeed claimed that “good management” is what “makes good politics.”<sup>166</sup> Yet despite these claims and the critics of Clinton’s push of politics into presidential administration,<sup>167</sup> Bush went further still. Concerns, for example, about partisanship directly overriding expertise or predetermining “science” in the Bush Administration were pervasive.<sup>168</sup> Critics assailed former oil executive Phillip Cooney’s editing of EPA reports to artificially inflate the uncertainty surrounding climate change while downplaying evidence of human-induced changes;<sup>169</sup> a political appointee claimed that NASA should la-

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163. BROWNSTEIN, *supra* note 47, at 168.

164. James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 67 PUB. ADMIN. REV. 6–20 (2007).

165. BROWNSTEIN, *supra* note 47, at 226.

166. James Bennet, *The Bush Years: C.E.O., U.S.A.*, N.Y. TIMES MAGAZINE, Jan. 14, 2001.

167. See Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

168. See, e.g., STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD GOVERNMENT 163–96 (2007).

169. See Andrew C. Revkin & Matthew L. Wald, *Material Shows Weakening of Climate Change Reports*, N.Y. TIMES, Mar. 20, 2007, at A16.

bel the big bang a “theory” because “it is an opinion” and labeling it otherwise “unduly discounts intelligent design by a creator”;<sup>170</sup> purposeful efforts to suppress credible scientific evidence surrounding the regulation of carbon in tailpipe emissions and the attempt to bar a Department of Agriculture employee from releasing his findings regarding air pollution around hog farms also led to popular criticism.<sup>171</sup>

Another important example of the rejection of expertise was Bush’s actions in January 2007 to amend Executive Order 12,866 by issuing Executive Order 13,422, which placed significantly more decision-making authority in the hands of Regulatory Policy Officers who were directly accountable to the President.<sup>172</sup> These officers’ authority came directly from agency heads who had previously been responsible for personally approving an agency’s regulatory plan.<sup>173</sup> Professor Strauss has argued that this change resulted in “a dramatic increase in presidential control over regulatory outcomes—an increase effected by the President’s own unilateral action and not authorized by Congress.”<sup>174</sup> In “requiring the approval of an official loyal to the administration before an agency takes action,” Strauss claimed, “these changes threaten to disturb the difficult but necessary balance between politicians and experts, between politics and law, that characterizes agency rulemaking.”<sup>175</sup> The problem with this politicization of science is that it creates more opportunities for interest group involvement in rulemaking with an implicit promise of campaign contributions if the White House involves itself to come to a favorable position. The opportunities for quid pro quo, electorally-focused, governance increase dramatically.

The Obama Administration has not been without criticism regarding its approach to incorporating expertise into Executive Branch decision making, but, on balance, emphasis on technocratic expertise has seemed to be a significant managerial goal of the Obama Administration and its efforts in these areas are more prevalent than claims of shortcoming. In August 2009, the Administration generated some criticism in conservative circles for a political appointee overruling DOJ career staff decisions to move forward with civil charges against Black Panther Party members for voter intimidation.<sup>176</sup> However, in general, the Administration has

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170. Adler, *supra* note 92.

171. Freeman & Vermeule, *supra* note 37, at 53–55.

172. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

173. Compare Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), with Exec. Order No. 12,866 § 4(c)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

174. Strauss, *supra* note 26, at 702.

175. *Id.*

176. Jerry Seper, *Exclusive: No. 3 at Justice OK'd Panther Reversal*, WASH. TIMES, July 30, 2009, available at <http://www.washingtontimes.com/news/2009/jul/30/no-3-at-justice-okd-panther-reversal/>.

been praised for its technocratic approach, though it remains too early to make any definitive judgments. In one of its most important moves, the Obama Administration rescinded Executive Order 13,422, limiting its own power to overrule expert decision making within agencies and inject White House policy into decision making.<sup>177</sup> From an institutional perspective this move was actually quite significant and may have been surprising given Elena Kagan's prediction that as administrations develop more advanced forms of presidential administration, later administrations would continue to build upon these successive adaptations.<sup>178</sup> On this view, voluntarily ceding power from political appointees back to experts is unexpected. Many commentators have also praised Obama's directive to agency heads setting forth broad parameters for agencies' use of scientific advisors and reliance on expert data.<sup>179</sup> Despite these positive indications, it is early in the Obama Administration and the White House has not yet had the opportunity to review, and thus consider overriding, nearly the number of policies that arise in a full presidential term; it is thus too early to issue a final statement on Obama's predilection for partisanship in this regard.

### B. Specificity and Accountability of Policymaking

According to Professors Moynihan and Roberts, "If the Bush administration's strategy of politicization was limited to matters of high policy and management, it might have been more defensible. But it was not."<sup>180</sup> Some critics of the Bush Administration saw the partisan approach to governing extend to such bureaucratically remote places as the State Department's Office of the Historian, which, according to one advisory committee member who oversaw the office, was "a reflection of the Bush-Cheney Administration. . . . [Y]ou're either with us or against us."<sup>181</sup> The Bush Administration was typically focused on political oversight of previously-depoliticized decisions.<sup>182</sup>

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177. Revocation Of Certain Executive Orders Concerning Regulatory Planning And Review, 74 Fed. Reg. 6113 (Jan. 30, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Revocation-Of-Certain-Executive-Orders-Concerning-Regulatory-Planning-And-Review/](http://www.whitehouse.gov/the_press_office/Revocation-Of-Certain-Executive-Orders-Concerning-Regulatory-Planning-And-Review/). This order also removed the formal policy review responsibilities that the Bush Administration had given to Vice President Cheney in 2002. *Id.*; see Press Release, OMB Watch Applauds Obama's Revocation of Bush-Era Executive Order on Regulatory Review, OMB Watch, Feb. 4, 2009, available at <http://www.ombwatch.org/node/9662>.

178. See Kagan, *supra* note 14, at 2317-19.

179. See Sheryl Gay Stolberg, *Obama Puts His Own Spin on Mix of Science With Politics*, N.Y. TIMES, Mar. 9, 2009; *Obama Directive Called "Sea Change" for Scientific Integrity*, Science Online, <http://blogs.sciencemag.org/scienceinsider/2009/03/obama-directive.html> (last visited Aug. 1, 2009).

180. Moynihan & Roberts, *supra* note 77, at 16.

181. Justin Vogt, *The Tweed Wars*, NEW YORKER, Jan. 12, 2009.

182. See, e.g., David C. Weiss, *The International Boundary Commission, Treaty Interpreta-*

In terms of accountability, Executive Branch secrecy has also been a major criticism of the Bush Administration. One commonly cited example is the Administration's willingness to distort or conceal scientific evidence that did not support its ideological goals, even when doing so seemed unnecessary, even ridiculous.<sup>183</sup> One such example is the Bush Administration's refusal to pursue a needle exchange program. The Clinton Administration had made the same decision, acknowledging that the social science supported a program but accepting the political fallout by rejecting it anyway.<sup>184</sup> However, the Bush Administration highlighted evidence that it claimed cast doubt on the performance of the program. Upon closer inspection, the only researchers who actually opposed needle exchange were those from a socially conservative organization that was unknown to prominent AIDS researchers.<sup>185</sup> The group's application for a federal grant had been rated as "not suitable for funding," but that rating was ignored, and the group received a grant and subsequently issued the lone "study" that the White House cited in favor of its needle exchange policy.<sup>186</sup>

For the Obama Administration it is, again, too early to conclude whether it is truly inclined to function in a more open, inclusory manner than its predecessors. There have, however, been instances that demonstrate that the Administration places a higher value on transparency than its immediate predecessor. For example, on his first day in office, President Obama issued an Open Government Directive to agency heads that explained that government must be transparent, participatory, and collaborative,<sup>187</sup> the types of values that, though vague, are necessary to the proper functioning of expert decision making and promote the inclusion of scientific input in decision-making processes. The memorandum included the command that agency heads work to provide the public with "increased opportunities to participate in policymaking," and indeed OMB and the Chief Technology Officer have solicited public participation through a Google group<sup>188</sup> and other web-based participation

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*tion, and the President's Removal Power*, 41 LOY. U. CHI. L.J. 39, 55–58 (2009) (describing politicization of the International Boundary Commission).

183. There are, of course, other examples. One cannot discuss accountability and openness in decision making in the Bush Administration without a mention of decision making surrounding detainment and interrogation techniques related to the global war on terror; however, these policies are, again, so easily characterized as ideological, as opposed to electorally-focused, and are thus not key for my claims in this Article.

184. Editorial, *Deadly Ignorance*, WASH. POST, Feb. 27, 2005 at B06.

185. *Id.*

186. *Id.*

187. Transparency and Open Government, 74 Fed. Reg. 23,901, (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/).

188. See Open Government Directive, Google Groups, <http://groups.google.com/group/opengovernmentdirective?hl=en&pli=1> (last visited Jan. 29, 2010).

mechanisms that groups such as the non-partisan OMB Watch have praised.<sup>189</sup> Nevertheless, drawing conclusions from such scant evidence would be premature and unduly generous to an Administration that has only recently encountered the type of declining political support that may often lead to a desire for less transparency in decision-making processes. Partisans have disagreed, for example, over whether Obama's appearance at the House Republicans' retreat or the bipartisan health care summit were true efforts at accountability in the health care reform debate or just ploys to drive support for his policies.<sup>190</sup> The fact that they are occurring at all, however, is a noticeable departure from Obama's predecessor. Yet after the Democrats lost their sixty-seat majority in the Senate, Obama conceded that the closed-door nature of health care reform deliberations had been a "mistake."<sup>191</sup> And in the wake of the divisive legislative battle over the final bill, Obama installed fifteen nominees through recess appointments, a move seen by many commentators as evidence of the Administration's increasing willingness to advance Obama's agenda using tactics that Democrats had decried during the Bush Administration.<sup>192</sup>

### C. Personnel Management

One of the areas in which the Bush Administration has received the harshest criticism for partisanship was in its management of personnel. Whether it is Jack Goldsmith's description of his interview for a position at OLC that began with a question about his political campaign contributions;<sup>193</sup> the partisan motivations related to political corruption investigations of Democrats and voter fraud cases underlying the U.S. attorney removals;<sup>194</sup> Monica Goodling's violation of the Hatch Act in considering Republican campaign contributions in hiring non-political positions;<sup>195</sup> politicization in firing a previously neutral boundary commis-

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189. Press Release, OMB Watch, OMB Watch Applauds Obama Administration's Step Forward on Open Government (May 22, 2009), available at <http://www.ombwatch.org/node/10035>.

190. See Posting of Tobin Harshaw to the New York Times Opinionator, Health Care's Clash of the Titans, <http://opinionator.blogs.nytimes.com/2010/02/26/health-cares-clash-of-the-titans/> (Feb. 26, 2010, 22:10 EST).

191. See Josh Gerstein, *President Obama: Lack of Transparency a 'Mistake'*, POLITICO, Jan. 25, 2010, <http://www.politico.com/news/stories/0110/31990.html>.

192. See Posting by John Hudson to The Atlantic Wire, *Obama 2.0: Now with 30% More Partisanship*, THE ATLANTIC, <http://www.theatlanticwire.com/opinions/view/opinion/Obama-20-Now-with-30-More-Partisanship-3008> (Mar. 28, 2010, 11:27 EST).

193. See GOLDSMITH, *supra* note 133, at 26.

194. Weiss, *supra* note 65, at 326, 333 n.105.

195. See Michael Isikoff & Evan Thomas, *Bush's Monica Problem*, NEWSWEEK, June 4, 2007, at 24, 27.

sioner charged with maintaining the border with Canada;<sup>196</sup> or the appointment of relatively young, inexperienced officials to posts traditionally reserved for more seasoned officials,<sup>197</sup> such criticisms are frequent in evaluations of Bush's presidency.

As for Obama, despite some commentators' claims that the selection of Rahm Emmanuel as Obama's Chief of Staff indicated the end of post-partisanship, on the more rank and file positions, for which the Bush Administration was subjected to significant criticism, Obama has worked to depoliticize the process. Shortly after entering office Obama issued an executive order dealing with Executive Branch employee ethics, a much-discussed lobbyist gift ban, a statement that employment is based on experience and qualifications, and an even more important "revolving door ban" that requires appointees to commit to not working in the private sector on their policy areas for two years after leaving the Executive Branch.<sup>198</sup> While such reforms are likely to reduce politics in administration, they are also likely to reduce partisan behaviors because revolving door lobbying tends to be a particularly direct way to inject campaign and fundraising concerns directly into policymaking. The "K-Street Project," an effort by former House Majority Leader Tom Delay to limit access to lobbying firms that hired Democrats is one such example of the partisan influence that revolving door hiring has had on federal policymaking.<sup>199</sup>

Another interesting contrast between the Bush and Obama Administrations is their efforts to recruit senior senators from the opposite party to their respective cabinets. Following Bush's election and the divisive Florida recount, Bush invited John Breaux, the moderate Louisiana Democrat, to serve as energy secretary. Breaux rejected the offer, in part because he recognized that Bush's offer likely was motivated by the fact that the Senate was divided fifty-fifty and a Republican governor would appoint his replacement.<sup>200</sup> Obama attempted a similar, failed courtship of New Hampshire Senator Judd Gregg as his Treasury Secretary. Pursuing Gregg was significant because he was a genuine conservative who would have been responsible, in a major cabinet post, for advancing Obama's ambitious plans on the economic bailout. However, unlike Bush, Obama's team worked with Democratic New Hampshire Governor John Lynch to ensure that he would appoint a Republican caretaker senator so as not to tip the balance of power in the Senate, as it was possible that another Democratic Senator from New Hampshire would have given

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196. See Weiss, *supra* note 182.

197. Strauss, *supra* note 26, at 736.

198. Ethics Commitments by Executive Branch Personnel, 74 Fed. Reg. 4673 (Jan. 21, 2009).

199. BROWNSTEIN, *supra* note 47, at 267–70.

200. *Id.* at 228.

Senate Democrats a filibuster-proof majority.<sup>201</sup>

As for judicial appointments, Bush's record in confirming Justices Roberts and Alito was mostly positive; however, he did encounter significant controversy over his appointment of conservative appellate judges,<sup>202</sup> and he was forced to withdraw the nomination of Harriet Miers. Bush also demonstrates why judicial nominations are a less than ideal setting to think about partisanship. On the one hand, it is easy to characterize Bush's nominations as bipartisan since both of the nominees he sent to the Senate were confirmed. On the other hand, excepting Clarence Thomas who was confirmed narrowly because of personal scandal, both of Bush's nominees were confirmed by narrower margins than any confirmed justices since at least before the Nixon Administration.<sup>203</sup> Bush seemed to follow Tom Delay's vote counting theory that "anything less" than "razor-thin party-line votes" meant that he had "conceded too much to those resisting the conservative agenda."<sup>204</sup> The Miers nomination also brings out the problems of characterization. To some, the key problem with Miers was that the appointment was political cronyism, a concern related to partisanship.<sup>205</sup> But, in the end, it may well have been conservative opposition stemming from the lack of a track record that doomed Miers' candidacy. Obama initially received mostly praise for his first appellate nomination, moderate David Hamilton to the Seventh Circuit.<sup>206</sup> While the ranking member of the Senate Judiciary Committee, Jeff Sessions, attempted to orchestrate a filibuster, Hamilton was eventually confirmed and the nomination was seen as many as an example of "good practices" in appointing Judge Hamilton by, for example, consulting with Hamilton's home state senators and finding a nominee who received the highest American Bar Association rating and was also praised by the local chapter of the Federalist Society.<sup>207</sup> In an even higher profile

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201. See, Posting of Marc Ambinder to The Atlantic Politics Channel, [http://politics.theatlantic.com/2009/02/lynch\\_will\\_appoint\\_republican\\_if\\_obama\\_nominates\\_gregg.php](http://politics.theatlantic.com/2009/02/lynch_will_appoint_republican_if_obama_nominates_gregg.php) (Feb. 2, 2009, 14:30 EST). At the time of Gregg's nomination, the winner of the Minnesota Senate race, which Democrat Al Franken would eventually win giving the Democrats sixty seats in the Senate, was still unclear. See Jay Weiner, *Senate Recount: After Unanimous Ruling for Franken, Attention Shifts to Pawlenty – and Coleman*, MINN. POST, June 30, 2009.

202. See, e.g., Helen Dewar & Mike Allen, *GOP May Target Use of Filibuster*, WASH. POST., Dec. 13, 2004, at A1.

203. See Wayne Sulfridge, *Ideology as a Factor in Senate Consideration of Supreme Court Nominations*, 42 J. OF POL. 560, 563 (1980).

204. BROWNSTEIN, *supra* note 47, at 3.

205. Adam Bellow, *Dealing in Dynasties*, NAT. REV. ONLINE, Oct. 18, 2005.

206. See Press Release, Office of Senator Richard Lugar, Lugar Introduction Statement for Judge David Hamilton, (Apr. 1, 2009), <http://lugar.senate.gov/press/record.cfm?id=310927>; Neil A. Lewis, *Moderate Is Said to Be Pick for Court*, N.Y. TIMES, Mar. 17, 2009 ("Judge Hamilton . . . is said by [Indiana] lawyers to represent some of his state's traditionally moderate strain."). *But see* Judicial Confirmation Network, Hearings Continue on Controversial Judge, <http://judicialnetwork.com/news/hearings-continue-controversial-judge> (last visited Jan. 26, 2010).

207. Carl Tobias, *Ending 'Confirmation Wars'*, BALT. SUN, Nov. 30, 2009, available at

nomination, Justice Sotomayor was confirmed on a 68-31 vote, a margin similar to Chief Justice Roberts and wider than Justice Alito, though she notably attracted less bipartisan support than pre-Bush Supreme Court nominees.<sup>208</sup> Excepting the immediate reception to the appointment of Berkeley Law professor Goodwin Liu, Obama's other federal judicial nominees have not yet encountered the resistance of those Bush appointed, though Obama has moved more slowly in appointing judges than did his predecessor.<sup>209</sup> Finally, Professors David Fontana and Micah Schwartzman have noted that the average age of Obama's first batch of circuit court nominee is older than those appointed by George W. Bush, Clinton, George H. W. Bush, and Reagan, an indication, they find, that Obama is less focused on appointing younger, more ideological candidates to the circuit courts.<sup>210</sup>

#### *D. Election Related Policies*

"Election administration is another policy area where the Bush administration has ignored evidence and the advice of career staff," according to Professors Moynihan and Roberts.<sup>211</sup> "In this case," they argue, "the policy goal closely coincides with partisan advantage."<sup>212</sup> A Republican volunteer from the 2000 Florida recount, for example, was charged with heading a voting rights unit at the DOJ and subsequently overturned career staff guidance, later upheld in court, that was viewed as disadvantageous to Republicans.<sup>213</sup> Political appointees at the Election Assistance Commission altered the findings in a report it had commissioned on voter fraud, changing the professional researchers' view from "there is widespread but not unanimous agreement that there is little polling place fraud," to "there is a great deal of debate on the pervasiveness of fraud."<sup>214</sup> Other examples of facially partisan behavior relating to elections are prevalent throughout the Bush Administration. For example, during President Bush's reelection campaign, then National Security Advisor Condoleezza Rice came under significant criticism for her public engagements that many saw as open campaigning. Whereas during Oc-

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<http://www.baltimoresun.com/news/opinion/oped/bal-op.confirmation30nov30,0,2535556.story>.

208. Paul Kane and Amy Goldstein, *Senate Confirms Sonia Sotomayor for Supreme Court*, WASH. POST, Aug. 6, 2009.

209. Jeffrey Toobin, *One Year: Where Are the Judges*, NEW YORKER, Jan. 10, 2010.

210. See David Fontana and Micah Schwartzman, *Old World*, THE NEW REPUB., July 17, 2009, <http://www.tnr.com/article/politics/old-world>.

211. Moynihan & Roberts, *supra* note 77, at 16-17 (citing Kaufman, *supra* note 99, at 1060).

212. *Id.*

213. *Id.*

214. Ian Urbina, *U.S. Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007.



tober and November of 2001, 2002, and 2003 she had made three public appearances combined (two in New York and one in Chicago), in October and November of 2004 she made at least one public appearance in Oregon, Washington, North Carolina, Michigan and Florida, and at least two appearances in the battleground states of Pennsylvania and Ohio.<sup>215</sup> Despite the truism that whether something is partisan is often a matter of characterization,<sup>216</sup> it is equally true that such electorally-focused behavior is pretext and simply cannot pass the plausible deniability test.

For this metric it is simply too early to judge the Obama Administration as it has yet to be in office during a federal election. It is at least concerning that conservatives have criticized the Obama DOJ's handling of a voter intimidation claim in Philadelphia that career staff was pursuing.<sup>217</sup> However, such claims are likely minor compared to those arising out of the U.S. attorney firings for example,<sup>218</sup> and a verdict on this metric of partisanship for the Obama Administration will have to wait until at least November 2010.

### *E. Relationship Building*

Interestingly, it is on this metric more than perhaps any other that George W. Bush stands more isolated from his presidential predecessors. One of Bush's advisors has lamented the former-President's lack of social outreach in Washington: "We have no social presidency," said the advisor. "We don't use the White House, we don't use Camp David, we don't use Air Force One, we don't use all the symbolism of the presidency to build community and connection with people on the opposite side, so when it comes time to talk the issues we would have relationships. We have none of that."<sup>219</sup> Bush was rumored to dislike cocktail parties, having given up drinking years earlier following his admitted alcohol abuse and drunken driving arrest.<sup>220</sup> Though he viewed his rejection of the Washington social scene as a badge of honor, there is no question that he socialized less in the White House than any President in recent memory.

President Obama, on the other hand, seemed to begin his presidency by moving in a different direction, though this good will was quickly lost as major disagreements brewed on the 2009 financial bailout and health

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215. Posting by John Nichols to The Beat blog, *A Politician, Not a Diplomat*, THE NATION, [http://www.thenation.com/blogs/thebeat/2012/a\\_politician\\_not\\_a\\_diplomat](http://www.thenation.com/blogs/thebeat/2012/a_politician_not_a_diplomat) (Nov. 17, 2004, 13:17 EST).

216. See Green & Zacharias, *supra* note 52, at 224–44.

217. Seper, *supra* note 176.

218. See *supra* text and accompanying note 194.

219. BROWNSTEIN, *supra* note 47, at 242.

220. See McGevna *supra* note 159.

care reform. The President initially received significant press for reinstating the kind of social events and after-hours get-togethers not seen at the White House in nearly a decade. First there was a cocktail party at the White House for a group of bipartisan legislators. Obama followed this up in February with a Super Bowl party that brought Democratic and Republican members of Congress to the White House. The First Family also hosted a concert by Stevie Wonder, which was attended by members of Congress from both parties. On attending the Super Bowl party, conservative Republican Congressman Trent Frank remarked that he is “probably as philosophically opposed to this president as any member of Congress.”<sup>221</sup> However, Franks said that he left the party with a newfound respect for Obama: “First of all, when you have a meeting like this, it humanizes and personalizes opponents, where you recognize them as human beings.”<sup>222</sup> Said Franks, “I think that does a lot towards helping people put aside politics and really try to do what is best for the country.”<sup>223</sup> Capitalizing on the success of these events, the President has determined to hold weekly Wednesday cocktail parties at the White House and has held a “time out dinner” with members of both parties. One analyst from the Brookings Institution noted that by late-April 2009, Obama had held personal meetings with more members of Congress than Bush did in his entire presidency.<sup>224</sup> Yet by early 2010 the major policy disputes had poisoned this good will. At least one member of the House was calling Obama “the most partisan President that America has ever seen.”<sup>225</sup> Thus, as of early 2010, despite any efforts Obama has spent on relationship building—and I claim the efforts do matter for post-partisanship—the results have not followed, and Obama has seen his relationships with members of Congress worsen significantly.

In concluding this admittedly brief application of the metrics of partisanship, I emphatically do not claim that these metrics can be mechanically applied, producing a dispositive answer as to whether an Administration is either partisan or not. Nor do I assert that the argument allowed by this brief space is an all-encompassing catalog with rigorous social science method. I do, however, argue that the metrics are useful to conceptually break down the question into the above component pieces that frequently arise both in commentators’ discussions and in the historical record of media and congressional criticism. Applying that

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221. See Jeff Zeleny, *Obama Woos G.O.P. With Attention, and Cookies*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/05/us/politics/04web-zeleny.html>.

222. *Id.*

223. *Id.*

224. *The Senator-in-Chief*, ECONOMIST, June 27, 2009, at 40.

225. Shiner, *supra* note **Error! Bookmark not defined.** (quoting Representative Candice Miller).

framework to the Bush Administration, I can see no credible response to the claim that the Bush Administration was the most partisan in the period under discussion—as far back as through the Nixon Administration. On almost every metric, the Bush Administration faced prominent and significant criticism for working not just for ideological goals but for pure party advantage. There are enough instances of this behavior that asserting an unprecedented record of partisanship as compared to recent administrations is neither manipulation nor cherry picking. This conclusion seems particularly justified given that the Bush Administration had a Republican Congress for six of the eight years it was in office and a media that is generally considered to have become relatively docile for a number of years in the wake of the September 11th terrorist attacks.

Furthermore, though I have taken a different route, I am hardly the first to reach this conclusion. Both legal and political science academics have argued this conclusion, as have those in the popular media, and, finally, politicians, political operatives, and policy staff have stated the same.<sup>226</sup> *The Economist* was likely the most direct in its assessment, stating that the result of the Administration's policies could be seen in “the three most notable characteristics of the Bush presidency: partisanship, politicization and incompetence. Mr. Bush was the most partisan president in living memory.”<sup>227</sup> The public also reflected this view that the Bush Administration was unusually partisan. Tellingly, at its worst, Bush's approval rating among Democrats fell lower than Nixon's ratings among Democrats at the peak of Watergate; Carter's showing among Republicans at his lowest point of his presidency; or Clinton's rating by Republicans during the height of his impeachment.<sup>228</sup>

As for the Obama Administration, my essential claim—as evidenced by the relatively scant discussion above—is that it is simply too early to take accurate stock of its degree of partisanship. So far, however, there are signs that Obama is retreating to pre-Bush levels of partisanship, perhaps to make good on his post-partisan pledge.<sup>229</sup> Again, the partisanship of the Obama Administration returns to my ends-means discussion above. On the metrics of partisanship I have developed, which are large-

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226. See, e.g., GOLDSMITH, *supra* note 133; Skinner, *supra* note 7, at 605 (“George W. Bush has brought this partisanship to a new extreme—perhaps to the point when practice becomes pathology.”); Editorial, *Politics, Pure and Cynical*, N.Y. TIMES, Mar. 14, 2007, at A22; Skinner, *supra* note 7. Rush Limbaugh has taken what appears to be the minority position, arguing that Bush “had a reverence for the office, that’s why he didn’t get partisan.” Limbaugh: Bush Wasn’t Partisan, Think-Progress.org, <http://thinkprogress.org/2009/02/02/limbaugh-bush-hated/> (last visited Jan. 29, 2010).

227. *The Frat Boy Ships Out*, *supra* note 7.

228. BROWNSTEIN, *supra* note 47, at 309.

229. See *supra* notes and accompanying text 176–178, 187–189, 200–210, 219–222. See also John Harwood, ‘Partisan’ Seeks a Prefix: Bi- or Post-, N.Y. Times, Dec. 6, 2008 “Obama is doing something marvelously right,” Michael Gerson, President Bush’s onetime senior speechwriter, wrote in *The Washington Post*. “He is disappointing the ideologues.” *Id.*

ly about means and process, Obama seems to be less partisan than his predecessor. However, because of the large-scale policy challenges he has taken on, the ends have been unquestionably divisive.

In one sense, regardless of how partisan Obama wanted to be, having had less than two years to generate scandals, and lacking an election cycle in which to deploy partisan tactics, it would be almost impossible for the new Administration to appear partisan in comparison to its predecessors. However, even given this short temporal period, there are clear indications—reliance on expertise, increased transparency, lobbying bans, de-centralization of administrative policy-making, and bipartisan relationship building, to name a few—that the Obama Administration is seeking a less partisan approach than the previous Administration, perhaps following its concept of post-partisanship. Many observers have welcomed this potentially post-partisan approach; however, there are, of course, detractors. Representative Barney Frank has stated that Obama “overestimates” his ability to “charm” the Right into agreeing with him; Frank joked that this collegiality was leading him to suffer from a “post-partisan depression.”<sup>230</sup>

### III. DEFINING POST-PARTISANSHIP AND THE IMPLICATIONS OF A POST-PARTISAN PRESIDENCY

Even if it is too early to render judgments about the Obama Administration, it is important to begin the discussion because of how President Obama has positioned himself. Indeed, a key goal of this Article is to address post-partisanship, a phrase that the President’s political team, campaign advisors, and the media use to describe his approach to politics. Given the length of time left for the Obama Administration, it is more useful to discuss what post-partisanship can and cannot be and what lessons it counsels for his Administration than to simply assess the political or partisan nature of his performance thus far. This final part engages in this discussion, arguing for an understanding of post-partisanship that is more limited and pragmatic than bipartisanship, as well as a natural reaction to the partisanship of the Bush Administration. It then explains that a claim to post-partisanship is a logical, welcome, and pragmatically useful position given the previous Administration. Finally, it explains that post-partisanship, as this Article understands it, is well-suited for the current political climate, which is characterized by unusually divided parties that are each more ideologically coherent within themselves than at almost any time in American history. This discussion also engages normative

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230. See Ryan Grim, *Barney Frank Has Post-Partisan Depression*, POLITICO, Dec. 22, 2008, [http://www.politico.com/blogs/thecrypt/1208/Barney\\_Frank\\_has\\_postpartisan\\_depression.html](http://www.politico.com/blogs/thecrypt/1208/Barney_Frank_has_postpartisan_depression.html).

implications of post-partisanship and includes some advice for the Obama Administration regarding the proper role of politics in a post-partisan Administration.

### A. *Defining Post-Partisanship*

The explanations for what it means to be post-partisan are almost as varied as the commentators that have weighed in on the issue. Some have argued that the post-partisan rhetoric is a strategy meant to capture the so-called Millennial Generation, which is less likely to identify with a particular party.<sup>231</sup> Others have looked at Obama's past as a community organizer in Chicago and claimed that post-partisanship is about returning to a strong inclusion of community values in politics.<sup>232</sup> On many commentators' understanding, post-partisanship is conflated with bipartisanship and is simply implementing policies that both parties support.<sup>233</sup> As Democratic operative Al From has usefully explained, "Post-partisan solutions transcend partisan orthodoxy. They put the national interest above party interests."<sup>234</sup> Clearly there is disagreement. One frustrated commentator opined that, "like everyone else, I'm left wondering just what post-partisanship means to Barack Obama and how it could possibly work as long as the Republican Party has enough votes to stop a Democratic president from enacting his or her ideas."<sup>235</sup>

I argue that the best understanding of what it means to be post-partisan arises from the metrics of partisanship described above. The argument is thus somewhat similar to From's in that post-partisanship is characterized by the fact that party-based electoral advantage takes a back seat to national policy concerns.<sup>236</sup> Post-partisanship is, however, not about removing all politics from governing, nor is it about passing legislation by broad bipartisan margins. President Obama has associated party-based partisanship with a kind of cynicism in politics.<sup>237</sup> Being post-partisan is taking action and implementing decision-making policies

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231. Eric Greenberg, *Obama and the Post-Partisan Vote*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/eric-greenberg/obama-and-the-post-partis\\_b\\_162314.html](http://www.huffingtonpost.com/eric-greenberg/obama-and-the-post-partis_b_162314.html) (last visited Jan. 29, 2010).

232. Dan Conley, *Look homeward, Obama*, SALON.COM, <http://www.salon.com/opinion/feature/2008/05/23/obama/index.html> (last visited Jan 29, 2010).

233. See, e.g., Mort Kondracke, 'Post-Partisanship' Isn't Dead Yet—But It's Very Close, ROLL CALL, Mar. 19, 2009; see also Op-Ed, Karl Rove, *The President Has Become a Divisive Figure*, WALL ST. J., Apr. 9, 2009.

234. Editorial, *Obama's Post-Partisanship*, PHIL. INQUIRER, Mar. 15, 2009.

235. Conley, *supra* note 232.

236. These policy priorities, of course, are still created largely within the party structure, but as explained throughout this Article, my understanding of post-partisanship does not require removing the party apparatus from policymaking.

237. See BARACK OBAMA, THE AUDACITY OF HOPE 8, 131, 214 (2006).

that counter that party-based cynicism. Making personnel decisions based primarily on qualifications; listening to science and expertise instead of overriding it with political concerns; appointing judges and justices that do not incite partisan firestorms or result in narrow confirmations; refraining from politically motivated prosecutions; working to build extra-political relationships across parties—these are all examples of behaviors which involve politics but which can be seen as post-partisan.<sup>238</sup> These behaviors are limited in that they do not embrace truly broad bipartisanship; however, they are nonetheless important. As one Capitol Hill commentator noted, post-partisanship “aspires to a politics of unity and respect.”<sup>239</sup> In his book on partisanship in American government, Ronald Brownstein argued that while it “may have been unrealistic for any President (short of a Lincoln) to entirely tame the forces dividing America” during the late 1960s and early 1970s, “Americans had a right to expect that their president would not deepen and widen those divisions,” often for mere electoral gain.<sup>240</sup> Brownstein’s claim gets to the core of the value of post-partisanship. Under post-partisanship, parties and elections are not the primary drivers of policy; they do not dominate rationality and professionalism.

An important corollary to this understanding of post-partisanship is that such a conception is not the same as being bipartisan. Many of the critics of President Obama since he has taken office have focused on the way in which the stimulus bill and health care reform legislation were passed without a single Republican vote, holding out such a perceived failure as the President renegeing on his post-partisan promises.<sup>241</sup> In March 2009, for example, columnist Mort Kondracke chided, “It’s time for Obama to remember all those ‘post-partisan’ campaign promises of his and find ways to listen to Republicans and accommodate some of

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238. It may, of course, be true that some Executive Branch actions will result in a political firestorm despite the goodwill of a White House’s actions, the qualifications of the candidate, or the merits of the policy. This is why looking at a single example of an action or decision, in isolation, is not particularly insightful. It is also why one must follow Professors Pildes’ and Levinson’s advice and analyze macro political and legal issues from the perspective of whether government is unified or divided based. See Levinson & Pildes, *supra* note 9. However, the fact that the value of information from an isolated incident is limited is also precisely why it is necessary to develop a number of metrics to roughly measure Executive Branch behavior over a period of years and in comparison to other administrations. Thanks to Patrick Luff for raising this point.

239. Brent Budowsky, *The Post-Partisan Realignment*, THE HILL, Oct. 21, 2008, <http://thehill.com/opinion/columnists/brent-budowsky/24629-thepost-partisan-realignment>.

240. BROWNSTEIN, *supra* note 47, at 105.

241. See, e.g., John Dickerson, *From Détente to Taunts*, SLATE, Mar. 30, 2009, <http://www.slate.com/id/2214963/>; Despite Post-Partisan Pledges, Obama Enters ‘Campaign Mode’ to Sell Stimulus, FOX NEWS, <http://www.foxnews.com/politics/first100days/2009/02/11/despite-post-partisan-pledges-obama-enters-campaign-mode-sell-stimulus/> (last visited Jan. 29, 2010); Steven Lee, Obama’s promise of post-partisanship, THE NEW REPUBLICANS, Apr. 9, 2009, <http://thenewrepublicans.net/2009/04/07/somewhere-in-the-middle/>.

their ideas.”<sup>242</sup> Kondracke went on to explain how the President should hold more closed-door strategy sessions with top Republicans and adopt policy ideas that Kondracke and other Republicans find favorable, implying that anything short of this failed Obama’s post-partisan pledge.<sup>243</sup> In June 2009, Senator John McCain criticized Obama’s approach to bipartisan consensus, deriding Obama’s strategy of getting a few key Republican votes rather than building wide legislative margins from both parties.<sup>244</sup> Post-partisanship, as I argue for it to be understood, does not require building broad legislative support from both parties; it just requires a less cynical brand of politics focused on rationality and expertise in decision making, accountability to the public, not using public office for party advantage, and working to build cross-party relationships. The Obama Administration essentially agrees as it “insists that being a post-partisan is not the same thing as being a centrist on all issues or meeting opponents halfway every time.”<sup>245</sup> Indeed, according to William Safire, “The adjective partisan means ‘strongly committed to an ideology or party.’ Bipartisan means ‘cooperation between two parties to achieve a political goal’; nonpartisan means ‘cooperation in pursuance of patriotic, civic or philanthropic goals.’”<sup>246</sup> Thus, there is political space for a form of post-partisanship that is not complete cooperation but is, instead, characterized by a standing-down from the partisan warfare of the previous administrations. On this understanding, post-partisanship is a more modest—though still important—goal and, those who have criticized the Obama Administration for not following through on post-partisan pledges are misguided.

The type of post-partisanship argued for above, even though more limited than traditional bipartisanship, is an important development and Executive Branch governance strategy, particularly when situated as a response to the extreme partisan behaviors seen in the Bush Administration. Indeed, some commentators predicted the idea of post-partisanship, though they did not describe it by that name. Writing in early 2007, when

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242. Kondracke, *supra* note 233.

243. *Id.*

244. *McCain: Obama Has Done Well, But Hasn't Been Bipartisan*, CNN Political Ticker, <http://politicalticker.blogs.cnn.com/2009/06/21/mccain-obama-has-done-well-but-hasnt-been-bipartisan/> (last visited June 22, 2009); *see also* Rove, *supra* note 233. Democratic strategist Marc Dunkelman has argued, the level of partisanship was so entrenched when President Obama took over that a bipartisan Administration was an unrealistic expectation. Marc Dunkelman, *Obama May Be Transformational, but Don't Expect an Instant End to Partisanship*, U.S. NEWS & WORLD REPORT, Mar. 19, 2009, available at <http://www.usnews.com/opinion/articles/2009/03/19/obama-may-be-transformational-but-dont-expect-an-instant-end-to-partisanship.html>. Regardless of whether this is the case—it certainly looks somewhat like justifying any potential shortcoming of Obama’s by blaming the Bush Administration—making this claim is unnecessary because, as I argue, post-partisanship is a more limited goal than bipartisanship.

245. Liasson, *supra* note 2.

246. Safire, *supra* note 63.

most observers considered Obama a long shot to even receive the Democratic nomination, author Ronald Brownstein presciently predicted the following:

One of the most venerable theories about presidential elections is that the nation almost always elects a president who responds to the flaws it finds in his predecessor. John F. Kennedy was more vibrant and energetic than Eisenhower; Carter more honest than Nixon; Reagan tougher than Carter; George H.W. Bush “kinder and gentler” than Reagan; Clinton more engaged and energetic than Bush; the second Bush more morally upright in his personal life than Clinton. If that pattern holds, Americans in 2008 will be searching for two things above all in the successor to George W. Bush: competence in the management of government’s day-to-day challenges, and the creativity and flexibility to construct more consensus at home and around the world.<sup>247</sup>

These concerns could be restated as a desire for expertise and accountability in administration and personnel management, as well as a desire for a willingness to remain open to bipartisan personnel and policies. Brownstein was not alone. Even before Obama’s nomination, George W. Bush’s chief pollster noted that “an election could come along that all of a sudden is not a close election if somebody or some party speaks to the . . . group while still maintaining part of their party. . . . I think people in this country want something that brings them together, not something that separates them.”<sup>248</sup> Indeed, at least one popular commentator has already questioned whether Obama has moved too far in the direction of post-partisanship, overreacting to the perceived deficiencies of the Bush and Clinton Administrations in terms of partisan action and decision making.<sup>249</sup>

### *B. Implications of a Post-Partisan Presidency*

A common criticism of the idea of being post-partisan is that the concept embodies no new insight, that it is essentially no different from previous promises of bipartisanship; however, there are reasons why the current appearance of post-partisanship is particularly important. Long-time political analyst Norman Ornstein was prepared to be skeptical of the post-partisan pledge, reminding that before Obama, “[t]here was Richard Nixon, whose slogan was ‘bring us together.’ Gerald Ford prom-

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247. See BROWNSTEIN, *supra* note 47, at 415.

248. *Id.* at 24.

249. Jacob Weisberg, *New President, Old Mistake*, SLATE, Aug. 1, 2009, <http://www.slate.com/id/2224026/>.



ised an era of ‘compromise, conciliation and cooperation.’ George H.W. Bush was ‘kinder and gentler,’ and George W. Bush wanted to ‘change the tone.’”<sup>250</sup> What makes the idea of being “post-partisan” any different? First, given the changes in political dynamics in the last decade or so, there is an important role for post-partisan behavior as herein defined. Second, as explained above, less partisanship is characterized by fewer instances within a given administration of the metrics of partisanship. Thus, if an administration is committed to post-partisanship, I argue below that such action should have—beyond generally positive consequences of increased likelihood of bipartisan cooperation—policy lessons for how we understand the presidency and the way in which the Obama Administration should behave in fulfilling its post-partisan pledge.<sup>251</sup> In addition, post-partisanship has legal implications for the following: the accountability justification for executive power, modern separation of powers doctrine, and the proper judicial deference to Executive Branch decision making.

### *1. The “why now?” of post-partisanship*

To begin, it is important to understand the political space in which post-partisanship is useful given the current dynamics and recent history of American politics. A widely recognized realignment, or sorting, of American political parties and ideologies in recent years makes post-partisanship particularly relevant and renders its contributions more important than they would have been a generation ago. This shift over time is one reason why Obama’s positioning is different and more meaningful than previous pledges of moving beyond party differences. In addition, there are more self-described independents than at any time since at least the beginning of the presidency of Franklin Roosevelt.<sup>252</sup> Thus, despite Norman Ornstein’s skepticism, he did concede that he was encouraged by Obama, pointing out that “[w]e are actually seeing — for the first time in a long time — some actions that may or may not lead to a different kind of partisan dynamic in Washington.”<sup>253</sup>

To the extent that the Obama Administration is serious about creating this different dynamic, it should be aware of the types of action and decision making, discussed above,<sup>254</sup> into which partisan behavior can

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250. Liasson, *supra* note 2.

251. See discussion *infra* Section III.B.2.

252. See Party Identification Trend, Pew Research Center for the People and the Press, <http://people-press.org/party-identification-trend/> (last visited Jan. 29, 2010) (noting that in 2009 thirty-two percent of voters identified themselves as independents, an all-time high since data was available beginning in 1939).

253. Liasson, *supra* note 2.

254. See discussion *supra* Section I.B.2.

creep. Though the Administration need not build the broad, bipartisan consensus that Senator McCain and Mort Kondracke have called for—and, indeed, the Administration’s policies have indicated it is willing to forego such support—the White House must continue to be sure that when it goes alone, as Democrats, its decisions are based on applying ideology to expertise and consistent process rather than promoting an agenda based entirely on cynical electoral advantage. Given the current state of Congress and American political parties, this may be more difficult than it at first seems.

Political scientists, popular writers, and, more recently, legal commentators have extensively discussed the effect of ideological and party alignment on American politics since the 1990s and how structural changes have resulted in increasing partisanship. A bare bones sketch of the argument, which I will call the “sorting account,” goes as follows: From the Civil War through the Civil Rights Movement, the political ideologies of conservative versus liberal did not neatly correlate with whether a voter or politician was a Republican or Democrat. The long-standing backlash against Abraham Lincoln and the Republican Party ensured party loyalty—Yellow Dog Democrats—and in many places, such as the Northeast, a then-broader Republican Party included moderates and even liberals. In Congress, legislation often could not move without bipartisan support because of these regional differences that were as important as party differences. As the stigma gradually wore off Republicanism in the South; as Democrats supported the Civil Rights Movement; and as increasingly gerrymandered congressional districts and progressively tighter rules of internal congressional control pushed members to political extremes to win primaries and caucus promotions, party became more predictive of political ideology than at any time in recent American history.<sup>255</sup> The result of this sorting is two political parties that are more internally coherent and polarized from each other than at any time in at least 150 years.<sup>256</sup> So whereas Nixon, Carter, Reagan, Bush I, and even Clinton had to reach across the aisle because of genuinely conservative Democrats or liberal Republicans within their own respective parties, Presidents George W. Bush and Obama were not in a position that required bipartisan cooperation when holding party majorities in Congress. They had and have the authority to drive through policy without so much as even a nod to the other party. Professors Levinson

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255. *See generally*, POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (Jon R. Bond & Richard Fleisher eds., 2000); BROWNSTEIN, *supra* note 47, at 175–220 (2007).

256. Others have claimed that the divisions in American society so often represented by the “culture wars” mean that the United States is simply no longer a bipartisan nation. *See* Op-Ed, Bonnie Erbe, John McCain, Barack Obama, and the Limits of Post-Partisan Myth, U.S. NEWS & WORLD REPORT, Jan. 26, 2009, <http://www.usnews.com/blogs/erbe/2009/01/26/john-mccain-barack-obama-and-the-limits-of-post-partisan-myth.html>.

and Pildes have argued that faced with “an era of cohesive and polarized parties” it is essential that courts and constitutional scholars consider “legislative activism and extremism”—and I would add Executive Branch action—against this partisan backdrop.<sup>257</sup>

In addition, Professor Richard Skinner has argued that beginning in 1980 Ronald Reagan began the era of the partisan presidency. As Skinner persuasively argues, the presidencies since 1980 are distinct from those previous.<sup>258</sup> The recent administrations, he claims, are characterized by a President that presents a more partisan image to the country, focuses more than previous presidents on consolidating administrative control, projects his message through niche media and partisan press, campaigns extensively and works with his party’s committee more closely than ever before, and increasingly works with campaign operatives, think tanks, and consultancies.<sup>259</sup> Skinner’s view is not contrary to the sorting account of American politics expressed above; rather, it is a particularly strong expression of it and an explanation that the result of this sorting is an increasingly partisan presidency.

Thus, under both the sorting account as well as Skinner’s complimentary view, George W. Bush’s partisanship may not have been the result only of his or his staff’s strategy and tactics. Bush’s partisanship may have also been a reaction to the fact that he governed in one of the only times in the last fifty years in which the same party controlled the White House and the Congress, and that controlling Congress meant having an ideological majority as well as a party majority. In addition, following Skinner’s approach, Bush merely continued kicking the ball of the partisan presidency down the road.<sup>260</sup> Perhaps, until structural devices and judicial attitudes catch up with the key insight of Professors Levinson and Pildes—that whether government is unified or divided is as important as branch-based separation of powers—we can only hope that a President and his advisors in a unified government recognize the ease with which cynical partisanship can creep into politics and policymaking. To career campaign operatives that inevitably end up in an administration’s higher reaches, unified government must seem to put the idea of a permanent governing majority within reach.

If these accounts are accurate then we might expect the Obama Administration to follow Bush’s partisan lead given the lack of structural constraints. While public choice theorists would likely reject Executive Branch officials’ ability to refrain from partisanization, those in the Obama Administration should look at the partisanship of the previous

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257. Levinson & Pildes, *supra* note 9, at 30.

258. Skinner, *supra* note 7, at 606.

259. *Id.* at 607–08.

260. *See id.* at 606 (“Bush is not an exception to the rule or the product of a recent change.”).

Administration and be acutely aware of overreaching. Put differently, this is one of the key political spaces in which post-partisanship adds value. Being post-partisan can serve as a self-moderating philosophy of inclusion when, for the first time in generations, political circumstance does not dictate cooperation by necessity. By positioning himself as post-partisan, President Obama sends important signals to his White House staff and agency heads and also stakes a challenge for himself against which the public can judge him. I argue that our judgment should be made based on the considerations that make up the metrics of partisanship discussed above. Perhaps creating such expectations *ex ante* more adequately aligns incentives for Administration officials to then follow them.

## 2. *Post-partisanship's constitutional and administrative ramifications*

In addition to guiding the Executive Branch's actions and decision-making processes, post-partisanship can do substantive legal work. Aspects of accountability, independence, and democracy are foundational to doctrines in constitutional and administrative law, and it is in these areas that post-partisanship is important for legal analysis.

A post-partisan President serves to legitimize the theory of accountability—the “trump card” according to Martin Flaherty<sup>261</sup>—that underlies constitutional law arguments regarding the proper scope of executive power. As Professor Heidi Kitrosser has explained, “Underlying all forms of accountability is the need for transparency and procedural regularity sufficient to enable public and inter-branch assessment of—and responses to—government actions.”<sup>262</sup> In other words, the types of openness and expertise-based decision making discussed above as metrics of partisanship do not only relate to how we characterize an administration's actions; such values relate to how those actions conform with the constitutional plan. To the extent that an administration acts in a particularly partisan way, especially as to the metric of specificity and accountability of policymaking, such actions undermine the legitimacy of executive unitariness.<sup>263</sup> In the other direction, the more an administration acts in a post-partisan manner, the more we should be comfortable with more centralized Executive Branch control.<sup>264</sup>

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261. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1824 (1996).

262. Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 610 (2009).

263. See Calabresi, *supra* note 33 (justifying normative claims for a unitary executive on the benefits of increased accountability).

264. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2337 (2006) (“[When the high-ranking officials at OLC] become advocates . . . the system breaks down. The decisions of that Office begin to look suspect,

Conceptualizing the degree to which a President acts in a partisan, party-based manner also has implications for separation of powers. Professors Pildes and Levinson have discussed the importance of parties and unified or divided government to the actual existence of the structural checks that Madison envisioned existing among branches, explaining that parties actually serve the checking function that Madison saw for branches: “From the Madisonian perspective that undergirds much of constitutional law and theory . . . the primary threat posed by political parties to the separation of powers comes not from party division of government but from party unification.”<sup>265</sup> Under this view, “Madisonians in a modern democracy must count on party division to recreate a competitive dynamic between the branches. And far from encouraging unified party control of the House, Senate, and presidency, Madisonians will view the prospect of unchecked and unbalanced governance by a cohesive majority party as cause for constitutional alarm.”<sup>266</sup> It follows from such a conception of separation of powers that the party-based problem that worries Professors Pildes and Levinson is exacerbated if the Executive Branch is acting with purposefully partisan ends or conducting business with objectively partisan means. Such behavior, by itself, is unlikely to cause constitutional alarm, but when combined with partisan behavior from the same party in Congress, the potential for the Madisonian checks to operate as planned dims more completely. To the extent that commentators and policymakers now think about separation of powers from a party-conscious perspective, they should also consider the degree of partisanship that an Administration demonstrates in its actions. An administration that acts in a post-partisan manner strengthens the types of checks that Madison envisioned and the kind of actual, party-based checks that Pildes and Levinson see today.

Finally, the demonstration of the possibility of pure partisanship raises questions about the proper scope of judicial deference to Executive Branch decision making. As Lisa Schultz Bressman has forcefully argued, one reading of the important administrative law deference issues in *Brown & Williamson* and *Gonzales v. Oregon*, for example, is that the Supreme Court was finding that in the Executive Branch’s request for deference no amount of political accountability was sufficient to overcome the Executive’s obligation to “function as a part of the larger government” and to “serve the public, especially when addressing significant social issues.”<sup>267</sup> Under this compelling view, the Executive Branch, she says, “is not entitled to deference when taking positions that, though po-

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resembling a courtroom flush with political influence rather than law.”).

265. Levinson & Pildes, *supra* note 9, at 17.

266. *Id.*

267. Bressman, *supra* note 37, at 780.

litically expedient, disregard Congress's views and the engagement of the people. To do so raises an inference that the administration is interested in representing only some of the people, not all of the people."<sup>268</sup> Seen through Professor Schultz Bressman's democracy-centric view, the question of when the Executive Branch is taking such expedient views at Congress's and the public's detriment is a question of when the Executive Branch begins to abandon typical politics and engage in pure partisanship. A dedication to post-partisanship, on this view, should restore legitimacy to the Executive Branch and buttress the reasoning underlying key cases discussing deference in administrative law.<sup>269</sup>

Such deference issues inherently relate to one of the metrics discussed above: the respect given to expertise. For example, Jody Freeman and Adrian Vermeule have argued that *Massachusetts v. EPA*, the so-called "global warming case," can best be understood as a continuation of *Gonzales v. Oregon* and *Hamdan v. Rumsfeld*, a line of cases in which Justice Stevens and Justice Kennedy "joined forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics."<sup>270</sup> They claim that this "expertise forcing" was the Court's solution to the EPA's refusal to exercise its discretion to assess whether greenhouse gases "cause or contribute to, air pollution which may reasonably be anticipated to endanger public welfare."<sup>271</sup> This "decision," made while facing pressure from the White House not to regulate carbon dioxide emissions and to uphold the essentially untenable position that greenhouse gases have no adverse effects on public health and welfare, counseled the Court—Freeman and Vermeule claim—in ruling against the EPA, resulting in less than usual *Chevron* deference.<sup>272</sup> In other words, decision making that looks *partisan* has led the Court to suggest that deference may not be afforded for these party-based decisions and has instead required a decision grounded in administrative expertise. This occurred increasingly toward the end of the Bush Administration.<sup>273</sup> Given that the Court's rulings on policies of the handling of suspected terrorists and global warming became a major detriment to Executive Branch political objectives, there was significant cost for the Bush Administration's partisanship. Thus, a further potential

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268. *Id.* at 798.

269. *But see* Kagan, *supra* note 14, at 2376 (arguing that more presidential involvement should lead to more deference to agency action). *See also* *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .").

270. Freeman & Vermeule, *supra* note 171, at 52.

271. *See* 42 U.S.C. §7521(a)(1) (2000).

272. Freeman & Vermeule, *supra* note 171, at 63–65, 75–77.

273. *Id.*

benefit to the Obama Administration for adhering to post-partisan promises may be the self-serving benefit of more deferential judicial review of agency decisions. Indeed, limiting deference based on the degree of partisan behavior that characterized Executive Branch action may create the additional incentives that public choice theorists would argue are needed for a White House to embrace post-partisanship.

#### CONCLUSION

An article of this length cannot hope to describe all of the facets or historical examples of differentiating the high politics of typical political choice from the low politics of cynical partisan advantage. It can, however, mark the beginning of a more detailed analysis of the differences between partisan, political, and mixed motive decisions and apply those differences to a theory of post-partisanship that is grounded in moving away from the Bush Administration's decision making with its frequent focus on electoral advantage. In doing so, I have established metrics of partisan behavior, and I argued that the post-partisanship practiced thus far by the Obama Administration is not the broad bipartisan consensus building for which some commentators had hoped. However, it need not be. Given the historically unique ideological division between the present Republican and Democratic parties, a post-partisanship that rejects thinking about public policy, personnel decisions, and internal process in a highly partisan, electorally-focused way is a moderating force on national politics that returns an element of civility to public life. In addition, post-partisanship buttresses values of accountability and democracy that relate to Executive Branch legitimacy, which, in turn, is a foundation of important doctrines in constitutional and administrative law. Finally, and perhaps most importantly from the perspective of democracy, the post-partisanship that the Obama Administration appears inclined to practice is exactly the type of force for which many Americans were hoping when they cast their ballots in November 2008.